MAINE REPORTS

109

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY 24, 1912—DECEMBER 5, 1912

WILLIAM P. THOMPSON

REPORTER.

PORTLAND, MAINE

WILLIAM W. ROBERTS

1913

PRESS OF

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

1. HON. WILLIAM PENN WHITEHOUSE, CHIEF JUSTICE
2. HON. ALBERT R. SAVAGE, CHIEF JUSTICE
   HON. ALBERT M. SPEAR
   HON. LESLIE C. CORNISH
   HON. ARNO W. KING
   HON. GEORGE E. BIRD
   HON. GEORGE F. HALEY
   HON. GEORGE M. HANSON
3. HON. WARREN C. PHILBROOK

1. Resigned April 8, 1913.
2. Appointed Chief Justice April 9, 1913.
3. Appointed April 9, 1913.

JUSTICES OF THE SUPERIOR COURTS

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

ATTORNEY GENERAL

SCOTT WILSON

REPORTER OF DECISIONS

WILLIAM P. THOMPSON

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1913.

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: WHITEHOUSE, Chief Justice, SAVAGE, CORNISH, KING, HALEY, HANSON, Associate Justices.

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

SITTING: WHITEHOUSE, C. J., SAVAGE, SPEAR, BIRD, HALEY, HANSON, A. J.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

PORTSMOUTH HARBOR, LAND & HOTEL COMPANY

vs.

LINDSAY SWIFT.

York. Opinion February 24, 1912.

Navigable Waters. Flats. Boundaries.

Ownership of flats along a navigable river, as between adjoining upland owners, is properly determined by drawing a base line between the two corners of each lot, where they strike the bank, and extending from these corners parallel lines perpendicular to the base line, and if the line of the river is straight the lines thus extended will be the boundaries of each lot; but if the river line is curved regularly or irregularly, so that the extended lines of the lots diverge from or interfere with each other, the triangular parcels thrown out or included thereby must be equally divided between the adjoining owners.

Since the base line of a particular lot should run along the upland and not over the flats, it would be improper to draw the line from a point not a part of the upland, but a small rocky point usually surrounded by water, and located several hundred feet from the upland.

Emerson v. *Taylor,* 9 Maine, 42, affirmed.

On report. Judgment for defendant.

Trespass quare clausum. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

William Frye White, and John Lowell, for plaintiff.

Aaron B. Cole, for defendant.

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

HALEY, J. This is an action of trespass quare clausum to recover damages for the driving of stakes and mooring a boat upon flats appurtenant to Gerrish Island in the mouth of the Piscataqua river in Kittery.

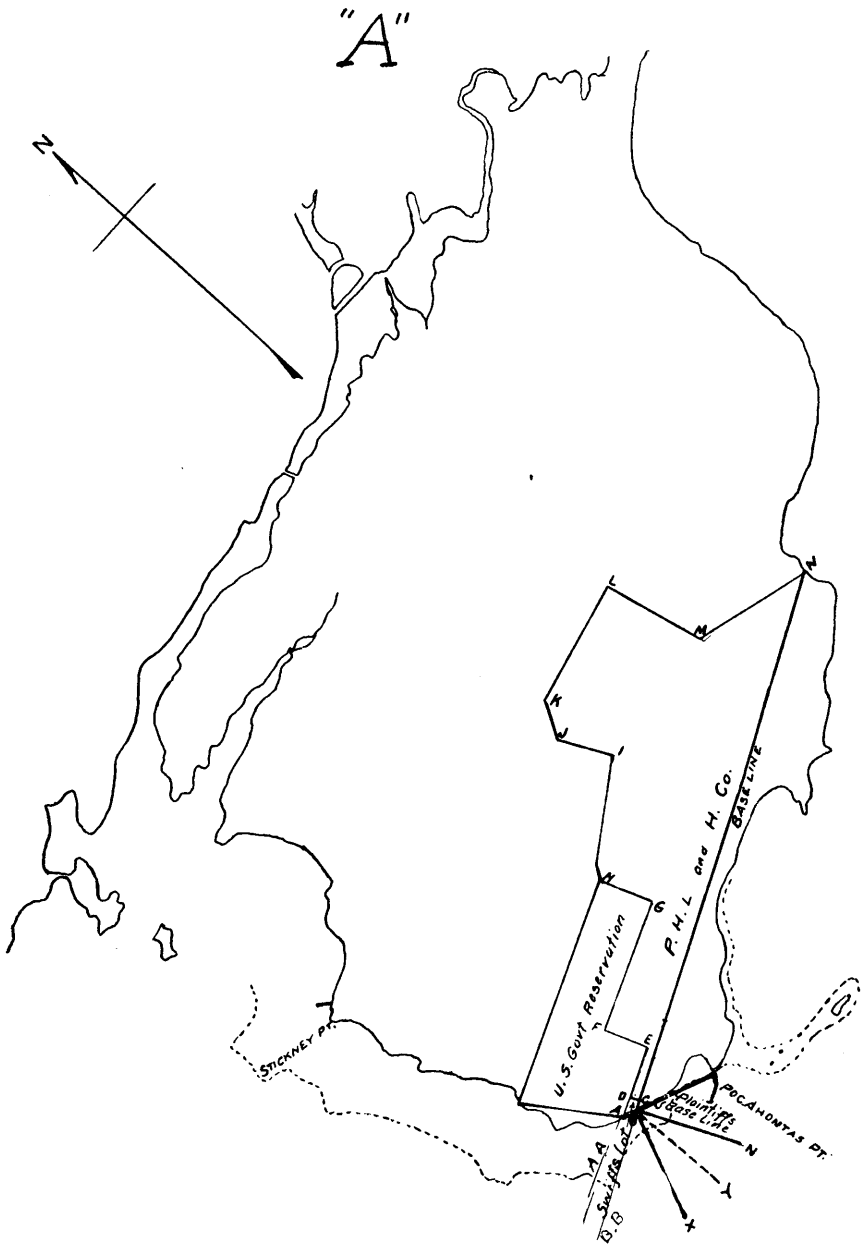
The case is before the court upon an agreed statement of facts.

The defendant admits doing the acts complained of, and justifies by a claim of ownership to the flats upon which these acts were done, and claims that, by the rule laid down in *Emerson* v. *Taylor,* 9 Maine, 42, in construing the Colonial ordinance of 1641, applied to this case, he was the owner of that part of the flats. The plaintiff admits that, by the rule of *Emerson* v. *Taylor,* the acts complained of were committed upon the flats owned by the defendant, and asks the court to apply a different rule to this case than that laid down in the case of *Emerson* v. *Taylor.*

The defendant's upland borders on the Piscataqua river. Northwesterly of defendant's upland, the United States Government owns a tract of upland, and southerly and easterly of defendant's upland is a tract owned by the plaintiff, a part being upland and a part flats. The plaintiff's upland extends in the rear of the defendant's upland across the island. The flats on the river begin above the upland of the United States and extend by the upland of the plaintiff and defendant to Pocahontas Point. The situation of the land, river, flats and ocean are shown on the plan marked "A."

The rule laid down in *Emerson* v. *Taylor* is, "Draw a base line from the two corners of each lot, where they strike the shore; and from these two corners, extend parallel lines to low water mark, at right angles with the base line. If the lines of the shore be straight, as in the case before us, there will be no interference in running the parallel lines. If the flats lie in a curve, or regular or irregular curvature, there will be an interference in running such lines, and the loss occasioned by it must be equally borne or gain enjoyed equally by the contiguous owners."

The plaintiff asks us to rule that the defendant's side line shall be extended in a straight line to low water mark, or, in other words, straight overboard, and that all flats within the extended lines


"A"
N
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E
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B
A
P. H. L and H. Co. BASE LINE
U.S. Govt RESERVATION
STICKNEY PT.
POCAHONTAS PT.
Plaintiffs Lateral Base Line
A A
B B
Swift's Lot
N
Y
X

shall be the defendant's flats; and if that is the rule the defendant is guilty of trespass, because the acts complained of were done below the down river side line of the defendant's extended line straight overboard.

The plaintiff's upland is shown upon the plan by the letters B, C, D, E, F, G, H, I, J, K, L, M and N, and the defendant's by the letters A, B, C and D.

The lines A A and B B are the extended sidelines of defendant's lot, as the plaintiff claims they should be, run straight overboard.

The acts of the defendant complained of were done on the land in the angle between the lines "B-x" and "B-y," as shown on the plan, which is made by the rule of *Emerson* v. *Taylor.*

The agreed statement does not show the source of title of either the plaintiff or the defendant, or when they or their predecessors acquired title, but from the agreed statement that the line upon the flats between them is to be run according to the rule of *Emerson* v *Taylor,* if that rule applies, we take it for granted that when there was a division of the upland adjoining the flats, the division included in one lot both the plaintiff's and the defendant's upland on the river side.

"The flats of a lot established by the original and contemporaneous division of the upland cannot be altered or changed by each sub-division." *Call* v. *Carroll,* 40 Maine, 31.

The object of the law is to give to each owner of land bordering upon tidewater his proportional part of the shore or flats.

If the side lines of the defendant's lot are run straight overboard, and plaintiff's side lines runs straight overboard, there will be a large triangular piece of flats undivided, which equity would say should be divided between the owners of the upland on the river side. The rule in *Emerson* v. *Taylor* would so divide it. The plaintiff objects to that method, and by the running of his rear side line instead of his side lines straight overboard, accomplishes the object he desires, adds great value to his lot by giving him all of that triangular piece, and the lines of each owner of flats upon that side of the island whose lands were acquired under the rule of *Emerson* v. *Taylor,* which give them their rights in the shore, must necessarily be changed.

If the plaintiff's contention is adopted, it will give the plaintiff the triangular piece which should be divided between the owners

on that side of the island. It will change all lines over the flats on the southerly side of Gerrish Island. It will take from all owners on that side title to flats now owned by them under the rule of *Emerson* v. *Taylor*. If this contention of the plaintiff be accepted as the rule on Gerrish Island, it should be the rule all over the State, and many titles along the coast will be affected and lines changed. Valuable wharves in tidewater, by the change of the rule, will change owners against the wishes of the present owners.

The plaintiff asks, if the rule of *Emerson* v. *Taylor* is the true rule in this case, that a line on his river side be run from where his upland adjoins the defendant's to Pocahontas Point, and that such line be called his base line. By that method the plaintiff's base line would run a long distance over the flats that are sought to be divided by running the base line. The base line should run along the upland, not over the flats, because Pocahontas Point is not a part of the upland; it is a small rocky point where the river flows into the ocean several hundred feet from the upland surrounded by water nearly all the time.

The argument advanced that, because the plaintiff owns no flats in front of its lot, the ocean side being rocky and deep water, it should have more flats upon the river side does not seem a valid reason for taking from the owners of the river side their flats and giving them to the plaintiff. If the plaintiff wanted land with flats, it should have bought land with flats. The rule of *Emerson* v. *Taylor* was not hastily adopted. For eighty years it has been the rule in this State. Many cases involving the title to flats and shore land have been before the court during that period, and in all cases the rule has wrought justice between the parties.

In *Dillingham* v. *Roberts*, 77 Maine, 284, the court, in defining the rights of the defendant who was building a wharf upon the flats in front of upland, stated: "The lines across the flats must be located by the rules laid down in *Emerson* v. *Taylor*, 9 Maine, 42."

The rights of the owners of upland in flats adjoining their upland, in this State have become fixed by that rule, and property in flats bought and sold by it. Other courts have attempted to adopt other rules, and they have been obliged to change them to fit the cases as they came before them; but the doctrine of *Emerson* v.

Taylor has been the rule in this State for eighty years, and as it makes an equitable division of the flats in this case, and as the running of the side lines of defendant's upland straight overboard would work injustice between the owners by giving to the plaintiff more than its proportional part of the flats, it is the opinion of the court that the rule of *Emerson* v. *Taylor* applies in this case, and the mandate should be,

Judgment for defendant.

INHABITANTS OF GORHAM

vs.

TRUSTEES OF THE MINISTERIAL FUND in the First Parish in Gorham in the County of Cumberland.

Cumberland County. Opinion March 4, 1912.

Taxation. Exemptions. Religious Societies. "Land." "Charitable Institution." Ministerial Funds. Statute (Mass.) 1801, chapter 28; 1816 (Mass.) chapter 115. Statute, 1845, chapter 159, section 10, paragraph 8; 1855, chapter 178; 1856, chapter 279; 1857, chapter 30; 1864, chapter 245, section 2. Act of Separation, [Revised Statutes, 1883, page 1005,] section 1, paragraph 7. Revised Statutes, 1857, chapter 6, sections 6, 14, clause 9; 1903, chapter 9, section 6, clause II, section 13, clause IX.

Even if lands granted by Massachusetts to a parish for ministerial purposes before the separation of Maine would be embraced by Revised Statutes, chapter 9, section 6, clause II, and the Act of Separation [Revised Statutes, 1883, page 1005] section 1, paragraph 7, exempting lands granted to religious societies, etc., the exemption does not apply to lands sold under authority from Massachusetts before the Act of Separation was passed.

Act of Separation from Massachusetts [Revised Statutes, 1883, page 1005] section 1, paragraph 7, exempting from taxation "lands" theretofore granted to any religious society, etc., while the same continue to be owned by such society, does not exempt a fund created from the proceeds of a sale of such lands.

A corporation established to manage and apply a fund toward the support of a minister is not a "charitable institution" within a statute exempting the property of such institutions from taxation.

Under Revised Statutes, 1903, chapter 9, section 13, clause IX, providing that personalty held by religious societies shall be assessed in the town where the societies usually hold their meetings, a ministerial fund is taxable.

On report. Judgment for plaintiffs.

Action of debt to recover a tax for the year 1910, assessed upon 228 shares of bank stock owned by the defendant. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

Scott Wilson and E. L. Bodge, for plaintiffs.

John A. Waterman, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

KING, J. This case is reported to the law court on an agreed statement of facts. It is an action to recover an assessment of $282.24, made for the year 1910, upon 228 shares of bank stock owned by the defendant and valued at $22,800. The defence is that the property was exempt from taxation.

The defendant is a corporation incorporated under an Act of Massachusetts, approved February 5, 1802, entitled "An Act authorizing the sale of Ministerial lands in the first Parish in Gorham to raise a fund for the support of the Ministry and appointing Trustees for those purposes."

Under the provisions of that Act the defendant corporation was authorized to sell and convey all the Parsonage and Ministerial lands belonging to said Parish, and to put at interest the proceeds thereof, and the interest accruing thereon, "until a fund shall be accumulated which shall yield yearly the sum of four hundred dollars interest." The Act further provides, "that as soon as an interest to that amount shall accrue, the Trustee shall forthwith apply the same for the annual support of the Congregational Minister which may then be settled in said Parish, or which may there-

after be settled there. And so long as the said Parish shall remain without a settled Minister, the annual interest aforesaid shall be put out at interest and secured as aforesaid to increase the said fund until there be a settlement of a Minister—And it shall never be in the power of said Parish to alienate or any wise alter the fund aforesaid."

The agreed statement recites: "That said bank stock was purchased from funds or the accumulations thereof received from the sale of its parsonage and certain ministerial lands belonging to said First Parish of said town of Gorham in accordance with the provisions of the above act, and also from four certain bequests to said defendant corporation amounting in all to three thousand two hundred forty-three dollars and eighty-seven cents ($3,243.87); that said ministerial lands were granted to said First Parish of the town of Gorham by the Commonwealth of Massachusetts for ministerial purposes at the time of the incorporation of said town in 1764."

The defendant's contention is, as we understand it, that the property assessed (at least so much of it as was not purchased from the proceeds of the bequests) is within that part of subdivision II, sec. 6, chap. 9, R. S., which exempts from taxation, "All property which by the articles of separation is exempt from taxation."

The last sentence of paragraph "Seventh" of sec. 1 of the Act of Separation of the District of Maine from Massachusetts, reads: "And all lands heretofore granted by this Commonwealth, to any religious, literary or eleemosynary corporation, or society, shall be free from taxation, while the same continues to be owned by such corporation, or society." It is specified in the agreed statement, as above quoted, that the lands sold, from the proceeds of which the property assessed was purchased, "were granted to said First Parish of the town of Gorham by the Commonwealth of Massachusetts for ministerial purposes at the time of the incorporation of said town in 1764."

The argument in support of the defendant's contention is, therefore this: first, that if the lands granted to the First Parish of Gorham had not been sold they would have been exempt from taxation under said exempting clause of the Act of Separation; and, second, that by the sale of the lands, under the Act of Feb-

ruary 5, 1802, the property was merely changed from one form to another—from real estate to a fund unmistakably identified as its substitute—and that the fund likewise remains exempt.

But the exempting clause of the Act of Separation now under consideration expressly provides that the lands granted to the corporations or societies therein mentioned were to be exempt from taxation only "while the same continued to be owned by such corporation, or society." Obviously this exemption could not be held to apply to any lands which were not owned at the time of the passage of the Act of Separation by some corporation or society therein referred to.

So then, if it should be conceded that the lands which Massachusetts had granted in 1764 to the First Parish of Gorham for ministerial purposes would be embraced in an exemption of lands granted "to any religious, literary or eleemosynary corporation or society," still we think the exemption in question was not applicable to those lands, because they had been sold under the express authority of Massachusetts long before the Act of Separation was passed, as we think it must be reasonably inferred from the report, and were not then owned by said First Parish of Gorham.

Neither do we think it can be held that the fund, which was created from the proceeds of the sale of the lands, is exempt from taxation, under this exempting clause of the Act of Separation, on the theory suggested, that the property was only changed in form by the sale. Indeed it seems a natural and indisputable conclusion, from the language used in that clause, "*all lands* heretofore granted . . . shall be free from taxation, *while the same continues to be owned* by such corporation, or society," that only the *lands,* and not the proceeds thereof, when sold, were to be free from taxation. It may not be necessary to suggest anything further to strengthen that conclusion, and yet much support is given to it in the fact that the proceeds of the sale of these lands had been constituted a ministerial fund by a special Act of Massachusetts, passed many years before the Act of Separation, and containing no provision that the fund so constituted should be free from taxation. Had it been the purpose of Massachusetts that the proceeds of the sale of these lands should remain free from taxation, it is at least reasonable to suppose that it would have been so provided in the special Act by which those proceeds were constituted a ministerial

fund. The strong presumption therefore, is that the clause of exemption contained in the Act of Separation was not intended to apply to the proceeds of the sale of the lands therein mentioned. "All doubt and uncertainty as to the meaning of a statute is to be weighed against exemption. Taxation is the rule and exemption the exception." *Auburn* v. *Y. M. C. A. Association,* 86 Maine, 244, 247.

It is therefore the conclusion of the court that the property assessed was not exempt under our statute as property made free from taxation by the Act of Separation, and accordingly the determination of this case might safely rest on that conclusion. But we present some further considerations as pertinent to the fundamental question here involved, whether this fund held by the defendant as trustee was taxable in Gorham.

In the absence of any evidence or stipulation to the contrary, we think the funds received by the defendant from the several bequests made to it as mentioned in the agreed statement, must be regarded as held by it for the same uses and purposes as the funds received by it for the sale of the lands. Hence it follows that all the property assessed represented a ministerial fund, which the defendant corporation held as trustee for the uses and purposes expressed in the Act of February 5, 1802.

It has not been argued that this fund, so held by the defendant, is specially exempted under our statute as the property of a charitable or benevolent institution, and for that reason, perhaps, we may regard it conceded that no such exemption is claimed. But we will add that it is now well settled that a corporation, established to manage and apply a fund towards the support of a minister, is not a charitable institution. *Trustees of the Green Foundation* v. *City of Boston,* 12 Cush, 54, 59.

But, moreover, an examination of the various statutory enactments in this State relating to the taxation of a miniserial fund shows plainly we think a legislative purpose to make such a fund taxable. In the tax Act of 1845 (Chap. 159, sec. 10, par. eighth) it was provided: "All property held by any religious society as a ministerial fund shall be assessed to the treasurer of such society" &c. This provision, however, was repealed in 1855 (Chap. 178). And, in turn, that repealing Act of 1855 was repealed in 1856 (Chap. 279). Again in 1857, (Chap. 30) this provision of the tax

Act of 1845, providing for the assessment of a ministerial fund, was once more repealed, and such a fund was expressly included in the enumerated exemptions from taxation. In the Revised Statutes of 1857 the law so appears, and it so remained until 1864 when, by chapter 245 of the laws of that year, the *exemption* of a ministerial fund was repealed, and it was then further expressly enacted that "The property held by any religious society as a ministerial fund shall be assessed to the treasurer of such society; and if it be real estate, it shall be assessed in the town where it is situated; and if it consists of personal property it shall be assessed in the town where such society usually hold their meetings."

We find no other special legislation touching the subject. In the revision of 1871 there is no exemption from taxation of a ministerial fund, as there was in the revision of 1857, but, on the other hand, clause eighth of sec. 14, c. 6, reads: "Personal property held by religious societies shall be assessed to the treasurer thereof in the town where such societies usually hold their meetings." It will be noticed that no express mention is made in this clause of the revision of a *ministerial fund,* but in the margin of the revision against this clause is the reference "1864, c. 245, § 2," showing that this clause of the revision is the revised expression of the specific statute wherein it was re-enacted that property held by any religious society *as a ministerial fund* should be taxed. And in the absence of any express legislation changing the meaning of the Act of 1864, we think it should not be held that the clause as expressed in the condensed and concise language of the revision does not embrace a ministerial fund. *St. George* v. *Rockland,* 89 Maine, 43, 45. Precisely the same language is used in the revisions of 1883 and 1903. (R. S., 1883, c. 6, sec. 14, cl. IX; R. S., 1903, c. 9, sec. 13, cl. IX.)

If property held by a religious society as a ministerial fund is expressly made taxable by statute, as we think the above mentioned provisions clearly show, then it would seem to follow that property, the title to which is in a corporation created expressly for the purpose of holding and administering it as a ministerial fund, should not be held free from taxation in the absence of an express exemption thereof.

Finally, we think the case of *Baldwin* v. *Trustees of Ministerial Fund,* 37 Maine, 369, may be cited as an authority directly in point

that the property assessed in the case at bar was taxable. In that case, as in this, the defendants were incorporated as trustees under an Act of Massachusetts, passed in 1816, which appears to have been like, if not identical with, the Act in this case. Under the provisions of that Act lands, which had previously been reserved by Massachusetts for Baldwin for the support of the ministry, were sold, in 1818, and the proceeds became under the provisions of the Act, a ministerial fund held by the defendants as trustees, the same as in this case. The fund was there taxed to the defendants, and it was held that it was properly so taxed. The question raised in this case, that the fund was exempt under the exempting clause of the Act of Separation, was not raised by counsel in that case, and was not considered in the opinion of the court. In other respects that case seems to be on all fours with this.

In Trustees of the *Greene Foundation* v. *Boston,* supra, a Ministerial fund held by a corporation as trustee, incorporated under a special Act of Massachusetts for the purpose, was held taxable to the corporation. The forceful reasoning of the learned Chief Justice Shaw as expressed in that case throws light upon some of the questions involved in this case.

No other question is raised as to the assessment of the tax, and it is admitted that all the required statutory proceedings essential to the maintenance of a suit for taxes were complied with.

For the reasons stated it is the opinion of the court that the property assessed in this case was not exempt from taxation, and was lawfully taxed to the defendant, and in accordance with the stipulation of the report the defendant is to be defaulted for the amount of the assessment.

Defendant defaulted.
Judgment for plaintiff for $282.24.

In Equity.

BANGOR AND AROOSTOOK RAILROAD COMPANY *vs.* BELONIE DUBAY.

Aroostook. Opinion March 4, 1912.

Equity. Findings of Fact by Single Justice. Conclusiveness. Review.

The decision of a single justice upon matters of fact in an equity case will not be reversed, unless clearly erroneous.

In equity. On appeal by plaintiff. Appeal dismissed. Decree below affirmed.

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

"This is an appeal from a decree of a single justice dismissing a bill in equity asking for specific performance of an alleged contract by the defendant to convey to the complainant a strip of land across his homestead farm for its right of way.

"The plaintiff with many others signed an instrument in which it was stipulated that the signers severally agree 'to convey by a sufficient warrantee deed to said corporation a strip of land one hundred feet in width across our homestead farms corresponding and exactly equal to the right of way when and as the same should be surveyed for an extension of the Bangor & Aroostook Railroad through Van Buren and Grand Isle, and for the purposes of such extension.' The bill alleges the location of the railroad across the defendant's farm with a description of the strip of land taken for its right of way, which is between the defendant's buildings and the river, and a refusal by defendant to give a deed in accordance with his alleged agreement. The defendant's contention is that the writing he signed does not represent the agreement that he did make, which was that if the railroad should be located back of his dwelling house, on the west side of the highway, he would give the right of way there, but that he would not give a right of way across his farm if the railroad should be located on the east side of the highway between his buildings and the river.

"The sitting Justice after hearing filed the following decree:

" 'In this case I find the following facts:

" 'That the defendant signed the contract by which he agreed to transfer to the plaintiff company a right of way one hundred feet wide across his farm; that he understood and intended that this right of way should be conveyed to the plaintiff company without any consideration if when surveyed it should be located in the rear of his buildings; on the other hand, I have no doubt that the defendant absolutely declined to consent to the location of the right of way between his buildings and the river where it was finally located, without compensation for the damages entailed upon his property, and that when he signed said contract he did so with an express understanding with the parties who were seeking to obtain his contract, and as a condition precedent to the signing thereof that if the right of way should be located between his buildings and the river, as it actually was, he should be entitled to whatever damage he sustained by reason of such location; that although the defendant signed the contract, which was not fully read to him, and which being in the English language he could not read, yet it was not the contract as represented to him, and was not the contract as he understood it, and contained stipulations to which he did not consent, and in the end presented a contract which he would not have signed had he fully understood it.

" 'Therefore this case having been heard on the 20th day of April, 1911, and argued by council; thereupon upon consideration thereof, it is *ordered, adjudged* and *decreed* that the Plaintiff's bill be dismissed without costs.' "

Appleton & Chaplin, Powers & Archibald, Stearns & Stearns, and Peter C. Keegan, for plaintiff.

William P. Allen, and *Hersey & Barnes,* for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

PER CURIAM. The decision of a single Justice upon matters of fact in an equity case will not be reversed unless it clearly appears that such decision is erroneous. The burden of showing the error lies on the appellant. *Young* v. *Witham,* 75 Maine, 536; *Paul* v.

Frye, 80 Maine, 26; *Sidelinger* v. *Bliss,* 95 Maine, 316; *Herlihy* v. *Coney,* 99 Maine, 469.

Applying this well established rule, we cannot say that the sitting Justice was clearly wrong in his decision in this case. On the contrary, from a careful and painstaking examination of all the evidence adduced at the hearing we are rather inclined to the opinion that the defendant did not understand and appreciate, when he signed or affixed his cross to the paper, which was not fully read to him, although more or less discussed and explained to him, that he had thereby agreed to give without any compensation a deed of the right of way for the railroad to cross his homestead farm between his buildings and the river.

The evidence clearly shows that the defendant said he would never consent to give the right of way between his buildings and the river, and we are constrained to the conclusion of the sitting Justice that the paper which the defendant signed "presented a contract which he would not have signed had he fully understood it."

Accordingly it is the opinion of the court that the entry in this case must be,

Appeal dismissed. Decree below affirmed.

In Equity.

THOMAS J. LYNCH, Trustee,

vs.

SOUTH CONGREGATIONAL PARISH of Augusta, et als.

Kennebec. Opinion March 5, 1912.

Wills. Charities. Construction of Will. Lapse of Legacy. Burden of Proof. Cy Pres Doctrine.

A testator devised the residuum of his estate in trust. He directed the trustees to pay the income of the trust fund to certain beneficiaries during life, and directed that the trust fund be paid in equal proportions of one third each to the South Congregational Society of Augusta, the Hallowell Classical and Scientific Academy of Hallowell, and the Bangor Theological Seminary of Bangor. The South Congregational Parish of Augusta is the business organization of the South Congregational Society. The gift to the Hallowell Academy has failed through the inability of that institution to take the fund and devote it to the purposes intended. The heirs of the testator claim this one third of the fund on the ground that the Hallowell Academy became defunct in the lifetime of the testator, and that therefore the legacy to it lapsed. The South Congregational Parish of Augusta and the Bangor Theological Seminary of Bangor claim this part of the fund on the doctrine of *cy pres*.

Upon a bill by the trustee for instructions, it is held:—that the burden is upon the heirs to show that the legacy to the Hallowell Academy lapsed in the lifetime of the testator, and that the case, as presented to the court, does not show it: that the doctrine of *cy pres* is recognized in this state: that the doctrine of *cy pres* is applicable to the bequest to the Hallowell Academy: that to apportion the Hallowell Academy legacy equally between the South Congregational Parish of Augusta and the Bangor Theological Seminary will be to carry out *cy pres* the testator's intentions.

And the trustee is instructed,

1. That the South Congregational Parish of Augusta, by its Prudential Committee, is entitled to receive that portion of the residuary trust fund which was bequeathed to the South Congregational Society of Augusta, to be used and expended as provided in the will.

2. That one half of the fund originally bequeathed to the Hallowell Classical Academy be paid by the trustee to the Bangor Theological Seminary for the educational uses and purposes of that institution.
3. That the remaining half of the fund originally bequeathed to the Hallowell Classical and Scientific Academy be paid by the trustee to the South Congregational Parish of Augusta to be used, appropriated and expended by it for the benefit of Congregational educational institutions, with the consent and approval of the Maine State Congregational Conference.
4. *"Cy pres"* is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. It is applied only to valid charitable gifts.

In equity. On report. Decree according to opinion.

Bill in equity brought by the plaintiff as trustee under the will of John Barrows, late of Augusta, deceased, asking for instructions. Answers were filed. All allegations in bill and answers were admitted to be true, and the case reported to the Law Court for determination.

The case is stated in the opinion.

M. S. Holway, for plaintiff.

J. W. Spaulding, John B. Madore, F. G. Farrington, and C. L. Andrews, for defendants.

SITTING: WHITEHOUSE, C. J., SAVAGE, KING, BIRD, HALEY, HANSON, JJ.

SAVAGE, J. This is a bill in equity brought by a trustee under a will, asking the instructions of the court. All the allegations in the bill and answers are admitted to be true.

The plaintiff is trustee under the will of John Barrows, late of Augusta, deceased. Mr. Barrows made his will November 12, 1885. He made three codicils to the will, dated respectively, January 8, 1886, December 15, 1886, and November 12, 1888. He died November 15, 1888. The will was duly allowed. The contents of the codicils are not material to this case.

After having made various testamentary provisions for his wife, sister and others, the testator, by the sixth paragraph of the will,

devised all the rest and residue of his estate to trustees, of whom the plaintiff is the successor in the trust. The will provided that the trustees should use, appropriate and pay the income of the trust fund to and for the sole use of the testator's adopted son, Greenleaf Barrows, during his natural life, and in case Greenleaf Barrows should die before the decease of the testator's wife, the trustees were directed to use, appropriate and pay the income to her during her life. Then followed the provision which we are now to consider. It is in these words:—"I then direct that said trust fund and estate remaining in the hands of said trustees shall be conveyed, transferred and paid over in equal proportions of one third part each, to the South Congregational Society of Augusta; the Hallowell Classical and Scientific Academy of Hallowell, and the Bangor Theological Seminary, of Bangor, Maine, to have and to hold the same in the proportions aforesaid, severally to said respective devisees forever, divested of said trust. The proportion which shall be received by said South Congregational Society to be used, expended and appropriated for charitable and benevolent purposes in such manner as that society, with the consent and approval of the Maine State Congregational Conference shall deem expedient and proper. And the said respective portions which shall be received by said Classical and Scientific Academy and said Theological Seminary to be used and expended for the uses and purposes of each of said institutions."

Greenleaf Barrows is deceased, and although not directly alleged in the bill, it is assumed in argument that the testator's widow is deceased also.

The parties defendant are the South Congregational Parish of Augusta, which is the business organization of the South Congregational Society, the Bangor Theological Seminary, the Hallowell Classical and Scientific Academy, and the heirs of John Barrows, all of whom have appeared and answered.

The Hallowell Classical and Scientific Academy discontinued its school in June, 1888, and the property of the school has been sold. It has no funds, and it has entirely and permanently ceased to carry on the work of maintaining a school or any other activity. The corporation has never been dissolved, but in its answer it admits that it has no expectation of continuing a school according to its charter, and that it makes no claim upon the fund, and is willing

that the same should be disposed of in such manner as may be found suitable by the court. Therefore it is conceded by all that the gift to this institution has failed through its inability to take the same and devote it to the purposes intended.

The South Congregational Parish of Augusta in its answer claims the gift made to the South Congregational Society of Augusta, and, also, that the share originally given to the Hallowell Classical and Scientific Academy should be paid to itself, to be used according to the purposes designated in the gift of its own one third, and in such manner as it may deem expedient and proper with the consent and approval of the Maine State Congregational Conference. And it makes this claim on the ground that such a disposal would be as nearly as possible like that which was intended by the testator.

The Bangor Theological Seminary, upon the same ground, claims in its answer that the Hallowell institution's share should be paid to itself to be used according to the object and purposes for which it was incorporated.

The heirs claim that the legacy in behalf of the Hallowell Classical and Scientific Academy has lapsed, and that the share originally given to that institution should now be distributed to the heirs of John Barrows or their representatives.

This claim of the heirs that the legacy lapsed in the lifetime of the testator may properly be considered first. In the case of common personal bequests, if the legatee, not a relative of the testator, dies before the decease of the testator, the legacy lapses. And this principle applies to charitable bequests to institutions or organizations. If the institution or organization becomes extinct in the lifetime of the testator, the legacy lapses. *Merrill* v. *Hayden,* 86 Maine, 134; *Jackson* v. *Phillips,* 14 Allen, 539; *Fish* v. *Atty. Gen'l,* L. R. 4 Eq., 521. This rule, however, does not apply if the institution comes to an end after the testator's death, but before the legacy is payable. In re Slevin, 2 Chancery Div. (1891) 236.

It is earnestly contended for the heirs that the allegations in the bill and answer of the Academy, admitted to be true, show that it had discontinued its school in June 1888, five months before the testator's death, that it had sold the school property, had no funds, had entirely and permanently ceased to carry on its educational work, and had no expectation of continuing a school according to

the terms of its charter. From these premises it is argued that although the Academy corporation had not been legally dissolved, it had ceased all practical existence before November 1888; that it was practically dissolved, so far as the testator's bequest to it is concerned. But the allegations in the bill and answer do not fully support the claim as stated. All of the allegations, except that relating to the discontinuance of the school, are in the present tense. We do not think we are warranted in assuming, in the absence of more specific evidence, that the Hallowell Classical and Scientific Academy was defunct as an institution, or that it had entirely and permanently abandoned its corporate existence, and the work it was chartered to do, prior to the testator's death. We have only the fact that the school was discontinued in June 1888. In truth it has not been reopened. But whether in the interim between June and November, the management had hopes, expectations and purposes, since frustrated or abandoned, we do not know. We think the burden is on the heirs to show it. The case of *Stone* v. *Framingham,* 109 Mass., 303, on which the heirs chiefly rely as a precedent, is unlike this one. In that case, the legislature had deprived the Academy, irrevocably, of all its property, and had taken away the power of performing the principal duties which devolved upon it. And it was properly enough held that the institution was practically dissolved, so far as it affected the right to retain a trust fund which had been given to its use.

We hold that the legacy did not lapse for the reason above stated.

The Hallowell Classical and Scientific Academy having become unable to execute the trust, and having declined the same, the South Congregational Parish and the Bangor Theological Seminary claim the fund upon the equitable doctrine of *cy pres* and the only debatable questions presented are whether, in accordance with that doctrine, the share of the Academy shall be paid wholly to the Parish, or wholly to the Seminary, or divided between them, or whether it shall descend to the heirs as an undevised portion of the residuum.

In order to answer these questions correctly, it is necessary to examine further the character and purposes of all three of the original beneficiaries.

The Hallowell Classical and Scientific Academy was chartered in 1872 "for the purpose of promoting Christian education, and the

more thorough training of the youth in such languages and in such of the arts and sciences as the trustees" should direct. At the date of the will, and until June 1888, it conducted a school at Hallowell for the education of youth of both sexes, of the grade and scope of high schools. It was a boarding as well as a day school. Its Board of Trustees and management, some of them clergymen, were affiliated with the Congregational denomination in this State. The school was devoted to the higher education of young men and women under the influence of the principles and doctrines of the Congregational denomination.

The South Congregational Society of Augusta was then and is now a religious and charitable organization located at Augusta, belonging to the Congregational denomination, its management being vested in a board of officers called the Prudential Committee. Its parish is accustomed to distribute part of its gifts to charity among educational institutions "such as the Congregational Educational Society and the American Missionary Association, organizations affiliated with the Congregational denomination;" and the funds given in this way "are used for the benefit of schools in the western and the southern parts of the United States."

The Bangor Theological Seminary, originally the Maine Charity School, was incorporated in 1814, "for the purpose of promoting religion and piety, and for the education of youth in such languages and in such of the liberal arts and sciences as the trustees thereof shall from time to time judge the most useful and expedient for the purposes of said Seminary." It is authorized to confer the degree of doctor of divinity. As stated in the bill, it was and is an institution located at Bangor, of a charitable nature. Its principal object is to educate young men as ministers of the Congregational denomination. As stated in the stipulations of the parties, it is practically a theological seminary for the fitting of young men for the Congregational ministry.

John Barrows was, in his lifetime, a devout member of the Congregational denomination, and a member of the South Congregational Society of Augusta.

The doctrine of *cy pres* has been fully and learnedly discussed in recent times in the opinions of this court in *Whalen* v. *Doyle,* 87 Maine, 426, and *Brooks* v. *Belfast,* 90 Maine, 318. See also the exhaustive opinion in *Jackson* v. *Phillips,* 14 Allen, 539. It is

unnecessary now to do more than to restate two or three principles. *Cy pres* is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. It is applied only to valid charitable gifts. Bouvier Dict. Title, *Cy pres,* Story Eq. Juris. sect. 1167. If charity be the general charitable intention, though the mode provided for its execution fails, and thereby the donor's general purpose will be impaired or destroyed, the court in equity will find some means of effectuating the intention of the donor, as nearly as possible. *Jackson* v. *Phillips,* supra. To apply the doctrine, the court must be satisfied that some other object may be found answering the intention of the donor in a reasonable degree, and most nearly consonant to the donor's general charitable purpose. *Atty. Gen.* v. *Briggs,* 164 Mass., 561, *Jackson* v. *Phillips,* supra. *Atty. Gen.* v. *Whiteley,* 11 Ves. Jr., 241. And to determine the donor's general intention, the court may look at all of the charitable bequests in the will. *Atty. Gen.* v. *Iron Mongers Co.,* 10 Clark & Finnelly, 908.

No citation of authorities is necessary to show that the legacy to the Hallowell Classical and Scientific Academy was a valid charitable gift. And read in the light of existing conditions, we think it evinces a general charitable intention. In this respect it is unlike the gifts in *Brooks* v. *Belfast,* 90 Maine, 318, and *Doyle* v. *Whalen,* 87 Maine, 426, cited in argument.

We think it is evident that the testator having made such provision for his widow and for such other persons and objects as he saw fit, intended to devote the remainder of his estate to charity. He was a Congregationalist. He desired his charity to be administered and expended under the auspices, or for the uses, of Congregational institutions, church and schools. Two thirds of the trust fund he wished should be expended to promote education in Congregationalist schools of different grades. He evidently wished to confirm the polity and extend the usefulness of the Congregational denomination by aiding schools under the management and control of men of that faith.

He gave one third of the fund to the Congregational Society of which he was a member, to be expended for such charitable and benevolent purposes as might be approved by the State Congrega-

tional Conference. And no question is raised here about the right of that society, through its parish, to receive and apply that bequest.

It is agreed that the South Congregational Society of Augusta is a charitable organization, and that customarily it devotes a part of its charitable gifts to educational institutions, affiliated with the Congregational denomination. It is agreed also that the Bangor Theological School is a divinity school of the same denomination.

The charity given to the Hallowell Classical and Scientific Academy was intended primarily for educational purposes, and secondarily, we think, to strengthen Congregationalism. And we conclude that to entrust the administering of this fund, or at least a part of it, to the Bangor Theological Seminary, a Congregational, educational institution in this state, though of a higher grade than the Hallowell Classical and Scientific Academy, would be to carry out *cy pres* the testator's intentions.

But although the Bangor Theological Seminary in its answer claimed the whole of the Academy share, and the Congregational Parish did the same, yet at the argument before us, they were represented by the same counsel; and, for them, he suggests that a division between the Seminary and the Parish "seems to be a fair interpretation of the probable intention of the testator." With this view we concur. No school of the Congregational denomination similar to the Hallowell school has applied for the fund, and it does not appear that the testator could have had any other in mind. But it does appear that his intention was that the three institutions should receive the entire residuum of his estate in equal shares. There is nothing to show that he preferred the Seminary to the church. He regarded them alike, and to the same degree. The legacy given to the Academy for educational uses can be applied by the church organization to similar uses through its customary channels of charitable beneficence. In this connection it should be said that no objection is made on the ground that the objects of the church society's charity are indefinite.

Accordingly the plaintiff trustee is instructed,—

1. That the South Congregational Parish of Augusta, by its Prudential Committee, is entitled to receive that portion of the residuary trust fund which was bequeathed to the South Congregational Society of Augusta, to be used and expended as provided in the will.

2. That one half of the fund originally bequeathed to the Hallowell Classical and Scientific Academy be paid by the trustee to the Bangor Theological Seminary for the educational uses and purposes of that institution.

3. That the remaining half of the fund originally bequeathed to the Hallowell Classical and Scientific Academy be paid by the trustee to the South Congregational Parish of Augusta to be used, appropriated and expended by it for the benefit of Congregational, educational institutions, with the consent and approval of the Maine State Congregational Conference.

A decree accordingly will be entered below.

So ordered.

TEDDY VEANO

vs.

ARTHUR A. CRAFTS and GEORGE W. STACEY.

Penobscot. Opinion March 9, 1912.

Master and Servant. Defective Staging. Trial. Nonsuit. Evidence. Exceptions.

When a master furnishes to his servants, employed in constructing a building, sufficient materials of a suitable character with which to build a staging, and the servants undertake to build it for themselves, the master is not liable to a servant who is injured by reason of a defect in its construction; and this is so, even if one of the servants who helped build the staging was foreman of the crew.

A nonsuit is properly ordered, when there is no evidence to support a finding which is essential to the plaintiff's right to recover.

Exceptions taken during a trial, but not noticed in the bill of exceptions, cannot be considered by the Law Court.

On exceptions by plaintiff. Overruled.

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

caused by the alleged negligence of the defendant. Plea, the general issue. At the conclusion of the plaintiff's testimony the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

George E. Thompson, and Charles J. Dunn, for plaintiff.

C. W. Hayes, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, BIRD, HALEY, HANSON, JJ.

SAVAGE, J. Exceptions to order of nonsuit.

The defendants, who are copartners under the name of the Shirley Lumber Company, were building a one story shed with single roof in lean-to form, adjoining and attached to their mill in Shirley. The shed was thirty two feet long by the side of the mill, and sixteen feet wide. The row of studding on the back side of the shed was stayed by stay laths, so called, nailed to the studding at one end and to the window casing in the side of the mill at the other. The stay laths were therefore about sixteen feet long. The window casing was a one inch pine board, and the end of the stay lath of which the plaintiff here complains was nailed to the casing with three wire board nails. During the progress of the work, it became necessary to have a staging on the inside of the shed next to the mill, in order that the workmen could conveniently handle and fasten the rafters overhead. Instead of building a staging specially for the purpose, the workmen, including one Huff who was the foreman and had charge of the erection of the building, placed planks for a staging across the stay laths near the mill structure, using them for supports. No support had been placed under the stay laths between their ends.

The plaintiff was employed by the defendants in general work about the mill or yard, but in the afternoon of the day in question was set to work with other men on the shed. The staging was then in place and part of the rafters had been put on. The men began to place other rafters in position. The plaintiff got onto the staging to spike the upper end of a rafter, and while so engaged, the end of a stay lath underneath the staging pulled away from the window casing to which it had been nailed. The three nails pulled

out. The staging planks fell and the plaintiff was thereby precipitated to the stringers under him and sustained serious injuries, for which he seeks to recover, at common law, in this action.

The case turns upon whether the defendants had undertaken to furnish the staging as a completed structure for the use of the plaintiff, or whether they merely undertook to furnish suitable and sufficient materials, with which their servants undertook to build the staging for themselves, and as they pleased. If the jury would be warranted by the evidence in finding that the former alternative is true, that is, that the defendants undertook to furnish the staging as a completed structure, the order of nonsuit was erroneous; if the other, and the only other, alternative is true, the order was correct.

We think the case clearly falls within the second of the above named classes. There is no evidence which would warrant a finding that the defendants undertook to build this staging. It is true that the defendants had a foreman on the work, and that the jury would have been warranted in finding that the foreman assisted in making the staging in the manner stated. But that is not enough. Whether the servants of the defendant, including the foreman, were fellow servants of each other in building the staging, so that the negligence of one is assumed by each of the others, or whether they were not, depends not upon their relative rank as servants, but upon the nature of the duty that was being performed. *Small* v. *Manufacturing Co.*, 94 Maine, 554.

Here it is not shown that the defendants themselves had anything to do with the details of the construction of the shed. They might well anticipate that a staging would be convenient, if not necessary, in putting in place a few rafters, which so far as the case shows was the only use for which a staging was required. But they furnished at hand all the materials that were needed, and we think that the only understanding that can be imputed to them is that the workmen should make such stagings out of the materials as they needed, and in such manner as pleased themselves. And in such a case, the master is not chargeable for the negligence of one of the servants causing injury to another, even though the negligent servant may chance to be superior in grade to the injured one. They are fellow servants, and the fellow servant rule of assumption of risk applies.

The facts in this case are widely different from those in *McCarthy* v. *Claflin,* 99 Maine, 290, and *Elliott* v. *Sawyer,* 107 Maine, 195, cited and relied upon by the plaintiff. They are more nearly like the facts in *Pellerin* v. *Paper Co.,* 96 Maine, 388, *Amburg* v. *Paper Co.,* 97 Maine, 327, and *Loud* v. *Lane,* 103 Maine, 309.

The order of nonsuit was correct, and the plaintiff's exceptions must be overruled.

The plaintiff's counsel have argued an exception to the exclusion of testimony. The record shows that an exception was noted at the time, but it was not preserved or referred to in the bill of exceptions, and for that reason cannot be considered.

Exceptions overruled.

JAMES W. BRACKETT *vs.* SARAH A. KNOWLTON, Executrix.

Franklin. Opinion March, 9, 1912.

Contracts. Advertising Contracts. Construction.

Under a contract to advertise mineral springs, on condition that payment for advertising under the contract and for that furnished before the agreement was made should be made on a sale of a spring, and that no demand for payment should be made until such sale, or until ownership of the springs should change, the owner's liability for the price of the advertising accrued at once on his giving the springs to his grandchildren.

On report. Judgment for plaintiff.

Assumpsit to recover the sum of $453.95. Plea, the general issue. An agreed statement of facts was filed and the case reported to the Law Court for determination.

Mr. JUSTICE BIRD who prepared the opinion, states the case as follows:

"The defendant's testator, Jeremiah B. Knowlton, was the owner of certain springs and prior to the date of the contract set forth below had advertised them as for sale in certain newspapers owned

or controlled by plaintiff. On the day of its date the plaintiff and the testator executed the following agreement:—

'Phillips, Maine, Nov. 5, 1900.

'Memorandum of advertising contract between J. B. Knowlton of Strong, Maine and the Phillips Phonograph and Maine Woods Phillips, Maine, for advertising said Knowlton's Soda and Sulphur Springs to such an amount as in the judgment of J. W. Brackett seems best but not to exceed the sum of ($1000), one thousand dollars a year for two years' time under this agreement, the regular price for said advertising to be paid when said Springs are sold or upon sale of one of them. If the property named herein is sold within two years the amount to be paid by said Knowlton is simply the amount that will have been earned by the advertising up to that time. It is also agreed that J. W. Brackett's bill of ($317.83), three hundred and seventeen dollars and eighty-three cents, for advertising said Springs previous to this date is also to be paid when said Springs or either of them is sold.

'There shall be no demand made for advertising until said Springs or one of them are sold or in some way change owners. This is to be interpreted to mean that the heirs in case of said Knowlton's death shall be no more liable than he unless there is business sufficient to pay it as managed by said heirs.

J. W. BRACKETT, (Seal)
J. B. KNOWLTON, (Seal)'

Witness: W. D. GRANT.

"The plaintiff, in accordance with the contract, continued to advertise the springs in the years 1901 and 1902.

"On the 18th of April, 1906, the testator conveyed the springs, described in the contract, as a gift to his grandchildren who were the testator's legal heirs. The testator died on the 12th day of March, 1907. By his will he left all his estate to his widow, the executrix. Since the conveyance to them, his grandchildren have neither sold nor leased the springs nor received any income therefrom. The plaintiff claims that his charges for advertising are due and brings this action to recover the same."

Elmer E. Richards, for plaintiff.

Frank W. Butler, and D. R. Ross, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

BIRD, J. The items for which this suit is brought are of two classes, one for advertising before the making of the contract between plaintiff and defendant's testator and the other for advertising done subsequent to and under the terms of the contract. The former constituted an absolute debt, payment of which was to be contingent upon the happening of a future event while the latter was to become an obligation of the testator, or his heirs, upon the occurrence of the same event. Whether the items of the first class were due within a reasonable time after the services performed it is unnecessary to determine; see *Sears* v. *Wright,* 24 Maine, 278, 280; *DeWolfe* v. *French,* 51 Maine, 420. By the terms of the contract the items of both classes were to be payable "when said springs or either of them is sold." The happening of this event is explained or modified by the second paragraph of the contract which we interpret to mean that payment of the sums properly chargeable for advertising shall not be enforceable until one, at least, of the springs is sold by the testator or, in the event of his death, until his heirs shall either sell one of the springs or, under their management, there is sufficient business to pay them. By the conveyance to his grandchildren by way of gift, the testator made impossible the occurrence of either of the contingencies and his liability at once accrued: *Crocker* v. *Holmes,* 65 Maine, 195, 199; *Wright* v. *Haskell,* 45 Maine, 489; *Poland* v. *Brick Co.,* 100 Maine, 133, 135.

Judgment for plaintiff for the sum of four hundred and fifty-three dollars and ninety-five cents with interest from the date of the writ.

WILLIAM R. LADD *vs.* C. VEY HOLMAN.

Penobscot. Opinion March 11, 1912.

Statute of Frauds. Oral Contract to Make Land Title Good.

A vender's oral agreement to remove existing incumbrances is generally good; but a general agreement to make good a title, if the deed delivered does not have that effect, is within the statute of frauds.

On report. Judgment for defendant.

Assumpsit to recover money which the plaintiff alleged he expended in order to make his title to land sold to him by the defendant and conveyed to him by deed of release and quitclaim, "good, complete and merchantable." Plea, the general issue with brief statement invoking the statute of frauds. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Taber D. Bailey, for plaintiff.

Fellows & Fellows, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

BIRD, J. This is an action of assumpsit to recover moneys which plaintiff alleges he expended in order to make his title to land, which he purchased of defendant by a deed of release and quitclaim of defendant's right, title and interest therein, "good, complete and merchantable." The case is reported to this court for decision upon the writ, pleadings and so much of the evidence as is legally admissible, such judgment to be entered as the legal rights of the parties require.

The declaration alleges that plaintiff on the eleventh day of June, 1908, had bargained with the defendant for a certain lot of land and for which the plaintiff was to pay seven hundred dollars, said

land being described as follows:—All my right, title and interest in a certain lot of land which is thereupon described as in the deed above referred to. "And whereas plaintiff having no knowledge of the nature and validity of defendant's title to said premises requested defendant to give him a warranty deed thereof, which defendant declined to do but tendered him a quitclaim deed of the premises; and in consideration that plaintiff would complete the bargain and purchase of said land, and pay the agreed price for the same, and accept the quitclaim deed of said defendant, defendant said that his title to said land was good and promised and agreed with plaintiff to stand behind the title to said land and that if plaintiff was put to any loss, cost or damage on account of any defect in said title that defendant would reimburse him for the same." It avers further that, relying upon the defendant's promise, the consideration was paid and the deed tendered and accepted by plaintiff in the belief that he acquired full and complete title but that afterwards he discovered that the deed conveyed to him only thirteen-fifteenths of the land and that in making the title good he expended time and money to the value of two hundred dollars, recovery of which is sought. The defendant pleads the general issue and the statute of frauds.

It appears from the testimony of the plaintiff, that after a negotiation for the purchase of the land in question, the parties met for payment of the consideration and the delivery of a deed; that there was discussion as to the title of two-fifteenths of the land; that defendant said that "that was all settled" and that conversation followed relative to a tax deed of the two-fifteenths under which defendant claimed; that defendant offered the deed of release and quitclaim to which plaintiff objected whereupon defendant said "it is all right, and I will stand back of it, and if anything comes up, it shan't cost you a cent;" that plaintiff then called in counsel and, to quote further from the testimony of plaintiff "they talked the matter over and they thought it was all right—gave me to understand the deed was all right, and I took the deed."

Assuming the testimony of the plaintiff to be true, and it is not uncorroborated, and admissible, we are unable to distinguish the facts of this case from those of *Bishop* v. *Little,* 5 Maine, 362. There defendant, as agent of the Pejepscot proprietors, executed

and delivered a deed of certain lands to the plaintiff, a settler. The deed contained no express covenants. When the agent of the plaintiff was about to pay the consideration for the deed he expressed fears that the title of the proprietors would not include the lands possessed by the plaintiff but the defendant affirmed that it would and that if the deed should not have the effect to pass and secure the land to the plaintiff, "he would make it good." The court held the alleged promise within the statute of frauds. See *Patterson* v. *Cunningham,* 12 Maine, 506, 512; *Raymond* v. *Raymond,* 10 Cush., 134, 141; Browne St. Fr., § 268; see also 20 Cyc., 232, where it is stated that a vendor's oral agreement to remove existing incumbrances is generally good, but a general agreement to make a good title, if the deed delivered does not have that effect, is within the statute.

Judgment for defendant.

In Equity.

L. B. FOURNIER et als.

vs.

COUNTY COMMISSIONERS of Aroostook County.

Aroostook. Opinion March 11, 1912.

Constitutional Law. Counties. County Buildings. Statutory Authority. Construction. Statute, 1911, chapter 52, sections 3, 4, 5.

Public Laws 1911, chapter 52, which provides for a slight change of the boundaries of the northern registry district of Aroostook county, and for the removal of the registry office to Fort Kent or Van Buren as designated by the qualified electors of the district and which provides that the act should be void unless, before January 1, 1912, one of the towns should render financial aid in the erection of a registry building, and that, after determination of such matters, donations by the unsuccessful competitor should be returned, is not invalid as delegating to the electors the question of changing the boundaries nor the question of removing the registry, nor is the requirement that financial aid be provided by the competing

towns ambiguous, the Act giving an option to render aid without compelling it; and Fort Kent having been selected by the electors as the location for the registry, and it having complied with the financial requirement, it is not essential to the county commissioners' right to erect the building that the town of Van Buren be given opportunity to offer aid, since that would be required to be immediately returned under the Act.

In equity. On report. Bill dismissed.

Bill in equity brought by the plaintiffs "L. B. Fournier, Fortuna W. Pelletier, Beloni Hebert, Thomas Hebert, Raymond Albert and Eloi Albert, all of Madawaska in said county of Aroostook, and all resident within the Northern Registry District of Aroostook County, all being six taxable inhabitants of said Madawaska in said county, against Samuel C. Greenlaw, of Presque Isle in said County, Lewis E. Jackman, of Sherman in said County, and Patrick Therriault, of Grand Isle in said County, as they are the commissioners of said County of Aroostook," for the purpose of enjoining the defendants from erecting a building in Fort Kent for the office of registry of deeds in the Northern Registry District in said county and from borrowing money for that purpose upon the credit of the county. The defendants filed an answer alleging in substance that they were legally authorized to erect such a building at Fort Kent, that it was their legal duty as County Commissioners to erect such a building and that unless enjoined they intended to erect such a building. An agreed statement of facts was filed and the case reported to the Law Court "to render such final judgment as the legal rights of the parties require."

The case is stated in the opinion.

Hersey & Barnes, and L. V. Thibodeau, for plaintiffs.

Perley C. Brown, County Attorney, Madigan & Madigan and Leonard A. Pierce, for defendants.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

BIRD, J. This bill in equity is brought by certain taxable inhabitants of the town of Madawaska and of the county of Aroostook for the purpose of enjoining the defendants from erecting a building in Fort Kent for the office of registry of deeds in the northern

district of the county and from borrowing money for the purpose upon the credit of the county.

The respondents claim authority in justification of their proposed acts under c. 52 of the Public Acts of 1911, which provides for a slight change in the boundaries of the northern registry district of the county and the removal from Madawaska of the office of Registry of Deeds of the northern registry district of the county to either Fort Kent or Van Buren as may be determined by a majority vote of the qualified voters of the district, for the erection of a building for such registry at the place selected and for the procurement of funds therefor on the credit of the county by the county commissioners.

Sections 3, 4 and 5 of the act referred to are

Section 3. This act shall be void unless at a special election duly called and held on the second Monday of September, nineteen hundred and eleven, and participated in by the qualified voters in said district, said district accepts the same and determines by a majority vote which town said registry shall be located in. This act shall also be void unless a suitable lot in Van Buren villlage, and a similar lot in Fort Kent, whereon to erect a building for the registry office, shall have been conveyed to the inhabitants of the county of Aroostook by each of said town of Van Buren and Fort Kent, and the sum of three thousand dollars paid by the citizens of said Van Buren into the county treasury, said sum to be expended by the county commissioners of said county in building a registry office on said lot if the same be located in Van Buren, on or before the first day of January, nineteen hundred and twelve. After the said election has been held and the foregoing matters determined, the lot of land so conveyed and the sum of three thousand dollars so paid by the parties failing to secure the location of said registry in their town, shall be re-conveyed and paid back to such unsuccessful donors.

Section 4. At said election the question of whether the registry shall be moved to Fort Kent or Van Buren shall be so presented upon one ballot that the voters of said district may indicate their choice.

Section 5. Said northern registry is to remain where now located until the first day of January, A. D. ninteen hundred and twelve, when it is to be removed to the place selected by the voters of said district at said election.

Prior to the special election, which was held at the time directed in the legislative act, the town of Fort Kent made conveyance of a lot of land therein in compliance with the provisions of the act. It is apparent that no conveyance of a lot of land in Van Buren suitable for a registry building was ever delivered by or in behalf

of the town to the County and that no sum of money was ever paid into the county treasury by citizens of Van Buren. At the special election a majority of voters indicated Fort Kent as their choice. It is, however, contended by defendants, among other things, first, that, the conveyance and payment of money on the part of Van Buren was to be made on or before the first day of January, 1912, and that a conveyance and payment, by Van Buren after the selection of Fort Kent, would be needless ceremony and, second, that neither town as a municipality could legally buy or convey a lot for a county building and that the legislature therefore could not require the same and did not intend to do so.

The act provides, in section 3, that it shall be void unless at a special election on the second Monday of September, 1911, the "district accepts the same and determines by a majority vote which town said registry shall be located in." This is not, in the opinion of the court, a delegation of legislative power to determine if the location of the registry should be changed. The legislature had already directed the change in boundary and the removal to one or the other of the two towns and the provision quoted is the somewhat unnecessary declaration that the act shall be ineffectual unless, in conformity with its provisions, the inhabitants of the district determine which town. To give it the construction that the legislature intended to delegate the power to determine a change in the boundaries and the question of the removal of the location of the registry with its attendant expense to the whole county to a part of the county would render the act of doubtful constitutionality.

The act also provides, in section 3, that it shall be void unless the respective lots shall have been conveyed and the sum of $3000 paid by the town of Van Buren to the county, said sum to be expended by the county commissioners of said county in building a registry office on said lot if the same be located in Van Buren, on or before the first day of January, nineteen hundred and twelve. This is an unambiguous requirement that the acts to be done by the towns be done on or before the first day of January 1912. Neither the whole act taken together nor its history convinces us that its plain language can be disregarded or that a different intention on the part of the legislature is ascertainable: *Cotton* v. *Cotton,* 103 Maine, 210, 212; *Standard Oil Co.* v. *U. S.,* 211 U. S. 1, 50; *Lyon* v. *Lyon,* 88 Maine, 395, 404.

It is evident that it was the legislative intent that the location of the registry office be changed but difficulty arose in view of the competition between the two towns of Fort Kent and Van Buren for the new location. Each had made offers of financial aid provided it was designated. The act gave an option to the towns to render such financial aid and while the act afforded each adequate power and authority to do so, it was not intended as a compulsory requirement; *Walton* v. *Greenwood,* 60 Maine, 356, 361, 369. Should the successful town fail to do so, the act became void. If, as an evidence of good faith or as furnishing a more positive inducement Fort Kent conveyed a suitable lot or Van Buren conveyed such lot and paid the sum named, before the election was held, it is directed that the land so conveyed and money so paid "by the parties failing to secure the location" be reconveyed and repaid to the "unsuccessful" donors.

In this we find nothing to indicate an intention on part of the legislature inconsistent with the clear language of the act. To require of Van Buren the conveyance of a lot and the payment of the sum named before January 1, 1912 and after its failure at the election to secure the location would be, as defendants urge, but empty ceremony. The party securing the location has seasonably furnished the financial aid required of the successful donor.

The bill must be dismissed.

Decree accordingly.

CHARLES L. MACURDA *vs.* LEWISTON JOURNAL COMPANY.

Lincoln. Opinion March 14, 1912.

Libel and Slander. Newspaper Articles. Construction. Innuendo. Malice. Evidence.

Whether a newspaper article is libelous is to be determined from an examination, not of a clipping, but of the entire article.

A newspaper item stating that there was a deadlock over the extradition of the plaintiff, who was indicted for larceny from an estate, was not libelous as imputing larceny, where a subsequent paragraph of the same item stated that the specific charge on which the plaintiff was indicted was for procuring a genuine signature to an instrument, the false making of which would be forgery.

In determining the effect of a newspaper item charging the plaintiff's indictment, it is unnecessary that the reader should be able to make a legal distinction between the offense charged in the alleged libelous words and the offense described in the entire article.

Where a newspaper article is claimed to be libelous as charging the commission of a public offense, the charge cannot be enlarged by innuendo.

An editorial, stating that it was hoped that it was not true that extradition of the plaintiff, under an indictment for larceny from an estate, was denied because of political pressure, was not libelous as imputing larceny to the plaintiff, where the item further stated that the specific charge against the plaintiff was for procuring an order, through false pretenses, to deposit money.

Newspaper articles concerning the plaintiff, and relied on by him as being libelous, cannot be deemed to be malicious, where the evidence showed that the plaintiff was unknown to the writer.

On report. Judgment for defendant.

Action of libel against the Lewiston Journal Company, the owner and publisher of a public newspaper called the Lewiston Evening Journal, charging that the defendant company published in its said newspaper "a certain scandalous and malicious libel of and concerning the plaintiff, and of and concerning him in his profession as an attorney at law, and of and concerning his conduct" in a certain matter called the "Barris matter." Writ dated September 22,

1908. The declaration in the writ fills 18 printed pages of the record. Plea, the general issue, with a brief statement which also fills 18 printed pages of the record. The action was tried at the April term, 1909, of the Supreme Judicial Court in Lincoln County and resulted in a disagreement of the jury. The action was then continued until the October term, 1910, of said court, when the case was reported to the Law Court under the following agreement: "By agreement of counsel this case is reported to the Law Court upon so much of the evidence taken at the trial at the April Term, 1909, as is legally admissible, the Law Court to determine all questions of law and fact involved and to render such judgment therein as the law and the admissible evidence require, including the assessment of damages if the plaintiff is legally entitled to damages."

The case is stated in the opinion.

Arthur S. Littlefield, and George C. Wing, for plaintiff.

Symonds, Snow, Cook & Hutchinson, and McGillicuddy & Morey, for defendant.

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

SPEAR, J. This is an action of libel against the Lewiston Evening Journal charging that paper with publishing a certain scandalous and malicious libel concerning the plaintiff and of and concerning him in his profession as an attorney at law, and of and concerning his conduct in the Barris matter. The Barris matter briefly stated was this: Wm. J. Barris and Irving H. Barris, the former the husband, the latter the son, of Alice G. Barris, were instantly killed, and Alice G. was seriously injured, in the Bakers Bridge accident, so called, on the Boston & Maine Railroad, which occurred on the 4th day of December, 1905. Robert F. Barris was appointed administrator of the estate of Wm. J. and Irving H. The plaintiff, being a friend of the family, was employed by the administrator to adjust the claims against the railroad. This he was able to do without suit, receiving the sum of ten thousand dollars for the death of the husband and son, for the benefit of Alice G. Barris. The plaintiff then obtained a written instrument signed by Alice

G. Barris, purporting to be a discharge or release of any obligation to her, her heirs, executors or administrators, upon any bond of the United States Fidelity and Guaranty Company filed in any Probate Court by Robert F. Barris or others as administrator of the estate of Irving H. Barris or of Wm. J. Barris. The plaintiff received, of the ten thousand dollars, $3333.33 from the administrator for his services, as shown by the following receipt: "Boston, January 4, 1906. Received from Robert F. Barris, administrator of the estate of William J. Barris and Irving H. Barris, three thousand three hundred and thirty-three ($3333.33) dollars and thirty-three cents in full for legal services rendered said administrator in procuring a settlement and adjustment with the Boston and Maine Railroad, of the claims which the said administrator had arising out of the deaths of William J. Barris and Irving H. Barris. (Signed) C. L. M." The account of the administrator presented to the Probate Court upon the estate of William J. Barris contained the following item for counsel fees: "Paid Chas. L. Macurda, Atty., of Wiscasset, Maine, for services in the matter of injuries to deceased—$1666.66," upon which but $150 was allowed by the court. Precisely the same item appeared in the administrator's account upon the estate of Irving H. Barris, and the same amount was allowed. That is, upon both accounts, for which the plaintiff had received $3333.33 as counsel fees, the court allowed $300, thus leaving the sum of over $3000 to be accounted for by the administrator to the estate. On the 4th day of June, 1906, the United States Fidelity and Guaranty Co., surety upon the bond of Robert F. Barris, paid to Alice G. Barris, as administratrix d. b. n., Robert F. having resigned, the sum of $3283.34 by reason of its acting as surety on the bonds given by Robert F. Barris as administrator of the estate of Wm. J. and Irving H. Barris. This was to supply the amount which the plaintiff had received as counsel fees in excess of that allowed by the court. Having paid the above sum of money the surety company claimed that the written instrument above alluded to, and of the following tenor, to wit: "I, Alice G. Barris of Maynard, Mass., in consideration of one ($1.00) dollar and other good and valuable considerations paid to me by the United State Fidelity & Guaranty Company, hereby release and discharge said Guaranty Company from all liability to me or my heirs, executors or administrators under any bond or bonds filed in

any Probate Court by Robert F. Barris or others as Administator of the estate of Irving H. Barris and of the estate of William J. Barris, both deceased, late of Maynard. Witness my hand and seal this 16th day of December, 1905. Alice G. Barris (seal) Witness, Charles L. Macurda," was procured by the fraud of the plaintiff, and that, relying upon this fraudulent instrument, it was induced to become surety upon the administrator's bonds of Robert F. Barris, upon which it was obliged to pay the above sum of $3283.34.

When the alleged libel complained of was published, the plaintiff upon the above state of facts had been indicted in Massachusetts, the Commonwealth in its indictment alleging that this release, purporting to be executed by Alice G. Barris, although signed by her, was obtained by the plaintiff through misrepresentation and fraud, upon the false pretense that the instrument was to be used for the purpose of authorizing the plaintiff to deposit the money collected of the railroad in savings banks; that Falvey and Berry, authorized attorneys to execute the bond of the Fidelity & Guaranty Co., were induced to place their signatures upon the bond, in execution thereof, in reliance upon the release thus procured and presented by the plaintiff; and that "the said Macurda then and there did obtain the signature of said Falvey and said Berry, such attorneys as aforesaid, to a written instrument, the false making of which would be punishable as forgery, to wit, a certain bond." . . . The specific offense then for which the plaintiff was indicted was for procuring genuine signatures to be affixed to an instrument, the false making of which would be equivalent to forgery.

The alleged libelous articles complained of in the plaintiff's writ were published in the Lewiston Evening Journal of October 21, 1907, one appearing as a news item, the other as an editorial. The news item was copied verbatim from the Boston Sunday Globe of October 20, 1907, but, as the question of liability only will be involved in the decision of this case, the defendant will be required to assume full responsibility for both the news and the editorial items. The plaintiff's declaration contains four counts, but only those charging that the defendant was indicted for larceny will be considered, as all other general satements contained in either the news items or the editorial are capable of defense under the plea of truth. Nor need we consider but one count, as the libelous

matter set out in the first count is of precisely the same nature as that set out in the other counts, and as broadly stated, and the same defense which can be set up in answer to the charge in the first count can be pleaded with equal force to the charges in the other counts.

The first count alleges that the defendant on the 21st day of October, 1907, published "a certain scandalous and malicious libel of and concerning the plaintiff, and of and concerning him in his profession as an attorney at law, and of and concerning his conduct in said Barris matter, containing therein among other things the false, scandalous, malicious, libelous and defamatory matter following, viz: "There is a deadlock over the extradition of Charles L. Macurda (meaning the plaintiff) a lawyer of Wiscasset, Maine, who (meaning the plaintiff) is indicted here (meaning the Commonwealth of Massachusetts) for larceny in three counts from the estate of Arthur L. Barris of Watertown." If the above item as quoted had comprised all that was said concerning the indictment of the plaintiff, it would undoubtedly be libelous, even though the plaintiff had been indicted for another offense; but this item is merely an extract, severed from its connection with the rest of the article which gives an explanation of the transaction leading up to the indictment in the State of Massachusetts. The defendant in its plea sets forth in full the articles published, from which the plaintiff has selected the quotations of which he complains, and avers that the effect of the articles as a whole are calculated to convey to the mind of the reader of reasonable understanding, candor and discretion, the precise offense for which the plaintiff was actually indicted.

It is familiar law in this state that whether a written statement is libelous or not is to be determined from an examination, not of a clipping, but of the entire article in which the alleged libelous language appears, and upon the impression produced by the article as a whole. In *Wing* v. *Wing,* 66 Maine, 62, the court say with reference to the interpretation to be placed upon libelous matter alleged to have been contained in a communication: "Another rule is, that all the words spoken, so far as necessary to ascertain the meaning of the person who utters them, must be considered together. The sense of actionable words may be so far qualified by subsequent words spoken in the same connection, that the words

taken together are not actionable. Therefore, if a person is charged with stealing, under such circumstances as show that a felony was not capable of being committed, the words are not to be regarded as actionable. Among the illustrations of this rule, is the familiar one found in the books and stated in Bac. Abr. in this way: 'If J. S. say to J. N., thou art a thief, and hast stolen my trees,' no action lies; it appearing from the latter words, that the whole words only import a charge of a trespass.'" In *Bearce* v. *Bass,* 88 Maine, 521, the same rule is approved by the court in the following language: "The construction to be put upon this particular part of the alleged libelous publication must be that which is consistent with the whole article, that which follows as well as that which precedes." In *Thompson* v. *Sun Co.,* 91 Maine, 207, the rule is reaffirmed in this language: "It is not the intention of the writer, or the understanding of any particular reader that is to determine the question. It is rather the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of readers of reasonable understanding, discretion and candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them." The same rule was established in Massachusetts in *Allen* v. *Hillman,* 12 Pick. 103, in an opinion by Chief Justice Shaw in which he says: "The use of the word 'robbed' which the evidence leaves a little doubtful, would make no difference, if as we think the conversation taken together proves the term was applied to the plaintiff, as having appropriated and converted the money intrusted to him as treasurer, to his own use. It would be like the common case put to illustrate the rule, that the words must, all taken together, charge an indictable offense, 'he is a thief, he has stolen apples from my trees.' The first clause in the sentence charges a felony; but taken in connection with what immediately follows, it shows that the defendant imputed only a trespass." The same doctrine is laid down in *Edgeley* v. *Swain,* 32 N. H., 482.

Upon these decisions the plaintiff's case must be determined. Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court." *Thompson* v. *Sun Pub. Co.,* 91 Maine, 207. As a

matter of law, therefore, it is the opinion of the court that neither the news article, nor the editorial, when read with reference to their effect as a whole can be regarded as libelous. The word "larceny" read in connection with the rest of the article, shows that the defendant imputed only the offense for which the plaintiff was actually indicted. The news article, after referring to the deadlock over the extradition of the plaintiff, then contains two short paragraphs relating to the controversy between the Governor of Maine and the Governor of Massachusetts, and in the third paragraph fully explains the meaning of the words "indicted here for larceny" by use of the following language: "Specifically Macurda is indicted for procuring a genuine signature to be affixed to an instrument, the false making of which would be forgery."

It is the opinion of the court that the news article taken as a whole would not, to a mind of reasonable intelligence and candor, lead to the conclusion that the plaintiff was charged with having been indicted for larceny, as the sentence just quoted, beginning with the word "specifically," as clearly and succinctly states the exact offense for which the plaintiff was indicted as the English language can convey. The effect of the article as a whole, we also think, would impress the mind of the intelligent and candid reader, with a full understanding of all the facts upon which the plaintiff was indicted, and particularly with the gravamen of the charge, as found in the indictment, that he fraudulently obtained the release alluded to; that upon the strength of this fraudulent paper he had obtained the execution of the bonds in question; that he had received $3333.33 for his services; that the bonding company had been induced by the plaintiff's fraud to execute the bonds; and that the defendant was indicted for fraudulently procuring their signatures. These general facts found in the news item ought to inform the ordinarily intelligent and reasonable mind that, whatever the offense was technically called, the plaintiff was actually indicted for having done the things which were generally and truthfully narrated as well as specifically defined. The effect of reading the news article as a whole, therefore, brings it within the decisions above quoted, and especially within the language of the 91 Maine, 207, supra, "It is rather the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of readers of reasonable intelligence, discretion and

candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them."

Nor is it necessary, in determining the effect of the entire article upon the specifically alleged libel, that the reader should be able to make the legal distinction, between the offense charged in the alleged libelous words, and the offense described in the entire article. This rule seems to follow from the decision already alluded to in *Wing* v. *Wing,* 66 Maine, supra, where the slanderous words were "Arnold Wing stole windows from Benjamin Jordan's house." The court holds that these words are not actionable since windows "are strictly a part of a house and ordinarily affixed permanently thereto. If the defendant had intended to charge the theft of windows which are not a part of the house, the former expression would more naturally have been that the plaintiff stole Benjamin Jordan's windows, or windows from Benjamin Jordan." The word "stole" implies a felony and is well understood and admitted, when unexplained, to be slanderous, but when applied to real estate, such as a window becomes, if attached to a house, it is held by the court not to impute theft, inasmuch as real estate is not a subject of larceny. The words "from Benjamin Jordan's house" are therefore held to so explain and modify the slanderous word "stole" as to negative the inference of theft. If this refined distinction in the interpretation of the word "stole" in the imputed slander was regarded as sufficient to negative, in the minds of reasonable, intelligent and candid men, the inference of theft, it would seem that the explicit definition of the offense for which the plaintiff was indicted, taken together with the general explanation, would obviously modify and limit the meaning of the word "larceny," as used in the alleged libel in the case at bar, to the actual charge upon which the plaintiff was indicted.

The illustration used by Chief Justice Shaw in *Allen* v. *Hillman,* supra, is also pertinent in corroboration of this rule. In analyzing the case he says "that the words must, all taken together charge an indictable offense, 'he is a thief, he has stolen apples from my trees.'" As said, the first clause charges a felony, but when explained by what follows, it becomes in law a trespass. But it could hardly be expected that even the intelligent and candid layman would be able to make this legal distinction. It is undoubtedly

generally understood that stealing apples from trees is larceny, yet, not being so legally understood, the charge is not regarded as libelous or slanderous. All of the other cases cited are to the same effect.

In the second count the matter alleged to be libelous is an excerpt from the news item; but, as innuendo can in no way enlarge the charge, we are unable to discover in this allegation anything libelous or far afield from a narrative of the admitted facts. The third count consists of a combination of the two excerpts from the news article, as found in the first and second counts, and need not be further considered. In the fourth count the matter alleged to be libelous is taken from the editorial article, the material part of which reads: "We trust that the charge is not true that Governor Guild's request that the extradition of Mr. Macurda, a lawyer of Wiscasset, indicted for larceny from the estate of the late A. L. Barris of Watertown, Mass., is denied because of political pressure." The gravamen of this charge is the use of the word "larceny." In this editorial comment, there also appears an explanation and specification of what is meant by the imputed charge of larceny in which it is said: "The attorney got an order from the bond insurance company to deposit this ten thousand dollars in Maine. The charge is that this order was secured by false pretenses." The last sentence states precisely the offense with which the plaintiff was charged and shows that the offense, imputed in the plaintiff's declaration, was not the offense described in the editorial when read as a whole. This construction is in accord with the legal principles which have already been considered in connection with the first count and does not require further comment. It should here be observed that the newspaper articles under consideration in each instance refer only to an indictment against the plaintiff, and not to his guilt. The distinction here noted is pointed out in *Stacy* v. *Portland Publishing Co.*, 68 Maine, 286, in this language: "To say that a man was arrested for murder and indicted for murder and tried for murder would not be saying or equivalent to saying that he was guilty of such a charge. If it were so, the newspaper press, would be sorely perplexed for publishing the current news." In accordance with this distinction we here wish to note that it is not our purpose to express the remotest opinion upon the guilt or innocence of the plaintiff of the offence with which he is charged.

Our conclusion is that these articles are substantially true; that there is no evidence to the contrary sufficient to raise a question of fact in this respect; and that the description of the indictment in Massachusetts as an indictment for larceny, in both the news article and the editorial comments, was directly and specifically modified by the context, although in each instance such modification was omitted in the plaintiff's declaration, but, under the pleadings, has been read into it.

Upon the evidence no malice could be imputed to the defendant as the writer of the editorial declared upon the witness stand that when the article was written and the news item copied, he did not know who the plaintiff was. The articles, therefore, cannot be regarded as libelous upon the ground that they originated in corrupt and malicious motives.

As the case comes up on report, the entry must be,

Judgment for the defendant.

HERBERT B. SHURTLEFF *vs.* ANNIE REDLON, Executrix.

Cumberland. Opinion March 19, 1912.

Nonsuit. Executors and Administrators. Claims Against Estate. Actions. Statutes, 1859, chapter 115. Revised Statutes, chapter 66, section 54; chapter 68, section 19; chapter 84, section 146; chapter 89, sections 4, 6, 9, 14; chapter 107, section 16.

A motion to dismiss is properly denied, whatever be the merits or demerits of the action itself, when on the face of the writ appear neither defects nor defenses, and it will not be assumed that the court at *nisi prius* went beyond the scope of the motion, and attempted to decide questions which the motion did not properly raise.

Under Revised Statutes, chapter 66, section 54, relating to the appointment of commissioners to determine claims alleged to be exorbitant, unjust, or illegal, the claimant has not the option of either further maintaining a pending suit or submitting his claim to the commissioners, but must do the latter, and the report of the commissioners is final, saving the right of appeal.

The word "maintained," as used in section 54, chapter 66, Revised Statutes, means to prosecute to a conclusion an action already begun.

Under Revised Statutes, chapter 66, section 54, a claim is committed when service of notice of the application filed in the Probate Court by the executor or administrator is made upon the claimant.

On exceptions by plaintiff. Overruled.

Assumpsit on an account annexed against the defendant in her capacity as executrix, to recover the sum of $3345.15, "and was heard on demurrer to the defendant's brief statement filed with her plea of general issue." The presiding Justice overruled the demurrer and ordered judgment for the defendant and the plaintiff excepted. The ruling of the presiding Justice overruling the demurrer was as follows:

"Demurrer to defendant's brief statement, which serves the purpose of a plea in bar, and the statements in which are agreed to be true.

"The date of the writ is November 28, 1910, service on defendant, December 2, 1910. By the allegations in the brief statement, it appears that prior to the date of the writ, to wit: November 21, 1910, the defendant filed her petition in the Probate Court representing that the claim now sued was exorbitant, unjust or illegal, and praying for the appointment of commissioners in accordance with the statute. Notice was ordered for a hearing thereon December 7, 1910, and the notice was served on the plaintiff November 23, 1910. Commissioners were duly appointed, and after notice to the plaintiff, they met to hear and determine the claim and did so against the protest of the plaintiff. The commissioners filed their report in the Probate Court and it was accepted. The plaintiff filed notice of an appeal from the award of the commissioners, but did not prosecute his appeal. Upon these allegations, I think that after the defendant filed her petition in the Probate Court November 21, 1910, and in any event after the notice of the hearing thereon was served on the plaintiff, November 23, 1910, the Probate Court had sole and exclusive jurisdiction to determine in manner provided by statute the validity and amount due on the plaintiff's claim, subject to appeal, and if this be so, it follows that the Supreme Judicial Court did not have original jurisdiction in this matter at the time this action was commenced. But it is alleged that pending the proceedings in the

Probate Court, to wit: at the January Term, 1911, of this Court, the defendant filed a motion to dismiss this action on the ground that it was commenced after the petition above mentioned had been filed in the Probate Court, which motion was at the same term denied. It is contended by the plaintiff that this denial was a judgment which bars or estops the defendant from further setting up the Probate proceedings in defense; in other words, that the defendant is concluded by a denial of her motion to dismiss. I do not think so. A motion to dismiss reaches only such defects or defences as are apparent upon the face of the writ. It is not available to present defences dehors the writ. It raises no issue as to matters not disclosed by the writ. Upon a motion to dismiss, the court has no jurisdiction to determine any issue upon any matter that is not apparent by an inspection of the writ. In this case the motion to dismiss was properly denied, whatever be the merits or demerits of the action itself, because on the face of the writ there appeared no defects nor defences, and I must assume that the presiding Justice did not go beyond the scope of the motion to dismiss and attempt to decide questions which the motion to dismiss did not properly raise.

"Therefore, the entry will be 'Demurrer to brief statement overruled,' and since the parties agree that the facts are correctly and truly stated in the brief statement, a further entry will be: 'Judgment for the defendant.' "

Memo. The commissioners appointed by the Probate Court allowed the plaintiff on his claim $105.51, with $11.34 interest.

The case is stated in the opinion.

William H. Gulliver, for plaintiff.

Anthoine & Talbot, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

BIRD, J. This is an action of assumpsit on account annexed and is here upon exceptions to the overruling of plaintiff's demurrer to defendant's brief statement, filed with her plea of the general issue, and the ordering of judgment for the defendant by the Justice presiding at *nisi prius.*

It appears that, upon plaintiff presenting to defendant a statement in writing of his claim against her testator, the defendant, on November 21, 1910, filed her petition in the Probate Court representing the claim to be exorbitant, etc., and praying the appointment of commissioners to determine the amount to be allowed. A day was appointed for a hearing and notice ordered, service of which was made on plaintiff November 23, 1910. On the twenty-eighth day of the same November plaintiff commenced this action against defendant declaring upon the identical claim set out in his written statement and service was made upon defendant December 2, 1910. Seven days later commissioners were duly appointed by the Probate Court. At the return term, January 1911, the defendant filed a motion to dismiss this action upon the ground that it was commenced after the filing of the petition of defendant for the appointment of commissioners upon the same claim declared on.

On the ninth day of March, 1911, the time appointed for hearing, the plaintiff appeared specially before the commissioners and filed written objections to a hearing upon the claim on the ground that they had no jurisdiction because of the commencement and pendency of this action. The plaintiff then presented to the commissioners a sworn statement of his claim, introduced evidence in its support and his case was argued by counsel. March 31, 1911, the commissioners filed their report in the Probate Court which was on the same day duly accepted and allowed by the court. On the eleventh day of April following the plaintiff filed notice of appeal which was ordered filed on the seventeenth day of said April.

Subsequently, at the October Term, 1911, the defendant filed in this action a plea of the general issue and a brief statement substantially setting forth the facts already recited. The plaintiff demurred generally to the plea of the general issue and to the brief statement demurred specially. The demurrer to the brief statement was overruled and, it appearing that the parties agreed that the facts are correctly stated in the brief statement, the further entry of judgment for defendant was made and plaintiff excepted.

The questions raised by the bill of exceptions, to adopt the statement of plaintiff's counsel are first; the effect of the overruling of a motion to dismiss, so called, which contained all the substantial facts which were later made the subject of a plea in bar, to which

plea in bar the defendant demurred and second, the construction of the following language in section 54 of Chapter 66, R. S.:—

"No action shall be maintained on any claim so committed unless proved before said commissioners; and their report on all such claims shall be final, saving the right of appeal."

As to the first question, it is urged by plaintiff upon authority of a work of acknowledged excellence, that the objection to the suit having once been disposed of cannot be raised in another form. The statement purports to be based upon *Cassidy* v. *Holbrook,* 81 Maine, 589; *Coxe* v. *Higbee,* 11 N. J. L., 395, and *Witmer* v. *Schatter,* 15 Serg & R., 150. In the first case a plea in abatement was overruled for technical error and exceptions were overruled. The conclusions of the court relied upon to support the text are *obiter dicta* merely: 81 Maine, 592. In *Coxe* v. *Higbee,* a plea in abatement had been sustained upon its merits and the court refused to allow the same matter to be pleaded in bar and *Witmer* v. *Schatter* simply holds that if a plea of abatement fails to give plaintiff a better writ, an error of plaintiff arising from such failure will not be ground for plea of abatement in a second suit.

Upon a careful examination of the record, we agree with the conclusion reached by the learned Justice presiding at *nisi prius* which is best expressed in his own language; "Upon a motion to dismiss the Court has no jurisdiction to determine any issue upon any matter that is not apparent by an inspection of the writ. In this case the motion to dismiss was properly denied, whatever be the merits or demerits of the action itself, because on the face of the writ there appeared no defects nor defenses, and I must assume that the presiding Justice did not go beyond the scope of the motion to dismiss and attempt to decide questions which the motion to dismiss did not properly raise." See also *Hunter* v. *Heath,* 76 Maine, 219, 222.

Section fifty-four of chapter sixty-six, R. S. was first enacted by c. 115 of the Public Laws of 1859 and remains in the present revision substantially as originally enacted. It in many respects resembles and was doubtless suggested by the provisions of R. S., c. 68 relative to the appointment of commissioners to decide upon claims against insolvent estates of deceased persons. Many of the sections of the latter chapter, including those giving and regulating

appeals, are made expressly applicable to proceedings under R. S., c. 66, § 54.

By § 19, c. 68, R. S., it is provided that "actions pending on claims not preferred when a decree of insolvency is made, may be discontinued without costs; or continued, tried and judgment rendered with the effect, and satisfied in the manner, provided in cases of appeal. No action can be commenced, except on a preferred claim, after such decree." That is, no action, except the action for money had and received by way of appeal, can be commenced upon any unpreferred claim after the decree of the Probate Court adjudging the estate insolvent and appointing commissioners, but an action commenced before such decree may be further maintained, provided plaintiff does not present the claim declared upon to the commissioners: *Bates* v. *Ward,* 49 Maine, 87, 89, 90. When, however, a claim has been presented to commissioners, the claimant can neither commence nor maintain any suit thereon except an action for money had and received by way of appeal: Id page 88. But § 19, c. 68, R. S. is not made applicable in the case of claims exorbitant, unjust or illegal: *Rogers* v. *Rogers,* 67 Maine, 456, 459; and under R. S., c. 66, § 54, no option is given the claimant of either further maintaining a suit pending or submitting his claim to the commissioners but he must do the latter, and the report of the commissioners is final, saving the right of appeal. It is clear that jurisdiction of such claims when committed to commissioners under R. S., c. 66, § 54, is taken from the common law courts and conferred upon the Probate Courts. Some of the difficulties which would attend the attempt to adapt a pending action to the requirements of the statute relative to appeals are enumerated in *Bates* v. *Ward,* 49 Maine, at page 90.

It is, however, urged most strenuously that the word "maintained" as used in R. S., c. 66 § 54 is equivalent to commenced or brought. It is true that this is, perhaps, the ordinary meaning of the word in legal phraseology but it is not always so used in our statutes, as in R. S., c. 84, § 146, we find "bring and maintain," in R. S., c. 83, § 108, "brought or maintained;" and in R. S., c. 107, § 16, "commenced or maintained" where the word means something more than begin or institute and the meaning is fairly equivalent to prosecute what has been begun. See also R. S., c. 89, §§ 4, 6, 9 and 14. It is apparent that the word maintain is used in three

meanings; to commence, *Burbank* v. *Auburn,* 31 Maine, 590, 591; to commence and prosecute to a conclusion, *Kinsey* v. *O. S. R. R. Co.,* 3 O. C. D., 249, 250 and to prosecute to a conclusion that which has already been begun: *Smith* v. *Lyon,* 44 Conn., 175, 178. The court is of the opinion that as used in R. S., c. 66, § 54, the word maintain means to prosecute to a conclusion an action already begun and that the inhibition was inserted out of abundant caution to more clearly differentiate proceedings upon such claims from those against insolvent estates where, as we have seen, the commencement of suits is forbidden after a decree of insolvency. To inhibit the commencement of an action after the claim is duly and legally committed to the commissioners by decree of the Probate Court is unnecessary in view of the fact that the report of the commissioners is made final saving only the right of appeal: R. S., c. 66, § 54.

It is further urged, in support of plaintiff's contention, that, unless his interpretation prevails, a claimant might be prevented wholly from commencing his action within the period limited for the commencement of actions against executors and administrators (R. S., c. 89, § 14) and attention is called to *Whittier* v. *Woodward,* 71 Maine, 161. In that case the administrator, defendant, gave notice of appointment December 31, 1874 and in March, 1877, filed a petition representing the claim of the plaintiff to be exorbitant and for the appointment of commissioners but no notice was ordered and none was given to plaintiff. On the 23rd day of July, 1877, plaintiff acknowledged notice and agreed to the appointment of commissioners. Subsequently she submitted her claim to the commissioners who disallowed it and she commenced her action for money had and received, by way of appeal, September 28, 1877. The court held that plaintiff's action was barred by the limitation, then existing, of two years and six months.

It will be observed that the plaintiff in *Whittier* v. *Woodward* did not acknowledge service of the petition and agree to the appointment of commissioners until some three weeks after the period of limitation had expired and that she had not at that time commenced any suit upon her claim against the administrator. The court says "She then first became a party to the process, and up to that time had a right to commence her action." This is not an accurate statement as her action was then barred by the statute.

What the court undoubtedly intended to say was that up to the time she became a party by acknowledging service she could have commenced her action if the limitation had not expired. In other words one having a claim against an estate may commence an action against the executor or administrator at any time, within the period limited for the commencement of such actions, before service of notice of application made to the Probate Court for the appointment of commissioners, and unless such notice is given within the time limited the jurisdiction of the Probate Court does not attach and any subsequent proceedings therein are of no avail. The difficulty experienced by plaintiff in *Whittier* v. *Woodward* arose from failure seasonably to commence suit or become party to the statutory process. Her suit was an appeal from the action of commissioners upon a claim already barred when she became party to that process. Had she commenced an action at law upon her claim seasonably the proceedings had upon the application of the administrator could not have been successfully pleaded in bar.

If, before her claim is barred, service is made upon or acknowledged by the claimant under the statute process, the subsequent steps, it is unnecessary to state, are unaffected by the statute of limitations.

The entry must be,

Exceptions overruled.

GEORGE L. HOOPER vs. ELLA S. LEAVITT.

York. Opinion March 21, 1912.

Life Estates. Vendor and Purchaser. Deeds. Notice. Record. Priorities. Unrecorded Deeds. Adverse Possession. Evidence. Statute, 1903, chapter 220. Revised Statutes, chapter 75, sections 1, 8, 11; chapter 107, section 3, clause III.

A life tenant's warranty deed in fee conveys a life estate only.

The title acquired under a recorded conveyance of specific real estate is valid against a prior unrecorded conveyance of the same property by the same grantor, unless it be shown that the grantee in the recorded conveyance, when he took it, had actual notice of the previous conveyance.

The doctrine which prevailed in Maine prior to chapter 220, Laws of 1903, that a conveyance of all the grantor's interest in the land described in his deed conveyed only the interest he actually had at the time of the conveyance, so that such a conveyance, although recorded, would not be effectual against a prior unrecorded conveyance of the same land, was never applicable to conveyances, although of quitclaim without covenants, in which the property was specifically described as conveyed.

In an action to recover land from the grantee under a recorded conveyance, the burden is on the plaintiff to show that such grantee took with actual notice of the existence of the plaintiff's prior unrecorded deed.

In an action to recover land, evidence *held* insufficient to show that when the defendant took under a recorded conveyance he had actual notice of the plaintiff's prior unrecorded deed.

A life tenant's warranty deed in fee and a grantee's taking of actual possession thereunder, do not work a disseizin of the remaindermen, since their right of entry does not accrue until termination of the life estate by its own limitation.

Under Revised Statutes, chapter 75, section 1, one owning land and having a right of entry into it, whether seized of it or not, can convey all his interest in it.

Possession and occupation of land by the grantees of a life tenant, under a warranty deed in fee, does not become adverse to the remaindermen until the life tenant's death, since until that time the possession and occupation is rightful.

In an action to recover land, evidence *held* insufficient to show adverse possession by the plaintiff.

On report. Judgment for defendant.

Real action wherein the plaintiff demanded an island in the town of Kennebunkport. Plea, the general issue, with a brief statement claiming title and possession. At the conclusion of the evidence the case was reported to the Law Court to render "such judgment as the law and the evidence require."

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

Allen & Willard, and Foster & Foster, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

KING, J. Real action, reported to the Law Court. The land demanded is a small island known as Cape Island, situated at Cape Porpoise in the town of Kennebunkport. The defendant pleaded the general issue with a brief statement of title in herself. The real issue, then, is which party shows the better title.

This island was owned by John Bickford at the time of his death in 1836. By his will it passed to his wife, Susan Bickford, for her life, and after her death to his two children, John W. and Lucy E. in fee simple.

April 26, 1847, Susan Bickford, the life tenant, gave to Clement Huff a warrantee deed recorded July 3, 1847, purporting to convey the island in fee. It is admitted that Susan Bickford died May 16, 1867.

The plaintiff claims his record title to the island from Huff and through the following conveyances: Warrantee deed from Clement Huff to Payson T. Huff and Henry F. Huff, dated June 25, 1880, recorded March 2, 1883; warrantee deed from Payson T. Huff to Anna S. Huff and Bertie W. Huff, dated Feb. 22, 1883, recorded March 2, 1883; and warrantee deed from Anna S. Huff, Bertie W. Huff and Henry F. Huff to George L. Hooper (the plaintiff) dated Aug. 25, 1890, recorded Sept. 11, 1890.

On the other hand the defendant claims her record title to the island through mesne conveyances from John W. Bickford and Lucy E. (Bickford) Goodwin, the remaindermen, as follows: Quitclaim deed from John W. Bickford to Justin M. Leavitt dated Nov. 27, 1897, recorded same day; quitclaim deed from Lucy E.

Goodwin to Justin M. Leavitt dated Dec. 1, 1897, recorded same day; and warrantee deed from Justin M. Leavitt to Ella S. Leavitt dated Nov. 20, 1902, recorded the same day. The defendant also introduced a deed from the State of Maine to Justin M. Leavitt, dated Oct. 5, 1897, recorded Oct. 7, 1897, in which deed "Cape" island with other islands is described as conveyed. In all of the conveyances in each chain of title the island in question is clearly described as the property conveyed and not merely the grantors' "right, title and interest therein."

The first question then is: which of these record titles is the better? Obviously the answer must be in favor of the defendant's title, for that is complete and securely established in the recorded conveyances from the remaindermen, who had the full title of record after the termination of the life estate in 1867.

On the other hand the plaintiff's title of record is fatally defective. By the deed from Susan Bickford to Clement Huff no greater estate was, or could have been, conveyed than the grantor then had, which was an estate for her life. *Moulton* v. *Edgecomb,* 52 Maine, 31, 32, and R. S., chapter 75 section 8. Accordingly Clement Huff acquired under that deed only a life estate which terminated at the death of Susan Bickford, May 16, 1867.

But the plaintiff introduced an instrument, of which the following is a copy, written on the back of the deed from Susan Bickford to Clement Huff, but which was not recorded, however, till March 22, 1898.

"We John Bickford and Lucy Goodwin, wife of Francis W. Goodwin, all of Kennebunkport & County of York, do hereby relinquish all our right and title to the within described Island & do confirm the doings of the within named Susan Bickford in the sale of the same.

"In testimony whereof we have hereunto set our hands & seals this twenty-fourth day of April in the year eighteen hundred & forty nine.

"Signed, sealed & delivered
in presence of us
PAYSON T. HUFF.

JOHN W. BICKFORD (seal)
LUCY E. GOODWIN (seal)
FRANCIS W. GOODWIN (seal)."

That instrument was admitted subject to objection. Against its validity and admissibility it has been suggested, that no grantee is named in it, that John W. Bickford was a minor at the time he signed it, and that it is an unacknowledged instrument and therefore was not entitled to record as a deed. But we do not regard it important to specially consider those suggestions, since we are of opinion that that instrument, not having been recorded at the time of the deeds to Justin M. Leavitt under which the defendant claims, even though it should be regarded as sufficient in form and substance to constitute a valid deed, and even if it had been acknowledged, could have no legal effect as against the defendant's record title, unless it be shown that Mr. Leavitt, at the time he took his deeds, had actual notice that the prior instrument had been given. The law is too well settled in this State to admit of doubt that the title acquired under a recorded conveyance of specific real estate is valid against an unrecorded previous conveyance of the same property by the same grantor, unless it be shown that the grantee in the recorded conveyance, when he took it, had actual notice of the previous conveyance. Our statute expressly provides: "No conveyance of an estate in fee simple, fee tail or for life, or lease for more than seven years, is effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided." R. S., chapter 75, section 11.

It is suggested in behalf of the plaintiff, that because the recorded deeds from the remaindermen to Mr. Leavitt given in 1897 were quitclaim deeds, they were not effectual against the prior unrecorded instrument in question. But the answer is, that the deeds to Leavitt, though quitclaim and without covenants, were not conveyances of the grantors' right, title or interest in the demanded premises, but purported to convey an actual title to the specific property—describing the island definitely as the property conveyed.

Prior to 1903 it had been held by this court (*Coe* v. *Persons Unknown,* 43 Maine, 432, *Walker* v. *Lincoln,* 45 Maine, 67, and other cases) that a conveyance of all the right, title and interest which the grantor has in and to the land described in his deed, conveys only the right, title and interest which he actually has at the time of the conveyance, and consequently that such a conveyance although recorded would not be effectual against a prior unrecorded

conveyance of the same land. The reason given for holding that doctrine was, that when a grantee takes a conveyance by so indefinite description as "the right, title and interest," which the grantor has, he must take the risk of the grantor's right, title and interest. *Coe* v. *Persons Unknown,* supra. But this doctrine was never held applicable to conveyances, although of quitclaim without covenants, in which the property was specifically described as conveyed, and not containing the limiting words, "all right, title and interest," etc. In 1903 the legislature enacted that, "Conveyances of the right, title or interest of the grantor, if duly recorded, shall be as effectual against prior unrecorded conveyances, as if they purported to convey an actual title." Laws, 1903, c. 220. The conveyances to Mr. Leavitt from the remaindermen, although given prior to the Act of 1903, were not conveyances of the right, title or interest of the grantors, but purported to convey an actual title to the island in question, and in the opinion of the court they are to be held effectual against the prior unrecorded instrument in question, unless Mr. Leavitt had actual notice thereof.

The burden of proving the fact of actual notice was on the plaintiff. Unquestionably that fact, like any other fact to be proved, may be established by direct evidence, or it may be inferred as a legitimate conclusion from indirect evidence—by circumstantial evidence. But in considering whether or not the evidence of such fact, relied upon in any given case, is sufficient, it must be borne in mind that *actual notice* is the requirement of the statute, and it is that fact that must be proved, whether the evidence be direct or circumstantial.

An examination of the record in this case fails to disclose any substantial evidence offered by the plaintiff reasonably tending to establish such fact. But he relies upon certain facts and circumstances, testified to by Mr. Leavitt, as circumstantial evidence tending to prove such actual notice. Those facts and circumstances are: that Mr. Leavitt, being at the time register of deeds for York County where the conveyances of Cape Island were recorded, examined the records and thereby acquired actual knowledge of the various warrantee conveyances under which the plaintiff claimed title to the island; that he knew, or ought to have known, that John W. Bickford and Lucy E. Goodwin were not in the actual possession of the island; that he procured his deeds from them, not

directly, but through an agent; and that he made no inquiries, directly or through his agent, as to whether or not the remaindermen had made any previous conveyance of the property.

But from those facts and circumstances we do not think it can be inferred as a legitimate conclusion that Mr. Leavitt had or is chargeable with actual notice that the instrument in question had been given. On the other hand he testified, that at the time he took his deeds he had no notice or knowledge either actual or otherwise of the existence of the instrument in question, and that the first knowledge he had of it was "the next year afterwards" when it came to the registry for record. Considering all the evidence bearing on this branch of the case, it is the opinion of the court that there is not sufficient proof that Mr. Leavitt at the time he took his deeds had actual notice of the instrument in question.

The plaintiff further seems to suggest, as we understand his brief, that the remaindermen were disseized by reason of the giving of the warrantee deed in fee of the island from Susan Bickford to Clement Huff under which he took actual possession, and that being disseized they could convey nothing to Leavitt by their deeds unless it appeared that they had made an entry upon the property and were in the actual possession of it at the time those deeds were given. The answer to that suggestion is twofold: first, that a conveyance by a tenant for life of a greater estate than he can lawfully convey will not work a forfeiture, and no expectant estate can be defeated by any act of the owner of the precedent estate or by any destruction of it (R. S., c. 75, sec. 8); and second, that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it or all his interest in it, by a deed to be acknowledged and recorded as hereinafter provided." R. S., c. 75, sec. 1.

Accordingly the deeds from the remaindermen to Leavitt were effectual to convey any and all interest they then had in the demanded premises, whether they were then seized of the premises or not. And this brings us, finally, to a consideration of the question whether John W. Bickford and Lucy E. Goodwin, at the time of their respective conveyances to Leavitt in 1897, had lost all their title to the island by adverse possession.

In discussing this branch of the case it should be said at the outset that the learned counsel for the plaintiff in his oral argument

stated that the plaintiff did not rely upon a title to the demanded premises acquired by disseizin. But inasmuch as we find in the brief for the plaintiff some assertion of a title seemingly based upon the doctrine of adverse possession, we deem it proper here to consider that question.

It has already been noted that the life tenant, Susan Bickford, died May 16, 1867. Accordingly such possession and occupation of the demanded premises as Clement Huff had prior to May 16, 1867, was not adverse to the remaindermen, because they had no right of entry until the termination of the life estate by its own limitation. Our statute of limitations of real actions (and the statute in force in 1847 was to the same effect) expressly provides that the right of entry of a remainderman first accrues "when the intermediate estate would expire by its own limitation, notwithstanding any forfeiture thereof for which he might enter at an earlier time," R. S., c. 107, sec. 3, cl. III. This question of adverse possession, thereof, is to be determined by the extent and character of the use and occupation of the demanded premises by the plaintiff and those under whom he claims since May 16, 1867.

The demanded premises is a small rocky, almost barren island, containing about seven acres, connected with another island by a half-tide bar. No one ever lived on it, and no buildings were ever built upon it. Its soil is untillable and no material effort was ever made by any one to cultivate any part of it. Clement Huff, the grantee of the life tenant, gave a deed of the island to his sons Payson T. Huff and Henry F. Huff in 1880, thirteen years after the death of the life tenant. Those grantees were called as witnesses for the plaintiff. They testified that their father built a wall of stones around the shore of the island where needed to keep sheep from coming on, which wall was washed down by the sea after two years; that he cut hay on the island two years, and permitted a yoke of oxen to be pastured thereon for one year. But those acts of occupation by Clement Huff were done soon after the deed from Susan Bickford to him was given, many years before her death, and while he was rightfully in possession of the island under his deed from her as the life tenant. The evidence of those acts therefore has no bearing on the question whether the remaindermen were disseized after the life estate terminated in 1867 by its own limitation, except so far as it indicates the physical char-

acter and condition of the island. Neither of the sons of Clement Huff testified to any overt act of occupation of the island by their father during the period of thirteen years from the death of the life tenant to the time of the conveyance to them in 1880. On the other hand they testified in cross-examination that they did not know of any thing which their father did on the island after the death of the life tenant. And there is no testimony in the record from any witness tending to show any acts of occupation of the island by Clement Huff, or by any one under authority of him, during that period.

It does appear, however, that Payson T. Huff and Henry F. Huff, after the deed from Clement Huff to them in 1880, built a wire fence across the bar, about midway between the two islands, to keep sheep from passing from the other island to Cape Island, that they cut some hay on it twice, and let a third party pasture some sheep there one season. But it is evident that they did not regard those acts of much consequence, for Henry F. Huff, in answer to a question as to what they did on the island said: "We never did much of anything. We were on a number of times but never got any benefit from the island then."

The plaintiff, a resident of Massachusetts, was a summer visitor at Cape Porpoise for many years, with more or less regularity, and after he took his deed of the island in 1890 he visited it frequently as a place of resort. At one time he set out a few small trees there, but they did not live. Asked as to what other acts he did on the island he said: "Really nothing except to visit the island, pick berries and fish from the rocks. Q. How many people have you seen doing the same thing when you were there? A. Hundreds of them."

In *Roberts* v. *Richards,* 84 Maine, 1, 10, it was said, that the essential use and occupation to establish adverse possession, unless expressly brought home to the knowledge of the owner, "must be of such unequivocal character as will reasonably indicate to him visiting the premises during the statute period, that instead of their suggesting the probable invasion of a mere occasional trespasser, they unmistakably show an asserted exclusive appropriation and ownership." The court there also quoted from *Worcester* v. *Lord,* 56 Maine, 265, 269, that "There must be overt acts which leave no room to inquire about intention and which amount to actual ouster."

Applying these principles to the case at bar it will not be difficult we think to reach a correct decision.

It has been noted that there is no evidence of any acts of occupation of the island by Clement Huff during the first thirteen years after the termination of the life estate, from 1867 to 1880, and the remaindermen conveyed to Leavitt within twenty years after 1880. But the acts of occupation shown to have occurred after 1880 were not of such unequivocal character as to reasonably indicate to the remaindermen visiting the property an asserted exclusive appropriation and ownership of it. The existence of the wire fence built across the bar in tide water, midway between the islands, might as reasonably suggest that it had been built by the occupier of the other island to keep the sheep thereon from crossing the bar, as that it was built by some one claiming ownership of Cape Island. The other acts were few and really suggestive of nothing more than that freedom of use which is habitually made of the small islands along our coast by fishermen and pleasure seekers. Indeed, Henry F. Huff, the plaintiff's witness, testified that others used Cape Island "Just when they had a mind to—free for any one to go on." As was said in *Roberts* v. *Richards,* supra, this court has already declared "that much more significant acts on wild and uncultivated land are not sufficient to disseize the real owner."

It is therefore the opinion of the court that there is not sufficient evidence of acts of occupation of the demanded premises by the plaintiff and those under whom he claims, to establish a title by disseizin, or adverse possession, good against John W. Bickford and Lucy E. Goodwin at the time of their conveyances to Justin M. Leavitt in 1897, or that has since ripened into a title against the defendant.

Judgment for the defendant.

GEORGE E. CARLETON

vs.

PATRONS' ANDROSCOGGIN MUTUAL FIRE INSURANCE COMPANY.

Oxford. Opinion March 25, 1912.

Insurance. False Representations. Misrepresentations. Waiver. Estoppel. Stipulations.

A policy of insurance is a contract founded on a proposal on one side and an acceptance on the other; and it does not become operative as a contract until the application is accepted.

Where the insured in a fire policy sued on the policy for a loss occurring after its issuance, he could not rely on the personal assurance of an officer of the insurer to protect him until a decision on the application.

A representation in an application for a fire policy that the statements therein are true must be true at the time the application is accepted and the contract of insurance completed by the issuance of a policy, so that where the applicant represented that other insurance would expire on a designated date, which was before the acceptance of the application, and thereafter and before the acceptance of the application he procured other insurance without knowledge of insurer, the representation was not true at the time of the acceptance of the application, and the policy was invalid.

Where a fire policy, stipulating that it should be void if the insured had other insurance, was issued on an application specifying when other insurance would expire, which was prior to the date of the policy, and no officer or agent of the insurer had any knowledge of additional insurance procured by the insured subsequent to the application and before the issuance of the policy until after a fire, the mere fact that the insured expressed to the soliciting agent at the time of the application an intention to obtain other insurance, and that the agent said that if the insured was not satisfied with the size of the policy he could get other insurance, was not a waiver by the insurer of the stipulation against other insurance.

The insurer was not estopped thereby from relying on the invalidity of the policy because of the other insurance.

Where a mutual fire policy, stipulating that it should be void if the insured had other insurance, was invalidated by the insured procuring additional

insurance subsequent to his application, which recited the date of the expiration of other existing insurance, and before the acceptance of the application, the insurer, having no knowledge of the additional insurance until after a loss, did not by inadvertently levying an assessment on insured's premium note waive its defense or a ratification of the act of the insured in procuring the additional insurance.

A fire policy stipulating that it shall be void if the insured "now has or shall hereafter make any other insurance * * * without the assent * * * of the company" is invalidated by the act of the insured in procuring, after the date of his application, other insurance without the knowledge of the insurer or any of its officers or agents.

A fire policy on a building and furniture therein is void in its entirety if void on account of prior insurance on the building.

On report. Judgment for defendant.

Assumpsit on a policy of fire insurance. Plea, the general issue with brief statement alleging in substance that the policy was rendered void because of misstatement of material facts in the written application for the policy and also because of a prior valid insurance on the property when the policy in suit was issued, etc. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Arteas E. Stearns, for plaintiff.

John A. Morrill, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

WHITEHOUSE, C. J. This is an action upon a policy of fire insurance bearing date July 1st, 1910, but actually issued by the defendant to the plaintiff July 25, 1910, in the form prescribed by law for the Maine standard policy, with a rider attached thereto. It contains the following stipulation: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured; or if the insured now has or shall hereafter make any other insurance on the said property, without the assent in writing or in print of the Company."

Two defenses to this action are interposed by the defendant, first, that the policy was rendered void by misstatement of material

facts contained in the written application signed by the plaintiff, and second, that by a stipulation in the policy itself it was rendered void by a prior valid insurance policy in the Connecticut Fire Insurance Company existing when the application for the policy in suit was accepted. The case comes to the Law Court on report.

The following facts are either established by agreement of the parties or by satisfactory evidence in the case. July 1, 1910, the plaintiff made a written application to the directors of the defendant company through W. M. White, its licensed agent, for an insurance of $1550 upon the property described in the policy and at the same time executed a premium note to the Company for the sum of $77.50, but the application was returned by the secretary for the reason that in his opinion the amount of insurance named was excessive.

July 6, 1910, the plaintiff made an amended application to the directors of the Company for an insurance of $1050 upon the same property and at the same time reduced the amount of the premium note to $52.50, both application and premium note being redated July 6, 1910, and the receipt of this revised application and premium note was duly acknowledged by the secretary of the Company in a letter to the agent White, dated July 9, 1910, in which he said, "I will refer George E. Carleton's application to the directors on the 25th and I think it will be accepted in its present form but am not sure. We will protect until they decide and I notify him."

At the next regular meeting of the board of directors held July 25, 1910, the plaintiff's application with others was accepted and soon after the policy of insurance in suit was issued and forwarded to the plaintiff by mail.

In the application of July 6, were the following question and answer, namely:

Q. Is there any other insurance on this property, if so, give name of company and amount.

A. $1000, expires next Friday, Connecticut Fire Insurance Company.

Thereupon the following covenant is appended to the application. "I hereby covenant and agree to and with the said Company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and

risk of the property to be insured so far as the same are known to the applicant and are material to the risk."

July 15, 1910, the plaintiff obtained a policy of insurance through the local agent at Rumford Falls, of the Connecticut Fire Insurance Company for $1250 upon the same buildings described in the policy in suit without disclosing to that agent the pendency of his application to the defendant company, and this policy was held by the plaintiff August 8, 1910, when the plaintiff's buildings were destroyed by fire. The Connecticut Company at first denied their liability on the plaintiff's policy claiming that the other insurance had been obtained by the plaintiff without the knowledge or consent of that Company or its agent, but later without admitting their liability, the Company paid to the plaintiff the sum of $700 as a compromise. It satisfactorily appears from the testimony that no officer or agent of the defendant company had knowledge of the Connecticut policy until after the fire. It also appears from the plaintiff's own testimony that the secretary's letter to Mr. White of July 9, in which he stated that the plaintiff's application would be referred to the directors on the 25th, was read to the plaintiff July 14, 1910. At their next regular meeting August 29, 1910, the directors of the defendant company discussed the plaintiff's loss, and the next day the secretary notified him that the Company denied its liability for the loss of his buildings.

It appears that in making an assessment of 5% on premium notes, the plaintiff's note was included and that he was notified that an assessment of $1.67 had been made on his note. This assessment the plaintiff paid on the 5th of the following October, but it was claimed on the part of the defendant that the plaintiff's premium note was erroneously included in the assessment through inadvertence and on November 2, 1910, the cash premium, premium note and assessment were returned to the plaintiff by the defendant company.

It is not in controversy that in an interview with the agent White before the policy in suit was actually issued July 25, the plaintiff stated to the agent that he did not think $1050 was enough and that he was going to Rumford and get some insurance up there and that the agent told him if he was not satisfied with that amount he could get more insurance in some other company the same as he himself had done. But the plaintiff admits that at the

time of the application for the policy in suit was filled out, the agent suggested to him that he should state when his former Connecticut policy expired, and told him that the Company would want to know about that other insurance and when it expired.

It has been seen that the question of the acceptance of the plaintiff's revised application of July 6, for the policy in suit, was referred to the decision of the directors of the defendant company at their meeting of July 25, and that the plaintiff was duly informed on July 14, that it would not be accepted until the 25th if at all; and it is not in controversy that the application was not accepted until July 25, and that the policy was not in fact made out and delivered to the plaintiff until a short time thereafter.

It is obviously unnecessary to cite authorities in support of the proposition that upon the facts above stated there could be no perfected contract of insurance between these parties until the plaintiff's application was accepted by the directors of the defendant company, although the policy, which was actually made after July 25, bears date July 1. A policy of insurance is a contract between the parties, and like all other contracts founded upon a proposal on one side and acceptance on the other, it does not become operative as a complete and valid contract until the application for it is accepted. Wood on Fire Insurance, section 6 et seq. May on Insurance, sec. 49, et seq; *Wainer* v. *Milford Fire Ins. Co.*, 153 Mass., 339; *Allen* v. *M. M. Acc. Assm.*, 167 Mass., 18; *Hoyt* v. *M. B. Ins. Co.*, 98 Mass., 539; *Markey* v. *M. B. Ins. Co.*, 103 Mass., 78.

But it appears that in his letter of July 9th, respecting the probable action of the directors upon the application of the plaintiff, the secretary of the Company wrote "We will protect until they decide and I notify him;" and it is contended by counsel that "the plaintiff had a right to rely upon this representation that from that time he was insured as fully as if he had the written policy in his possession." But it is important to remember that the plaintiff's loss did not occur between the date of the application and the time of its acceptance, but after its approval by the directors on July 25, and after the delivery of the policy to the plaintiff. Whether the secretary's assurance of protection in the meantime, would have created any liability on the part of the Company for a loss which occurred before the Company's acceptance of the application and

delivery of the policy, is a question not now before the court. The plaintiff has declared upon a policy of insurance which could not take effect as a completed contract until July 25, and he must recover if at all upon that contract and not upon the personal assurances of the secretary prior to that time, with reference to the possible contingency of a loss occurring before the acceptance of the application and issuance of the policy.

The covenants and representations contained in the application of July 6, have already been recited in the statement of facts, and it has been seen that when the application was made the agent called the plaintiff's attention to the question and answer in regard to other insurance and stated to him that the directors would wish to know about other insurance. It was necessary that such representation in the application should be true at the time when the application was accepted and the contract completed.

In May on Insurance, section 190, page 385, 4th ed., it is said: "A representation is a continuous statement from the time it is made during the progress of the negotiations, and down to the time of the completion of the contract; so that though in point of fact the representation be true when actually made, yet if by some change intervening between that time and the time of completion of the contract it then becomes untrue, it will avoid the contract, if the change be material and to the prejudice of the insurers, or be such as might probably influence their opinion as to the advisability of accepting the risk. The law regards it as made at the time the contract is entered into. And the same rule applies in case of concealment." See also *Piedmont & Arlington Ins. Co.* v. *Ewing, P. & A. Ins. Co.*, 92 U. S., 377; *Blumer* v. *Phoenix Ins. Co.*, 45 Wis., 622.

In the case at bar the plaintiff's representation in regard to other insurance in his application of July 6, which he covenanted to be a full and true exposition of all the facts, etc., was not a full statement in regard to other insurance on July 25 when his application was accepted and the contract made, for the reason above stated, that in the meantime, namely, July 15, the plaintiff had procured other insurance on the same buildings for $1250 in the Connecticut Fire Ins. Co. without the knowledge of the defendant company, and was still the holder of that policy at the time of the fire on August 8. The contract made with the defendant company applied

to a risk materially different from that described in the plaintiff's application. The minds of the parties did not meet in mutual understanding of the situation existing at the time the application was accepted and the policy never became a valid contract between the parties. The fact that the feasibility of procuring further insurance was mentioned between the plaintiff and the agent, and that the plaintiff expressed an intention to obtain other insurance, will not constitute a waiver or estoppel on the defendant, it being admitted that no officer or agent of the company had any knowledge until after the fire that the plaintiff had in fact obtained other insurance. *Schenck* v. *Ins. Co.,* 24 N. J. L., 447; *Gray* v. *Germania Fire Ins. Co.,* 155 N. Y., 180; *Stone* v. *Howard,* 153 Mass., 475; *Parker* v. *Rochester Ger. Ins. Co.,* 162 Mass., 479; 2 May on Ins. page 1183, Note a.

Nor did the assessment by the directors of 5% on the plaintiff's premium note constitute sufficient evidence of either a waiver or ratification on the part of the Company. The defendant's claim that the plaintiff's note was inadvertently included in the assessment, is rendered probable by the fact that the plaintiff's claim for insurance was rejected at the same meeting and that his assessment of $1.67, the cash premium and premium note were subsequently returned to the plaintiff. But in any event, it has been frequently held that a premium note given on a policy which does not become operative, cannot be enforced and it is not even necessary for the Company to make a formal declaration that the note is void. 2 May on Insurance, sec. 345, page 750; *Betcher* v. *Capital Fire Ins. Co.,* 78 Minn., 240. And in this State it has been frequently held that when the note was originally valid and the policy was rendered void by a subsequent breach, a subsequent assessment is no waiver of the breach. *Knowlton* v. *Insurance Co.,* 100 Maine, 481, and cases cited. *Towle* v. *Insurance Co.,* 107 Maine, 317.

But the stipulation in the policy itself that it shall be void "if the insured now has or shall hereafter make, any other insurance on the said property without the assent in writing or in print of the Company" constitutes another insuperable objection to the maintenance of this action. At the time the plaintiff's application of July 6, was accepted by the defendant company, it has been seen that the plaintiff in fact had other valid insurance to the amount

of $1250 in the Connecticut Fire Insurance Company, which he had procured on July 15, and that no officer or agent of the defendant company had any knowledge of such prior insurance until after the fire.

Upon this state of facts under such a stipulation, the plaintiff's policy in the defendant company if otherwise operative, was rendered void by the existence of a prior valid insurance. *Lindley* v. *Union Ins. Co.,* 65 Maine, 368; *Bigelow* v. *Ins. Co.,* 94 Maine, 39. The last named case is cited by counsel as authority for the plaintiff; but it distinctly appears that the agent of the Imperial Insurance Company, one of the companies involved in that case, had knowledge of the fact of the prior insurance there in question, admitted its liability and paid its proportion of the loss, and it was properly held upon these facts that that Company had waived the stipulation in this policy in regard to the assent in writing. On the other hand, it appears that the defendant company in that case had no knowledge of a prior insurance in the Imperial Company and there being no stipulation in the policy permitting other insurance, judgment was rendered for the defendant.

It is also familiar law that such a contract of insurance is entire, and if void on account of prior insurance on the buildings, an insurance on the furniture cannot be recovered. *Day* v. *Charter Oak Ins. Co.,* 51 Maine, 91; *Dolloff* v. *Ins. Co.,* 82 Maine, 266.

The certificate must accordingly be,

Judgment for the defendant.

PETTENGILL, ANDREWS & CO.

vs.

RANGELEY LIGHT & POWER COMPANY, and CHARLES C. BENSON, Trustee.

JAMES H. KERR *vs.* SAME.

Androscoggin. Opinion March 25, 1912.

Trustee process. Executory Contracts. Corporate Officers. Evidence.

One is not chargeable as trustee for the price of bonds on his breach of an executory contract to buy them.

On trustee process, evidence *held* insufficient to show that the alleged trustee was indebted to the principal defendant.

The treasurer of a corporation cannot be charged under trustee process for its property in his official custody.

On Report. Trustee discharged.

Two actions of assumpsit, in each of which the principal defendant was defaulted, and the cases reported to the Law Court to determine the liability of the trustee.

The cases are stated in the opinion.

Geo. C. & H. L. Webber, for Pettengill, Andrews & Co.

Bisbee & Parker, and Harrie L. Webber, for James H. Kerr.

McGillicuddy & Morey, and White & Carter, for trustee.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

WHITEHOUSE, C. J. The former of the above named cases is an action to recover for the price of material furnished to the defendant corporation. The defendant has been defaulted for $865.82 and interest.

The latter is an action brought to recover the contract price for extra labor and materials and for excavating a pipe trench and building a dam for the defendant's power station. The defendant has been defaulted for $6,926.61.

The cases are reported to the Law Court upon the same evidence to determine the liability of the trustee upon the disclosure of the trustee, the allegations of the respective plaintiffs and the evidence.

The alleged trustee Charles C. Benson, filed a disclosure in each case alleging that at the time of the service of the writ upon him in that case, he had not in his hands and possession any goods, effects or credits of the defendant corporation and thereupon submitted himself to examination on oath.

The plaintiff in each case filed a statement alleging that C. C. Benson named as trustee, purchased of the Rangeley Light & Power Company, the defendant corporation, bonds issued by that company of the par value of $30,000 agreeing to pay therefor the sum of $27,000, being at the rate of 90 cents on the dollar; that in pursuance of such purchase Benson took delivery of the bonds and paid the sum of $10,000 on account thereof; that there is still due from Benson to the defendant company on account of the purchase of these bonds, the sum of $17,000; that Benson agreed with the defendant company to purchase on the same terms the remainder of the bonds issued by the defendant company of the par value of $5000 in the event that the sum of $27,000 did not prove sufficient in amount to install and finish the defendant's plant then in process of construction and "that the said Benson, the alleged trustee has not carried out the agreements or any of them hereinbefore recited."

The Rangeley Light & Power Company, the defendant corporation, was organized under the general law in 1908 for the purpose of furnishing electricity for light and power in the town of Rangeley and its immediate vicinity. This organization was confirmed and additional powers conferred upon the company by chapter 330 of the Special Laws of 1909. In the summer of that year, Dwight D. Elliott of Rangeley, who was an electrician, having some knowledge of the establishment of electrical plants, became president and general manager of the company, and arranged with Charles C. Benson, a banker and broker in Lewiston, the alleged trustee in these cases, to accept the position of treasurer. Extensive improve-

ments were in contemplation at that time and it was understood that the treasurer would take a prominent part in the management of the financial affairs of the new enterprise.

It is not in controversy that Benson had some negotiations with the president of the company with reference to the methods of providing the funds required to make the improvements that had been projected. It appears to have been estimated by the president that this expense would not exceed $22,000; but as the bills then outstanding amounted to $5000, it was deemed necessary to make provision for a total indebtedness of $27,000. It was accordingly arranged to issue bonds to the extent of $35,000 secured by a trust mortgage, in order to procure the required sum of $27,000 if practicable, from the sale of bonds of the par value of $30,000, and to hold the remaining $5000 of the bonds in the treasury for further improvements in the future. In pursuance of this plan the bonds were duly prepared, the mortgage executed and recorded, and the treasurer authorized by vote of the directors to dispose of the bonds. It does not appear that the price at which they were to be sold was fixed by this vote, but it seems to have been understood by all the parties that the price agreed upon by the directors was 90 cents on the dollar; and the plaintiffs in these actions contend, in accordance with the allegations filed by them, that these negotiations between President Elliott and treasurer Benson, who was doing business in Lewiston as a banker and broker under the name of Chas. C. Benson & Co. resulted in an agreement on the part of Benson that he would purchase $30,000 of the bonds at ninety, that pursuant to that agreement the bonds were delivered to him; that he paid for $11,000 of them, and that he was indebted to the Company for the balance of the bonds.

On the other hand Treasurer Benson insists that the negotiations never resulted in an unconditional agreement on his part or on the part of Chas. C. Benson & Co. to buy any part of the bonds; that the bonds were never delivered to Chas. C. Benson & Co., but were in his hands and possession as treasurer of the defendant corporation and were deposited and held in a safety deposit box rented by the corporation; that so holding the bonds as treasurer, and being authorized by the directors to dispose of them at ninety, he took $11,000 of them at that price and paid the amount into the treasury of the corporation; that the balance of the bonds there-

after remained in the safety deposit box of the defendant corporation, and that he never had possession or control of them otherwise than as treasurer of the corporation.

In support of the plaintiffs' contention that there was an actual sale and delivery to Benson & Co. of the bonds of the corporation of the par value of $30,000, President Elliott testifies that while the question of procuring the necessary funds for the construction of the plant was under consideration, Benson said to him in substance that he would personally "help him out on the bonds;" that on another occasion Benson expressly stated that "he would take $30,000 worth of the bonds and pay 90 cents on the dollar; that as he got on the train to return to Lewiston he said, "You understand this time I am only taking $30,000 at $27,000, and that he "signed and delivered to Mr. Benson $35,000 of the bonds," and has never seen them since. But he admits that all the conversation he ever had with Mr. Benson with reference to the purchase of $30,000 of the bonds for $27,000, took place before the bonds were signed, and that he never made any agreement with him in regard to the remaining $5000, in the event that $27,000 should prove insufficient. The plaintiff Kerr and Judson A. Record also gave testimony tending to show that Benson admitted that he was to take $30,000 of the bonds for $27,000.

In his examination on oath Benson states that upon the representation and assumption that $27,000 would be sufficient to pay for the improvements and the outstanding indebtedness of the corporation, he did undertake to aid in providing that amount of capital and expected to take bonds at 90 cents on the dollar for whatever money he furnished, but he emphatically denies that he ever made any contract with the defendant corporation to purchase any specific number or amount of the bonds of that company, and denies that he ever made any such statement to Mr. Elliott or any other person. He says that at one time President Elliott asked him to sign a contract to take the bonds, and that he refused to sign a contract and told Mr. Elliott that he would not obligate himself in any way to take any stated amount of bonds. He admits that he received $11,000 of the bonds as a purchaser at 90 cents on a dollar and used them as collateral security in raising $10,000 which he placed to the credit of the defendant corporation in his account as treasurer and disbursed the entire amount in paying the debts of the company,

with the exception of $2.06 which he had in his possession as treasurer at the time of the service of the trustee writs upon him. He further states that no other bonds were ever delivered to him as a purchaser, and that the balance of $24,000 remained in the safe-deposit box rented by the defendant corporation and have never been delivered to him or been in his possession otherwise than as treasurer of the defendant company.

It also appears in testimony that Mr. Benson in giving his reasons for not furnishing any more money, stated "that the proposition was going to cost $3000 more than Mr. Elliott had represented to him; . . . . that he had made arrangements with the bank to furnish the money and take these bonds as collateral, and to furnish it as fast as the thing developed, and they had refused to furnish the money and consequently he should stop."

But the question presented for the determination of the court in these cases is whether Benson was indebted to the defendant corporation for bonds delivered to him as a purchaser by virtue of an absolute contract of sale upon which the corporation might have maintained an action for the price of the bonds. If Benson had agreed to purchase $30,000 of the bonds and only $11,000 of them were actually delivered to him, as a purchaser, his refusal to accept and pay for the balance would simply be a breach of an executory contract, which might afford a cause of action by the defendant company to recover unliquidated damages, but would not render Benson chargeable as trustee for the price of the bonds. His reasons for refusing to carry out such an executory contract would be obviously immaterial in the cases now before the court. But upon the question whether these bonds were delivered to Benson as a purchaser or whether they were delivered to him as treasurer only and thus legally remained in the possession of the corporation, the attitude of the plaintiff Kerr in regard to them after Benson had refused to accept any more than the $11,000 used by him as collateral, has considerable significance. Kerr testifies that he understood Benson to say that he had bought $30,000 of the bonds for $27,000, but after there had been a default in the payment of the balance of his claim, he employed counsel to collect it and it satisfactorily appears from the uncontradicted testimony of Mr. Benson that after being informed that there was no money in the treasury he endeavored to obtain some of these bonds, as the prop-

erty of the corporation, at fifty cents on a dollar, in payment of the claim. It is also worthy of notice that the $5000 of bonds which President Elliott admits were not sold to Benson do not appear to have been separated from the others but were delivered into the custody of the treasurer with the $30,000 alleged to have been sold, and remained in the Company's safe-deposit box precisely the same as the others. And finally it must be admitted that there is an element of improbability involved in the proposition that a business corporation would sell and deliver $30,000 of bonds on credit leaving the time and conditions of payment to be fixed by the purchaser.

It is therefore the opinion of the court that Benson acquired title only to the $11,000 of bonds which he used as collateral and for which he accounted to the defendant corporation at 90 cents on a dollar, and that at the time of the service of the trustee writs upon him, he was not personally indebted to the company for any bonds sold and delivered to him. It is admitted that the small balance of $2.06 was held by him as treasurer of the corporation, and a "treasurer cannot be charged as the trustee of his corporation for its property in his official custody for the reason that he is quoad hoc the corporation." *Donnell* v. *Railroad Co.*, 73 Maine, 567. The certificate in each case must therefore be,

Trustee discharged.

In Equity.

FREDERIC DANFORTH, Executor,

vs.

CHARLES F. REED, GEORGE E. REED, and FRANK A. REED.

Kennebec. Opinion March 26, 1912.

Wills. Construction. Power of Sale. Remainders.

In construing a will, the testator's intention collected from the whole instrument and considered with reference to all the surrounding circumstances, his family, the nature, amount, and situation of his property, and his avowed or manifest purpose, should govern.

A will directed that all the testator's property should be held in trust for payment of the income to his widow during her life, gave her the use of the homestead and its furniture, and provided that, if the income should not be sufficient to comfortably maintain her, the executor might use as much of the principal as he deemed necessary, and that at the widow's death the estate then remaining should go to testator's two stepsons, and to his own son in stated proportions. *Held,* that the remainders vested in the son and stepsons at testator's death subject to divestiture by execution of the trustee's power of disposal during the widow's lifetime, and that the executor was not empowered to sell the land for the purpose of distributing the estate on death of the widow.

A testamentary remainder will not be construed to be contingent if, consistently with the testator's intention, it may be deemed vested.

In equity. On report. Decree according to opinion.

Bill in equity to obtain the construction of the will of Robinson Reed, late of Gardiner, deceased testate. 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 A. Knight, for plaintiff.

A. C. Stilphen, for Charles F. Reed and George E. Reed.

George W. Heselton, for Frank A. Reed.

SITTING: WHITEHOUSE, C. J., SAVAGE, KING, BIRD, HALEY, HANSON, JJ.

WHITEHOUSE, C. J. This bill in equity was brought for the purpose of obtaining a judicial construction of the will of Robinson Reed late of Gardiner, and was reported to the Law Court for final determination upon the agreed statement of facts. The first and second items of the will are as follows:

"Item I. I direct all my property, real and personal, to be held in trust by my executor, hereinafter named, and him to invest and reinvest the same as in his judgment may be most advisable and the net income thereof as the same accrues he shall pay over to my beloved wife Sabrina Maria Reed so long as she shall live, she having the use and occupancy of my homestead and all the furniture therein, to have and use the same as she may desire, and to make such change, alteration and improvements in said homestead as she may desire, and if she should so wish, she may dispose of my said household furniture to the children in such manner as may to her seem fitting, giving to each his proportional value thereof. If the income of my property should not be sufficient for the comfortable maintenance of my said wife, I hereby direct my executor to use so much of the principal of my property as from time to time he may deem necessary therefor in addition to said income.

"Item II. At the decease of my said wife, I give, bequeath and devise all the rest and residue of my estate then remaining to my two stepsons, children of my said wife, and to my son in the following proportions, to wit:

"To my stepson Charles F. Burke, otherwise known as Charles F. Reed, one-seventh part of said remainder, to my stepson George E. Burke, otherwise known as George E. Reed, two-sevenths of said remainder, to my own son Frank A. Reed four-sevenths of said remainder, the same to be paid to my stepsons and son as soon as may be after the decease of my said wife.

"Item III. I hereby appoint Frederic Danforth, Esq., of Gardiner, executor of this my last will and testament."

The following facts appear in the agreed statement. The testator left a widow, Sabrina Maria Reed, one son Frank A. Reed and two stepsons, George E. and Charles F. Burke, known also as George E. and Charles F. Reed, who were the legatees named in

the will. At the time of the testator's death, May 24, 1888, his estate consisted of a brick store appraised at $5,000, then occupied by the defendants, Frank A. Reed and George E. Burke, as co-partners; a homestead appraised at $2,500, $4,202.32 in cash and notes, and household goods appraised at $50. The plaintiff administered the estate as executor and according to his second account in November, 1907, had a balance of personal estate amounting to $3,216. After the death of the testator, the homestead was occupied by the widow until her decease February 13, 1911, and the plaintiff had acted as trustee in the management of the entire estate. The store was rented at the time of the death of the testator and was afterward rented by the trustee. At the time of the widow's decease the value of the store was approximately $6,000, the homestead $3,000 and the personal property in the hands of the trustee was substantially of the same value as in 1907, namely, $3,216. There were no debts outstanding against the estate. After the decease of the widow, the plaintiff petitioned as executor for license to sell the real estate for the purpose of making a division of the entire estate among the residuary legatees. Thereupon a question arose as to the power of the trustee to sell the real estate after the death of the widow under the circumstances stated, and the court is asked to determine whether the plaintiff can now legally sell the real estate and give a valid title to the purchaser under the provisions of the will or whether the title to the real estate was vested in the legatees and the executor's authority limited to the distribution of the personal property.

In considering the proper construction to be given to this will for the purpose of determining the question presented, the intention of the testator, collected from the language of the whole instrument and examined with reference to all the surrounding circumstances, his family, the nature, amount and situation of his property, and his avowed or manifest purpose, is to have a controlling influence in the interpretation of the testamentary provisions especially involved in the inquiry. In the light of this elementary rule of construction, and of the facts and circumstances disclosed by the agreed statement, the well recognized and familiar principles of law respecting life estates with a qualified or unqualified power of disposal, and the doctrine of vested and contingent remainders, lead irresistibly to the conclusion that the title to the real estate here in

question was vested in the son and stepsons, in the proportions specified in the second item of the will, at the death of the testator, but liable to be devested by the execution of the trustee's power of disposal during the lifetime of the widow, the actual possession and enjoyment of it by these sons being postponed in any event until the death of the widow.

The thoughtful and clearly expressed terms of the first item of the will disclose a manifest desire and purpose on the part of the testator to give to his wife the use and occupation of "the homestead and all the furniture therein" and to provide ample means for her support during her lifetime. He directs the executor to hold all his property real and personal in trust, to invest and reinvest it as he may deem most advisable and pay over to his wife the net income of it as long as she shall live; and if the income of the property should prove insufficient for her "comfortable maintenance" the executor is directed to use so much of the principal as he may deem necessary in addition to the income. In this item the testator also gave to his wife direct authority to make such alterations and improvements in the homestead as she might desire and to dispose of the household furniture among the children "in such manner as may seem to her fitting, giving to each his proportional value thereof."

But knowing the style of life to which his wife had been accustomed, and that her wants would be few and simple, the testator undoubtedly felt well assured that her "comfortable maintenance" after his death would never involve the necessity of disposing of any of the real estate, and but *slight*, if any, encroachment upon the principal of the personal estate. It appears that the store was occupied by his son and one of his stepsons as co-partners at the time of his death, and as his death occurred about six weeks after the date of the will, it may fairly be inferred that the store was so occupied at the date of the will, and that it was his desire and expectation that the title to the store should remain in the family and not be transferred to strangers.

At the beginning of the second item in the will the language is: "At the decease of my said wife I give, bequeath and devise all the rest and residue of my estate then remaining to my two stepsons and to my son," &c. It is evident from the use of the word "devise" in this provision that the testator anticipated that at the

decease of the widow there would be both real and personal property belonging to the estate. It is true that in the clause specifying the aliquot part given to his son and each stepson, the language is; "the same to be paid to my stepsons and son as soon as may be after the decease of my said wife, and that the term "to be paid" is ordinarily applicable exclusively to personal property. But the term here would have its proper field of operation in the distribution of the undiminished personal estate amounting to $3,216, and the use of the phrase in this connection should not control the intention of the testator gathered from all parts of the will and the existing circumstances considered in relation to each other. The real estate had vested in the sons at the death of the testator, to be devested only upon the conditions above stated. After the death of the widow and the termination of the trust, it was no longer subject to the control of the plaintiff either as trustee or executor. By the aid of the personal property of $3,216, the division of the estate into the proportional parts named by the testator can probably be conveniently effected without the necessity of exposing the store to a public sale.

This conclusion that the real estate passed to the sons as a vested remainder is in harmony with the established rules of law and the recent decisions of this court. In the first place, it is among the elementary rules of construction that no remainder will be construed to be contingent which may consistently with the intention of the testator be deemed vested; and in *Woodman* v. *Woodman,* 89 Maine, 128, it was held by this court that "according to principle and the weight of authority a remainder is not made contingent by an uncertainty as to the amount of property that may remain undisposed of at the expiration of the particular estate, the life tenant having the power of disposal." See also *Burleigh* v. *Clough,* 52 N. H., 267; *Ducker* v. *Burnham,* 146 Ill., 9; *Heilman* v. *Heilman,* 129 Ind., 59, and *Welsh* v. *Woodbury,* 144 Mass., 542.

It is accordingly the opinion of the court that under the provisions of the will and the circumstances of this case, the plaintiff is not clothed with power to sell the real estate of Robinson Reed, the title thereto having vested in the son and stepsons at the death of the testator as above stated, and that "the plaintiff's authority is now limited solely to a distribution of the personal property after the payments of the debts and funeral charges of the widow."

Decree accordingly.

FRED M. MILLER *vs.* CARRIE HADDOCK, Aplt.

Cumberland. Opinion April 1, 1912.

Brokers. Real Estate Brokers. Commissions.

To entitle a real estate broker to a commission for procuring a prospective purchaser, he must produce a customer willing and prepared to purchase and pay for the property at the price and on the terms given by the principal to the broker.

In an action for a real estate broker's commission, it was proper to refuse to instruct that the fact that payments were not made by the purchaser would not bar plaintiff's right to recover, if a sale had been made, where it was admitted that payments were not made, and the question as to whether a sale had been made was fully covered by the instructions given.

On motion and exceptions by plaintiff. Overruled.

Action of assumpsit brought by the plaintiff, a real estate broker, to recover the sum of $25.00 for services in the alleged sale of a bakery in the city of Portland. Plea, the general issue. The action was commenced in the Portland Municipal Court, and by appeal on the part of the defendant was transferred to the Superior Court where a trial was had and the verdict was for the defendant. The plaintiff excepted to several rulings and also filed a general motion for a new trial.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

Harry E. Nixon, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, J. J.

HANSON, J. This is an action of assumpsit brought by a real estate broker to recover the sum of $25.00 for services in the alleged sale of a certain bakery in the city of Portland, the plaintiff claim-

ing that he procured a customer on the terms agreed upon, and was thereupon entitled to payment notwithstanding the purchaser failed to carry out the agreement to purchase.

The jury found for the defendant, and the case comes before the court on motion and exceptions by the plaintiff.

As to the motion. The plaintiff produced a "sale contract" signed by the defendant and one Donahue, the alleged purchaser, in which it is stipulated that the defendant "agreed to sell to said Donahue" the bakery business, stock and fixtures at 131 Forest Avenue for the sum of $300.00—$50.00 cash, assuming a mortgage of $50.00, and mortgage back for two hundred dollars, and Mr. Donahue agreed to purchase said property at the price named within two days from the date thereof. This "sale contract" is dated July 13, 1910. The defendant denies liability thereunder, claiming that the document does not contain the agreement or terms authorized by her; that she told the plaintiff "there was a note out for $50.00, and a mortgage for $50.00, and I must have $100.00 down. . . . I told him I wanted $250.00 for the bake shop outside of this, he said 'I will add that on. We will ask $350.00 for the bake shop; we may have to come down some;' " that a week later plaintiff came to her shop to discuss the sale, and she repeated the demand for $100.00, as a first payment, and that later plaintiff procured her signature to a paper which he claims is the one declared upon in the suit.

Plaintiff produced as exhibit 2 a similar "sale contract" dated July 7, 1910, signed by defendant only, and not reciting the name of any purchaser, in which the terms are as follows: $100.00 cash, assuming mortgage on oven $50.00 and mortgage back for $150.00 8 months. Both "contracts" were procured from her by the plaintiff and are in his handwriting. It will be seen that neither contract contains the exact terms claimed by defendant to have been authorized by her. There is conflict throughout the testimony, and the case shows that the alleged purchaser made but one payment of $50.00, and that to the plaintiff, who paid to Mr. Nixon who held defendant's note, $30.00, the balance of $20.00 being paid to the defendant. Mr. Donahue remained in possession about two months and did not pay the payments due in August and September. On September 27th the defendant took possession of the property, and thereupon the plaintiff demanded payment of the sum sued for.

The case shows that the plaintiff did not follow the original instructions of the defendant; that he assumed full charge of the transaction and collected the only money paid under the contract. It clearly appears that Mr. Donahue was not able to complete the purchase on the terms authorized or on any terms; that the plaintiff was to collect his pay from the deferred payments to be made by the purchaser and all his acts point to this conclusion. Defendant's letter introduced by plaintiff as exhibit 3 corroborates the claim of defendant as to the manner and means of payment of commissions, if earned.

The rule as laid down in recent decisions in this State requires that the agent shall procure and produce to the principal a customer willing and prepared to purchase and pay for the property at the price and on the terms given by the principal to the agent. *Hartford* v. *McGillicuddy,* 103 Maine, 224, and cases cited. While there is sharp conflict between the parties, it clearly appears that the customer was not prepared to pay for the property at the price and on the terms agreed upon in either sale contract,—and further that the plaintiff relied upon the customer for payment of his commission; in other words, his commission was to be taken from the monthly payments which were to be made to him in August and September and which the customer did not pay, and so the jury found.

As to the exceptions: The only exception was to the refusal of the presiding Justice to give the following instruction:

"If you find payments were not made, if a sale had been made, this would not bar the plaintiff from recovering."

The testimony does not support the request, nor could the instruction be given entire with legal propriety. *Work* v. *Athens,* 99 Maine, 82.

It was *admitted* that payments were not made, and the question as to a sale between the principals was fully covered by the presiding Justice in his charge to the jury, and enlarged upon in his ruling, as follows: "The condition imposed on this plaintiff is to produce a customer ready and willing and of ability to perform his contract, and the requested instruction I refuse. I give it to you in this way: That if the payments were not made because of the fault of the customer and without the fault of the defendant, this plaintiff cannot recover. If the fault for the non-payment was the fault of

the customer, and the fault of the defendant did not enter into that, then he cannot recover. It is one of the conditions of his contract that the customer must be ready and willing and of ability to perform."

The law was clearly stated by the presiding Justice, and all the facts fairly submitted. No error appears in the instruction given or in the refusal to instruct. A careful study of the case discloses no reason for disturbing the verdict.

Motion and exception overruled.

EDWARD C. RICE AND MARTHA RICE, Executors,

vs.

MICHAEL MURPHY et als.

Somerset. Opinion April 1, 1912.

Bankruptcy. Discharge. Poor Debtor's Bond. Revised Statutes, chapter 114, sections 49, 65.

The defendant Murphy having been arrested on execution, obtained his release by giving a six month's bond signed by himself as principal and by the other defendants as sureties, conditioned as provided in Revised Statutes, chapter 114, section 49, to wit, that he would "within six months thereafter, cite the creditor before two justices of the peace; submit himself to examination, and take the oath prescribed in section fifty-five; pay the debt, interest, costs and fees, arising in said execution; or deliver himself into the custody of the keeper of the jail to which he is liable to be committed under said execution." A few days before the six months expired the defendant Murphy filed his petition in bankruptcy and was discharged six weeks after the bond had run out. None of the conditions of the bond were performed.

Held: 1. That at the expiration of the six months named in the bond, neither of the alternative conditions of the bond having been performed, the liability of the sureties became fixed, and a right of action upon the bond then accrued to the plaintiffs.

2. That Murphy's discharge in bankruptcy granted after the breach of the conditions of the bond was not a bar to an action on the bond.

Fogg Company v. *Bartlett,* 106 Maine, 122, distinguished.

On report. Judgment for plaintiffs.

Action of debt on a poor debtor's six months bond. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

Mark J. Bartlett, for plaintiffs.

P. A. Smith, for defendants.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

KING, J. Action of debt on a poor debtor's six months bond. The case is reported on an agreed statement of facts. The defendant Murphy, having been arrested on execution, obtained his release by giving the bond in suit, dated October 12, 1909, signed by himself as principal and by the other defendants as sureties. The bond was conditioned, as provided in R. S., c. 114, sec. 49, that within six months thereafter Murphy would either (1) cite the execution creditors and submit himself to an examination and take the poor debtors oath as provided by the statute, or (2) pay the debt, interest, costs and fees arising in said execution, or (3) deliver himself into the custody of the keeper of the jail to which he was liable to be committed under said execution.

April 2, 1910, a few days before the six months mentioned in the bond expired, Murphy filed his petition in bankruptcy and was adjudged a bankrupt. Thereafter, on May 27, 1910, six weeks after the bond had run out, a discharge in bankruptcy was granted to him. None of the conditions of the bond were performed. This action was commenced December 13, 1910. The only question presented in the report is, whether the action is barred by the bankruptcy proceedings and the discharge granted thereunder.

Sec. 65, c. 114, R. S., provides: "If the debtor fails to fulfil the condition of such bond, judgment in a suit thereon shall be rendered for the amount of the execution, costs and fees of service, with interest thereon, against all the obligors; and a special judgment against the principal, for a sum equal to the interest on said amount, at the rate of twenty per cent a year, after breach of the bond."

At the expiration of the six months named in the bond, neither of the alternative conditions of the bond having been performed, the liability of the sureties became fixed. It was no longer contingent, but had become, by reason of the breach of the bond, absolute and definite under the terms of the statute. A right of action upon the bond had then accrued to the plaintiffs. The then pending voluntary bankruptcy proceedings by the principal defendant was not a defence to such right of action, because, (1) those bankruptcy proceedings might be dismissed, or if prosecuted no discharge might be granted thereunder, and (2) the liability under the bond, which in this case became fixed by a breach thereof within the six months and before the discharge was granted, was wholly contingent at the time the petition in bankruptcy was filed and therefore was not a provable liability in the bankruptcy proceedings.

"Where a liability of the bankrupt is not fixed so that it can be liquidated by legal proceedings instituted at the time of bankruptcy, it is not a debt. It is deemed so far contingent that it cannot be proved in bankruptcy, nor is it released by the bankrupt's discharge." Loveland on Bankruptcy (3d Ed.) § 112, and cases cited.

Fogg Company v. *Bartlett,* 106 Maine, 122, cited by defendants, is clearly distinguishable from the case at bar. There the principal defendant was discharged in bankruptcy, and thereby released from the execution debt, before the time elapsed within which the conditions of the bond could have been fulfilled, and the court held in substance that the discharge so granted should be regarded as superseding the necessity of a literal fulfillment of the conditions of the bond, and that in legal effect there was no breach of the bond.

The court is therefore of opinion that Murphy's discharge in bankruptcy, granted after the breach of the conditions of the bond, is not a bar to this action on the bond, and in accordance with the stipulation of the parties the case is to stand for trial.

So ordered.

INTERNATIONAL HARVESTER COMPANY of America

vs.

JOHN G. FLEMING.

Penobscot. Opinion April 5, 1912.

Guaranty. Consideration. Burden of Proof.

The undertaking of a guarantor is his own separate and independent contract, distinct from that of the principal debtor.

Where the guaranty is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor, there is not, or need not be, any other consideration than that moving between the creditor and the original debtor under the principal contract.

In an action against a defendant guarantor on a note, *held* that the burden was on the defendant to show bad faith on the part of the plaintiff sufficient to release the defendant from liability or that there was a failure of consideration for the guaranty.

On report. Judgment for plaintiff.

Assumpsit to recover a balance due on a note given by Ora A. Fleming and guaranteed by the defendant. Plea, the general issue with a brief statement alleging "that the consideration for which the supposed guaranty was made has wholly failed." At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Artemus Weatherbee, and Charles J. Dunn, for plaintiff.

G. Willard Johnson, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HANSON, J. Assumpsit to recover a balance due on a note given by Ora A. Fleming and guaranteed by the defendant.

On May 7, 1907, Ora A. Fleming of Lincoln, Maine, signed the following note as promissor:

"$675.00 Lincoln, Maine, 5-7 1907 BOSTON NUMBER 32068 Year 1907

On or before the first day of Oct., 1907, for value received, I promise to pay to International Harvester Company of America, or order, the sum of Six Hundred and Seventy-five Dollars no interest until due at 6 per cent, from date.

Payable at Lincoln, Me.

After maturity this note shall draw interest at 8 per cent.

It is expressly agreed that the title to the . . . . machine for which this note is given shall remain in the International Harvester Company of America until this and all other notes given for the purchase price of said machine shall be paid in full. If default is made in the payment of any of said notes, or the machine is levied upon, or undersigned attempts to sell or remove same, or, if said company for reasonable cause deems itself insecure, it may declare all notes due, and also may take possession of said machine and sell it at public or private sale without any notice whatever. In consideration of the use of said machine, I hereby agree to pay any balance remaining unpaid after net proceeds are applied.

ORA A. FLEMING.

Post Office Lincoln, Maine
County Penob. R. F. D. No.
Section, Township, Range
Witness to Signature F. A. Hoar
5% disc. if paid Oct. 1st, '07."

On the same day the defendant signed a guaranty on the back of the note, the guaranty reading as follows:

"Guaranty

For value received, I hereby guarantee the payment of the within note, and all renewals and extensions thereof to the payee therein named or any owner and holder thereof; and I hereby waive protest, due presentment, demand and notice of nonpayment thereof; and I hereby waive diligence on the part of any holder thereof in

collecting said note and all defenses arising out of lack of diligence in enforcing payment thereof.

JOHN G. FLEMING.
Protest Waived
For Collection Account of
International Harvester Company
of America
Auburn, N. Y."

The case was submitted to the Law Court on report, the parties stipulating that the Law Court shall enter such judgment as the legal rights of the parties require.

The plaintiff claims that the note was given in payment for a gasoline engine ordered the same day by Ora A. Fleming, and that the order for the engine, in the usual form, was signed at the same time and place by Ora A. Fleming; that the note and order in triplicate, and the guaranty, were the only papers executed in the transaction.

The defendant contends that while the above papers were executed, there was another document executed at the same time by Ora A. Fleming and the agent of the plaintiff, called by defendant an application for an agency, which document was intended to take the place of the order for the engine, and further that the defendant signed as guarantor solely upon that understanding, and with the agreement that Ora A. Fleming should be appointed selling agent of the plaintiff in the vicinity of Lincoln; and here is the principal if not the only question in the case. Defendant says it was "understood, at least by implication, that the agency contract took the place of the ordinary sale contract first signed by Ora A. Fleming;" "that it was understood, at least by implication, that it was but a tentative arrangement to save time, and that the agent of the company was to take the contract for an agency and the note and present it to the company for its acceptance or rejection;" "that the engine was duly shipped to Ora A. Fleming, and as he and John G. Fleming, the defendant, thought the agency contract was accepted, no questions were asked, and they waited, and it does not appear in evidence just when they first knew that the first contract which was signed by Ora A. Fleming was the one which plaintiff company claimed to have sold the engine under, except

that the defendant probably knew of it at the time the suit was brought against the son to recover on the note."

The note was dated March 7, 1907, and was payable October 1, 1907. Ora A. Fleming was sued on the note March 1, 1909, and, after the evidence was taken out, by agreement of the parties a discount of seventy-five dollars having been made, a verdict was directed for the plaintiff for $796.49. Plaintiff pursued the judgment and the engine was sold thereon, return made, and an alias execution issued, on which, Ora A. Fleming having disclosed, and having received discharge upon disclosure, the execution was returned in no part satisfied. Thereupon this action was brought. The plaintiff introduced the note, order and execution, and rested his case.

The defendant claimed that his guaranty was procured by the agent of the plaintiff by a promise to appoint Ora A. Fleming agent of the plaintiff company, and the testimony of his wife and son was introduced in support of his contention. The plaintiff denied in detail all the testimony offered by defendant upon that question, and offered the testimony of two witnesses in corroboration of plaintiff's agent, who testified that the defendant in conversations with them stated to one that the reason he did not pay the note in suit was "that the engine is not what it was guaranteed to be, and I refuse," and to the other "Mr. Fleming said he bought a gasoline engine to run his shingle mill, and was perfectly willing to pay for the engine when they would show it could run his mill."

The plaintiff urges that the testimony of these witnesses shows the inconsistency of defendant's claim, and that an admission made by him in cross-examination is conclusive upon the point. He was asked: "Didn't you state as a reason why you refused to accept this engine, was because they agreed to furnish a twenty horse power gasoline engine, that would run a shingle mill full blast, and a lath machine on sixteen gallons of gasoline a day—that you refused to pay the note for that reason, and if they would take the engine back you would pay a hundred dollars? A. I have no doubt I put in that, and put in a lot more with it."

The record shows that the engine was ordered to be shipped to the defendant, and was received in a short time after it was ordered; that although the note was due October 1, 1907, suit thereon was not commenced until March 9, 1909, and that in the

meantime, a period of seventeen months, neither defendant nor his son raised a question as to the appointment of the son as an agent. It further appears that the lumber sawed in the mill belonged in part to the defendant, and he paid for part of the labor; that the business was his, and that he tried to sell the engine.

Counsel in his outline of defense says that the defendant should not be held liable, (1) because there was no delivery of the note and guaranty, and (2) because there was failure of consideration; but we are not able to agree with him in either claim.

"When a note is left wih a third person to be delivered to the payee on the happening of a contingency the first delivery is complete and irrevocable." *Jones* v. *Jones,* 101 Maine, 447.

The undertaking of a guarantor is his own separate and independent contract, distinct from that of the principal debtor. 14 Ency. Law, 1129.

Where the guarantee is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor, there is not, or need not be, any other consideration than that moving between the creditor and the original debtor under the principal contract. 14 ency. Law, 1133; *Waterhouse* v. *Kendall,* 11 Cushing, 128; *Huntress* v. *Patten,* 20 Maine, 28; *Gilligan* v. *Boardman,* 29 Maine, 79; *Gas Co.* v. *Wood,* 90 Maine, 516.

The guaranty was absolute; the terms were plain and without ambiguity; it was signed by the defendant after full discussion and with a clear understanding of the liability involved.

"No principle is more familiar than that all conversations at and about the time, and preparatory to the formation of a contract, are inadmissible to explain or vary the terms of it, when reduced to writing, and subscribed by the party thereto." *Hilton* v. *Homans,* 23 Maine, 136-138.

Defendant having set up a defense which would vary the terms of his written contract, and relieve him from liability because of the alleged fraudulent acts of the plaintiff, must sustain his contention by a fair preponderance of the testimony. *Grant* v. *Ward,* 64 Maine, 239.

The plaintiff's testimony shows that four papers were signed by Ora A. Fleming, viz: one note and a sale contract in triplicate, and the parties agree that a note and sale contract were signed.

Defendant's son testified that he signed three or four papers, and that the plaintiff's agent took all papers with him. The note, guaranty and sale order are the only exhibits in the case aside from the court records.

The defendant assumed the burden of showing bad faith on the part of the plaintiff, that there was a substitution of an agency application for a sale order, which substitution was the inducement or consideration for his signing as guarantor, and that there was consequent failure of consideration for the guaranty. The testimony does not support this claim. It does not appear that an agency contract was signed by the parties. The defendant and his witnesses are not sufficiently in accord to establish fraud on the part of the plaintiff, nor does the testimony justify an inference of fraud.

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

Judgment for the plaintiff for $722.80, and interest from the date of the writ.

In Equity.

HERBERT A. FOGG *vs.* LINWOOD C. TYLER.

Penobscot. Opinion April 8, 1912.

Banks and Banking. Deposits. "Special Deposits."

Bank deposits are either general or special, being "special" where the bank merely assumes custody of the funds, without authority to use them, and where the depositor is entitled to a return of the identical money, in which case the relation is that of bailor and bailee, and not creditor and debtor.

There was a special, and not a general, deposit of a package of money in a bank, where the depositor left it merely until he should return from a trip, marking his initials on the wrapper with a pencil, and where the cashier issued a receipt, showing that the money was received for safe-keeping, entitling the depositor to reimbursement in full on dissolution of the bank.

A contract for a special deposit in a bank need not be in any particular form, it being governed, like all other contracts, by mutual intention and understanding of the parties.

The maker of a special deposit of $500 in a bank is not prevented from recovering that amount in full on dissolution of the bank, because the original package cannot be found, where all the moneys received after that deposit were general deposits, and the bank's cash did not fall below $500.

In equity. On report. Petition sustained.

Petition filed by George W. Maxfield in the matter of the receivership of Tyler, Fogg & Co. asking the court to issue an order directing the receiver of that firm to restore to him a package of money containing $500 in bills, which the petitioner deposited with the cashier of the firm for safe keeping April 22, 1911. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

E. C. Ryder, for petitioner.

Charles H. Bartlett, Receiver, pro se.

Edgar H. Simpson, for committee of unsecured creditors.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

WHITEHOUSE, C. J. This is a petition filed by George W. Maxfield in the matter of the receivership of Tyler, Fogg & Co. asking the court to issue an order directing the receiver of that firm to restore to him a package of money containing $500 in bills, which the petitioner deposited with the cashier of the firm for safe keeping April 22, 1911.

It is contended on the part of the petitioner that this was a special deposit which was not to be mingled with the general funds of the bank and form a part of its disposable capital, but was to be kept by it and be specifically returned. On the other hand, it is contended in behalf of the receiver that this was an ordinary general deposit of money with the bank which transferred the title to the bank and created the relation of debtor and creditor between the bank and the petitioner.

It is not in controversy that on the 22nd day of April, 1911, the petitioner, George W. Maxfield, hastily entered the banking rooms of Tyler, Fogg & Co. and delivered to the cashier a package of bills containing $500, taking from him a receipt of the following tenor:

"April 22, 1911.

Received of George W. Maxfield $500 for safe keeping.

$500. P. pro. TYLER, FOGG & Co.

RALPH P. PREBLE, *Cashier.*"

According to the testimony of the petitioner, the deposit was made under the following circumstances. He received a telegram in the early afternoon of Saturday, April 22, requesting his presence in New York the next morning, and in order to comply with this request, it would be necessary for him to take the 1.50 train at Bangor in seventeen minutes from the time he received the telegram. He had lately received the package of $500 in bills from the Augusta Trust Company with the ordinary bank wrapper around it marked $500. On this wrapper, he marked his initials G. W. M. with a pencil, and on his way to the railroad station, stepped into the banking rooms of Tyler, Fogg & Co. and delivered the package to the cashier, Mr. Preble, stating that he wanted to leave that money there; that he didn't want to buy anything and didn't want to sell anything, he simply wanted to leave that package there until he got back from New York. The cashier replied, "Mr. Maxfield, you can have the money any moment you call for it." The petitioner testifies that the cashier started to open the package and he said to him "Don't meddle with that, don't meddle with that, that is all right." "He says, 'All right, I just wanted to count it,' and he counted it and wrote the receipt pretty fast for I had only seven minutes."

There is no necessary conflict between the testimony of the petitioner and that of the cashier in relation to the material facts. The cashier does not recollect seeing the initials of Mr. Maxfield upon the Bank wrapper but would not say they were not there. He also admits that it would be his natural course to put a strap around the bills and put them away as a package but would not say that he did not put the same strap around the package if he took it off. The cashier also states that he does not recollect the petitioner's request that he should not meddle with the package.

The petitioner returned from New York on the next Saturday afternoon, April 29, but not in season to call for his package of money that day. The great fire of April 30th occurred the next day, Sunday, and rendered it impossible to open the vault of the firm until May 25th. But before the vault was opened, the peti-

tioner made a demand upon the senior member of the firm for his money and was informed that it would be delivered to him as soon as the vault was opened. But before the opening of the vault, the firm was dissolved by a decree of court and a receiver appointed who took over all the assets of the firm. From the time the money was deposited with the firm April 22, until the close of the banking hours on April 29, cash was received and paid out by the firm in the usual course of its banking business. When the vault was opened by the receiver, there was on hand in the vault in cash $1620.21 and at no time after the petitioner's deposit to the time the assets were taken over by the receiver, was there less than $500.

At the time the vault was opened there were two $500 packages in it but the cashier was unable to state whether either of them had the petitioner's initials upon it or not. The cash was kept in the vault and the checks received were deposited daily with the Kenduskeag Trust Company, and at the time the receiver took possession, there was on deposit in that Company the sum of $2859.55 in addition to the amount of cash above stated in the vault of Tyler, Fogg & Co. The cashier expressly states that after he counted the petitioner's money he deposited it in the cash drawer, where all the cash receipts were deposited that were received during the week following the deposit in question; but there is no evidence that any other package of money was deposited that week expressly "for safe keeping," or under circumstances similar to those of the petitioner's deposit. So far as appears, all other moneys received by the firm prior to the closing of its vault, were general deposits which created the relation of debtor and creditor between the depositor and the firm.

In response to an inquiry by counsel for the defendant, whether in his opinion, judging from all he knew of the dealings in the bank, the petitioner's package was in the bank at the time the vault was closed, the cashier says, "Couldn't state; I have no opinion on that subject."

At the close of the testimony, by agreement of the parties, the questions involved were reported for the determination of the Law Court.

It is well recognized and familiar law that "Deposits made with bankers are either general or special. In the case of a special deposit the bank merely assumes the charge or custody of property

without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case the right of property remains in the depositor and if the deposit is of money the bank may not mingle it with its own funds. The relation created is that of bailor and bailee and not that of creditor and debtor." *Alston* v. *State of Alabama,* 92 Ala., 124; 3 Am. & Eng. Enc. of Law, 324; *McLain* v. *Wallace,* 103 Ind., 562 (5 N. E. 911-12); *Pattison* v. *Syracuse, Natl. Bank,* 80 N. Y., 82-90.

In *Mut. Acc. Ass'n.* v. *Jacobs,* 141 Ill., 261, the court said: "As we understand the question there is a wide difference between a special and a general deposit, as these terms are understood not only by bankers but by the public who are transacting business daily with the banks. Where money of any description is deposited in a bank and the identical gold, silver or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special." . . . .

"Where a package of bills or currency is received in the bank as a special deposit, the identical money to be returned, the bank has no authority to use the money in its business." So in *National Bank* v. *Peck,* 127 Mass., 298, the court said:

"Money deposited in a bank does not remain the property of the depositor upon which the bank has a lien only, but it becomes the absolute property of the bank. The bank being the absolute owner of the money deposited and being a mere debtor to the depositor for his balance of account holds no property in which the depositor has any title or right." See also *Grissom* v. *Bank,* 87 Tenn., 350; *School Dist.* v. *First Natl. Bank,* 102 Mass., 174; *Clark* v. *Northampton Natl. Bank,* 160 Mass., 26. In *Boettcher* v. *Colorado, Nat'l. Bank,* 15 Col., 16, the court thus speaks of a special deposit: "A deposit is not general, but a trust fund when there is an expressed agreement to that effect, or there are circumstances which give to the transaction the nature of a special deposit."

When these well settled rules of law which are well understood by men of affairs and constantly observed in the practical management of banking business are applied to the facts and circumstances above stated in the case at bar, it is the opinion of the court that the plaintiff's contention must be sustained and that his delivery of the package of $500 in bills to the cashier of Tyler, Fogg & Co. must be deemed a special deposit which created the relation of

bailor and bailee between the parties, and not a general deposit which created the relation of debtor and creditor between them. It became a special trust fund to be held by the bank for the petitioner, and restored to him on demand a few days later. It did not become a part of the general funds of the bank to be used in the conduct of its business.

The law prescribes no particular formula for the contract involved in making a special deposit. Like all true contracts it grows out of the mutual intention and understanding of the parties; and the sources of evidence and means of proof are no more difficult or complex than in most other inquiries constantly arising in the courts. The purpose and terms of the deposit may be explicitly stated, or the intention of the parties may be inferred from their declarations considered in connection with their conduct and all of the circumstances. In this case the declarations of the petitioner at the time of the delivery of the money to the cashier, unmistakably show that he understood the deposit to be a special one and that the identical money was to be returned to him on demand The receipt written by the cashier himself, stating expressly that the money was received "for safe keeping," is of the highest significance in its tendency to prove that the cashier had the same understanding of it. The term "safe keeping" aptly expressed the duty imposed upon the cashier as bailee of a special deposit, but was wholly inappropriate and superfluous as applied to a general deposit which was to be mingled with other funds and become a part of the property of the bank. The evidence cannot be consistently reconciled with the proposition that the money was left as a general deposit, but fully warrants the conclusion that the package was received "for safe keeping" to be held in trust as the property of the petitioner.

But it has been seen that neither of the $500 packages found in the vault after it was opened, nor any other money found there, has been identified by any distinguishing marks as the money deposited by the petitioner; and it is contended in behalf of the defendant that in any event the petitioner is not entitled to recover the sum of $500 in this proceeding, for the reason that his money having been mingled with the moneys of other depositors and paid out indiscriminately, can no longer be identified in the hands of the receiver. But it has been seen that all of the moneys received

from depositors after the receipt of the petitioner's package were general deposits which became the property of the bank, and that the cash in the vault was not less than $500 at any time during that week. The petitioner's package was the only special deposit and the only trust fund held by the firm at that time. The petitioner's difficulty arising from a failure to identify his money by distinguishing marks is therefore readily solved by an application of the established principle of equity that "when one makes a draft from a fund composed partly of his own funds and partly of the money of another, the presumption is that the draft was intended to be made and was made from the drawer's own funds." *Hall* v. *Otis,* 77 Maine, 125. In *Knatchbull* v. *Hallett,* L. R. 13 Chan., Div. 696, it was decided that if money held by a trustee has been mingled with his private funds in his bank account the cestui que trust can follow it and has a charge on the balance in the banker's hands. "It was further held that the rule attributing the first drawings out to the first payments in, does not apply except as between the moneys of different cestuis que trust, whose moneys are commingled by the common trustee, and that as between the individual funds and trust funds, the drawer must be taken to have drawn his own money in preference to the trust money." The principle is thus stated in 2nd Perry on Trusts, (2nd ed.) 837. "If trust money is mixed in the same parcel with the trustee's own money, it may be said that the trust money has run into the general mass and has become absorbed and that the cestui que trust has no lien; but such cannot be the case. Although every identical coin cannot be ascertained in a given mass, yet there being so much trust money in the parcel, the cestui que trust is entitled to so much of it. If a trustee deposits trust moneys in a bank to his own credit, the courts will disentangle the accounts and give the cestui que trust what belongs to him." This principle has received the emphatic approval of the Supreme Court of the United States in *National Bank* v. *Insurance Co.,* 104 U. S., 54, and of our own court in *Houghton* v. *Davenport,* 74 Maine, 596. See also *Lyman* v. *Bank,* 98 Maine, 448; *First Nat'l Bank* v. *East Trust & Banking Co.,* 108 Maine, 79, 79 Atl., 4; *Farmers' Bank* v. *King,* 57 Pa., 202 and *Harrison* v. *Smith,* 83 Mo., 210.

It thus appears from this beneficent doctrine of equity that when trust money is mingled in the same parcel with the trustee's own

funds, the question is not necessarily whether the trust money can be identified by distinguishing earmarks, but whether it can be traced into the hands of the trustee "either in its original or its altered state." The petitioner's money was received by the firm of Tyler, Fogg & Co. in a fiduciary capacity, and mingled with its private funds. Moneys paid out during the week following April 22, are presumed to have been paid from the private funds of the firm, and not from the petitioner's trust money. The entire amount of cash on hand at the time the vault was opened was charged with a trust in favor of the plaintiff. The presumption is that $500 of the $1620.21 in money found in the vault and turned over to the receiver, belonged to the petitioner. As trustee of the petitioner for his $500, the firm would have been bound to restore that sum to him on demand if a receiver had not been appointed. A demand was made by the petitioner upon the receiver for the return of his money soon after the latter took possession of the assets of the firm on the ninth day of June, 1911. The receiver is now bound to restore to the petitioner the sum of $500 deposited with the firm by him April 22, 1911, and it is ordered that the sum of $500 be paid to the petitioner by the receiver with interest thereon from the fifth day of September, 1911, the date of the petition. The certificate must accordingly be,

Petition sustained.
Claim for $500 and interest allowed.

ERNEST L. RICHARDSON, Admr.,

vs.

THE TRAVELERS INSURANCE COMPANY.

Penobscot. Opinion April 8, 1912.

Contracts. Validity. Mental Capacity. Burden of Proof. Evidence.

In an action to recover back money paid by the plaintiff's decedent for the purchase of a life annuity contract, on the ground that the decedent was not legally competent to make a valid contract, *held* that the burden was on the plaintiff to show that the decedent was mentally incapable of contracting.

On an issue as to one's mental capacity to contract, mere intellectual feebleness must be distinguished from unsoundness of mind, since one incapacitated by age or impairment of mental faculties may be capable of forming a rational judgment as to a particular transaction.

In an action to avoid a contract by plaintiff's decedent for the purchase of a life annuity, evidence *held* insufficient to show that decedent was mentally incapable of contracting.

On report. Judgment for defendant.

Money had and received. The declaration in the plaintiff's writ is as follows: "In a plea of the case, for that the said The Travelers Insurance Company at said Bangor, on the sixth day of July, A. D. 1908, was indebted to the said Joel Richardson, in his lifetime, in the sum of one thousand one hundred and forty-eight dollars, for so much money before that time had and received by the said The Travelers Insurance Company for the use of the said Joel Richardson, and in consideration thereof, then and there promised the said Joel Richardson to pay him the same on demand; yet, though requested, the said The Travelers Insurance Company never paid the same to the said Joel Richardson in his lifetime, nor since the decease of the said Joel Richardson to the plaintiff, but

neglects and refuses so to do, to the damage of said plaintiff, in his said capacity of administrator, as he says, the sum of two thousand dollars, which shall then and there be made to appear, with other due damages."

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.

Charles J. Dunn, for plaintiff.

George E. Thompson, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

WHITEHOUSE, C. J. This is an action of assumpsit brought by the plaintiff as administrator of the estate of his father, Joel Richardson, to recover the sum of $1148 paid by the intestate to the agents of the defendant company on the 2nd day of July, 1908, for the purchase of a life annuity contract in which the defendant company promised to pay the annuitant the sum of $200 on the 6th day of July in each and every year during his life, the first payment to be made on the 6th day of July 1909. At the time of the execution of this contract the annuitant was 78 years of age, and it is not in controversy that he died on the eleventh day of October, 1908, from senile dementia. The plaintiff seeks to avoid the contract and to recover the amount paid to the defendant company, on the ground that at the time of the purchase of the annuity on the 2nd day of July, 1908, the intestate was not legally competent to make a valid contract. On the other hand while not controverting the proposition that the annuitant Joel Richardson had for several years shown symptoms of arterio-sclerosis, the defendant contends that although the powers of his mind may have been weakened or impaired by old age and bodily disease, he yet possessed sufficient mental capacity on that day to "transact business with intelligence and an intelligent understanding of what he was doing."

The burden is upon the plaintiff, who seeks to avoid the contract, to show that on the second day of July, 1908, the annuitant did not possess a sound mind in a legal sense, so as to be capable of acting rationally and reasoning intelligently with respect to the particular

transaction under consideration; that he did not have sufficient mind and memory to enable him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; that he did not have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, to hold them in mind a sufficient length of time to perceive their obvious relations to each other and to form a rational judgment in relation to them. *Hall* v. *Perry,* 87 Maine, 569; Chandler Will Case, 102 Maine, 72. But mere intellectual feebleness must be distinguished from unsoundness of mind. A person may be incapacitated by age or the impairment of certain faculties of the mind from engaging in complex and intricate business and yet be capable of forming a rational judgment in relation to the disposition of a single item of property or the execution of a plain and simple contract; and so one suffering from degeneration of the arteries may have periods of mental confusion of short duration, and yet have lucid intervals between such attacks when he is apparently normal and is capable of transacting business with an intelligent understanding of what he is doing. Chandler Will Case, 102 Maine, supra.

In applying these familiar principles to the case at bar it is important to consider the situation and circumstances of the annuitant, his manner of life, the nature and extent of his property, his conduct on the day of the purchase of the annuity and the significance of all the evidence tending to show the reasonableness or unreasonableness of the transaction itself. He was a resident of the town of Newport, was a successful farmer and competent land surveyor, and a man of more than ordinary general intelligence. He had been acustomed to participate in the discussions at the Grange meetings and at the annual town meetings, contributed to the agricultural papers and had nearly completed a history of the town of Newport. His farm comprised 150 acres of land, and after the death of his wife in 1886, he employed help in the house and on the farm, and during the last five or six years of his life, took his meals at a near neighbor's. The plaintiff, his only child, had left the old homestead 34 years before his father died, and had a wife and several children. In 1907 his father made an arrangement with one of his grandsons, Fred J. Richardson, to come there

with his wife and carry on the place "at the halves;" but this proved unsatisfactory and was terminated at the close of that season. A new proposition made by the grandson to accept a deed of the farm and give his grandfather a mortgage for his support, was promptly rejected by the latter. But in addition to his farm property, he appears to have had on deposit, before the purchase of the annuity about $1650 in the Dexter Bank. On the first day of May, 1908, he made an elaborate olographic will, which affords internal evidence that it was the product of a rational mind thinking coherently and reasoning intelligently. This will contains the following items among others:

"5th. I give to Fred J. Richardson $5.00 (I gave him in the season of 1907 more than the other grand-children are likely to receive at my decease.") . . . .

"7th. I give and bequeath the sum of $500 for the purpose of building a monument to the memory of the citizens of North Newport who served in the War of 1861-65, to be built by my executors provided that my property at my decease shall not be less than $1500 after debts are paid."

Under these circumstances he visited the First National Bank of Dexter for the purpose of drawing the money on three certificates he held against the Bank amounting to $1137, stating that he proposed to buy an annuity, and asked the advice of the cashier, Mr. Sawyer, in regard to it. But the advice of the cashier being adverse to the proposition, he drew only the annual interest due him on those three certificates and left the bank without making a final decision in regard to the principal. But on July 3, Blake, Barrows & Brown of Bangor presented the certificates duly endorsed by Mr. Richardson, and received a check on Boston for the amount. Mr. Sawyer states that he had known Mr. Richardson for a number of years and that there was nothing noticeable in his appearance on that day different from what he had observed in former years and nothing in his appearance or conversation to suggest that he was not rational.

It appears that after leaving the bank he reached the conclusion that he ought to have an annual cash income of $200, about three times the amount he was then receiving from deposits in the Bank, and on July 2, without solicitation from any one representing the defendant company, he went alone from his home in North New-

port to Bangor and found his way to the office of Blake, Barrows & Brown, to whom he was personally a stranger, and inquired for an annuity. Mr. Barrows, a member of the firm states in his testimony that he asked Mr. Richardson if he had any one dependent upon him, and whether he fully understood the nature of an annuity, but he found that he had obtained information from some one before coming to them, and had a clear understanding of the whole subject. He simply wished to know how much money he must pay them in order to obtain an income of $200 every year during the remainder of his life. He accordingly paid the amount required by the established rates of the Company for a man 78 years of age, having according to their tables an expectation of life of 5.11 years, and signed a formal application to be forwarded to the defendant company. In reply to Mr. Barrows' inquiry as to how long he expected to live, he replied in substance that he thought he should outlive the expectation and make money out of it. The conversation between them occupied from half an hour to an hour, and he observed nothing in Mr. Richardson's appearance or conversation indicating that he was a man of unsound mind.

This annuity contract involved no special or peculiar features. The policy was issued under the established regulations of the company. Any other applicant of his age could have procured an annuity on precisely the same terms. Nor can it be deemed an unreasonable contract for the annuitant to make under the existing circumstances. It would not have been considered an extraordinary transaction if he had accepted the grandson's proposition and given him a deed of his farm in consideration of an agreement for his own support during his lifetime. But he preferred to retain the ownership and control of the farm and live at the old homestead and increase his annual income by the use of his bank deposits for the purchase of an annuity.

But the plaintiff introduced evidence tending to show that four years before the purchase of the annuity, Mr. Richardson fell from his wagon while driving along the highway and was unconscious for some little time; that from that time on there was a gradual and progressive impairment of his mental faculties with loss of memory of recent events, while his recollection of the events of his early life remained unimpaired; that during the year preceding his death there was observable a marked impairment of his ability to

make simple mathematical calculations; that he had hallucinations of sight and hearing, delusions of persecution and a loss of real insight into his true condition both mental and physical, and that he had not been rational during the last six months of his life. Dr. Sheldon of Stetson was called to see him the 28th day of July nearly a month after the contract in question, and found him in bed. He says the patient gave him a history of being out in the field the day previous working quite hard. He complained of headache and dizziness and his mental condition was extremely bad; but he was not committed to the insane hospital until September 29.

Dr. Tyson, assistant superintendent had the patient under his charge until his death on the 11th day of October, and while from his mental condition when he was admitted, the nature of the disease, and the history of the case, he was of opinion that his judgment must have been impaired a month before, he did not consider that he had sufficient data by which to determine his mental status on July 2. And Dr. Hills, the superintendent who took charge of the institution after the death of Mr. Richardson, after hearing the testimony of the assistant and the history, of the case testified as an expert that "the man had been suffering from a gradually increasing mental enfeeblement; that he had had periods of mental confusion temporary in character which apparently were due to the degeneration of the arteries from which he was suffering. Those periods were of short duration, and the confusion apparently cleared completely, so that there was an interval between those attacks when he apparently was in a normal mental condition excepting for the enfeeblement of old age." He further stated that after hearing the testimony of Mr. Barrows relating to the purchase of the annuity, and the conversation held with him at that time, he should say that he understood the nature and quality of the contract made by him on the second day of July, but if he had delusions prior to that date, he should question the soundness of his judgment.

But no useful purpose can be subserved by a further discussion of the details of the testimony. It is not controverted that Joel Richardson suffered from a gradual degeneration of the brain tissue due to a hardening of the arteries, and died from senile dementia three months and ten days after the purchase of the annuity in question. But evidence of arterio-sclerosis is not necessarily proof

of senile dementia at any given period. Notable illustrations of this fact might be adduced as a matter of common knowledge where men of great intellectual power afflicted with a hardening of the arteries have died from the effects of the disease without any symptoms of dementia within a few weeks after a prolonged and brilliant mental effort. Even in the decadence of old age, the mental confusion and other symptoms of arterio-sclerosis and approaching dementia, are not always or ordinarily constant and continuous, but intermittent and periodical, and between the attacks the sufferer is in substantially a normal condition except the feebleness of old age.

Such is shown to have been the fact in the case at bar prior to July 28, 1908. And it is the opinion of the court that the evidence in behalf of the plaintiff is insufficient to sustain the burden of proving that on the 2nd day of July of that year, Joel Richardson was not possessed of mental capacity sufficient to enable him to act rationally and reason intelligently with respect to the matter under consideration, but that it satisfactorily appears from all of the evidence that in making the not unreasonable contract entered into by him on that day for the purchase of an annuity, he had sufficient mind and memory to comprehend the nature and particulars of the transaction, and to act with an intelligent understanding of what he was doing.

The certificates must accordingly be,

Judgment for the defendant.

In Equity.

FRANK W. NUTTER AND FRANK C. DEERING, Receivers of Saco Savings Bank, Petitioners, In re Batchelder & Snyder Company

vs.

SACO SAVINGS BANK.

York. Opinion April 9, 1912.

Banks and Banking. Savings Banks. Claims. Commissioners. Revised Statutes, chapter 48, sections 44, 45, 47.

Under Revised Statutes, chapter 48, section 45, which provides that after decree of sequestration in a proceeding to wind up a savings bank, commissioners shall be appointed to receive and pass upon claims, and that the court may extend the time for hearing claims as justice may require, the court may reappoint commissioners, and extend the time within which claims may be presented and determined.

Revised Statutes, chapter 48, section 47, which provides that claims not presented to the commissioners in a proceeding to wind up a savings bank within the time fixed by the court shall be forever barred, does not prevent allowance of a claim presented within an extension of time for presenting claims.

The report of commissioners to receive claims in a proceeding under Revised Statutes, chapter 48, section 44 et seq., to wind up a savings bank, like the report of a master in chancery or a verdict, should not set aside, unless clearly erroneous.

In equity. On exceptions by petitioners. Overruled.

The case is stated in the opinion. (See *Batchelder & Snyder Company* v. *Saco Savings Bank,* 108 Maine, 89.)

Leroy Haley, for petitioners.

Clifford E. McGlauflin, Foster & Foster, and Charles G. Briggs, for Batchelder & Snyder Co.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, KING, HANSON, JJ.

CORNISH, J. Upon proper process in equity brought by the Bank Commissioner for the State of Maine, the Saco Savings Bank was duly enjoined from proceeding further with its business, and the petitioners were appointed Receivers to wind up the affairs of the institution by decree of court dated January 3, 1911. Under the same decree Messrs. John G. Smith and John A. Snow were appointed commissioners to receive and decide upon all claims against said Bank, their report to be made on or before March 7, 1911, which date was extended by order made on March 7, 1911, to March 18, 1911. On this last named date the commissioners filed their report, which, after due notice was duly allowed and confirmed by decree dated April 1, 1911.

Prior to the decree of sequestration of January 3, 1911, Batchelder & Snyder Co. had brought an action against the Saco Savings Bank in the Supreme Judicial Court for York County upon a claim of $1092.81, and upon a nonsuit being ordered had carried the case to the Law Court on exceptions, where it was pending at the time of sequestration. On March 8, 1911, a certificate sustaining the exceptions and ordering the case to stand for trial, was received by the clerk of courts for York County.

On May 12, 1911, upon application of the Batchelder & Snyder Co. the sitting Justice entered a decree further extending the time within which the commissioners should file their report to May 26, 1911, which decree on petition of the receivers was vacated and annulled by another decree of the same Justice dated May 23, 1911, and at the same time and by the terms of the last decree, said Smith and Snow were reappointed commissioners to receive and decide upon all claim against the Bank, their report to be made to the court on July 13, 1911, the time for hearing claims to be extended to July 11, 1911. Two claims were presented to and heard by the Commissioners under this decree of May 23, 1911, one of which was that of Batchelder & Snyder Co. and this claim to the amount of $1092.81 with interest from July 3, 1909, and costs of hearing $52.83 was allowed by the commissioners in their final report dated July 12, 1911. The receivers thereupon filed exceptions to said report, and the sitting Justice having overruled

their exceptions, the case is before the Law Court on exceptions to this ruling.

Two points are raised by the receivers, one on procedure, the other on the merits.

1. Stated succinctly the receivers claim that the order of May 23rd, 1911, reappointing the commissioners and extending the time within which claims could be filed and final report made, was void, because the court had no power to make it; that the court had the power to make only one appointment and fix one date for report and when that report was made on the date fixed, the commission was functus officio and no extension of time could be granted nor could reappointment be made thereafter.

An examination of the statute under which this proceeding is had, and a consideration of its spirit and purpose, lead to the conclusion that this court is not so hampered and fettered.

It is true, as the counsel for the Receivers contend, that independent of statute, the court in equity would have no power to sequester the funds of a savings bank, and dispose of them as it may judge to be equitable and just among those beneficially interested, *Savings Inst.* v. *Makin,* 23 Maine, 360, but the Legislature as early as 1842 saw fit to clothe the Supreme Judicial Court with full equity powers in taking charge of and winding up the affairs of savings banks upon proper process. The empowering act is now embodied in R. S., Chap. 48, Sec. 44, et seq. The single problem for the court to work out is the preservation of the rights and property of all parties in interest, creditors on the one hand and depositors on the other. By section 45, it is provided that "after a decree of sequestration is passed . . . the court or any justice thereof in vacation shall appoint commissioners, who shall give such notice of the times and places of their sessions as the court or such justice orders; receive and decide upon all claims against the institution and make report to the court, at such time as the court orders, of the claims allowed and disallowed and of the amount due each depositor, which shall be subject to exception and amendment, as reports of masters in chancery. On application of any person interested, the court may extend the time for hearing claims by the commissioners as justice may require." Provision for extension of time of hearing claims is therefore made in express terms and the last clause is significant. "Such extension as justice

may require." The broadest latitude and discretion are thereby expressly conferred upon the court. So long and so many times as justice may require an extension, in order to protect the rights of interested parties, just so long and just so many times it should be granted. To hold that the time once set for a final report of commissioners, cannot be extended after that date has passed or that a new appointment either of the same or other commissioners after that date which is in effect merely an extension of time, cannot be made, would result in a denial of justice, the very result that the statute was intended to avoid.

In the case at bar, the sitting Justice had full power to reappoint the commissioners under the decree of May 23, 1911, and extend the time of hearing and report. Had this not been done the claim of Batchelder & Snyder Co. which had been pending in the Law Court could not have been presented and heard. This was pre-eminently a case where justice required that an extension be granted and an opportunity of hearing be given to a creditor whose non-presentation of its claim to the commissioners at the first hearing was excusable and whose rights would otherwise have been cut off.

In *Bisbee* v. *Mfg. Co.,* 107 Maine, 185, where the defendant corporation was in process of dissolution in equity under R. S., ch. 47, sec. 80 et seq. a similar objection was raised and a similar excuse was offered, the court say:

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

The defendant calls attention to R. S., ch. 48, sec. 47, which provides that "all claims not presented to the Commissioners within the time fixed by the court . . . are forever barred." This, however, admits of no such narrow construction as would confine it to the time first fixed by the court. It means such time as during the proceedings, the court under the varying conditions may ulti-

mately fix as the final date, within which all claims may be presented, heard and determined.

2. The Receivers attack the finding of the Commissioners allowing the claim of the Batchelder & Snyder Co. upon the law and the evidence. But it is our opinion that their finding should not be disturbed.

The report of the commissioners in this proceeding is like that of a Master in Chancery and a master's report, like the verdict of a jury, is not to be set aside unless clearly wrong. *Paul* v. *Frye,* 80 Maine, 26; *Lynn Shoe Co.* v. *Auburn Lynn Shoe Co.,* 103 Maine, 334.

A review of the evidence simply confirms the opinion of this court previously announced in *Batchelder & Snyder Co.* v. *Saco Savings Bank,* 108 Maine, 89, 79, where the validity of the plaintiff's claim was considered, and the action ordered to stand for trial. The trial has taken place and the claim established.

Exceptions overruled.

MARY E. LEWIS *vs.* FRED O. GRAY.

Franklin. Opinion April 22, 1912.

Bailment. Lien for Storage.

A person, not an inn-keeper or warehouseman, nor in the business of storing goods, who permits the property of another to remain on his premises under an agreement that storage is to be paid, but without any agreement for a lien, has no lien for the storage at common law.

Held: That a ruling that the defendant was entitled to a lien for the storage of certain hay if there was an understanding or agreement between the parties that the storage was to be paid for, was erroneous and that the defendant had no such lien at common law.

On exceptions by plaintiff. Sustained.

Trover for the alleged conversion of certain pressed hay. Plea, the general issue with a brief statement as follows: "That he retained possession of the hay which he then had in possession at

the time of the alleged conversion and refused to deliver same to plaintiff on demand for the reason that defendant had a claim for storage of said hay, and by reason of said claim for storage a lien on the same to enforce collection of same, which claim for storage plaintiff refused to pay prior to the demanded delivery." Verdict for defendant. The plaintiff excepted to certain rulings.

The case is stated in the opinion.

Frank W. Butler, for plaintiff.

Elmer E. Richards, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

KING, J. Action of trover for the value of a certain quantity of pressed hay. It appears from the exceptions, that the plaintiff was the owner in 1907 of an undivided half of a farm; that the hay in question was cut that year on the farm, pressed, and stored on the premises; that in 1908, the plaintiff sold and conveyed her half of the farm to her co-tenant, and thereafter the co-tenant sold and conveyed the farm to the defendant, the pressed hay still being stored thereon; that after the defendant came into possession of the premises he notified the plaintiff to remove the hay, and that if it remained there storage would be claimed; and there was some evidence introduced tending to show an agreement to pay storage. The question was, whether the defendant had a lien on the day for storage after his notice that storage would be claimed.

The presiding Justice gave the jury explicit instructions relating to the question whether there was a contract on the plaintiff's part to pay storage, and then said:

"If they did come to an understanding—if a proposition was made, and assented to by her, that storage should be paid from that time—then I give you this rule, as it lies in my mind at present, that the defendant would be entitled to retain possession of that hay until a fair reasonable price for the storage was made or tendered. We have a class of cases on the subject of liens where things are put into the possession of another to do something to them—to mend them, or repair them, or do work upon them—in which case the one who does the work is entitled to retain them until pay for the work is made to him. And I think, and so rule to you, and it

will be your guide in this case, that where one places a thing to be kept, to be stored for pay, under an agreement or an understanding that it is to be paid for, that he is entitled to keep it until he is paid."

It is not claimed that the defendant had any statutory lien, nor that he had any lien on the hay by virtue of any express contract therefor in the nature of a pledge. Did he have a common law lien, so called—a lien arising under the rules of the common law? We think not. It is quite impossible to find uniform rules by which it may always be determined when a common law lien results. "Derived from the civil law, and founded on considerations of equity and justice, the rules by which they are governed vary with the grounds on which such rights are given." *White* v. *Smith,* 44 N. J. L., 105, 106.

Particular liens have always been admitted, by the common law, in favor of those persons, such as innkeepers, farriers, common carriers and warehousemen, who are bound by law to serve the public in their trades and occupations. And the privilege of a particular lien—the privilege to detain and hold the possession of some particular property of another as security for some debt or obligation, has been extended to other persons, in a variety of cases, where such persons by their labor and skill have imparted an additional value to the goods. This includes artizans, tradesmen, mechanics and laborers who receive property (although not obliged to receive it) for the purpose of mending, repairing and improving its condition for hire, and they have, by the common law, a lien on such property until the reasonable charges for their labor and expenses thereon are paid. But the defendant, under the facts in this case, cannot be classed with those persons who are allowed liens because they are bound by law to receive and care for the goods of others. He was under no obligation to permit the hay to remain on his premises. He was not a warehouseman, nor in the business of storing goods. He was, at most, a voluntary bailee of the hay under an agreement with the owner that he was to be paid reasonable compensation for its storage. Nor can he be reasonably classed with those persons who are given liens on specific property which has been enhanced in its intrinsic value by their skill and labor bestowed upon it. True, the storage of the hay may properly be regarded as beneficial to its owner, for it may have preserved it

from deterioration and destruction, but we do not think it can be held that by the mere storage of the hay the defendant has added to its intrinsic value and thereby become entitled to a lien on it under the application of this rule of the common law.

As suggested above, any effort to subject common law liens to uniform rules is necessarily unsatisfactory, and therefore it becomes most important, in the determination of whether or not a lien should be admitted in any given case, to examine and consider judicial precedents.

Our attention has not been directed to any case, and we have found none, in any jurisdiction, which decisively admits a lien under facts and circumstances like those in the case at bar. Mr. Lummus, in his recent work on liens cited by defendant, says: "There seems to be no good reason for limiting the lien to persons making a business of acting as warehousemen. It seems that any person having possession of the goods and a valid claim for storing them ought to have a lien." Sec. 73. No authorities, however, are cited which directly support that proposition. In sec. 76 he cites *Schnider* v. *Dayton,* 111 Mich., 396, as an authority for a lien where notice was given that storage would be charged, and the owner of the goods made no reply. But we find upon examination of the report of that case, that the notice to the owner of the goods was that the landlord "would insist upon a *lien* for storage," and the court held, that inasmuch as a lien for the storage was claimed in the notice, and the owner did not remove the goods, the lien was assented to.

In *Whitlock Co.* v. *Holway,* 92 Maine, 414, cited by the plaintiff, this court said: "But, in the absence of any agreement, the common law does not give to a person, not an innkeeper or warehouseman, a lien on personal property for its storage." It is suggested that the above quoted statement is only a dictum, as the case did not really involve that question. There may be merit in that suggestion, for that was a case where a tenant left on the premises a machine the title to which was in the plaintiff, and the question was, whether under those circumstances the landlord had a lien on the machine for its storage. But if that statement be only a dictum it is, we think, a correct statement of the law as understood and applied by this court, and also in accordance with judicial precedent elsewhere.

In *Allen v. Ham,* 63 Maine, 532, it was held, that a livery stable keeper, who had a horse in his possession which he had been keep-

ing under an express contract with the owner of the horse to pay one dollar per day for its care and keeping, had no lien at common law on the horse for any care and keeping furnished prior to the passage of the Act of 1872, c. 27, which provided a statutory lien for pasturing, feeding and sheltering animals. The court there said: "Not being an innkeeper, or farrier, or trainer, he has no such lien by the common law. *Miller* v. *Marston,* 35 Maine, 153. He has none by any agreement with the respondent amounting to a pledge."

This court having thus held that a stable keeper had no lien at common law for stabling and feeding a horse under an express agreement to pay therefor, a fortiori must it be held that a person, who is not a warehouseman, nor in the business of storing goods, but who permits the property of another to remain on his premises, under an agreement that storage is to be paid, has no lien therefor at common law. *Stoddard* v. *Crocker,* 100 Maine, 450 may be cited as holding by implication that only warehousemen have a lien at common law for storage.

In Jones on Liens, sec. 968, it is said: "In some states a person not a warehouseman, and not in the business of storing goods, has no lien on goods for his compensation for storing them, unless there be an express agreement for a lien, or it is the legal duty of one to receive and hold the goods. A mere volunteer, under no obligation, who accepts the temporary custody of goods, without any agreement for a lien can claim none for his compensation."

In re Kelley, 18 Fed. Rep., 528, (District Court, S. D. N. Y.) it is said: "The authorities in this State hold that a person not being a warehouseman, nor in the business of storing goods, who has articles on private storage, has no lien upon them for his compensation any more than a landlord has on his tenant's goods for rent." See also *Grinnell* v. *Cook,* 3 Hill, 485; *Rivara* v. *Ghio,* 3 E. D. Smith, 267, 268; *Merritt* v. *Peirano,* 10 App. Div. N. Y. 563; *White* v. *Smith,* 44 N. J. L., 105, 109; *Preston* v. *Neale,* 12 Gray 222.

If it be said that considerations of equity and justice seem to require that there should be a lien wherever a valid claim for storage exists, the answer may be made that such a lien can always be provided for by contract between the parties, and it may be created by legislative enactment.

It is therefore the opinion of the court that the ruling at *nisi prius,* that the defendant was entitled to a lien for the storage of the hay if there was an understanding or agreement between the parties that the storage was to be paid for, was erroneous, and accordingly the entry must be,

Exceptions sustained.

ELIZABETH GRANT, Admx.,

vs.

BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot. Opinion May 9, 1912.

Street Railways. Injury to Pedestrian. Negligence of Motorman. Parent. and Child. Injury to Child. Contributory Negligence. Capacity of Child. Care of Child.

In an action against a street railway company for death of the plaintiff's child by being struck by a street car, evidence *held* to show that the motorman failed to exercise that degree of care which the situation demanded, especially in failing to reduce the speed of the car and having it under control as demanded by the exigencies of the occasion, and that it did not show any want of due care on the part of the child.

Though the court can say, as a matter of law, that there is an age at which a child cannot exercise any care under the circumstances, and also an age when the court can say, as a matter of law, that a child is capable of exercising some care under the circumstances, between these limits are the ages where it is for the jury to determine the capacity of the child to exercise care for itself.

However young a child may be, the negligence imputable to the parent or custodian from the mere presence of the unattended child in the place of danger is only prima facie and not conclusive.

The facts and circumstances in explanation of a child's presence unattended in a place of danger are always to be considered. No hard and fast rules as to the care of children can be laid down and the financial condition of the family and the other cares devolving upon the parents are not to be ignored.

Where a mother was obliged to go to a nearby market for something for supper and left her five year old child with a nine year old daughter on the sidewalk, telling the latter to watch the child which she promised to do, and the young child was struck by a street car during her absence, *held* that the mother was not guilty of contributory negligence.

On motion by defendant. Overruled.

Action on the case by the plaintiff to recover damages at common law for personal injuries sustained by her intestate, who was her child five years and three months old, by reason of being struck and run over by a street car of the defendant and which resulted in the death of the child a few hours after the injury. The declaration in the writ alleges that the deceased child "endured great conscious mental and physical suffering from the effects of her said injuries for a long period of time, to wit, from the time of receiving her said injuries until the time of her death," and the evidence shows that the child was conscious after her injuries and underwent great suffering. Verdict for plaintiff for $1508. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

Fellows & Fellows, for plaintiff.

E. C. Ryder, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

CORNISH, J. This is an action on the case brought by the plaintiff, as administratrix of the estate of Ida Bernice Grant, her deceased child five years and three months old, to recover damages at common law for injuries sustained by her intestate by reason of being struck and run over by a car of the defendant on Harlow Street in the city of Bangor, about 5.30 P. M., July 13, 1910, from which injuries the child died a few hours later. The case is before the Law Court on defendant's motion to set aside the verdict as against the evidence.

The following facts are fairly established:

Mrs. Grant lived on the second floor of the National block on the corner of Harlow and Franklin Streets. Harlow Street runs in a general northerly and southerly direction, and the car in question

was on its regular route, having come into Harlow Street from Cumberland Street at a point 482 feet north of the place of the accident and was passing southerly along the center of Harlow Street toward Central Street. Harlow Street is one of the busy streets of the city and the surroundings are such that motormen have special instructions not to run too fast on that street. The accident occurred about five feet below the Prospect Street crossing, and in front of the playground in the yard of the High School. At this point the city was excavating a reservoir, so that the entire sidewalk and a portion of the street itself was blocked by the excavated earth, leaving a space of only two or three feet between the outside of this pile of earth and the track of the defendant. This narrow space was the walk in use. Cumberland Street makes a sharp descent into Harlow Street and from the junction there is a continuous down grade of two and one-half per cent on Harlow Street past the place of accident toward Central Street. The motorman had been in the employ of the defendant since May 30th, 1910, was a spare hand and had been on this run three days.

Mrs. Grant, the mother, was obliged to go to a nearby market to purchase something for supper and left her five year old child for a few minutes on the sidewalk with the injunction to stay there which the child promised to do. At the same time she called her older daughter, a girl of nine, and told her to watch her sister, which she also promised to do. The mother was gone only about ten minutes but the accident happened before her return.

It appears that the child did not remain where she was left but walked along the sidewalk to the excavation and was seen standing by the reservoir about five or six feet from the track and eight feet from the cross walk on Prospect Street. She was looking into the reservoir with her back toward the approaching car, then, in the language of an eye witness called by the defendant, "she started across the track slowly until she was about in the middle of the track, when she turned slightly and she saw the car, and she didn't know whether to continue and go across or come back; she seemed kind of dazed, and the car struck her on the forehead and knocked her down and run over her."

It further appears from the motorman's own testimony that as soon as he turned into Harlow Street from Cumberland Street, he saw the child standing near the track by the reservoir and he

watched her as she stood there all the time he was coming down the street his vision being unobstructed; that he was coasting along Harlow Street with the power shut off, that the car was moving in his judgment about seven or eight miles an hour, that he did not apply the brakes until he saw the child start to cross the street, that he was then about a car length or thirty feet distant, that he immediately put on the brake and reversed the power, but it was too late. The car struck the little girl while she was in the center of the track and ran over her. Reversing the power caused a fuse to blow out, which locked the wheels and the car slid a distance of two and a half car's length or seventy-five feet before it stopped. The rail was wet and muddy owing to the work that was going on.

Witnesses for the plaintiff made the speed much greater than seven or eight miles an hour, some calling it fifteen or twenty and others simply stating that the car was going very fast, so fast as it came out of Cumberland Street and continued its course down Harlow Street as to attract their attention. The distance which the car went after the accident would seem to confirm this view, the motorman making it 75 feet, other witnesses more than 100.

Such is the picture, and as is usual in this class of cases, where it is fairly drawn, the legal conclusions that follow are quite apparent.

1. *Defendant's Negligence.*

From the above statement of facts it is difficult to resist the conclusion that the motorman failed to exercise that degree of prudent and watchful care which the situation demanded especially in using that degree of precaution in reducing the speed of the car and having it under his immediate control which the exigencies required.

The speed at which a car may be properly run and the kind of control which should be exercised over it must depend to some extent upon the surrounding circumstances and the situation ahead. No specific rate can be arbitrarily fixed. A speed of thirteen miles an hour on Upper Main Street in Lewiston under the there existing conditions was not considered necessarily dangerous and reckless in *Malia* v. *St. Ry. Co.,* 107 Maine, 95, while a much less rate was demanded where the track was near the sidewalk and private driveways were in frequent use in *Butler* v. *Railway Co.,* 99 Maine, 149, or in approaching public street junctions as in *Denis* v. *Railway Co.,*

104 Maine, 39. A similar degree of caution should be observed in passing public playgrounds or where children are in the street. "The driver of a horse car in a street where there are children may well be required to manage his car with reference to all the risks that may reasonably be expected, and among these may be reckoned the risks arising from the heedlessness and indiscretion of children in the street." *Collins* v. *So. Boston R. R.*, 142 Mass., 301.

The motorman, in the case at bar, admits that he saw this little girl as she was standing only five or six feet from the track when he was nearly five hundred feet away. She stood there facing away from the car and apparently unaware of its approach. With the indiscretion of childhood she might be expected to step across the track, at least it might not be unexpected. Yet with this combination facing him, a street crossing, a nearby playground, an obstruction on one side of the street and a little child perilously near the track and apparently oblivious of the approaching car, the motorman maintained his speed at such a rate and to within such close proximity that when the child turned and attempted to walk across the tracks he could not sufficiently control the car to avoid collision. His efforts then were too late. And yet, it was not the unexpected, but what might reasonably be expected, which happened, and the reasonably prudent motorman would have foreseen it and guarded against it, either by stopping the car completely or by having it under such control that he could stop it almost instantaneously. This man did neither.

Nor does the alleged wet and slippery condition of the rails afford sufficient excuse. If that condition existed it was known to no one better than to the man who had been running on this same circuit during the past three days while work upon the reservoir had been in progress, and therefore greater care was imposed upon him to counteract that condition by extra precautions, and by running his car at a lower speed and under better control than usual.

Upon the question of defendant's negligence, we think the verdict of the jury cannot be said to be manifestly wrong.

2. *Contributory negligence on the part of the mother.*

The second point raised in defence is that no recovery can be had because the child was negligently permitted by her mother to be upon the street unattended at the time of the accident. The standard of age at which a child is chargeable with parental negligence

cannot be absolutely fixed, although within certain limits it may be approximately determined. "There doubtless is an age where the court can say as a matter of law that a child cannot exercise any care under any circumstances. There is also an age where the court can say as matter of law that a minor is capable of exercising some care under circumstances like those in question. . . . The limits of these two classes are not settled by our decisions." *Sullivan* v. *Boston Elevated Ry.*, 192 Mass., 37, p. 43.

The test of course is the capacity of the child to exercise care for itself. In the application of this test it has been held that a child of nineteen months was of such tender age as to be incapable of exercising such care as a matter of law, *Gibbons* v. *Williams,* 135 Mass., 333; so a child of twenty months, *Grant* v. *Fitchburg,* 160 Mass., 16; of two years, *Wright* v. *Railroad Co.,* 4 Allen, 283; of two years and four months, *Callahan* v. *Bean,* 9 Allen, 401; of three years and ten months, *Cotter* v. *R. R. Co.,* 180 Mass., 145.

On the other hand such capacity has been held to be possessed by a child of nine years, *Brown* v. *Ry. Co.,* 58 Maine, 384; of ten, *Colomb* v. *Ry. Co.,* 100 Maine, 418; and of twelve, *Gleason* v. *Smith,* 180 Mass., 6. Between these two extremes lies a zone with shadowy and indefinite boundaries.

But however young the child may be, the negligence imputable to the parent or custodian from the mere presence of the unattended child in the place of danger is only prima facie and not conclusive. *Gibbons* v. *Williams, Grant* v. *Fitchburg, Wright* v. *R. R. Co., Callahan* v. *Bean,* supra, and *O'Brion* v. *McGlinchy,* 68 Maine, 552.

The facts and circumstances in explanation of the child's presence are always to be considered. No hard and fast rules as to the care of children can be laid down and the financial condition of the family, and the other cares devolving upon the parents are not to be ignored.

As is said in Thompson on Neg. Vol. 1, p. 306 in discussing this question, "Small children have a right to light, air and exercise and the children of the poor cannot be constantly watched by their parents."

In the case at bar, the family, which was apparently in limited circumstances, consisted of the mother and two girls, aged five and nine, and they occupied a second story tenement. The mother had been calling upon a friend the afternoon of the accident, having the

younger child with her and leaving the older at home. Just as she reached home she found that she was obliged to go to a market a short distance off in order to obtain something for supper. Instead of taking the little child with her again, she left her in the care of the nine year old sister with strict instructions as to watchfulness. She expected to be and was gone less than ten minutes. To hold that under these circumstances the mother did not use that degree of care which an ordinarily prudent woman in her station in life and under the same circumstances would exercise, is too severe, and such has been the tendency of the decisions, where the question has been held to be for the jury and a verdict in favor of the plaintiff has been allowed to stand.

To illustrate:

A mother allowing a child two years and ten months old to go with her sister, a child of five years and four months, to play in a vacant lot at the side of the house, the lot being unfenced and unguarded and fronting on a public street, *McNeil* v. *Boston Ice Co.,* 173 Mass., 570.

The mother of a child three years old, having hung out the clothes in the yard, while the child was playing therein, went into the house to set the table for dinner and left the child playing alone inside an open gateway leading into the street, *Creed* v. *Kendall,* 156 Mass., 291.

A boy between four and a half and five years old was permitted, by a sick mother, who had two younger children to play about the room, but while she was asleep he escaped from the house, first to a neighbors and then to the street, *Slattery* v. *O'Connell,* 153 Mass., 94. A boy of four was permitted to walk in the streets of a city under the care of his sister who was nearly eleven, *Collins* v. *R. R. Co.,* 142 Mass., 301. Of like effect are *Hewitt* v. *Taunton Street Ry. Co.,* 167 Mass., 483, *Ingraham* v. *Street Ry.,* 207 Mass., 451.

We have not overlooked a line of decisions, many of which are cited by the learned counsel for the defendant, in which the court held that the parent or custodian did not exercise reasonable precaution in the care of the child. Such are *Callahan* v. *Bean,* 9 Allen, 401; *Casey* v. *Smith,* 152 Mass., 294; *Grant* v. *Fitchburg,* 160 Mass., 16; *Cotter* v. *R. R. Co.,* 180 Mass., 145. But a careful study of the facts in these cases differentiates them from the cases before cited. It is simply a question as to whether the facts of a

particular case place it below or above the required standard. The Massachusetts court recognizes the distinction which is one of fact and makes each case as it is brought up fall into one class or the other as the facts may dictate. Applying the same rule here we have no hesitancy in saying that the case at bar belongs to the class where the jury were justified in finding that the mother exercised reasonable care.

3. *Want of due care on the part of the child.*

This question arises only on the assumption that the intestate was of sufficient age and intelligence to be permitted to go alone upon the street on which electric cars were frequently running. If she had not attained that age and intelligence and there was no want of due care on the part of the mother, then this point is not involved.

Here, again there is a zone between two limits which cannot be exactly fixed, *Sullivan* v. *Boston Elevated Ry.*, 192 Mass., 37, supra.

If the jury found in the case at bar that the intestate was capable of exercising care, then they must have found that she used that degree of care which the ordinarily prudent child of her age would have exercised under the same circumstances, and that finding we are not disposed to disturb.

It appears that she was standing near the track looking into the excavation, that others were about, that she was facing away from the car and apparently unaware of its approach. There may have been a reason for this. Perhaps the gong was not sounded. The motorman testified that he used it, but many of the witnesses both on and off the car and including some for the defendant as well as the plaintiff, did not hear it. Probably she did not. Under these conditions she walked towards and over the track. She did not dart across quickly, as if to dodge ahead of the car, but walked slowly with her head down. The only want of care which could be attributable to her would be her failure to look up the line to see if a car was coming. That is all that could be expected of an adult, and the law is not so unreasonable as to require so high a degree of watchfulness on the part of a child of five as of a mature man. The measure of care required was that degree or extent which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances. That measure the jury have found she fulfilled.

The cases cited by the defendant, are clearly distinguishable because of their peculiar facts. In some the child was more mature, as a child of eight years in *Morey* v. *St. Ry.* 171 Mass., 164; of nine in *Young* v. *Small,* 188 Mass., 4, and of ten in *Colomb* v. *St. Ry.,* 100 Maine, 418; while in *Hayes* v. *Norcross,* 162 Mass., 546, and *Murphy* v. *Boston Elevated,* 188 Mass., 8, the children though only between five and six years of age were on the street by the permission of the parents and so conducted themselves as to be considered reckless even for that age in attempting to run across the street and to dodge a closely approaching car in one case and a team in the other. The case at bar more nearly resembles *Lynch* v. *Smith,* 104 Mass., 52 and *Sullivan* v. *Ry. Co.,* 192 Mass., 37, supra.

It is the opinion of the court that the jury were warranted in their findings upon all branches of the case and the entry must therefore be,

Motion overruled.

BRIAN E. MCDONOUGH, Petitioner, *vs.* FRED A. BLOSSOM.

Cumberland. Opinion May 10, 1912.

Exceptions. Laches. Jurors. Judgment. Dismissal. Review. Revised Statutes, chapter 91, section 1, paragraph VII.

A petitioner's right to writ of review is not defeated on the ground of laches in failing to procure signature and allowance of a bill of exceptions before the trial judge died, where he had five days left within which to present the bill under an allowance of time.

In actions brought on notes and defended on the ground of forgery by a third person, jurors who had tried a similar action, wherein identical facts were involved, were disqualified; and it was improper to refuse defendant a continuance on the ground of such disqualification, especially since defendant intended to call as a witness one who had been taken in custody in the presence of the jurors in the other action on a charge of perjury.

A judgment of the Law Court, dismissing exceptions brought from the Superior Court for want of prosecution, not being on the merits, cannot be urged as res adjudicata.

A petitioner being prevented without his own fault from taking cases from the Superior to the Law Court on exceptions, through the death of the Judge of the Superior Court before exceptions were allowed, is entitled to present them by petition for review.

To entitle one to a writ of review, he must show that justice has not been done; that the consequent injustice was through fraud, accident, mistake or misfortune, and that a further hearing will be just and equitable.

Where one asks for review of two actions, he should present a petition in each action; but, where the same facts apply to both cases, a single petition may be discontinued as to one of the causes, without prejudice, and a writ of review issued in the other.

On report. Writ of review to issue.

Petition for writs of review in two actions at law brought in the Superior Court, Cumberland County, and tried in that court at the November term, 1910. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Michael T. O'Brien and Carroll W. Morrill, for plaintiff.

M. P. & H. P. Frank, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HALEY, J. The petitioner asks for writs of review for two actions at law tried in the Superior Court for Cumberland County at the November term, 1910. The petition is based upon par. VII, sec. 1, chap. 91, R. S. In the original actions the petitioner was defendant. The actions were upon two promissory notes. The defense was forgery. The defendant claims that one James Dunn forged many notes, among which were the two in suit in the above actions. Dunn has disappeared.

The case tried in the Superior Court immediately preceding the case against the petitioner was upon a note claimed to have been signed by one James Rowe, and claimed by said Rowe to have been forged by the said Dunn. The verdict was for the plaintiff. Immediately upon receiving the verdict the Justice holding the court, in the presence of the jury, ordered the defendant Rowe into custody

for perjury. Rowe was taken from the court room by an officer, and in a few minutes, by order of the Justice, was returned into court, and, in the presence of the jury, was placed under $2000 bonds to appear at the next term of the court to answer to the charge of perjury. The grand jury returned no bill against Rowe, which ended the criminal charge against him, but did return several indictments against Dunn for forgery, one of which was for forging the note which Rowe had testified was forged and for giving which testimony Rowe was arrested for perjury.

Immediately after Rowe had recognized as above, the trial of the cases against the petitioner was begun. The defense being the same, the counsel for the petitioner requested a continuance upon the ground that the jury having in the preceding case passed upon the same question, and that the defendant intended to call as a witness said James Rowe and the arrest of him by order of the court had prejudiced the jury against his testimony, they were disqualified. The motion was denied by the presiding Justice, who allowed an exception to his ruling, and a jury was impanelled, seven of whom had sat in the preceding case. The verdict was for the plaintiff in each case, and a motion for a new trial was made upon the ground that the verdict was against the law and the evidence. The time for filing the report of evidence and exceptions was extended to the February term, 1911, and the case marked "Law." At the February term, the time for filing the report of evidence and exceptions was again extended to the last day of the February term. On the nineteenth day of February, 1911, the Judge of the Superior Court died, and the exceptions had not been signed by him. The case was entered at the June term of the Law Court, and motion and exceptions were overruled for want of prosecution.

The petitioner claims a review because the Judge of the Superior Court died before the expiration of the time allowed the petitioner to file his exceptions, and that there was no way to have the exceptions allowed, that the Law Court might pass upon them, because of the death of the presiding Justice. The respondent claims there was laches on the part of the petitioner that bars him from being heard upon this petition; that there was ample time allowed for the filing of the exceptions; and that the petitioner should have had them signed and allowed in the lifetime of the Justice of the Superior Court.

The record shows that the petitioner's right to file his exceptions was extended to the last day of the February term, and further shows that the February term adjourned on February 24th.

We cannot hold the petitioner guilty of laches in not presenting his exceptions to the Judge for his approval before the nineteenth day of February, the day of the death of the Judge, because he had several days after the nineteenth day of February in which to present them. All that the law required was that the exceptions should have been presented within the time allowed. No one, in preparing exceptions, would take into consideration the fact that the Judge might die before the time fixed for filing the exceptions. The petitioner had until the last day of the February term in which to file his exceptions. Several days before the close of that term the Judge died, and they could not be allowed after his death. To hold that it was laches on the part of the petitioner not to have filed them before the death of the Justice would be, in substance, to hold that an act of God would make the petitioner guilty of laches.

In Moulton, Petr., 50 N. H., 532, the court allowed an appeal by the administrator, when the party entitled to it had died just before the sixty days allowed for claiming it, saying:

"It was no neglect for him to wait, even if he had waited until the last day of the sixty days before claiming an appeal. The statute giving him that right, the appeal would have been well enough if he had lived; but his death, under the circumstances of the case, was a misfortune which defeated it."

No authority has been cited, and we venture the assertion that none can be cited, upholding the ruling of the Justice that the petitioner should proceed to trial at the time he was compelled to do so. The jury were disqualified by their verdict in the preceding case. The arrest of Rowe, who was a witness in the case of the petitioner, by order of the presiding Justice, in the presence of the jury, when the evidence was the same as in his case, and his being placed under bonds in the sum of $2000 upon the charge against him, could but further prejudice the petitioner's case, and was a palpable error.

Garthwrite, Grinnin & Co. v. *Tatum,* 21 Ark., 336, was an action upon a note executed at the same time of another note upon the validity of which the jury had passed. The issues were the same. The plaintiff objected to the jury as disqualified. The court over-

ruled the objection, and the case was taken to the higher court. Fairchilds, J., in delivering the opinion said:

"By their verdict in the other case the jurors had formed and expressed their opinion upon this case, and the fact that it was done on oath after hearing all the facts and after full deliberation thereof, amid the solemnities and under the direction of judicial proceedings, could have no other effect than to incline them to render such verdict as they had rendered before. The law presumes them to have been under a disqualifying bias."

The same doctrine is laid down in *Burke* v. *State,* 66 Ga., 157; *Bragdon* v. *State,* 75 Miss., 904; *State* v. *O'Connor,* 105 Mo., 121; *Golden* v. *State,* 75 Miss., 130; *Railway Co.* v. *Smith,* 60 Ark., 221; *Weeks* v. *Lyndon,* 54 Vt., 638.

There are cases which hold that the discretion of the court in refusing or granting a continuance is not subject to exception, but the great preponderance of the cases are to the contrary, where there has been a clear abuse of the discretion to the prejudice of the moving party. As stated in *Schwartz* v. *Drinkwater,* 70 Maine, 409, which was a case in which exception was taken to the refusal of the court to continue the action: "Therefore, whether the motion should be granted or not was for the Judge to determine as a matter of discretion. His ruling, unless palpable error was committed, cannot be reviewed here." Also see cases cited in note to *Stevenson* v. *Sherwood,* 74 Am. Dec., 140. The petitioner attempted to reserve for the Law Court the question of whether there was a clear abuse of the court's discretion in denying the petitioner's motion for a continuance. He was prevented from doing so by the death of the Judge and the Law Court, when it overruled the exceptions for want of prosecution, did not pass upon the merits, or give judgment upon the merits, as there was not before the court any bill of exceptions, and its order dismissing the exceptions cannot be successfully urged as res adjudicata of the question presented by the petition in this case.

There being no way that the petitioner could take his cases to the Law Court upon exceptions, it was his misfortune, not caused by his own act, and it is proper to present them by a petition for review. As said by the court in *Reynard* v. *Brecknell,* 4 Pick., 302, "If a party should be seriously injured by any determination of a court of common pleas on matters clearly within its discretion, such

as the postponement or continuance of an action, we know of no remedy but by a petition for a writ of review. According to the general statute giving this power to sustain such petitions on the hearing of which, if it be made to appear that injustice has been done to the party by his being hurried to trial unprepared, a review will be granted.

The same doctrine was approved in *Todd* v. *Barton,* 117 Mass., 291, and in *Converse* v. *Carter,* 8 Allen, 568, the last case holding that a petition for review was a proper remedy, but denying the petition, the statute of Massachusetts granting reviews being similar to the statute in Maine.

To entitle the petitioner to a review he must prove to the satisfaction of the court:

1. That justice has not been done.

2. That the consequent injustice was through fraud, accident, mistake or misfortune.

3. That a further hearing will be just and equitable.

Donnell v. *Hodsdon,* 102 Maine, 420.

We think that the two first propositions are proved by the compelling of the petitioner to proceed to trial before a jury disqualified by law from sitting in his case.

The question to be determined is, has justice been done by the verdict? It is surely equitable and fair that the petitioner shall have a fair trial before a jury that is unprejudiced, and we think there is sufficient evidence in this case to authorize us to say that, under the peculiar circumstances of the case and trial, justice has not been done, and that it is proper that he have the right to present his case to an unprejudiced jury.

The petitioner asks for a review of two actions. There should have been a petition for a review in each action, but as the same facts apply to both cases, the petitioner may discontinue as to one of the cases without prejudice and a writ of review issue in the other.

Writ of review to issue.

In Equity.

FREDERICK F. PROCTOR AND FREDERICK F. PROCTOR, JR.

vs.

KEITH AND PROCTOR AMUSEMENT COMPANY, BENJAMIN F. KEITH AND R. PAUL KEITH.

York. Opinion May 10, 1912.

Corporations. Dissolution. Disposition of Property. Contracts. Construction.

In June, 1906, plaintiff and defendant organized a corporation in which each held one-half the stock, and to which they assigned leases on theaters, under an agreement that on any dissolution "the theaters, including the personal property, good will, and business of each shall be retransferred to the party from whom they were respectively received by the corporation;" and any new theaters leased should be taken by the highest bidder. Plaintiff previously held a lease on the F. theater, expiring in 1912, subject to termination on one year's notice in case of a sale. In April, 1906, a corporation, whose control by defendant was concealed by him, purchased the theater and gave notice terminating the lease May 1, 1907. Plaintiff's assignment included his rights under this lease. In 1907 a new lease was given by defendant's company to the corporation first mentioned. *Held* that, on dissolution, it was not error to award a transfer of the lease on the F. theater to plaintiff under the clause of the contract above quoted.

In equity. On appeal by defendants. Appeal dismissed.

Bill in equity praying that the affairs of the defendant, Keith and Proctor Amusement Company, "a corporation duly established by law and located at Kittery, in the County of York and State of Maine," be wound up and the corporation dissolved.

The case is stated in the opinion.

Verrill, Hale & Booth, and William F. S. Hart, for plaintiffs.

Libby, Robinson & Ives, for defendants.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, KING, HALEY, HANSON, JJ.

WHITEHOUSE, C. J. This is an appeal from a final decree entered by a single justice in a suit in equity brought by the plaintiffs, who were owners of one-half of the stock of the defendant company, against the corporation, and the defendants, B. F. and A. Paul Keith, who were owners of the other half of the stock. It is alleged in the plaintiff's bill, dated December 30, 1910, that the defendant corporation, the Keith and Proctor Amusement Company, was organized in June 1906, by Benjamin F. Keith and Frederick F. Proctor, for the purpose of combining and operating under corporate ownership, for the common benefit of the stockholders, six theatres in New York and Jersey City, four of which including the Fifth Avenue Theatre had prior to that time been operated by Mr. Proctor and two of them by Mr. Keith; that there had been gross and fraudulent mismanagement of the affairs of the corporation, on the part of the defendants, B. F. and A. Paul Keith, the president and treasurer of the company, respectively, whereby its property was being wasted; that by reason of the friction between the two equally divided factions of stockholders, it was impossible to continue the business of the corporation without great injury to the rights of one-half of the stockholders, and that by reason of the premises, the purposes of the corporation could not be accomplished. They accordingly ask that the affairs of the corporation be wound up and the corporation dissolved.

The defendants filed an answer denying the charges of fraud and mismanagement on the part of Mr. Keith, but state that "by reason of the differences of opinion that have existed between the two interests which are equally divided," they joined in the prayer for a dissolution of the corporation; and thereafter under date of July 31, 1911, the parties entered into a stipulation whereby it was agreed that all of the theatres then under the corporate management should be restored to the party by whom they were respectively contributed, except the Fifth Avenue Theatre, the lease of which was to be renewed for five years from April 30th, 1911. Thus all of the important questions raised by the bill and answer were adjusted except that relating to the disposition of the Fifth Avenue Theatre. After hearing, a decree was entered by a single

justice "that the lease of the Fifth Avenue Theatre, which the defendant corporation now holds and which runs for a term of five years from May 1, 1911, shall be assigned and delivered forthwith as of the date of this decree, to the plaintiff, Frederick F. Proctor, together with all the personal property appurtenant thereto." The defendants took an appeal from this decree.

Prior to the organization of the defendant corporation, Mr. Proctor and Mr. Keith had for many years been individually and separately engaged in the theatrical business, each having the ownership of one or more theatres and the management and control of several others by virtue of leasehold interests. The lease of the Fifth Avenue Theatre which Mr. Proctor held from the Gilsey Estate when the defendant corporation was organized, did not by its terms expire until May 28, 1912; but it contained a provision that in the event of the sale of the property the landlord might terminate his tenancy by not less than one year's notice. The property was in fact sold April 25, 1906, to the International Amusement & Realty Company, which for convenience will be hereafter called the International Company, and notice was promptly given to Mr. Proctor of the cancellation of the lease, so that the term would expire May 1, 1907.

At that time this International Company was wholly under the control of Mr. Keith, but this fact appears to have been carefully concealed from Mr. Proctor, Mr. Keith being introduced to the attorney and one of the incorporators of the International Company under the assumed name of "Franklin."

Under these circumstances, in order to prevent the enormous expenditures resulting from the strenuous competition between the managers of vaudeville theatres, and in the belief that a renewal of the lease of the Fifth Avenue Theatre could doubtless be secured by the loyal assistance of Mr. Keith, an agreement was entered into between Mr. Keith and Mr. Proctor under date of June 27, 1906, to take effect as of June 4, for the consolidation under corporate management of the six theatres therein specified, for the term of ten years. The stipulations in that agreement specially involved in the consideration of the appeal now before the court, are found in the following provisions:

1. "A corporation shall be organized under the laws of the State of Maine with a capital of $100,000 to which corporation the

party of the first part shall assign his lease of the Union Square Theatre in the City of New York and shall lease his Bijou Theatre in Jersey City, now being altered, and shall assign his lease from Herz Brothers to the premises adjoining the same; and the party of the second part shall likewise assign his leases of the 23rd Street and Fifth Avenue Theatres in the said Borough of Manhattan and shall lease his 58th Street and 125th Street Theatres in said Borough. The Jersey City, 58th Street and 125th Street Theatres shall each be leased for a term of ten years, and said leases of the Union Square, 23rd Street and Fifth Avenue Theatres and the said Herz lease shall be assigned at the rentals and on the conditions stated in such leases which rentals shall be paid and conditions performed by said corporation, and the assignment of the Fifth Avenue lease shall be subject to the notice of cancellation served."

. . . .

17. "With the theatres that are to be transferred to the corporation as herein provided shall be included all personal property appurtenant to said theatres belonging to the present proprietor."

18. "At the expiration of this contract by limitation or otherwise, the parties hereto shall and will, as stockholders and directors, vote and consent that the theatres, including the personal property, good will and business of each, shall be re-transferred to the party from whom they were respectively received by said corporation, and that the Board of Directors then in office shall be apointed trustees in liquidation, provided, however, that if any vacancy shall exist in the Board of Directors it shall be filled by the election of such director or directors as the parties hereto entitled to nominate shall designate; and said declarations of trust shall so provide."

19. "In the event that any new theatres shall be erected or leased or purchased under this agreement and the parties hereto shall no longer desire to jointly own or operate the same after the termination of this agreement as herein provided, the parties hereto shall have the exclusive right to purchase such theatre or theatres together with its and their good will, business and appurtenances, and they shall be sold respectively to such of the parties hereto as shall offer the highest price or sum therefor, unless the parties hereto shall at that time otherwise agree in writing."

In accordance with this agreement, the leases of the several theatres were assigned to the defendant corporation as of June 4, 1906. In the assignment by Mr. Proctor of the lease of the Fifth Avenue Theatre, is included all of the personal property in the theatre belonging to Mr. Proctor. It is also expressly stated that it is subject to the notice terminating the lease on the first day of May 1907, and it is described in the granting clause as "the lease of my Fifth Avenue Theatre." Under date of March 28, 1907, a new lease was given by the International Company to the defendant corporation for the term of four years from May 1, 1907, terminating April 30, 1911, at a rental of $51,000 per annum. This lease contained a covenant for a renewal lease at the same rent and on the same terms and conditions for a further period of five years from the 30th day of April 1911, "provided the same tenant shall elect to take such renewal lease and shall notify the said landlord of his intention so to do, in writing, on or before the first day of September, 1910."

Thereupon the defendant corporation was organized and commenced to transact business. At a meeting of the directors held July 12, 1906, it was voted to accept the offer of Mr. Keith to lease to the defendant corporation the theatres named in the agreement, in consideration of 500 shares of the stock of the corporation; and the offer of Mr. Proctor to lease the 58th Street and 125th Street theatres to the corporation and to assign to it "the leases, good will and business of his 23rd Street and Fifth Avenue Theatres" and to receive in payment therefor 500 shares of the stock of the corporation, was accepted on motion of Mr. Keith.

It is unnecessary to dwell upon the history of the Company's operations during the two or three years following its organization. There appear to have been some dissensions and differences of opinion in regard to the alterations and general management of the several theatres under the control of the Company. These minor difficulties, however, are not of primary importance in this case, which was finally reduced to the sole question whether the existing lease of Fifth Avenue Theatre should be assigned to Mr. Proctor under the agreement of June 27, 1906. But it is contended that the incidents which culminated in the commencement of this suit for a dissolution of the corporation and especially the active and persistent efforts of Mr. Keith to prevent the renewal of the lease of

the Fifth Avenue Theatre which would expire April 30, 1911, have marked significance upon Mr. Keith's attitude and understanding at the time in regard to the restoration of that theatre to Mr. Proctor in the event of a dissolution.

It has been seen that by a covenant in that lease, the defendant corporation, of which Mr. Keith was president and one of the executive committee, was entitled to a renewal lease for five years from the International Company, which was owned and controlled by Mr. Keith, provided notice in writing of its election to take such renewal lease should be given by the defendant corporation to the International Company, on or before the first day of September, 1910. The renewal of this lease had been the subject of discussion between the parties in the autumn of 1909, but on account of the prolonged absence of Mr. Keith, his coöperation in giving the required notice in writing of an election to take such a renewal lease, could not be obtained; and before leaving for his summer residence, Mr. Proctor acting as vice president and executive manager in the absence of Mr. Keith, sent such a notice in writing to the International Company under date of July 18, 1910. This notice appears to have been duly received by Mr. Keith as owner of the International Company, but it was not acknowledged until October 21, 1910, seven weeks after the time had expired for giving a renewal notice. In this reply a request is made for an extract from the records and by-laws showing that the notice was duly authorized. The next day Mr. Keith as president of the defendant corporation, wrote a letter to the International Company owned by him interposing the technical objection that the notice received the day before was not a legal one because not authorized by the board of directors or the executive committee. October 31, he made the suggestion that the Company must not be without a tenant, and November 17, he stated that the Fifth Avenue Theatre might be put on the market to be leased to the highest bidder. It must be admitted that the correspondence between the parties in regard to a renewal of this lease, considered in relation to the fact that these two parties were equal stockholders and both officers of the defendant corporation, discloses a continual resort on the part of Mr. Keith to disingenuous endeavors to disguise his ownership of the International Company in the hope of creating a belief in the mind of Mr. Proctor that he was dealing with one occupying

the position of a partner in business and not with a hostile competitor. It is claimed in behalf of the plaintiff Proctor and of the defendant corporation, that in pursuing this course, Mr. Keith was endeavoring to take advantage of his position to deprive the corporation of its most valuable asset in order to obtain control of the Fifth Avenue Theatre for his personal benefit, it being admitted that Mr. Keith was the sole owner of the International Company, which was the lessor of that theatre.

It is true that after a complaint was entered in the New York Court charging Mr. Keith with devising an unjust scheme to deprive the defendant corporation of its renewal lease, Mr. Keith was finally induced to enter into the stipulation hereinbefore mentioned, agreeing to a renewal of the lease and to a dissolution of the corporation. But it it argued that Mr. Keith would never have resorted to such questionable methods to prevent a renewal of the lease, unless he had then understood that in the event of a dissolution of the defendant corporation, the Fifth Avenue Theatre, with its existing lease for five years, yielding a total rental of $255,000, would pass to Mr. Proctor under the terms of the agreement of June 27, 1906.

The respective contentions of the parties in regard to the proper interpretation of the express terms of this agreement of June 27, and especially of the provisions of paragraph 18 hereinbefore quoted, will now be more critically examined and considered.

It has been seen that in paragraph 18 of that agreement, it is provided that in the event of a dissolution of the corporation "the theatres, including the personal property, good will and business of each, shall be re-transferred and assigned to the party from whom they were respectively received by the corporation," and in paragraph 19 it is provided that in case "any new theatres shall be erected or leased or purchased under this agreement, and the parties hereto shall no longer desire to jointly own or operate the same after the termination of this agreement . . . . they shall be sold respectively to such of the parties hereto as shall offer the highest price or sum therefor."

The question now before the court is whether the decree of the single justice that the present lease of Fifth Avenue Theatre shall be "assigned and delivered" to Mr. Proctor is clearly wrong. It is not in controversy that in determining that question, this court will

be governed by the terms of the above agreement so far as they are applicable, either when considered by themselves or construed in the light of the circumstances, and if there is nothing in the agreement controlling the disposition of the present Fifth Avenue lease, that the rule of the common law must apply and the lease be treated as a corporate asset to be disposed of for the benefit of all the stockholders.

It is contended in behalf of the defendants that when the terms of paragraph 18 of this agreement are brought into contact with the surrounding circumstances a latent ambiguity is developed respecting the meaning to be ascribed to the word "theatres" in the clause "the theatres shall be re-transferred," &c., and this ambiguity is removed by an examination of the extrinsic evidence in the case showing the surrounding circumstances, the situations and conduct of the parties at that time, and the practical construction subsequently given to the contract by the parties themselves. It is contended that when the terms of the contract are thus examined and interpreted in the light of the subject matter to which they relate, the word "theatres" in the clause mentioned must be deemed to have been employed to designate the leasehold interests which were transferred under the agreement and to be re-transferred.

It has been seen that by reason of the sale of the Fifth Avenue Theatre to Mr. Keith's International Company, the lease of that Theatre actually transferred by Mr. Proctor to the defendant corporation under the agreement in question, was terminated May 1, 1907, and that the renewal lease in controversy expiring April 30, 1916, was not the identical lease which was in fact transferred to the defendant corporation by Mr. Proctor. It is accordingly insisted in behalf of the defendants, first, that the disposition of that lease is not controlled by paragraph 18 of the agreement, and that it must be treated as a corporate asset, second, that if it is not to be treated as a corporate asset, but is held to be within the provisions of paragraph 18, it must be treated as a lease received by the corporation from Mr. Keith, and third, that if Mr. Proctor's contention is sustained, and the Fifth Avenue Theatre is found to be a "Theatre" assigned by him to the corporation, he is only entitled to have it re-transferred to him for the term of the lease

which he assigned, viz, for the term of ten months and twenty-one days.

In the exhaustive argument of counsel for the defendants, no consideration appears to have been omitted which would have any legitimate tendency to support their contentions.

But the plaintiffs earnestly contend that in the clause in question relating to the re-transfer of "Theatres" the parties must be presumed to have intended what they have plainly expressed, and that since it is not allowable to "interpret" what has no need of interpretation, there is no reason for a construction of language which they claim is capable of only one meaning. They further insist that if the clause can reasonably be considered ambiguous, the extrinsic evidence only serves to strengthen their claim that in the contemplation of the parties the word "theatres" was not synonymous with the word "leases" and was not employed to designate simply those leasehold interests existing at the date of the agreement, June 27, 1906. They claim that when all of the evidence in the case is considered, four propositions are satisfactorily established; first, that the Fifth Avenue Theatre was received by the defendant corporation from Mr. Proctor, within the meaning of paragraph 18 of the agreement, by virtue of an assignment of his lease, and that he is now entitled to have it re-transferred to him under the same agreement; second, that the Fifth Avenue is obviously not a "new" theatre, within the meaning of paragraph 19 of the agreement, and is not to be sold to the highest bidder under that provision; third, that this theatre cannot be held to have been received from Mr. Keith simply because the existing renewal lease comes from the International Company, the stock of which is owned by him, and fourth, that this provision of the agreement was manifestly intended by the parties to cover the disposition of all of the property put into the corporation including the Fifth Avenue Theatre, as well as the 23rd Street and Union Square theatres, and that the Fifth Avenue Theatre cannot now be held to be a corporate asset.

In the elaborate discussion of these propositions by the counsel, another complete analysis of the evidence is presented from the plaintiff's point of view.

It may be true that the question presented for decision is not entirely free from difficulty and doubt, but after a careful reading

of the evidence and a patient study of the history of the case in the light of the luminous discussions of counsel, it is the opinion of the court that the decree of the single justice that the existing lease of Fifth Avenue Theatre shall be assigned to Mr. Proctor, is not shown to be clearly erroneous.

It cannot be doubted that by virtue of the stipulations in this contract, the parties intended to provide in the event of dissolution, for the disposition of all the theatres then under the management of the defendant corporation, and as far as practicable to restore each to the position he occupied before the corporation was organized. In specifying, in his letter to Mr. Keith, the Theatres claimed by him under the contract, Mr. Proctor mentions the Fifth Avenue, 23rd Street, 58th Street and 125th Street theatres and concedes to Mr. Keith the Union Square and Jersey City theatres; and in his reply Mr. Keith contests Mr. Proctor's claim only to the Fifth Avenue Theatre. But it appears that the Fifth Avenue, 23rd Street and Union Square were all in the same class, for the reason that the lease of each had expired after 1906 and a new lease given to the corporation. If it be held that the parties did not intend that the Fifth Avenue Theatre should be re-transferred to Mr. Proctor in dissolution of the corporation, the same construction applied to the Union Square and 23rd Street Theatres, would have prevented the transfer of these theatres to Mr. Keith and Mr. Proctor respectively, and thus one-half of the theatres would have remained undisposed of by the contract.

The conduct and declarations of the parties before the institution of this suit, with reference to the other two theatres, have important significance as to their understanding of the contract with respect to the Fifth Avenue. If Mr. Keith thus acquiesced in Mr. Proctor's view that the Union Square Theatre should revert to Mr. Keith, and that the 23rd Street Theatre should revert to Mr. Proctor on dissolution, it is strong evidence that Mr. Keith understood that each theatre should be restored to the one from whom the corporation received it, although the term of the lease then existing may have been extended by a subsequent lease or leases. It is not controverted by the defendants that if the Fifth Avenue Theatre was received by the corporation from Mr. Proctor it should be re-transferred to him for at least a term equal to that of his unexpired lease at the time the corporation was organized.

But if the word "theatres" in paragraph 18 was intended to be synonymous with the word "leases" as claimed by the defendants, the logical conclusion would seem to be that as the lease of this theatre which the corporation received from Mr. Proctor, had expired, there would be nothing to be restored to him. But the word "theatres" and not the word "leases" was employed to express the understanding of the parties.

It has been noticed that paragraph 17 of the agreement provides that the re-transfer of the theatre shall include the personal property, good will and business of each, and it is worthy of mention that about two years before the corporation was organized, Mr. Proctor expended $7000 for new chairs for the Fifth Avenue Theatre and that the assignment of his lease expressly included all personal property in the theatre belonging to him. It does not seem probable that this personal property would have been included in the transfer without any stipulation for its return, unless he had understood that the theatre was to be re-transferred to him together with his chairs.

Again in Mr. Keith's efforts to refute the charge in the plaintiff's bill that he had so managed that the theatres which would revert to him were kept in good repair, while those which would revert to Mr. Proctor were not so maintained, he states in his affidavit that he had spent $87,000 on the Proctor theatres, including the Fifth Avenue, thus indicating that he understood that the theatre would revert to Mr. Proctor under the contract. Indeed when the contract is considered with reference to the circumstances existing at the time it was made, it is not improbable that Mr. Keith intended to have it so drawn that in the event of an early dissolution of the corporation, Mr. Proctor would be obliged to take the Fifth Avenue Theatre, since Mr. Keith would then receive a large rental for a theatre, which in June 1906 showed a loss of $30,000, and in June 1907, a loss of $54,000.

But a further discussion of the evidence in detail would be unprofitable. There was sufficient evidence to warrant the conclusion of the single justice that in the contract of June 27, 1906, the parties contemplated that each theatre should be "re-transferred and assigned" to the party from whom it was received, with the leasehold interest pertaining to it at the time of the dissolution of the corporation, and that the Fifth Avenue Theatre was received

from Mr. Proctor by the corporation within the meaning of the contract interpreted in the light of all the circumstances and the conduct of the parties.

The defendants' final suggestion that the decree from which this appeal was taken is inequitable, should be considered, if at all, in the light of the fact that Mr. Keith will receive a rental of $51,000 a year for this theatre during the remaining four years, $6000 a year more than was received from the Gilsey Estate.

The date fixed in the decree for the assignment of the existing lease to Mr. Proctor is sufficiently favorable to the defendants.

The certificate will therefore be,

Appeal dismissed.
Decree below affirmed.

STATE OF MAINE *vs.* LUTHER J. IRELAND AND HATTIE D. BULL.

Aroostook. Opinion June 4, 1912.

Indictment. Records. Judicial Power. Lost Indictment. Substitution. Constitution of Maine, Article I, Section 7.

An indictment duly found, returned, and filed becomes a part of the records of the court.

At common law and independent of any statute, courts have an inherent power to preserve and protect their own records and to substitute copies of lost records.

Copy of a lost or mislaid indictment may be substituted by order of the trial court as soon as the loss is discovered and before the case is submitted to the jury, but omission to do so before conviction is not fatal; the substitution being properly made upon satisfactory evidence at a forthcoming *nisi prius* term.

On exceptions by defendants. Overruled.

The defendants were indicted for adultery, placed on trial, and during the trial the indictment disappeared.

The case is stated in the opinion.

Perley C. Brown, County Attorney, for the State.

Powers & Archibald, for defendants.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

CORNISH, J. An indictment for adultery was duly found and returned against the defendants by the grand jury, at the April Term 1911 of the Supreme Judicial Court for Aroostook County and placed on the files of the court by the clerk. Upon this indictment the respondents were arraigned and severally pleaded not guilty. A jury was thereupon impanelled, the indictment was read to the jury and the case proceeded to trial. At some later stage of the trial and before the case was finally submitted to the jury, it was discovered that the indictment had disappeared, whether it was mislaid or lost or accidentally destroyed or abstracted, is not known. No copy was substituted. In the course of the charge the presiding Justice instructed the jury that although the indictment had disappeared, and could not be taken to the jury room with them, yet inasmuch as the respondents had been arraigned upon it and had pleaded to it, and it had been read to the jury, in presenting the respondents for trial, he should permit them to retire and return a verdict in its absence.

The jury subsequently returned a verdict of guilty. Counsel for respondents before the verdict was taken, seasonably objected to receiving any verdict in the absence of the indictment and also moved the discharge of the respondents for the same reason. The presiding Justice, however, received the verdict and subsequently pronounced sentence upon one of the respondents while the case against the other was continued for sentence. The case is before the Law Court on the respondents' exceptions to these rulings.

This presents a question of novel impression in this State. What are the powers of the court in case an original indictment is missing from the files? Is it indispensible to the validity of a sentence that the indictment should be among the records at the time sentence is pronounced? This is an important question because the rights not only of the accused but of the public are affected by its answer.

It must of course be conceded that an indictment duly found by the grand jury, duly returned to court and filed by the clerk, becomes at once a part of the records of the court, and there must be and is an inherent power in the court to preserve and protect its

own records. Shepley, J., in speaking of civil actions, and we see no reason why the words would not apply with equal force to criminal causes, said, "Every court of record, has power over its own records and proceedings to make them conform to its own sense of justice and truth, so long as they remain incomplete and until final judgment has been entered," *Lothrop* v. *Page,* 26 Maine, 119.

The record itself is but the outward evidence of a cause to which the jurisdiction of the court has attached. That jurisdiction cannot be taken away by the mere loss or abstraction of a part of the record. Rather the jurisdiction remains and the missing record should be supplied or substituted in such manner as the court itself may prescribe.

As the Supreme Court of Alabama said in *Bradford* v. *State,* 54 Ala., 230, where the indictment was lost after plea had been entered and the trial had begun; "Courts of record, independent of express legislation, have power to substitute any of the files or records which may be lost or destroyed. The power is a matter of necessity, whether the loss occurs while the cause is in fieri, before it has progressed to final judgment or after such judgment has been rendered, and whether the loss is of the whole record or of papers, which when it is finally made up will constitute a part of it."

This succinct statement of a fundamental principle we adopt as indispensible in the administration of criminal law. If the court does not possess the power to authorize the substitution of a lost indictment, the rights of the public are at the mercy not merely of accident but of design and the destruction of a court house with its contents by fire is equivalent to a jail delivery.

The decisions in other states are not in entire harmony, but it can safely be asserted that the overwhelming weight of authority has so solved the problem as to protect all the legal rights of the accused on the one hand and of the public on the other without allowing the accused to escape his deserts either through accident or artifice.

In some states, statutes have been passed, expressly conferring this power in criminal cases, as in Arkansas, *Miller* v. *State,* 40 Ark., 488; Louisiana, *State* v. *Heard,* 49 La. Ann., 375. 21 So., 632;

Oklahoma, *Harmon* v. *Territory,* 9 Okl., 313, 60 Pac., 115; and in Texas, *Schultz* v. *State,* 15 Tex. App., 258.

In other States, the courts, while acknowledging the inherent common law power, have construed statutes, apparently originally designed to cover substitution in civil actions only, to include criminal cases as well. See *State* v. *Gardner,* 13 Lea, (Tenn.), 134; *Roberson* v. *State,* 45 Fla., 94, 34 So., 294.

In many jurisdictions, however, the courts have assumed and exercised the power of substitution, independent of any statute.

In *Ganaway* v. *State,* 22 Ala., 772, a majority of the court denied the power of the trial court to substitute an indictment before arraignment and trial. But in the later case of *Bradford* v. *State,* 54 Ala., 230, the indictment was lost after arraignment and plea and the substitution of a copy during the trial was permitted.

In the early case of *State* v. *Harrison,* 10 Yerg, (Tenn.), 542, it was held that a Judge could not supply a lost indictment upon affidavits of others and independent of his own recollection, but this decision was overruled in the later case of *State* v. *Gardner,* 13 Lea, (Tenn.), 134, in which it was held that the substitution might be made upon affidavits, independent of the recollection of the Judge. In that case ten indictments were stolen from the clerk's files after arrest but before trial.

Without quoting at length further from decisions in other States, suffice it to say that the inherent power of the court at common law has been accepted as authority for substitution in the following States:

In South Dakota, *State* v. *Circuit Ct.,* 20 So. Dak., 122, 104 N. W., 1048, (1905).

In Mississippi, *McGuire* v. *State,* 76 Miss., 504, 25 So., 495, (1899).

In West Virginia, *State* v. *Strayer,* 58 W. Va., 676, 52 S. E., 862, (1906) where the indictment was lost after verdict of guilty rendered.

In Pennsylvania, *Com.* v. *Becker,* 14 Pa. Super. Ct., 430.

In Iowa, *State* v. *Rivers,* 58 Iowa, 102, 12 N. W., 117; *State* v. *Stevisger,* 61 Iowa, 623, 16 N. W., 746; *State* v. *Shank,* 79 Iowa, 47, 44 N. W., 241, (1890).

In Indiana, *Buckner* v. *State,* 56 Ind., 208.

In Missouri, *State* v. *Simpson,* 67 Mo., 647; *State* v. *Paul,* 87 Mo. App., 47, (1900) and *State* v. *McCarver,* 194 Mo., 717, 92 S. W., 684, (1906).

The contrary view is held in *Bradshaw* v. *Com.,* 16 Gratt., (Va.) 507, 86 Am. Dec., 722, but it has not been generally followed, and the citations above given abundantly warrant the general doctrine laid down by text writers that a copy may be substituted independent of an authorizing statute. 1 Bish. Crim. Proc. Vol. 1, Sec. 1400, 22 Cyc. p. 221, 10 Ency. Pl. & Pr. p. 417.

But the respondents further contend that even if a copy might have been substituted when the loss was discovered none was in fact substituted and a verdict could not legally be rendered or sentence passed without either the original indictment or a copy on the files of the court. Why not? No legal or constitutional right of the respondents has been sacrificed or invaded.

The Constitution of Maine, Art. 1, Sec. 7, provides that "No person shall be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury," with certain exceptions immaterial here. This provision has been fully complied with. The indictment had been returned by the grand jury and to it the respondents had pleaded and placed themselves on trial as the docket entries prove, thus admitting its verity. Their next constitutional right was to the verdict of a jury duly impanelled and sworn which they had accepted as their tribunal. This right was fully given them.

It was a right that could not be taken from them by the mere loss or abstraction of a paper, and the State had the corresponding right that notwithstanding such loss or abstraction the case should proceed and a judgment of conviction or acquittal be rendered. These rights are too sacred to be impaired by the accidental loss or wilful abstraction of papers during the trial, and the mere fact that the jury did not have the indictment with them in the jury room could not nullify all that had gone before. The issue had already been made up. The jury knew the nature of the offence charged and the parties involved. The presence or absence of the indictment itself could not aid or hinder them in reaching their verdict. It did not in this case. Such meritless technicalities should not be permitted to thwart the administration of criminal justice.

The remaining constitutional right vouchsafed to the accused is that they shall not be put twice in jeopardy for the same offense. This can be secured by substituting a copy for the original. Such a copy can be readily prepared by the County Attorney who drafted the original. The notes of the stenographer at the trial will furnish all necessary data as to place, time and parties, so that no possible error can creep in. Such a copy duly certified by the county attorney can, by order of court at the next term, be placed on file in lieu of the original and the rights of the respondents be thereby safely guarded.

It would have been proper for the County Attorney to ask for such substitution as soon as the loss was discovered, but the omission to do so at that time was not fatal. Substitution can be made by the court upon satisfactory evidence at the coming term, and the rights of the respondents on the one hand and of the public on the other be fully protected.

The rulings of the presiding Justice being free from exceptionable error, the entry must be,

Exceptions overruled.

SARAH B. FORD *vs.* SAMUEL D. ERSKINE et als.

Lincoln. Opinion June 4, 1912.

Ways. Alteration. "Location." Construction of Ways. Liability of Officers. Individual Liability. Certiorari. Record. Collateral Attacks. Master and Servant. Trespass. Liability. Revised Statutes, Chapter 104, sections 14, 15.

Where upon petition to the county commissioners for alteration of an alleged existing highway, the return of the commissioners contains no express adjudication that the alleged highway is a highway, and shows the alteration by them of a town road, their record will be held void for want of jurisdiction.

"Location" of a highway and "alteration" of a highway do not amount to the same thing.

A county commissioner is not liable individually for trespass committed in the construction of a road across private lands under void proceedings, so far as he acted in an official capacity.

The selectmen of a town and a contractor employed by them in constructing a road, who made it as an alteration of an existing highway by county commissioners, who were without jurisdiction, are liable in trespass.

Under Revised Statutes, chapter 104, sections 14, 15, on denial of a petition for certiorari, it is improper to affirm the record sought to be quashed; issuance of a writ being essential to any judgment affirming, modifying, or quashing the record.

Where the record of certiorari proceedings fails wholly to show the grounds alleged therein for attack upon the record sought to be affected and the grounds for the denial of the writ, the petitioner is not estopped from collaterally attacking the record for want of jurisdiction.

While it may be that one who, having mere knowledge of a contemplated trespass, allows the use of his personal property in effecting the same may be not liable for the trespass, one who directs his employe to aid in the doing of a specific act which proves to be a trespass is liable.

On report. Judgment for plaintiff.

Trespass quare clausum fregit to recover damages for the construction of a road across the plaintiff's land. Plea, the general

issue with a brief statement alleging that any acts done by the defendants on the plaintiff's land were done in the construction of an alteration of an existing highway laid out by the county commissioners of Lincoln County. The case was first submitted to the jury on the question of damages which were assessed at $270, and then was reported to the Law Court for determination, with the following stipulations: "If the plaintiff is entitled to recover because there is no legal road at the place where the trespass is claimed to have been committed judgment is to be awarded for the plaintiff for the sum of two hundred and seventy dollars ($270.00), it being the amount fixed by the jury as damages. If the plaintiff is not entitled to recover as above, the court is to determine whether there is a trespass outside the location, and if so, assess the damages therefor. If no liability, judgment shall be for the defendants. All objections to the testimony to be passed upon by the Law Court and the case to be determined upon that which is admissible."

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

Tupper & Perkins, for defendants.

SITTING: WHITEHOUSE, C. J., SAVAGE, KING, BIRD, HALEY, HANSON, JJ.

BIRD, J. This is an action of trespass quare clausum whereby the plaintiff seeks the recovery of damages for the construction of a road across her land in the town of Jefferson. The defendants, pleading the general issue, by way of brief statement claim that any acts done by them upon plaintiff's land were done in the construction of an alteration of an existing highway laid out by the County Commissioners of Lincoln County.

To establish their justification, the defendants offered the record of the county commissioners, from which it appears that the selectmen of Jefferson duly petitioned the county commissioners that a change be made in the highway leading from the North Whitefield road, commencing at a defined point, "said proposed change of location to extend in a course eastwardly and re-entering the highway, as now located," at another described point and that, after notice ordered and given, hearing had and the continuances taken, as required by statute, at the September session 1909 their "pro-

ceedings were adjudged to be closed and their return ordered to be recorded." The return determines that common convenience and necessity require the alteration made as prayed for and describes the road as laid out by them as "Beginning ..... on the Easterly side of the town road ..... thence running (here follow various courses and distances) to an elm tree standing on the easterly side of the road, before mentioned."

Neither in the return or other part of the record is there an express adjudication that the road, an alteration in which is prayed for, is a highway or county road. Had the petition prayed for the location of a highway, the petition might show jurisdiction, as held in *Waldo* v. *Moore,* 33 Maine, 511, 514. And where the prayer is for alteration of a highway, the taking of jurisdiction and the subsequent alteration of the highway described by the petitioners might warrant the presumption that the commissioners found as a jurisdictional fact the existence of the highway sought to be altered. See *Plummer* v. *Waterville,* 32 Maine, 566, 568.

But in the case at bar the return of the commissioners, with no express adjudication as to the existence of the alleged highway, shows that the alteration made was that of a town road and while the word road may include county roads, town roads, turnpikes, etc., see *Windham* v. *Commrs.,* 26 Maine, 406, 408, it can hardly be contended that "town road" can be construed to comprehend county road or highway. It appears, therefore, from inspection of the record, that the road which was altered was a town road and not a county road as alleged in the petition. The location of a county road and the alteration of a county road are not one and the same thing. *Com.* v. *Cambridge,* 7 Mass., 158, 165; *Raymond* v. *Co. Commrs.,* 63 Maine, 112, 114. And it cannot be contended that the way laid out in the return is the location of a new county road especially in view of the fact that part of the old road, which it was attempted to change, is by the return of the commissioners attempted to be discontinued.

Being an inferior court their jurisdiction depended, entirely, upon the existence of a highway; the validity of their acts upon their jurisdiction; hence, if a highway, their acts were valid; if not, invalid. *South Berwick* v. *Co. Commrs.,* 98 Maine, 108, 111.

Without passing upon the admissibility of the evidence offered aliunde the record to show that the road described in the petition

was a town road and not a highway, the court feels that the conclusion above reached is in accordance with the fact.

The defendants, subject to the objection of the plaintiff, offered the following record:—

"Sarah B. Ford, of Jefferson, County of Lincoln, petitioner, certiorari vs. County Commissioners of Lincoln County, defendants.

"The petition is dated September 22, A. D. 1909, and was legally served upon said Defendants on the 24th day of September, A. D. 1909.

"This action was duly entered at the October Term, A. D. 1909.

"The same is thence continued from term to term to the present April Term, 1910, where after hearing, the writ is denied and records adjudged good."

The defendants claim that by this record the plaintiff, who was the petitioner named therein is estopped to attack the record of the county commissioners collaterally. We think the judgment of the court found in the words "records adjudged good" was not warranted. The writ of certiorari was not granted but was denied. In all the reported cases of this court arising upon certiorari none is found where the court on dismissing the petition goes further or makes any adjudication as to the records attacked in the petition. That, in order that such adjudication be made, the writ must issue and the record attacked be before the court seems a fair inference from the provisions of R. S., c. 104, §§ 14, 15, and a conclusion warranted by *State* v. *Madison,* 59 Maine, 538, 544 and *State* v. *Madison,* 63 Maine, 546, 550. And see *Morrill* v. *Buker,* 92 Maine, 389, 392.

Did the denial of the writ of certiorari work an estoppel? The record of the certiorari proceedings fails absolutely to show the ground or grounds alleged by petitioner in application for the writ or the answer of the respondents. The point in litigation is not apparent nor the reasons for the denial of the writ. Without determining what would have been the effect if the lack of jurisdiction, which we have considered, had been set up as the ground for the issue of the writ and so appeared by record, we are clearly of the opinion that the record of the proceedings upon the petition for certiorari set out above works no estoppel of the plaintiff. See

Brown v. *Co. Commrs.,* 12 Met., 208, 209. See also *Smith* v. *Boston,* 194 Mass., 31, 34.

As to the liability of the defendants: One was a member of the board of county commissioners laying out the way. Whatever he did in his official capacity, upon the authority of *Rush* v. *Buckley,* 100 Maine, 322, does not make him liable nor can his subsequent conversation with and letter to the selectmen be considered as an advising, instigation or direction of the trespass.

Two of the defendants are the selectmen of the town of Jefferson who contracted for and superintended the building of the road and another is the person, who under contract with the selectmen, constructed the road. As to their liability for damages, there can be no question: *Chase* v. *Cochran,* 102 Maine, 431, 437.

The remaining two defendants let their team and servant-driver to the contractor with full knowledge that they were to be employed in the construction of the road. While it may be that one who has merely knowledge of a contemplated trespass and allows the use of his personal property in effecting it may not be liable for the trespass, one who directs his servant to aid in the doing of a specific act which proves to be a trespass is liable: *State* v. *Smith,* 78 Maine, 260, 265, 267.

Judgment will be entered for $270 against all the defendants except Carney.

In Equity.

HERBERT J. SAWYER *vs.* PASCAL P. GILMORE, State Treasurer.

Penobscot. Opinion June 6, 1912.

Assessment. Benefits. Constitutional Law. Contribution. Common School Fund. Distribution. Local Taxation for School Purposes.

1. That the method of levying the tax cannot be assailed. Section 8 of Art. IX of the State Constitution, which requires that "all taxes upon real or personal estate, assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof," is fully met. No property escapes, no locality escapes, and the rate is uniform. There is no discrimination.
2. That as a matter of fact the Legislature has made more generous provision for the education of children in unorganized townships than in incorporated places, as each scholar on the average in the townships received for the year ending April 1, 1911, $19 for school purposes, while the amount per scholar throughout the State averaged only $2.52.
3. That the fact that this common school fund is distributed to the towns one-third according to number of scholars and two-thirds according to valuation, instead of all according to number of scholars, does not of itself render the act unconstitutional. Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare.
4. The particular method of distribution rests in the wise discretion and sound judgment of the Legislature. The Constitution provides no regulation in this matter and it is not for the court to say that one method should be adopted in preference to another. We are not to substitute our judgment for that of a coördinate branch of the government working within its constitutional limits.
5. That there is no force in the contention that because the town receives back from the State two-thirds of what it has paid to the State, therefore it can relieve itself from local taxation for other purposes than schools, and can devote the proceeds, when received, to the support of paupers, or the maintenance of roads, or the running expenses of the town, thereby making the unorganized townships contribute toward these local charges.

6. That section 6 permitting sums received from the State under this distribution "to be deemed to be raised by the municipalities within the meaning of R. S., c. 15, sec. 13, as amended" does not render the act unconstitutional as being in violation of Art. VIII of the State Constitution.
7. Article VIII imposes upon the Legislature the duty to require towns to make "suitable" provision for common schools at their own expense, but the Legislature alone is clothed with power to determine what is suitable and is thereby given a wide discretion, as the term "suitable" is elastic and varying, dependent upon the necessities of changing times.

In equity. On report. Bill dismissed.

Bill in equity brought by Herbert J. Sawyer of Mattamiscontis, an unorganized township in the County of Penobscot to enjoin the defendant, and his successors in office, from collecting a tax assessed under the provisions of Chapter 177 of the Public Laws of 1909, entitled "An Act relating to the Common School Fund and the means of providing for and distributing the same." Bill dated July 27, 1910. An answer was filed by the defendant. By agreement the case was reported to the Law Court for determination.

The case is stated in the opinion.

Louis C. Stearns, Taber D. Bailey, and Louis C. Stearns, Jr., for plaintiff.

Warren C. Philbrook, Attorney General, and *William R. Pattangall,* Attorney General, for defendant.

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

CORNISH, J. This bill in equity is brought to enjoin the Treasurer of State and his successors in office, from collecting a tax assessed under the provisions of Chapter 177 of the Public Laws of 1909, entitled, "An Act relating to the Common School Fund and the means of providing for and distributing the same." The plaintiff is a resident of Mattamiscontis, an unorganized township in the County of Penobscot. He is the owner of twelve lots of land in the township, and has one child of school age. The entire State tax assessed against these lots at the rate of five mills amounted to twenty-one dollars and fifty-one cents, three-tenths of which or six dollars and forty-five cents, was created by the act in

question. The amount involved in this suit is not large but the consequences are of vast importance.

The case comes up on report, and by stipulation, the only question raised and to be considered is the constitutionality of the chapter above referred to under the State and Federal Constitutions.

Chapter 177 of the Public Laws of 1909, the statute in question, reads as follows:

"Sec. 1. A tax of one and a half mills on a dollar shall annually be assessed upon all of the property in the state according to the valuation thereof and shall be known as the tax for the support of common schools.

"Sec. 2. This tax shall be assessed and collected in the same manner as other state taxes and shall be paid into the State Treasury and designated as the common school fund.

"Sec. 3. One third of this fund shall be distributed by the treasurer of state on the first day of January, annually, to the several cities, towns and plantations according to the number of scholars therein, as the same shall appear from the official returns made to the state superintendent of public schools for the preceding year, and the remaining two thirds of said fund shall be distributed by the treasurer of state on the first day of January, annually, to the several cities, towns and plantations, according to the valuation thereof as the same shall be fixed by the state assessors for the preceding year.

"Sec. 4. All of the said fund not distributed or expended during the financial year shall at its close be added to the permanent school fund.

"Sec. 5. All moneys provided by towns or apportioned by the state for the support of common schools shall be expended for the maintenance of common schools, established and controlled by the towns by which said moneys are provided, or to which said moneys are apportioned.

"Sec. 6. Sums received by any city, town or plantation from the distribution provided by section three shall be deemed to be raised by such city, town or plantation within the meaning of revised statutes, chapter fifteen, section thirteen, as amended.

"Sec. 7. The passage of this act shall in no wise affect the provisions of sections one hundred and twenty-four, one hundred and twenty-five, one hundred and twenty-six and one hundred and

twenty seven of chapter fifteen of the revised statutes, or of section two of chapter one hundred and eleven of the Public Laws of 1907."

It is contended that this statute violates section 8 of Article IX of the State Constitution, which reads: "All taxes upon real or personal estate assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof;" Article VIII providing that "the Legislature are authorized and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools" and the fourteenth amendment of the Federal Constitution, declaring that "No State shall deny to any person within its jurisdiction the equal protection of the laws."

Before entering upon a consideration of the constitutional questions thus raised, it may be useful to take a brief survey of the laws in force at the time this statute was enacted, pertaining to the raising and distribution of money for the common schools of the State.

These schools have received their support from two distinct sources, State aid and direct municipal taxation, the former passing through the State treasury to the treasuries of the several municipalities and the latter through the municipal treasuries alone.

State Aid.

The State aid, since 1872, when the first so-called mill tax was created, has itself been derived from three sources.

First. From the income of the "Permanent School Fund" so called, a fund created by the sale of wild lands appropriated by the State in former years for the support of schools, amounting at the present time to about one-half a million dollars, and on this principal the State pays interest at the rate of six per cent. R. S., Ch. 15, Sec. 122.

Second. From one-half of the State tax on Savings Banks and Trust Companies, R. S., Ch. 15, Sec. 122.

Third. From the school mill tax so called, derived from assessing all the property in the State situated in cities, towns, plantations and unorganized townships, at the rate of one mill on the dollar from 1872 to 1907, and since 1907 at the rate of one and one-half mills. R. S., Ch. 15, Sec. 124, Pub. Laws 1907, Ch. 111.

This school mill fund is distributed by the Treasurer of State to the several cities, towns and plantations, according to the number of scholars therein.

The Legislature of 1909 created by the act in question, Chap. 177, an additional revenue by imposing a further State tax of one and one-half mills upon all of the property in the several cities, towns, plantations and unorganized townships of the State at the rate of one and one-half mills on the dollar, this fund to be known as the Common School Fund and to be distributed by the State Treasurer to the several cities, towns and plantations of the State, one-third according to the number of scholars therein and two-thirds according to the valuation. The support of common schools on the part of the State under the present plan is therefore derived from (1) the Permanent School Fund, (2) the Savings Bank and Trust Company tax, (3) the School and Mill Fund and (4) the Common School Fund. It is this last which is under consideration here.

Municipal Aid.

The several cities, towns and plantations have in addition been compelled by the Legislature to assist in the maintenance of common schools by municipal taxation. The amount thus required has varied from time to time. In 1821, it was fixed at forty cents per capita, inclusive of the income of any incorporated school fund, Stat. 1821, Ch. 117, Sec. 1; changed in 1832 to forty cents, exclusive of State income or of any State aid, Pub. Laws 1832, Ch. 39; sixty cents, exclusive, as in R. S. 1857, Ch. 11, Sec. 5; changed to one dollar, exclusive, by Pub. Laws 1868, Ch. 196; eighty cents exclusive of such income, State aid and of the mill tax, from 1872 to 1907, Pub. Laws 1872, Ch. 56, R. S. 1903, Ch. 15, Sec. 13; fifty-five cents, exclusive from 1907 to 1909, Pub. Laws 1907, Chap. 111; and since January 1, 1910, eighty cents "exclusive of the income of any corporate school fund, or of any grant from the revenue or fund from the State or of any voluntary donation, devise or bequest," Pub. Laws 1909, Chap. 128, but inclusive of any sums received from the distribution of the Common School Fund created by the act now under consideration. Pub. Laws 1909, Ch. 177, Sec. 6.

It is perhaps unnecessary to add that it has always been and still is within the power of the municipalities to voluntarily raise

by taxation such amounts in addition to the required per capita tax as they may deem necessary and proper. *Cushing* v. *Newburyport,* 10 Met., 508; *Piper* v. *Moulton,* 72 Maine, 155-166.

Let us now take up the constitutional questions involved in this case and consider what the plaintiff deems the vulnerable points in the act in question. We will discuss them seriatim.

It is not contended that the manner in which this tax is assessed violates any constitutional provision. Section 8 of Art. IX of the State Constitution requires that "All taxes upon real or personal estate, assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof." The act under consideration meets this requirement fully. The assessment is laid upon all the property both real and personal throughout the State, in all the cities, towns, plantations and unorganized townships. No property escapes. No locality escapes. All the property is assessed by the State Board of Assessors at its just valuation and a uniform rate of taxation, one and one-half mills, is laid upon all classes of property. No such objection can be raised to the mode of assessment here as in the statute considered in the Opinion of Justices, 97 Maine, 595, where a discrimination was made between land in incorporated and in unincorporated places. Here there is no discrimination. The apportionment and assessment are equal throughout the State.

Objections, however, are raised to the manner of distribution, and the plaintiff contends that in considering the constitutionality of a statute creating revenue by taxation, the method of distribution as well as of assessment should be scrutinized.

1. The first objection is that this act imposes an unequal burden of taxation upon the unorganized townships of the State, because while the fund is created by the taxation of all the property in such townships as well as upon the property in the cities, towns and plantations, no provision is made for the distribution of any part thereof to such townships, but it is all apportioned among the cities, towns and plantations. The townships are omitted. In other words, while four subdivisions of the State are made to contribute to the fund, only three are permitted to share in the financial benefits.

This objection, however, is without legal foundation. The Legislature has the right under the constitution to impose an equal rate

of taxation upon all the property in the State, including the property in unorganized townships, for the purpose of distributing the proceeds thereof among the cities, towns and plantations for common school purposes, and the mere fact that the tax is assessed upon the property in four municipal subdivisions and distributed among three, is not in itself fatal.

Doubt arose as to the constitutionality of the original School Mill Act, Ch. 43, of the Public Laws of 1872, which was the first in this State to impose a general tax upon all the property in the State and devote the proceeds to the maintenance of the common schools. Accordingly in 1876, the House of Representatives asked the Justices of the Supreme Judicial Court whether the Legislature has the power under the Constitution of the State to assess a general tax upon the property of the entire State, for the purposes of distribution for the support of the common schools. The Justices answered unanimously in the affirmative. Opinions of the Justices, 68 Maine, 582.

Ample ground for the exercise of this legislative power was found in the constitutional provision that "A general diffusion of the advantages of education are essential to the preservation of the rights and liberties of the people," Art. VIII, and in the "full power" conferred upon the Legislature "to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State," Art. IV, part 3, Sec. 1. The existence of the power being granted, of the necessity of its exercise, the Legislature must be and is the sole judge. The broad ground upon which the validity of the act was upheld is stated in these words: "The tax in question is like that for the support of government. It is for the benefit of the whole people. All the property in the State is assessed according to its valuation. All contribute thereto in proportion to their means. It is a tax for a public purpose, not one by which one individual is taxed for the special and peculiar benefit of another. All enjoy the beneficial results of education, and the better order and government arising therefrom, irrespective of the amounts respectively contributed by each to these most important objects." While it is true that the opinions of Justices given at the request of either Branch of the Legislature or of the Executive, do not have the binding force of decisions in adjudicated cases,

(95 Maine, 566, 573) yet they carry weight in proportion to the reasons upon which they are based.

The Justices in considering the mill tax did not in detail discuss the discrimination against unorganized townships, which share in the contribution but not in the distribution, but that question was necessarily involved in their opinion, because in this respect the Acts of 1872 and of 1909 are identical, and the language quoted above meets and answers it fully. The fundamental question is this, is the purpose for which the tax is assessed a public purpose, not whether any portion of it may find its way back again to the pocket of the tax payer or to the direct advantage of himself or family. Were the latter the test, the childless man would be exempt from the support of schools and the sane and well from the support of hospitals. In order that taxation may be equal and uniform in the constitutional sense, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree nor that each one of the people should participate in each particular benefit. Laws must be general in their character and the benefits must affect different people differently. This is due to difference in situation. As was said in the State Railroad Tax Cases, 92 U. S., 575-612, "perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation is a dream unrealized." But the law recognizes a broader and more unselfish test than this. In a Republic like ours each must contribute for the common good, and the benefits are received not directly in dollars and cents, but indirectly in a wider diffusion of knowledge, in better homes, saner laws, more efficient administration of justice, higher social order and deeper civic righteousness.

This is the legal and constitutional answer to the plaintiff's claim of inequality but in this connection it should not be overlooked that the Legislature has in fact made wise and generous provision for the education of children in the unorganized townships, more generous in fact than in the case of children in incorporated places. The very fact that these townships have no municipal organization precludes a distribution to them of any share in the school fund by the same method that distribution is made to cities, towns and plantations. The municipal machinery therefor, is lacking. Accordingly by R. S., Ch. 15, Section 94, as amended by Chap. 87 of the

Laws of 1909, the State either maintains a school for twenty-six weeks in the year in every unorganized township in which there is more than one child of school age, or provides for sending the children to schools in adjoining towns or plantations, on condition that the inhabitants of the township pay to the State, a sum equal to forty cents for each inhabitant. The expense of educating the children in such townships in excess of the per capita tax of forty cents and of the interest on the reserve school fund in the township, is all borne by the State by appropriations from the annual school funds of the State, which include the mill tax fund and the common school fund.

And these appropriations from the annual school funds for use in the township schools have increased as the State funds for school purposes have increased. In 1899 it was $1500, Pub. L. 1899, Ch. 89, increased to $2500 by Pub. L. 1901, Ch. 206, to $5000 by Pub. L. 1903, Ch. 128, to $7000 by Pub. L. 1905, Ch. 45, to $15,000 by Pub. L. 1909, Ch. 87, and to $18,000 by Pub. L. 1911, Ch. 29.

So that when the Legislature of 1909 by the enactment of Chap. 117, practically increased the State tax for school purposes from one and one-half mills to three mills, and doubled the rate on these unorganized townships, it, at the same session by Chap. 87, increased the appropriation for the township schools from $7000 to $15,000, a little more than the same ratio of increase would require. It might be added that each of the three school children in the township of Mattamiscontis in the year ending April 1, 1911, received an expenditure of $53.58 and each scholar on the average in all the unorganized townships of the State received $19.00 for school purposes while the amount per scholar throughout the State averaged only $2.52. The 948 children of school age in the unorganized townships received on the average about eight times as much as the 214,960 children in the cities, towns and plantations.

In this view of the situation it is evident that the passage of the common school fund act of 1909 in fact works neither inequality nor injustice so far as the education of children in the unorganized townships is concerned, and when the Legislature doubled the amount of the school tax which the land of the plaintiff was to pay, it at the same time more than doubled the proportional part of the State fund which could be used for the education of his children.

So much for the first contention as to inequality between taxes paid and benefits received.

2. But the plaintiff further attacks the method of distribution as unconstitutional because it is made, not according to the number of scholars, as is the school mill fund, but one-third according to the number of scholars and two-thirds according to valuation, thus benefiting the cities, and richer towns more than the poorer.

But that result, is not the test of constitutionality. Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare. The method of distributing the proceeds of such a tax rests in the wise discretion and sound judgment, of the Legislature. If this discretion is unwisely exercised, the remedy is with the people and not with the court. Such distribution might be according to population, or according to the number of scholars of school age, or according to school attendance, or according to valuation, or partly on one basis and partly on another. The Constitution prescribes no regulation in regard to this matter and it is not for the court to say that one method should be adopted in preference to another. We are not to substitute our judgment for that of a coördinate branch of the government working within its constitutional limits. The distribution of the school mill fund of 1872 has resulted in inequality. That distribution has been, and continues to be, based on the number of scholars, thereby benefiting the poorer towns more than the richer, because they receive more than they pay, and in the opinion of the Justices before cited, that method is deemed constitutional. The act under consideration apportions the newly created common school fund one-third according to the number of scholars and two-thirds according to the valuation as fixed by the State Assessors, thereby benefiting the richer towns more than the poorer, producing inequality in the other direction, but we are unable to see why this method is not equally constitutional with the other. Both taxes are assessed for the same admittedly public purpose, both promote the common welfare, and the fact that the Legislature has seen fit to distribute the two on different bases is not fatal to the validity of either. It may be that the two methods taken together produce a more equal distribution than either operating alone. In any event, the Legislature has adopted both methods and both must stand or fall together.

3. Nor is there any force in the contention that because the town receives back from the State practically two-thirds of what it has paid to the State, therefore it can relieve itself from local taxation for other purposes than schools, and can devote the proceeds, when received, to the support of paupers, or the maintenance of roads or the running expenses of the town, thereby making the unorganized townships contribute towards these local charges. This is a groundless fear. The very terms of the act prohibit it. Section 5 provides that "all moneys provided by towns or apportioned by the State for the support of common schools, shall be expended for the maintenance of common schools, established and controlled by the towns by which said moneys are provided or to which said moneys are apportioned." It is not for the court to say that this express and mandatory clause will be deliberately nullified or evaded by the towns. This money is raised for a particular purpose, collected by the State for that purpose, paid over to the towns for that purpose with a specific injunction that it shall be used for that and nothing else. Who has the right to say that that injunction will be violated?

4. But the constitutionality of this act is assailed on another ground and that is that Section 6 permits sums received from the State under this distribution "to be deemed to be raised by the municipalities within the meaning of R. S., Ch. 15, Sec. 13, as amended," thereby relieving them pro tanto from raising by municipal taxation for school purposes the not less than eighty cents for each inhabitant required by R. S., Ch. 15, Sec. 13, as amended by Pub. Laws of 1900, Ch. 128.

In this respect this common school fund act of 1909, differs from the school mill act of 1872. The act of 1872 does not afford such relief because the towns are still required to raise their eighty cents per capita tax, and the amount received by the towns from the mill fund is additional thereto. But the act of 1909 permits the amounts apportioned thereunder by the State to the several towns to be applied towards the per capita tax, so that under this act some towns are wholly and others partially relieved from such local taxation. This, it is claimed, contravenes Art. VIII of the State Constitution which reads:

"A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people,

to promote this important object, the Legislature are authorized and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of the public schools," etc.

What is the fair construction of this clause? What force has it as a part of the organic law of the State?

It is but the restatement of a fundamental and familiar principle to say that the sovereign power is lodged in the people and that the Constitution, framed and adopted by the people, divides the powers of government into three distinct and yet coördinate departments, executive, judicial and legislative. But it is not always borne in mind that the Constitution operates differently with respect to these different branches. The authority of the executive and judicial departments is a grant. These departments can exercise only the powers enumerated in and conferred upon them by the Constitution and such as are necessarily implied therefrom. The powers of the Legislature in matters of legislation, broadly speaking are absolute, except as restricted and limited by the Constitution. As to the executive, and judiciary, the Constitution measures the extent of their authority, as to the Legislature it measures the limitations upon its authority. *Field* v. *The People,* 2 Scam. (Ill.), 79-81; Cooley, Const. Lim. 6th Ed. p. 104 and cases cited.

"It has never been questioned, so far as I know, says Redfield, C. J., in *Thorpe* v. *R. R. Co.,* 27 Vt., 140, "that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. This must be conceded, I think to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must of course possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question."

It follows therefore that a legislative act is to be held constitutional unless a positive restriction or limitation or prohibition can be found in the Constitution which renders it invalid. No such limitation or prohibition in regard to the maintenance of the common schools can be found. The argument for unconstitutionality

on this ground is this, that Art. VIII, before referred to makes it the duty of the Legislature to require the several towns to raise a suitable sum by local taxation for the support of common schools; that acting under that provision, the Legislature from the organization of the State to the present time has fixed the amount at a per capita rate, varying at different times between forty cents and one dollar as we have before seen, that the practical effect of this act under consideration is to relieve some towns altogether from such local taxation and therefore to pro tanto repeal R. S., Ch. 15, Sec. 13, and to nullify the constitutional provision. The mathematical result claimed undoubtedly exists. According to the annual report of the State Superintendent of Schools, fourteen of the cities, towns and plantations in this State in the year ending April 1, 1911, raised nothing locally under the 80c. per capita statute, the amount received from the State being sufficient to meet the amount so required of them and it being "deemed to be raised" under Chap. 15, Sec. 13, they avoided the local taxation completely. From the same report it appears that other towns profited so largely by the act that the per capita assessment was reduced from eighty cents to a very small figure, so that of the total amount of $1,184,439.60 required to be raised by all the cities, towns and plantations, under R. S., Ch. 15, Sec. 13, $542,802 was in fact raised by local taxation, and $642,378.69, or more than one-half, was contributed by the State under Chap. 177 of the Laws of 1899. The practical effect is undoubtedly as contended, and this result may well arrest the attention of the Legislature upon whom rests the responsibility.

But no limitation or prohibition of the Constitution has been violated. Art. VIII "is mandatory not prohibitory." 68 Maine, 583. It imposes the most solemn duties upon the Legislature and for obvious reasons. No subject was dearer to the hearts of the framers of our Constitution than that of education, recognizing as they did that it lies at the very foundation of good government. It was for that reason that they inserted this provision in the organic law of the State. They in terms expressed the broad and full powers which should be exercised in dealing with this subject and sought to impress upon the Legislature its high duty to avail itself of these powers. Not only could the Legislature enact laws providing for a general assessment under the public benefit clause, but in order that the towns, which were always jealous of their

rights, might assist, the power was lodged with the Legislature to require the towns to make suitable provision at their own expense. It is an historical fact that in the early days the towns had frequently neglected to make such provision and therefore the framers of the Constitution left no room to doubt that the Legislature should have the power to require them to do their duty to the end that the children and youth of the State should be properly educated. But the provision is nothing more than mandatory. "It shall be the duty of the Legislature to require the towns to make suitable provision." Suppose after the Constitution was adopted the Legislature had failed to pass any such act, what would be the remedy? None certainly in the court. It might be deemed a failure of duty but the court could not correct it. "The Legislature is in duty bound to perform all duties imposed upon it by the Constitution, but if it fails to do so and neglects or refuses to pass legislation as required by a mandatory constitutional provision, there is no remedy." 8 Cyc. Const. Law, p. 762, In re State Census, 6 So. Dak., 540, 62 N. W., 129. "The 15th section of the schedule to the Constitution declares, that 'the General Assembly shall pass all such laws as may be necessary to carry this Constitution into full effect.' There is no way of enforcing this injunction on the Legislature. Under our system of government there is no power to compel the legislative department of government to make laws. Constitutions may restrict legislative powers, and declare what laws shall not be valid; but, from the very nature of legislative power, its exercise in a particular case must depend upon the volition of the Legislature. Responsibility to a constituency, and a sense of public duty, are the only incentives which can prompt legislative action." *St. Jos. Board* v. *Patten*, 62 Mo., 444-448.

The Constitution of Alabama adopted in 1819 declared that the "general assembly shall direct, by law, in what manner and in what courts, suits may be brought against the State." In accordance with that provision, statutes were enacted in 1820 and from time to time amended prescribing the courts and the mode of procedure. In 1865 the Constitution was amended to read, "Suits may be brought against the State in such courts as may by law be provided." It was held in Ex parte Alabama, 52 Ala., 231, 23 Am. Rep., 567, that the subsequent repeal of these statutes was constitutional and abated pending suits.

A case on all fours with that at bar is *Adams* v. *Howe,* 14 Mass., 340. In the Massachusetts Declaration of Rights it was declared "that the people have a right to invest their Legislatures with power to authorize and require, and the Legislature shall, from time to time authorize and require the several towns, parishes, precincts and other bodies corporate and politic and religious societies to make suitable provision at their own expense for the institution of the public worship of God and for the support and maintenance of public protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily." Provisions for ministerial and parish taxes were subsequently made by the Legislature in accordance with this mandate of the Constitution. But in 1811, what was afterwards known as the Religious Freedom act was passed whereby any person was exempted from the payment of a ministerial tax by filing with the proper town officers a certificate of membership in another society. The Constitutionality of this statute was attacked on the ground that its effect was to pro tanto repeal the statutes imposing ministerial taxes and therefore that it controverted the provision in the Declaration of Rights above quoted. Chief Justice Parker in delivering the opinion of the court answered this contention as follows: "That part of the declaration which enjoins it upon the Legislature to exact the support of religious institutions and attendance upon public worship is merely directory. If no law had been passed pursuant to it, there could be no penalty upon the citizen, for not obeying the clear expression of the public will; nor is there any way of coercing a Legislature, to carry into effect these important requisitions. So the mode also, of executing the will of the people, in this particular, is left entirely to the Legislature; and although laws may be passed, which have a contrary tendency, and which, in their consequences, may injure, instead of promoting, the public worship; yet the Legislature is to judge; and even their erroneous construction of the design of the people, as expressed in the said declaration, must have legal effect, so far as they are not manifestly repugnant to the principles of the Constitution."

The phrasing of Art. VIII in the Constitution of Maine seems almost to have been copied from this clause in the constitution of the mother state and the authority of this decision is the greater because rendered at a time (1817) not long after the Constitution

of Massachusetts had been adopted. It may with propriety be deemed the construction placed upon it by contemporaries. This act of 1811 came again under discussion by the Massachusetts Court in *Holbrook* v. *Holbrook,* 1 Pick., 248, and in the course of the opinion Judge Wilde says: "No such exemption seems to have been contemplated by the framers of the Constitution, who manifestly intended that every one should be held to contribute according to his ability to the support of public worship, upon the institution and maintenance of which the happiness of the people, and the good order and preservation of civil government so essentially depend. But there being no restraining clause in the Constitution, the Legislature in the plenitude of their power have in the second section provided for this exemption; and as it seems, on the condition only, that the person claiming it shall become a member of some religious society, and shall produce a certificate of his membership to be filed with the town clerk. This religious society may be composed of Christians, or of Jews, Mahometans, or Pagans. It is not required to support any teacher of piety, religion and morality; and the person claiming exemption is not obliged to attend public worship as the condition of this privilege."

The phraseology of Section VIII is in itself significant. In the first place only a "duty" is laid upon the Legislature. The Constitution does not even say that they shall require, but that they are "authorized" and it is "their duty to require" the several towns to provide for the support of common schools.

And in the second place the extent of the requirement is left wholly to the discretion of the Legislature, because their duty is to require the several towns to make "suitable" provision. Who is to determine what is suitable? Clearly the Legislature itself. "Suitable" is an elastic and varying term, dependent upon the necessities of changing times. What the Legislature might deem to be suitable and therefore necessary under some conditions, they might deem unnecessary under others. The amount which the towns ought to raise would depend largely upon the amounts available to them from other sources, and as these other sources increase the local sources can properly diminish.

Most significant too, in this connection is the fact that the first act passed by the Legislature in furtherance of the constitutional injunction, fixed the municipal tax as "a sum of money, *including*

the income of any incorporated school fund, not less than forty cents for each inhabitant." Stat. 1821, Ch. 117, Sec. 1. Under that Act, whatever was received from the income of any incorporated school fund was in effect "deemed to be raised" under that statute and reduced the amount required to be raised locally, and if such income were sufficient in any town to equal the per capita tax of forty cents, then the requirement for local taxation in that town ceased entirely. In this most important particular the act of 1821 and of 1909 are identical.

In the light therefore, of these decisions and in view of the language of the Constitution and of the first legislative act passed in accordance therewith, we have no hesitation in saying that although the Act of 1909 may relieve a few towns (at present only fourteen out of a total of about five hundred) from any local taxation whatever for public schools, that is a matter which may be considered by the Legislature in the performance of their duty but does not of itself, in the absence of any restrictive constitutional provision, render the act unconstitutional and void.

We have not overlooked a statement in the opinion of the Justices, 68 Maine, 583, that Art. VIII "is affirmative and not negative in its character. It, (the Legislature,) cannot constitutionally absolve the towns from making at their own expense suitable provision for this primary and indispensable foundation of all good government. The Legislature are by proper enactments to require the towns to make suitable provisions for the public schools and the towns are, at their own expense, to comply with those enactments. Neither can escape from the performance of their several and respective obligations." The question then before the court was the power of the Legislature to supplement local taxation by general taxation for this public purpose, and the precise question of the force of the constitutional mandate was not involved. We do not feel that the conclusions reached in this decision after mature deliberation should be modified because of these expressions in the opinions of the Justices which are in the nature of dicta in an unadjudicated case.

5. Another result of the application of the common school fund to the local tax is that all the towns are not now obliged to raise a uniform amount per capita, but it varies all the way along the line, from nothing up to eighty cents. In other words, the legis-

lative requirement operates differently in different towns and the inevitable result is to create automatically as it were, a varying and un-uniform rate in the various cities and towns of the State.

But the Legislature has this power. Towns are mere agencies of the State. They are purely creatures of the Legislature and their powers and duties are within its control. *Howe* v. *Water Co.*, 104 Maine, 225. Hence it lies in the power of the Legislature not merely to pass laws applicable to all towns but it may direct its attention to the need of a particular town and compel such town to raise money by taxation, provided the purpose be a public one, and the tax be apportioned and assessed equally within that town, and the town receive the benefit thereof.

For instance the Legislature has control of the highways and bridges of the State and it has the power to reach out and compel one or more towns to construct a certain piece of road or erect a certain bridge and require such town or towns to assess the property therein for the expense. *Waterville* v. *Co. Coms.*, 59 Maine, 80; Opinions of the Justices, 99 Maine, 515. This is clearly implied in the decision of *Dyer* v. *Farmington, VIII. Corp.*, 70 Maine, 515, where the reason that a tax assessed for a public purpose could not be held constitutional was that it was imposed upon only a portion of the real estate of a town leaving the remainder exempt.

In *State* v. *Board of Co. Coms.* of Shawnee Co., 28 Kans., 431, the question involved was the right of the Legislature to establish a State road and cast the cost thereof upon the county through which the road lay and that too without submitting the matter to the determination of the county commissioners or the people of the county. That learned jurist, Justice Brewer, then of the Supreme Court of Kansas, sustained the constitutionality of the act and after holding the purpose to be a public one defined the legislative power in these words: "And finally we remark that counties are purely the creation of State authority. They are political organizations, whose powers and duties are within the control of the Legislature. That body defines the limits of their power, and prescribes what they must and what they must not do. It may prescribe the amount of taxes which each shall levy, and to what public purpose each shall devote the moneys thus obtained. It may require one county to build a certain number of bridges at certain specified places, and of a particular size and quality. It may

require another to open roads in given localities, and another to build a court house and to levy a tax to a prescribed amount for the purpose of paying therefor. In short, as a general proposition, all the powers and duties of a county are subject to legislative control; and provided the purpose be a public one and a special benefit to the county it may direct the appropriation of the county funds therefor in such manner and to such amount as it shall deem best."

Following the same reasoning the same court in *Kansas* v. *Freeman,* 61 Kans., 90, 47 L. R. A., 67, declared constitutional a legislative act establishing a high school at Howard, Elk County, and requiring its maintenance by the people of the county. The court say: "If the obligations which the municipalities are required to assume and discharge are for institutions and necessities of purely public concern, and for which taxes may ordinarily be levied, the power of the Legislature in respect to them is supreme, and its determination, if reached by constitutional methods, is not subject to review. The matter of establishing schools is certainly a public purpose, and the case at bar falls within the cited case, with which decision we are entirely satisfied." Other cases in point are *Gordon* v. *Cornes,* 47 N. Y., 608, where a single town was compelled to raise taxes for the erection of school buildings for a State Normal School; *Merrick* v. *Amherst,* 12 Allen, 500, where the Supreme Court of Massachusetts held that the Legislature had power to pass a statute authorizing a town to raise money for an Agricultural College to be established therein by the commonwealth; *Hanscom* v. *Lowell,* 165 Mass., 419, where an act establishing a textile school in the city of Lowell was held constitutional on the same ground. The last case affords an excellent illustration of the exercise of this power. In large manufacturing centers like Lowell, the Legislature may deem a textile school a necessity. It therefore directs Lowell to maintain such a school by local taxation. In another city it may deem a night school necessary. If so, it has the power to require that city to maintain one. See also, as to the extent of the powers of the Legislature in directing the assessment of taxes for public purposes, Cooley on Taxation, 2nd Ed. p. 119, *Cushing* v. *Inhs. of Newburyport,* 10 Met., 511, *Freeland* v. *Hastings,* 10 Allen, 570, *Prince* v. *Crocker,*

166 Mass., 347, *School Dist.* v. *Prentiss,* 66 N. H., 145, *Call* v. *Chadbourne,* 46 Maine, 206.

It should be added that in all these states, whose decisions have been cited, the Legislature had no broader powers under their respective Constitutions than has our Legislature under the Constitution of Maine.

The power to impose a burden upon a particular town for a public purpose thus residing in the Legislature, the provisions of Sec. 8 of Art. IX of the Constitution as to equality of apportionment and assessment is fully complied with in the levy under consideration, because all the property in the particular town is assessed at a uniform rate for the support of the schools of that town, and the schools of that town receive all the benefits therefrom. So long as all the property in town A is assessed at the same rate for the maintenance of schools in town A, and all the property in town B, for the maintenance of schools in town B, the provision of the Constitution as to equality of taxation is not violated even though the local rate prescribed by the Legislature in town A differs from that prescribed in town B.

6. Finally, does this act violate the Fourteenth amendment of the Federal Constitution, which declares "Nor shall any State deny any person within its jurisdiction the equal protection of the laws?" A single word is sufficient on this branch of the case. The object of this amendment is to prohibit discriminatory legislation, as the hawkers and peddlers license law, Ch. 298 of the Pub. Laws of 1889, *State* v. *Montgomery,* 94 Maine, 192, Same, Ch. 277 of Pub. Laws of 1901, *State* v. *Mitchell,* 97 Maine, 66. But if all persons subjected to the law in question are treated alike, under like circumstances and conditions both in the privileges conferred and in the liabilities imposed, there is no violation of this amendment. *Leavitt* v. *Ry. Co.,* 90 Maine, 153; *State* v. *Leavitt,* 105 Maine, 76. "The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways." *Bells Gap R. R.* v. *Pennsylvania,* 134 U. S., 232.

Our conclusion therefore is that Chap. 177 of the Pub. Laws of 1909, violates neither the State nor the Federal Constitution, and the entry must therefore be,

Bill dismissed with costs.

JOSEPH TURGEON *vs.* HARRY E. BEAN.

York. Opinion June 6, 1912.

Arrest. Civil Arrest. Bankruptcy. Exemptions.

Action on the case for false imprisonment. The plaintiff was arrested on July 16, 1910, on a process issued by a disclosure commissioner upon an execution in favor of the defendant on a debt provable and dischargeable in bankruptcy, and was committed to jail. On July 18, 1910, upon his own petition, he was duly adjudicated a bankrupt, but the record does not show that he has ever obtained his discharge. He was held in jail until November 24, 1910, when he was released by the United States District Court upon habeas corpus proceedings. It is admitted that the arrest and commitment of July 16, 1910, and his detention until July 18, 1910, when his petition in bankruptcy was filed, were legal, but the plaintiff contends that his detention after that time was illegal.

1. That as a matter of statutory construed Section 9 of the Bankruptcy Act of 1898 which provides that a bankrupt shall be exempt from arrest upon civil process should be constructed to mean exemption from arrest made after bankruptcy petition is filed and does not apply to an arrest on civil process properly made before the filing of the petition.
2. That in this case, however, the plaintiff having been granted his release by a court of competent jurisdiction, the question is res judicata, and the liability of the defendant has become fixed.

On report. Judgment for plaintiff.

Action on the case to recover damages for an alleged false imprisonment of the plaintiff in the common jail at Alfred in the County of York. Plea, the general issue with a brief statement alleging in substance that the plaintiff was arrested and committed to jail on a process issued by a disclosure commissioner upon an execution in favor of the defendant. At the conclusion of the evidence, it was agreed that the question of liability should be determined by the Law Court on report of the evidence, and that a special finding as to damages in case of liability be submitted to

the jury. A special finding was then rendered by the jury assessing damages in favor of the plaintiff in the sum of $298. It was then agreed that if the Law Court held that the defendant was liable that judgment should be for the plaintiff for $298 and costs; otherwise judgment should be for the defendant.

Cleaves, Waterhouse & Emery, and Ruggles S. Higgins, for plaintiff.

Louis B. Lausier, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

CORNISH, J. This is an action on the case for false imprisonment. The plaintiff was arrested on July 16, 1910, on a process issued by a disclosure commissioner upon an execution in favor of the defendant on a debt provable and dischargable in bankruptcy, and was committed to jail. On July 18, 1910, upon his own petition, he was duly adjudicated a bankrupt, but the record does not show that he has ever obtained his discharge. He was held in jail, the defendant paying the necessary charges therefor, until November 24, 1910, when he was released by the United States District Court upon habeas corpus proceedings brought by himself. *Turgeon* v. *Emery,* 182 Fed., 1016. This suit followed. It is admitted that the arrest and commitment of July 16, 1910, and his detention until July 18, 1910, when his petition in bankruptcy was filed, were legal, but the plaintiff contends that his detention after that time was illegal. This raises the question whether mere adjudication in bankruptcy entitles a bankrupt to release from arrest made upon a provable and dischargeable claim prior to the filing of petition, and that is a question of statutory construction.

Were this question open in this case we would have no hesitation in holding that mere adjudication in bankruptcy does not ipso facto, entitle the bankrupt to release under such circumstances.

The obvious purpose of the bankrupt law, speaking in general terms, is the uniform and equal distribution of a bankrupt's assets among his creditors. Its benefits are two fold; on the one hand the creditors share equally in the payment or partial payment of their claims, except so far as matured liens and certain preferences are

concerned, and on the other, the debtor, in the absence of fraud, is relieved from the harassment of obligations that he cannot meet.

Under the Constitution and Laws of the United States, the Federal Courts are given exclusive powers in matters of bankruptcy and in the enforcement of these powers their jurisdiction is supreme. These powers, however, are statutory in their origin, and an interference with the processes of the State courts is not to be presumed. As Judge Story said: "Certainly the Courts of the United States have no authority to intermeddle with State process, except in cases, where, either expressly or by necessary implication, such an authority is given by law. The State Sovereignty is supreme within its own sphere; and the process thereof must have full effect and operation until displaced by some other Constitutional authority, which controls or qualifies it." In re Cheney, Fed. Cas. No. 2636.

A decree in bankruptcy affects the bankrupt's property but not his person, it dissolves attachments made within a certain prescribed time and vests in the assignee or trustee all the bankrupt's property not exempt. An arrest on execution creates neither an attachment nor a lien. It simply affords the creditor a possible method of obtaining payment, but all the unexempted property passes from the bankrupt debtor whether he is under arrest or not.

Under the Bankruptcy Act of 1841, which contained no provision as to immunity form arrest during the pendency of proceedings, the court uniformly refused to grant a release on habeas corpus to a bankrupt who had been arrested before petition filed, but had not obtained his discharge. In re Hoskins, 12 Fed Cas. No. 6712, Ex parte Rank. 20 Fed. Cas. No. 11566, In re Comstock, 6 Fed. Cas. No. 3073, In re Cheney, 5 Fed. Cas. No. 2636. Judge Story in the case last cited in a characteristically able and exhaustive opinion, met and answered all the contentions raised in favor of the petitioner, and upon the legal effect of merely filing a petition in bankruptcy said: "Now upon what ground can it be said, in this case, that the bankrupt has a clear title to be released from imprisonment? He has not as yet obtained any certificate of discharge from the debt, or his other debts. Non constat, that he ever will obtain such a certificate. If he never does obtain it, he must still remain liable for the debt, and be bound by the execution to

satisfy it. How then can he now be entitled to be discharged from imprisonment under the execution, since the debt is not satisfied and discharged, and it rests in contingency, whether it ever will be by any proceedings under the bankruptcy." This decision is cited with approval in *Craggin* v. *Bailey,* 23 Maine, 104.

The Bankruptcy Act of 1867 provided that "No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." Sec. 26.

The Federal Courts in a long line of decisions have held in the most emphatic language that this section did not relieve from arrest one who was legally in custody upon civil process at the time the petition in bankruptcy was filed. In re Walker, 1 Lowell, 222, 17 Fed. Cas. No. 9642; *Hazelton* v. *Valentine,* 1 Lowell, 270, 11 Fed. Cas. No. 6287; *Minan* v. *Van Nostrand,* Dist. Ct., 1 Lowell, 458, 17 Fed. Cas. 9642; *Same* v. *Same,* (Circuit Ct.), 1 Holmes, 251; See also *Brandon Nat. Bank* v. *Hatch,* 57 N. H., 401; *Stockwell* v. *Silloway,* 100 Mass., 287; *Hussey* v. *Danforth,* 77 Maine, 17.

The Bankruptcy Act of 1898, Sec. 9, provides that "A bankrupt shall be exempt from arrest upon civil process, except," etc. We are unable to discover any essential difference between this section and section 26 of the Act of 1867 before referred to. Both are designed to cover the same situation, that is, immunity from arrest made after petition filed. In one case the prohibition is expressed affirmatively, in the other negatively, but the meaning of both is the same. So too, General Order No. 27, established by the U. S. Supreme Court in connection with the Act of 1867, covers the same ground as No. 30, 89 Fed. Rep. XII, in connection with the Act of 1898. Both provide for the production of the bankrupt upon habeas corpus before the court to facilitate the bankruptcy proceedings, and his restoration to custody, if arrested before proceedings begun, and his release if arrested after, upon a provable and dischargable debt.

Moreover, in construing the Act of 1898, no little weight should be given to the fact that the exemption from arrest clause in the Act of 1867, was frequently and clearly interpreted by the courts to be confined to subsequent arrests, and when this clause was

placed in the Act of 1898 in substantially the same language, Congress must be presumed to have intended to adopt the former language as interpreted by the court. Had it wished to extend it beyond the limit already placed upon that section, and to release the bankrupt from detention as well as arrest, it should have expressed itself in clear and unmistakable terms leaving nothing to inference. In other words, the Act of 1898 is to be construed in the light of the Act of 1867 plus the decisions thereunder.

In the first case arising under the Act of 1898, In re Claiborne, (Dist. Ct. N. Y. 1901) 109 Fed. 74, Section 9, was construed as had been section 26 of the Act of 1867, and following the decisions before cited, Judge Browne refused the petitioning bankrupt a discharge from custody. In the second case, *People Ex Rel. Taranto* v. *Erlanger,* (Dist. Ct. N. Y. 1904) 132 Fed. 883, the opposite view was taken by Judge Holt and the debtor was discharged. The opinion seeks to find a distinction between the two sections and is based upon the idea that detention under an arrest made prior to bankruptcy is equivalent to an actual arrest made subsequent thereto. This definition of the term "arrest" is not only novel, but is in conflict with the interpretation of the word as given by text writers and courts. Bouvier Law Dic. "Arrest." Jacobs Law Dic. "Arrest" Words and Phrases, Vol. 1, p. 501, *French* v. *Bancroft,* 1 Met., 502. To give section 9 the interpretation contended for would make it read, "A bankrupt shall be exempt from arrest upon civil process made after bankruptcy proceedings begun, and from detention under arrest on such process made prior thereto." This is further than Congress has ever seen fit to go and this result seems to be reached by the court in the Taranto case by judicial legislation rather than by judicial construction.

The third case, was that out of which the case at bar arose. *Turgeon* v. *Emery,* (Dist. Ct. Maine 1910) 182 Fed. 1016, where the court, without discussing the question, accepted the Taranto decision in preference to the Claiborne, saying, "I am constrained to believe this decision follows the spirit and meaning of the bankrupt law and should be followed. I make this decision with some hesitation after so eminent an authority as Judge Addison Browne in the Claiborne case, has given a different construction of section 9 of the Bankrupt Act, taken in connection with General Order 30."

Upon the fundamental legal proposition therefore the Federal Courts are at variance, but upon both reason and authority we think the construction placed upon the statute in the Claiborne case is the sound one and that the discharge under such circumstances should be refused.

It is for that reason that we have devoted more space to this question than the situation would otherwise warrant, because, whatever our view upon this point as an academic legal proposition, we feel that in the case at bar it is res judicata, a court of competent jurisdiction, with the same parties before it having in fact granted a discharge to this plaintiff. *Turgeon* v. *Emery,* 182 Fed. 1016, supra. By that decision this court feels itself bound in these proceedings.

"It is an elementary principle of high importance in the administration of justice that the judgment or decree of a court of competent jurisdiction is final, as to the subject matter determined and that it cannot be opened before any court of concurrent jurisdiction." *Emery* v. *Goodwin,* 13 Maine, 14. "It may also be laid down as a general principle that a prior decision is conclusive upon all matters and issues which were in fact there tried and decided in all subsequent litigation between the same parties or their privies, even in a suit which is not for the same cause of action." *Corey* v. *Independent Ice Co.,* 106 Maine, 485, and cases cited. The case at bar falls within these elementary principles. The issue in the District Court was the legality of Turgeon's detention in jail. Notice of the hearing was served on the creditor, Bean and on his attorney of record, by order of court and the counsel was present at the hearing and resisted the discharge. No appeal was taken from the decision although appeal would lie. Under these circumstances the question of illegal restraint is res judicata. It was determined by a court of competent jurisdiction after due notice to all parties in interest and the proceedings were regular. By that determination no appeal being taken the defendant must abide. It is true that in habeas corpus proceedings, the doctrine of res judicata at common law does not apply in so far as a refusal to discharge no one writ is no bar to the issuance of a new writ. Ex parte Partington, 13 M. & W., 679; *Cox* v. *Hakes,* 15 App. Cas. 506; *Bradley* v. *Beetle,* 153 Mass., 154. But it is equally true that a discharge of a prisoner stands on a different footing and that it constitutes a determination

that at the time he was improperly restrained and cannot be rearrested without some new circumstance to authorize the arrest which did not exist when the discharge was granted. 21 Cyc. p. 349. McConologues case, 107 Mass., 154, 171.

In *Castor* v. *Bates,* 87 Mich., 285, 86 N. W., 811, this precise question arose and it was held that judgment for the plaintiff in habeas corpus proceedings in which the person causing the arrest appeared and was heard is res judicata in an action by such plaintiff against such person for false imprisonment.

The liability of the defendant having therefore been already determined, final judgment must be rendered for the plaintiff in the sum of two hundred and ninety-eight dollars and costs in accordance with the special finding of the jury on the question of damages.

So Ordered.

THE AMERICAN AGRICULTURAL CHEMICAL COMPANY

vs.

JOHN A. ELLSWORTH et als.

Franklin. Opinion June 6, 1912.

Guaranty. Construction. Continuing Guaranty. Requisites. Acceptance. Notice.

The plaintiff appointed in writing one Berry, its agent for the sale on commission of its fertilizers. Berry by the same writing agreed to make at a time stated full settlement in cash for all sales made by him. On the back of the writing was written a guaranty, which was signed by the defendants, by which they guaranteed "the faithful performance by Berry of all and singular the obligations, of the within agreement on his part to be kept so long as the agency shall be continued." The contract of agency itself provided that it should "not be in force until accepted by the Home Office," which was in New York. No sufficient notice of acceptance of the contract, or guaranty, was given until eleven months after the date of the guaranty, and ten or eleven months after Berry received the fertilizer which he sold, and several months after he had received and appropriated to his own use the proceeds of the sales. In a suit upon the guaranty, *held:*

1. That the guaranty was a continuing one.
2. That in the case of such a continuing guaranty, for debts to be created, and uncertain in their amount, the guarantor is not liable unless the guaranty is accepted, and notice of the acceptance is given to the guarantor within a reasonable time.
3. That in this case the notice of acceptance was not given to the guarantors within a reasonable time.
4. That the facts in the case do not bring it within the exceptions to the general rule requiring notice of acceptance of a continuing guaranty, namely, that the consideration of the guaranty was a valuable one, moving directly or indirectly to the guarantor from the creditor, or that the guaranty was made at the request of the creditor, or that it was contemporaneous with the contract guaranteed.

On report. Judgment for defendants.

Action of assumpsit on a written contract of guaranty to recover the sum of $1812.20. 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.

Frank W. Butler, for plaintiff.

Joseph C. Holman and D. R. Ross, for defendants.

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

SAVAGE, J. This case comes before the court on report. The plaintiff, on March 11, 1909, appointed in writing one George E. Berry as its agent for the sale on commission of its fertilizers in Salem, Maine, and vicinity. By the same writing, Berry agreed to make at a time stated full settlement in cash for all sales made by him of plaintiff's goods consigned to him. On the back of the writing, and under the same date, was written a guaranty, signed by the defendants. The material part of the guaranty, so far as necessary now to state it, was as follows:—"In consideration of the sum of one dollar to me in hand paid by the American Agricultural Chemical Company . . . I do hereby guarantee the faithful performance by George E. Berry of all and singular the obligations of the within agreement on his part to be kept and performed and all renewals and extensions thereof, so long as said agency shall be

continued." Fertilizers were consigned by the plaintiff to Berry in accordance with the terms of his appointment. He sold the same, but failed to account for the proceeds. He was afterwards, in June, 1910, adjudged a bankrupt. This suit is brought on the above mentioned guaranty. The defendants tender several defences, but we shall have occasion to notice only one.

This is a continuing guaranty, and the general rule is well settled in this State, as well as elsewhere, that in case of such a guaranty, for debts yet to be created, and uncertain in their amounts, the guarantor is not liable unless the guaranty is accepted, and notice of the acceptance is given to the guarantor within a reasonable time. *Norton* v. *Eastman,* 4 Maine, 521; *Tucerman* v. *French,* 7 Maine, 115; *Howe* v. *Nickels,* 22 Maine, 175; *Mussey* v. *Rayner,* 22 Pick., 223; *Lee* v. *Dick,* 10 Pet., 482. Until acceptance and notice, the writing of guaranty is merely a proposal, making necessary acceptance by the other party to complete the contract. *Allen* v. *Pike,* 3 Cush., 238; *Davis* v. *Wells,* 104 U. S., 159. In this respect the rule differs from that applicable to contracts in general. 20 Cyc., 1405. The reason for the rule as commonly stated is that the guarantor being only secondarily liable, he should be informed that his offer has been accepted, that he may know the amount of his liability, and may have an opportunity of taking indemnity from the principal debtor, or of otherwise securing himself against loss. 20 Cyc., 1406; *New Haven County Bank* v. *Mitchell,* 15 Conn., 206.

Also, the creditor, in case of a continuing guaranty, must give the guarantor reasonable notice of the amount which may have been advanced, and failure to give such notice will defeat the guaranty, pro tanto, at least, if it has operated injuriously to the guarantor. *Howe* v. *Nickels,* 22 Maine, 175; *Vinal* v. *Richardson,* 113 All., 521.

There are some exceptions to the general rule above stated, three of which the plaintiff relies upon, in this case. One is when the consideration of the guaranty is a valuable one, moving directly or indirectly to the guarantor from the creditor. Another is when the guaranty is made at the request of the creditor. And a third is when the agreement to accept, or the contract guaranteed, is contemporaneous with the guaranty. In such cases, notice of acceptance of the guaranty is unnecessary. *Davis* v. *Wells,* supra. 20 Cyc., 1407.

Since a contract of continuing guaranty is not complete without acceptance, or the existence of conditions which render acceptance unnecessary, the burden is on the plaintiff, suing upon such a guaranty, to show that it was accepted, or that it comes within the exceptions to the rule. That is, the plaintiff must show a completed and binding contract. Merely showing a signed guaranty is not enough.

In this case, no sufficient notice of acceptance is shown until eleven months after the date of the contract of guaranty, and ten or eleven months after Berry received the fertilizer which he sold; and several months after he had received and appropriated to his own uses the proceeds of the sales. The notice was not seasonable. It is true that one of the defendants, Ellsworth, knew when the fertilizers arrived. But this was after the plaintiffs had completed the consignment now in controversy, and Berry's responsibility had attached. But even if this were sufficient implied notice to Ellsworth, it cannot avail the plaintiff in this suit. For by the original guaranty, the several guarantors became liable to contribute to each other. If for want of notice of acceptance, the other guarantors were released from the proposed guaranty, this one defendant is deprived of his right of contribution by the neglect of the plaintiff. Under such circumstances we think the plaintiff cannot effectively pursue this defendant.

Nor is it shown that the case comes within any of the claimed exceptions to the rule of notice of acceptance. No valuable consideration is shown moving from the creditor to the guarantors, the consideration named in the contract of guaranty, "one dollar," being evidently only a nominal consideration. The real consideration lay in the contract between the creditor and Berry. It is conceded in argument that the guarantors signed the guaranty at the request of Berry. If the fact that the contract of guaranty was written and signed on the back of the agreement guaranteed is presumptive evidence that the making of the guaranty was contemporaneous with the making of the original contract, still that will not avail the plaintiff. The case shows that the original contract was executed at Salem in this State by Berry and by an agent of the plaintiff in its behalf. But the contract itself provided that it should not "be in force until accepted by the Home Office, "which was in New

York." Therefore it was not a contract until accepted in New York. Only such an acceptance would complete it as a contract. If the guaranty was signed contemporaneously with the execution of the original contract in Salem, the guarantors could not know that the latter contract would ever be accepted, and their guaranty thereby become in force. The general rule should apply in such a case, and we hold that it does apply. The guarantors were entitled to notice that their responsibility had attached by the acceptance of the original contract.

For these reasons, the plaintiff cannot recover in this suit.

Judgment for defendants.

STATE OF MAINE *vs.* IGNAZIO ALBANES alias JOE BILL.

Oxford. Opinion June 6, 1912.

Appeal. Cumulative Evidence. Declarations. Discretion. Error. Exceptions. Homicide. Issue. Limitations. Malice. New Trial. Reasonable Doubt. R. S., Ch. 135, Sec. 27.

At the October Term 1911, of the Supreme Judicial Court for the county of Oxford, the respondent was found guilty of the murder of his wife, Rosina Albanes on May 11, 1911. He thereupon filed a motion for new trial, which was denied by the presiding Justice, and an appeal from this decision was taken to this court under R. S., Ch. 135, Sec. 27. Various exceptions were also reserved.

1. That the single question before this court on this branch of the case is whether in view of all the testimony "the jury were warranted in believing beyond a reasonable doubt and therefore in finding, that the defendant was guilty of the crime charged against him." *State* v. *Lambert,* 97 Maine, 51.

2. That a careful study of the occurrences which were either uncontroverted or which from the evidence the jury were warranted in believing took place, not only justified but demanded the verdict rendered. There was ample evidence both of implied and of express malice.

3. That it is the opinion of the court that the jury were warranted in finding that a husband who, armed with a revolver, fired three shots at his defenseless wife with no more provocation than is here revealed and especially after twice making threats to kill her if the divorce case which he had brought against her were continued, who turned and left her lying

upon the floor in the blood that was pouring from her wounds without attempting to ascertain whether she were living or dead, or to call a physician to her assistance, (although she lived three hours and regained consciousness before her death), but sought his own safety in delivering himself up to the officers, who never afterwards manifested the slightest remorse or even regret at his deed but rather continued to cherish his hatred towards her, for though a man of some property, when asked by the undertaker on the next day after the homicide when he wanted her buried, answered "tonight," and when asked in what price casket, told the undertaker to "bury her in a pine box" if he could not get a casket for ten dollars, is, according to the laws of Maine, guilty of murder and nothing less.

1. That the evidence of John Zacolli as to certain conversation he had with the deceased on the day before the shooting, offered "to show what she had to say about Joe Bill's manner" was properly excluded. It was merely hearsay.

2. That the ruling of the court that evidence charging the deceased with adultery "must be confined to acts occurring within one, two, three or four days prior to the homicide" was at the most harmless error. Such facts would not be admissible unless they were brought to the knowledge of the respondent, and no evidence was offered to that effect. Moreover the record shows that the respondent had been informed of his wife's alleged relations with one Nicola Balistin and had brought a libel for divorce against her on the ground of adultery. Harmless error, if such there was, should not be permitted to overturn a just verdict.

3. That, two of the leading citizens of Rumford having testified to the good reputation of the respondent in that community in which he had lived for the preceding ten years, the exclusion of the testimony of two witnesses to the same effect from Lewiston where he had lived for ten years prior to coming to Rumford was not reversible error. This inquiry under ordinary circumstances is confined to the place of residence at the time of trial, provided the residence there has been of sufficient length for a reputation to have been acquired.

Moreover the question of relevancy or irrelevancy on the ground of remoteness in time is a preliminary question to be determined by the presiding Justice in his discretion and his ruling will not be disturbed unless the discretion has been grossly abused.

Further, in this case, the evidence offered was merely cumulative, as this point was not challenged by the State, and the court has the power to impose a reasonable limitation upon the number of witnessses who shall be permitted to testify on the issue of character.

4. That the evidence of the undertaker as to the declarations of the respondent made on the next day after the homicide, in regard to the interment of his wife was admissible as bearing upon the question of express malice, its weight, being for the jury.

On appeal, motion and exceptions by defendant. Appeal dismissed. Motion and exceptions overruled.

The defendant was indicted for the murder of his wife, Rosina Albanes, and a verdict of "guilty as charged in the indictment" was returned by the jury. The defendant then filed a general motion for a new trial which was denied by the presiding Justice. The defendant then appealed to the Law Court under Revised Statutes, chapter 135, section 27, which provides that "if a motion for new trial in any case in which a person has been convicted of any offense for which the punishment is imprisonment for life, is denied by the justice before whom the same is heard, the respondent may appeal from said decision to the next law term; and the concurrence of but three justices shall be necessary to grant such motion." The defendant also took various exceptions.

Memo. It will be noted that under Revised Statutes, chapter 135, section 27, that the concurrence of only *three* of the eight Justices who constitute the Supreme Judicial Court, is necessary to grant a motion for a new trial in a case where a "person has been convicted of any offense for which the punishment is imprisonment for life."

The case is stated in the opinion, and dissenting opinion.

William R. Pattangall, Attorney General, *and Ralph T. Parker,* County Attorney, for the State.

McGillicuddy & Morey, for defendant.

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

CORNISH, J. At the October Term 1911, of the Supreme Judicial Court for the county of Oxford, the respondent was found guilty of the murder of his wife, Rosina Albanes on May 11, 1911. He thereupon filed a motion for new trial which was denied by the presiding Justice and an appeal from this decision was taken to this court under R. S., Ch. 135, Sec. 27. Various exceptions were also reserved. We will consider the appeal first.

Appeal.

The single question before this court on this branch of the case is whether in view of all the testimony "the jury were warranted in

believing beyond a reasonable doubt and therefore in finding, that the defendant was guilty of the crime charged against him." *State* v. *Lambert,* 97 Maine, 51.

In this State degrees of murder have been abolished and the crime as now defined by R. S., ch. 119, sec. 1, is the unlawful killing of a human being with malice aforethought either express or implied.

A careful study of the occurrences which were either uncontroverted or which, from the evidence, the jury were warranted in believing took place, not only justified but demanded the verdict rendered. In fact a verdict for a less crime would have been a miscarriage of justice. The respondent was a man of mature years, a native of Italy, who had been in this country since 1887, and in this State about twenty years, ten of which were spent in Lewiston and ten in Rumford. His domestic relations had been unpleasant for several months because of his wife's alleged relations with one Nicola Balistiri, and the respondent had brought a libel for divorce against her on the ground of adultery, returnable at the May Term 1911 of the Supreme Judicial Court for Oxford county. On the 11th day of May a hearing was had in the court, then being held in Rumford, on the wife's motion for a continuance of the case to the October term, the motion being strenuously resisted by the husband. The presiding Justice granted the continuance. This was between 12.30 and 1 P. M. When the decision was announced the respondent's expression was noted. His face was "pallid and colorless." He went directly to his house, where his wife still lived, and ate dinner, his wife and a boarder being at the table. When the dinner was finished the boarder withdrew but the respondent remained. The wife was removing the dishes from the table and as he described it to the officer, she threw up her head, laughed, and said "I told you I would beat you, I could get my case put over to October." He told her to keep still but she continued to laugh at him, whereupon he drew a revolver and fired three shots, each of which took effect in her body as she faced him. She fell upon the floor and he left the house, sought an officer, and was placed in the police station at his own request. If malice in law can be implied from the intentional doing of a wrongful act or of an injury to another without legal justification or excuse, the implication exists here in full force.

But the State's case did not stop here. There was reliable evidence of express malice. On May 8, the attorney for the wife in the divorce proceedings met the respondent in the banking room of the Rumford Falls Trust Co. where the respondent signed and gave to the attorney a check for the amount due for attorney's fees and separate support pending the libel, as decreed by a Justice of this court at a prior hearing, and then repeated a most significant threat which he had previously made to his wife. The attorney's testimony is as follows: "While we were there he said to me, 'I have told my wife what I should do if she put the case over.' I replied to him that she had told me what he had said, that he said he would kill her; 'but' I says, 'Joe you won't do that.' He says, 'I shall kill her if the case is put over.'" Here then we find a threat made first to the wife herself and then to her attorney, a threat which was carried into fatal execution three days later within an hour after the case was "put over" by order of the presiding Justice.

All the requirements of murder have been met, premeditation, malice and the killing.

But the defendant seeks to reduce the crime to manslaughter by injecting into the wife's remarks which preceded the shooting, the assertion that the baby in the cradle did not belong to him but to Nicola, and that this remark coupled with some letters in his possession showing their guilty relations, released the clutch on his mental machinery and caused him to fire the fatal shots in the heat of provoked passion. What his wife actually said was a question of fact for the jury to decide, and they were warranted in taking the State's view. The evidence comes on the one side from the officer to whom the respondent made his statement soon after the homicide, and on the other from the respondent himself when on the stand. The officer testified that he never heard of the taunt in regard to the paternity of the child until he heard it in court. The repondent's testimony on this point lacks probability. It would hardly seem reasonable that the wife who was contesting the divorce should admit the charge on which it was based; while the testimony of the officer is perfectly consistent with what had been the immediate subject of contention between the respondent and his wife, viz, the postponement of the trial of the libel. So far as the letters

were concerned, the respondent admits that they had been in his possession since the previous September or October and had at least been partially translated to him before the full translation a few days prior to the shooting. Of their purport he must have been fully aware, and there could have been no sudden shock brought on by the news of his wife's infidelity that swept away his reason, because in the libel for divorce which he had signed and brought on the third day of April, the sole cause alleged was adultery. The respondent therefore for a long time prior to the 11th of May, had believed his wife to be unfaithful and was attempting to divorce her on that ground. If his testimony of her statement to him was true it revealed little that was new to him. But the probabilities are strongly against its ever being made.

Without discussing the evidence further it is the opinion of the court that the jury were warranted in finding that a husband who, armed with a revolver, fired three shots at his defenceless wife with no more provocation than is here revealed, and especially after twice making threats to kill her if the divorce case were continued, who turned and left her lying upon the floor in the blood that was pouring from her wounds, without attempting to ascertain whether she were living or dead, or to call a physician to her assistance, (although she lived three hours and regained consciousness before her death), but sought his own safety in delivering himself up to the officers, who never afterwards manifested the slightest remorse or even regret at his deed but rather continued to cherish his hatred towards her, for though a man of some property, when asked by the undertaker on the next day after the homicide when he wanted her buried, answered "tonight," and when asked in what price casket, told the undertaker to bury her in a pine box if he could not get a casket for ten dollars, is, according to the laws of Maine, guilty of murder and nothing less.

Exceptions.

Although several other exceptions were taken only three were pressed in argument, viz:

1. The exclusion of certain evidence of John Zacolli, offered by the respondent as to what conversation he had with the deceased on the day before the shooting and when objected to by the State, the counsel for the respondent stated the object of the testimony as

follows: "I wish to show what she had to say about Joe Bill's manner." The ruling was correct. The evidence offered was merely hearsay and clearly inadmissible. In this connection the counsel challenged the ruling of the court, that on the question of admissibility of evidence charging the deceased with adultery, "they must be confined to acts occurring within one, two, three or four days prior to the homicide." No specific evidence was offered on this point and ruled upon, and had the same been offered it would properly have been excluded unless knowledge of the facts could have been brought home to the respondent by other evidence. The mere facts were not admissible per se. Knowledge of them by the respondent would have been, but the record is silent as to any offer to connect such facts with the respondent.

Moreover the exclusion was harmless in any event because the record shows that the respondent had been informed of his wife's relations with Nicola long before and on that information had brought his libel for divorce. Harmless error if such there was, should not be permitted to overturn a just verdict.

2. The second exception is based upon the exclusion of certain evidence offered by the respondent tending to show his good character. The respondent had raised this question as he had a legal right to do and had been permitted to introduce the testimony of two of the leading citizens of Rumford who had known him during the preceding ten years that he had lived in that town. The respondent then offered the testimony of two other witnesses who lived in Lewiston, to testify as to his reputation while in that city during a period from ten to twenty years prior to the trial.

In other words the respondent was permitted to introduce evidence of his general reputation for peaceableness in the community in which he then lived and had lived for a period of ten years, but evidence of his reputation in another community which he had left ten years before was excluded. There was no error in this ruling. The inquiry under ordinary circumstances is confined to the place of residence at the time of trial provided the residence there has been of sufficient length for a reputation to have been acquired. This is especially true where the evidence so offered is not controverted by the other side. If a person has lived but a short time in a community it might be proper and even necessary to go to

his former home in order to establish his reputation. But that is not this case. Rumford had been the respondent's home for ten years, his reputation was well established and under these circumstances to go back to a prior home was too remote both in time and place. Moreover it is well settled that whether the evidence, offered to show a person's reputation, is irrelevant because too remote in time or the community is too distant in space, is a preliminary question to be determined by the presiding Justice in his discretion, and his ruling on this point will not be disturbed unless the discretion has been grossly abused. And further, the court has the power to impose a reasonable limitation upon the number of witnesses who shall be permitted to testify on the issue of character.

These are all familiar principles of evidence. 3 Ency. Ev. p. 30-32; Cyc. Vol. 16, p. 1276 et seq.; *State* v. *Potts,* 78 Iowa, 756, 5 L. R. A., 814, and they were carefully observed in this case. The respondent had the benefit before the jury, of the evidence of two of his neighbors who had known him in Rumford for the past ten years, and their statements were not attacked by the State. Certainly he was not prejudiced because the inquiry was not extended further and two other witnesses who had known him at a remote time and in a somewhat distant place were not permitted simply to corroborate them. Their evidence at most was merely cumulative.

3. The third exception rests upon the admission of the evidence of one Voter, an undertaker and a witness for the State, as to a conversation which took place the next day after the homicide and which has already been referred to. The testimony is as follows:

A. I went to the lock-up to ask him what he wanted done with the remains of his wife.

Q. What did he say?

A. I asked him when he wanted her buried. He says "tonight." I told him I couldn't do it on such short notice as that. . . . I asked him what price of casket he wanted. He said, "Put her in a ten-dollar one." I told him I had never seen one like that; we didn't have any at that price. He says, "If you haven't got one, telephone for one." I says, "I don't know where you can get a casket for that price." He says, "Then put her in a pine box."

In his charge the presiding Justice instructed the jury to disregard this testimony, but this caution was unnecessary, because

the evidence was admissible as bearing upon the question of express malice, tending to show the attitude of mind at the time of shooting, its weight, of course, being for the jury. This conversation took place twenty-four hours after the shooting. The respondent had had time to repent, if the deed had been done in the heat of passion. But his words indicated neither regret nor remorse but continued hatred.

Upon the question of express malice his heartless replies were clearly admissible. *Wilkinson* v. *Drew,* 75 Maine, 360; *Spear* v. *Sweeney,* 88 Wis. 545, 60 N. W., 1060; *Lewis* v. *State,* 29 Tex. App., 201, 15 S. W., 642; *Duncan* v. *Commonwealth,* (Tex.) 12 S. W., 672.

A careful study of the whole record fails to reveal any error on the part of court or jury and therefore the entry must be,

Appeal dismissed.
Motion for new trial denied.
Exceptions overruled.
Judgment for the State.

HALEY, J. Dissenting. I do not concur in the opinion of the majority of the court, and many careful readings of the case convince me that the defendant is entitled to a new trial. My convictions are so firm that I desire to state my reasons, and enter my protest against what seems to me to be a wrong done the defendant.

At the October term, 1911, of the Supreme Judicial Court, in the county of Oxford, the respondent was found guilty of the murder of his wife on May 11th, 1911. He thereupon filed a motion for a new trial, which was denied by the presiding Justice, and an appeal from his decision was taken to this court under R. S., chapter 135, section 27. Various exceptions were also reserved at the trial.

In this State different degrees of murder have been abolished, and the crime is now defined by the revised statutes as the unlawful killing of a human being with malice aforethought, either express or implied. Chap. 119, sec. 1, R. S.

Manslaughter, by chapter 119, section 2, R. S., is thus defined:

"Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice afore-

thought, or commits manslaughter as defined by the common law, shall be punished by imprisonment for not more than twenty years, or by fine not exceeding one thousand dollars."

Upon the question of appeal the opinion states the single question before this court on this branch of the case is whether, in view of all the testimony, the jury were warranted in believing, beyond a reasonable doubt, and therefore finding, that the defendant was guilty of the crime charged against him. *State* v. *Lambert,* 97 Maine, 51. That undoubtedly states the rule of law governing cases of this nature, but cases may arise which require it to be stated with some modification. The jury being judges of the facts, if the trial was conducted according to the rules of law, and there was testimony which justified the jury in believing, beyond a reasonable doubt, that the defendant was guilty, this court upon appeal has no right to substitute its judgment for the verdict of the jury; but if the trial was not conducted according to the rules of law, if it was conducted in such a manner that testimony was admitted which was inadmissible, and did not bear upon the guilt or innocence of the accused, and the only result of which was to prejudice the jury against the defendant; if testimony was excluded which was admissible, if the Justice who presided at the trial neglected to give the jury the instructions which the law requires, then the question before the court, upon appeal, as this case is: Did the defendant have a fair trial? Did the inadmissible evidence, the rulings of the court excluding evidence and admitting evidence, and the neglect to give proper instructions, tend to prejudice the jury against the defendant's case so that, but for those errors, the jury would have been justified in returning a verdict more favorable to the defendant than the verdict which was returned?

The defendant was entitled to a verdict of the jury, uninfluenced by prejudice or inadmissible testimony, and to proper instructions by the court. If inadmissible testimony was introduced, which the jury was instructed to consider, and the instructions to which he was entitled were not given, then this court cannot say that the neglect to charge the jury as required by law, did not prejudice them, and that, if they had disregarded the inadmissible testimony, they would have returned the verdict they did, because but for that evidence and the errors of the court, they would have been justified

in finding, and might have found, the defendant guilty of manslaughter.

It is urged that the errors to which I shall refer were open to the defendant upon exceptions, and as he failed to take exceptions, or request the instructions he was entitled to as to manslaughter, this court cannot consider them upon appeal. A very plausible reply, but my answer to that is that no government in a civilized country should ask for a conviction of the crime of murder upon technicalities. To do so would be abhorrent to every principle of justice. The party accused, in fighting for his life, may be justified in relying upon technicalities, but the government, never. To hold otherwise would be to make a trial for murder a contest in which liberty for life is the stake, to depend, not upon the guilt or innocence of the accused, but upon the skill of the counsel engaged in the trial, and the court, instead of protecting the accused and seeing that he had a fair trial, would only be concerned in the points scored and the blunders made by opposing counsel, and by his neglect to give proper instructions to the jury, if counsel were negligent in claiming exceptions, and by admitting inadmissible testimony, instead of aiding the jury in the discovery of the truth and assisting them in arriving at a just verdict, would prevent a fair trial of the accused.

It was the duty of the court to exclude inadmissible testimony, to admit admissible testimony, and to give proper instructions to the jury, and, although the defendant had the right of exception for the failure of the court to do so, this court, upon appeal, must look to the whole record, and, if the errors were such that the defendant was, or might have been, prejudiced, then the court cannot say he has had a fair trial, and cannot say that, but for such irregularities, the jury might have returned a verdict of manslaughter.

Was inadmissible evidence admitted that had a tendency to and might have influenced the jury against the defendant?

Mr. Hutchins, a witness called by the government, upon cross examination was asked if he had not been circulating stories that the defendant had killed a person in another state, and admitted that he had. The State then questioned the witness as follows:

"Q. Now Mr. Hutchins, he has referred to this matter, and I wish you would tell the jury just what *you have heard?*

"WITNESS: Would it be admissible, your Honor?

"COUNTY ATTORNEY: He has opened it up, if the Court please.

"The COURT: You may answer.

"A. I have heard from the police of Rumford that the Chief of Police of the town of Rumford had a communication from the Chief of Police of another city asking whether Ignacio Albanese, who is known in Rumford as Joe Bill, was the same Ignacio Albanese who killed a party at Buffalo, New York; and I had previously had information from Mrs. Joe Bill herself covering this same event. She told me in the month of March, last March, that Joe Bill had told her that he had killed a woman in or near Buffalo when he was living there at Buffalo. She told me that he had described to her how he escaped from that place in the night under the cover of the woods, guided by the stars; that he hid in the woods during the day time; that he ate roots and leaves, not daring to come out in the open; that he finally reached Albany, went to New York City, to Boston, and came to Lewiston, Maine, where he was known as Joe Bill. She told me this several times, and she said that he had told her on several occasions; that he went into details more when he had been drinking than he did when he was sober. That is all I know about it. I have never mentioned it to a member of either panel nor in their presence. I have mentioned it to members of this Bar and to one of the defending counsel.

"Q. When did you hear of this letter to the Chief of Police?

"A. Since I came to Paris to attend this term of court.

"Q. And it has been since that letter that you say you heard the Chief of Police had, that you circulated these stories?

"A. I have told my associate counsel, Mr. Swasey, before this time; but up to that time without any corroborating evidence I have kept silent what a client had told me.

"Q. Did you take pains to hunt up this letter and see it yourself?

"A. I took pains before announcing any information on the subject to see a man who said he had read it, a selectman of the town of Rumford, L. H. Veillieux.

"Q. And you did not go to the police to find out about it?

"A. I have since consulted the Chief of Police, Mr. Violette, and although I have not seen the letter, he has stated to me its contents.

"Q. You never have seen the letter?

"A. I have not."

It is not pretended that the above testimony was admissible. Even the witness protested to the court against giving it, but the court ruled that he should answer the question as to what *he had heard*. Not a sentence of that testimony was admissible, and, taken in connection with the testimony given by the same witness in answer to this question, "Referring to the above testimony, I ask you if you claim it is true? A. In my opinion it is," it shows that not only was hearsay evidence admitted, but admitted to prejudice the jury against the respondent by accusing him of the crime of murder twenty years before the offense charged. Also into the scales was placed the opinion of Mr. Hutchins, a citizen of the county, that the defendant was guilty of the acts recited by him in his inadmissible testimony! It is true no exceptions were taken to its admission, but a reading of the case shows that the court was determined that it should be admitted—admitting it against the protest of the attorney for the defense and against the protest of the witness who gave it, its only effect could be to prejudice the jury. And this court cannot say what effect that prejudice had upon the jury in arriving at the verdict which it returned. And again I say that, although the defendant did not take an exception to the admission of this testimony, the government should not ask for a conviction of the respondent for the crime of murder upon technicalities, and this court, upon a review of the whole case, cannot say that, but for that testimony, the jury might have arrived at the conclusion that the defendant was guilty of manslaughter, as claimed by his counsel, and not guilty of the crime of murder.

The opinion of the court sets forth fairly the claim of the government as to the commission of this crime. Afterwards, in different parts of the opinion, it refers to some things claimed by the defense; but in order to determine whether the defendant had a fair trial, it is well to also consider the position of the defense.

The defendant was a native of Italy, and had been in this country since 1887, and in this State about twenty years, ten of which were spent in Lewiston and ten in Rumford. His domestic relations had been unpleasant for some months because of his wife's alleged

relations with one Nicola Balistiri, and the respondent had brought a libel for a divorce against her on the ground of adultery, returnable to the May term of the Supreme Judicial Court for Oxford County. On the 11th day of May a hearing was had in the court on the wife's motion for a continuance of the case to the October term; the motion being resisted. The Justice presiding granted the continuance. The defendant claimed that he had received two letters from his wife's uncle in Italy, to whom he had loaned money, that he was unable to read them, and that they were finally translated to him at about the time of the hearing on the motion for a continuance of the libel for a divorce, and that the letters were such as to arouse his passion; that the respondent had taken the children from their mother and sent them to an asylum in Portland, on account of the mother's conduct; that an infant child was not taken with the other children, but left in the same house with the respondent and his wife, although they did not live together as husband and wife; that at about the same time the letters from the uncle in Italy were translated, the respondent also had the possession of and was informed of the contents of a letter from the wife's lover Nicola, and of a letter from his wife to Nicola; that immediately after the hearing on the divorce matter, the respondent went home; that his wife got dinner for him and his hired man, and the wife having been informed that the case had been continued, tantalized and taunted him with the fact, saying, "I told you I would beat you," and that the respondent replied to her, "Do your business and nobody say anything now," but that she kept on laughing and said, "I beat you any time I want to," and that she continued laughing and taunting him, telling him that she could beat him. Then, finding that that did not arouse him, she said, "You see that baby? That no belong to you; it belong to Nicola. I going to put you on the dirt before you get through, and after I put you on the dirt I going to marry Nicola." The respondent claims that at those words, with what he knew of his wife's conduct, the letters of her uncle, Nicola's letter to her and her's to Nicola, he lost control of himself—aroused by the taunt that the child that he had held in his arms and caressed as his own child was not his own, but was the fruits of an illicit love of his wife's, and that then, in the heat of passion, he shot his wife. This is the position of the defense.

If it is true, and if the jury were not satisfied beyond a reasonable doubt that it was not true, then it needs no citation of authorities to show that the killing was not murder, but manslaughter.

After the people arrived at the house, Mrs. Bill was informed that she was dying, and was asked if she wanted to make a statement, and, in answer to questions put to her, stated that the defendant shot her three times.

The State then offered evidence of other statements made by her after her statement that the defendant had shot her three times; and, under the ruling of the court that "any statements she made while knowing that she was at the point of death, are admissible," the witness was allowed to testify "that she said that Lawyer Hutchins telephoned her at noon time that Joe Bill was mad and was going to kill her, and was going up to the house, and for her to get out of the house as soon as she could, and she said she was going just as soon as she could get some clothes together." This was not in the presence of the accused, and was the introduction of threats by the defendant that no one had testified to his making, and was not a part of the declaration connected with the homicide, and was clearly inadmissible.

"The declarations of the deceased are admissible only to those things to which he would have been competent to testify if sworn in the case." Greenl. Ev. sec. 159.

"But courts have refused to extend the rule beyond the cause and circumstances of death." *State* v. *Wood,* 53 Vt., 560.

"Dying declarations, when they relate to former distinct transactions and embrace facts or circumstances not immediately connected with the declarant's death, are inadmissible. They are admissible only as to those things to which the deceased would have been competent to testify." *State* v. *Baldwin,* 79 Ia., 714.

"The rule is well settled as to the class of declarations admitted as dying declarations. Declarations of facts stated by the deceased must be such as he would be permitted to testify to if a witness." *Hall* v. *State,* 132 Ind., 317.

Under the above authorities the statement by the deceased of her conversation with Lawyer Hutchins and the threats of her husband and of what she was about to do, were inadmissible, and prejudiced the defendant's case.

It is urged that the inadmissible testimony did not work prejudice to the defendant, as the other evidence was sufficient to justify the jury in returning the verdict they did. In *State* v. *Westfall,* 49 Ia., 328, which was a case where the defendant was convicted of murder in the second degree, the court disposes of the same objection in the following language:

"The attorney general does not contend with great confidence, that the evidence was admissible, but he insists that its admission did not work prejudice to the defendant, for the reason that the other evidence, apart from this now under consideration, was amply sufficient to authorize the verdict. But his position is unsound. Without the illegal testimony the jury may not have found the verdict for the State. This testimony may have made the complement of proof which satisfied their minds. In that case the defendant would have been convicted upon illegal evidence. This court cannot determine what quantity of evidence was lawfully sufficient to authorize the verdict."

In the absence of the jury, counsel argued the question of the admissibility of evidence charging the deceased with adultery, and the court ruled that, "under the authorities, the testimony must be confined to acts occurring within one, two, three or four days prior to the homicide."

If acts showing the adultery of defendant's wife were admissible, as the court held they were, the ruling limiting such acts to within four days of the time of the homicide was error. It being the claim of the defendant that his wife's past conduct and action on the day of the murder so far aroused his anger that, in the heat of passion, he shot her, and if evidence of her adultery within four days of the shooting was admissible as tending to show how, with her taunts, he might have become so angry as to lose control of himself, evidence of her adultery five days before was admissible for the same purpose, and the rule of law is that her conduct for a long time prior to the homicide, if brought home to the knowledge of the defendant, was proper to be proved, and to be considered by the jury in connection with the other facts as showing that he might, as claimed by himself, have lost control of himself; that all her acts, together with her taunt in regard to the parentage of the child, took from him his reason, and the jury had the right to consider all that

evidence, and the limiting of the acts of adultery of the defendant's wife to four days before the homicide cannot be defended upon any rule of law.

The defendant admitted the killing, and claimed that his wife's conduct in the past, the letter from her uncle, her letter to her lover that day translated to him, her language after dinner taunting him and informing him that his supposed child was that of her paramour, altogether was such, that it aroused his passion to that extent that he lost control of himself, and in the heat of passion, caused by her acts and her language he, without malice, caused her death, and the jury, if they believed his statement of the tragedy, would have been justified in returning a verdict of "Guilty of manslaughter."

No instruction was given by the court to the jury in regard to manslaughter. All that the court said was: "The defendant, however, through his able counsel, admits the killing, but says that it was manslaughter as defined by the statute which has been read to you (not by the court); that it was the unlawful taking of a human life in the heat of passion and on sudden provocation, without malice aforethought, either express or implied, and he urges the statute of this State in his plea that it was manslaughter instead of the higher degree on the ground that while a voluntary manslaughter occurs where one unlawfully kills intending to kill, but under such circumstances as he has described, the law, in its tender mercies for the frailties of human kind, mitigates the crime from murder to manslaughter."

It was the duty of the court to so fully instruct the jury, upon every degree and kind of crime of which the accused might be convicted under the indictment, as to give him the benefit of having the evidence considered by the jury, with full knowledge of the law as to the essential characteristics of each kind and degree of crime for which a verdict might be returned against him.

In *State* v. *Meyer,* 58 Vt., 457, the defendant was tried on an indictment for murder. The defendant, in the fifteenth request, asked the court to charge, "If the jury should find that the respondent killed Herman Krause, in the absence of any proof of malice or premeditation, they are at liberty to find him guilty of murder in the second degree, manslaughter, or to acquit him." The court

so instructed the jury, and also instructed them as to what constituted murder in the first degree, and the statement of the statute that all other kinds of murder should be murder in the second degree, and telling them what was the punishment for murder in each degree and the punishment for manslaughter, and then explained to the jury what constituted the crime of murder; also what constituted the crime of manslaughter, but did not explain to the jury what constituted murder in the second degree, or wherein murder in the second degree differed from murder in the first degree. The court say: "The reading of the statute declaring what was murder in the first degree, and that all other kinds of murder shall be murder in the second degree, was not a sufficient explanation of the two degrees. Upon an indictment for murder, where the jury may convict the respondent of murder in the first degree, and second degree, or manslaughter, the State, to convict of murder in the first degree, must first overcome by evidence the presumption of innocence that always shields the respondent until the contrary is proved beyond a reasonable doubt, and when that is overcome, the State must next overcome every reasonable doubt that the crime which the respondent has committed is not manslaughter nor murder in the second degree, advancing from the lesser to the greater crime, the presumption to be first in favor of innocence, and then of the lesser crimes in their order. And it was the duty of the trial judge to so fully instruct the jury upon every degree and kind of crime of which the respondent may be convicted under the indictment as to give the respondent the benefit of having the evidence considered by the jury under a full knowledge of the law as to the essential characteristics of each kind and degree of crime for which a verdict may be returned against him, so that he may have the benefit of every reasonable doubt that may arise, both as to the commission of crime and as to the kind and degree of it. . . . The respondent was entitled to a full explanation to the jury of what constituted each degree of murder, and the distinguishing characteristics of each. This the learned Judge wholly neglected to give, and as this neglect and omission might have been prejudicial to the respondent, it was error."

In this case the respondent was entitled to a full explanation of what constituted manslaughter under the laws of Maine, and, as

the learned Judge wholly neglected to give such instruction, his neglect and omission may have been prejudicial to the respondent, and it was error.

The above case was before the court upon exceptions, but, as the fifteenth request was given in the language that it was asked for, the court must necessarily have believed that it was the duty of the court to go further and define the various kinds of crime of which the defendant might have been convicted, and the fact that the case was taken up on exceptions does not change the rule of law in regard to the duty of the court as to instructing the jury, and the right of the defendant to have proper instructions.

It is stated in many cases that the defendant upon appeal cannot take advantage of the admission of illegal testimony, the excluding of the legal testimony, or neglect by the court to give proper instructions, unless he took exceptions at the time of the admission or exclusion of the testimony, or requested the proper instruction and excepted to the refusal of the court to give the instruction. It should be so when the evidence admitted, excluded, or instruction not given, does not materially affect the case; technicalities which do not go to the merits of the case may well be considered as waived, unless raised at the proper time; but inadmissible testimony, or the exclusion of legal testimony, that goes to the merits of the case, or neglect to give the instructions that the defendant is entitled to, should not be within that rule, and the defendant should have the right upon appeal to take advantage of errors that effect the merits of his case.

In *State* v. *Beal,* 82 Maine, 284, the defendant was convicted of murder in the first degree, and the case was before this court upon appeal. The opinion states: "At the bar, a new trial was urged solely upon the ground of evidence newly discovered. The motion was not pressed for any other cause; nor does the court, after a careful consideration of the whole evidence, see any good reason why it should have been. The trial seems to have been a fair one. The charge of the Justice was plain, and easy to be understood by the jury. . . . The court is of opinion, after a careful consideration of the whole case, that no just cause has been shown why the appeal should be sustained."

By the opinion it seems that the court carefully examined the whole case and found no errors. They found that the defendant had a fair trial, which means a trial where illegal testimony was not admitted, when legal testimony was admitted. They found the charge to the jury plain and fair and covered the case and included the instructions the defendant was entitled to as a matter of law. There are many well considered cases that hold that the court upon appeal will consider the errors of which the defendant complains, and which are in line with the opinion in *State* v. *Beal*, supra.

In *Connor* v. *State*, 23 Texas Criminal Appeals, 378: *held:* "The failure to define murder of the second degree in a case where the jury, upon the evidence, might have found the defendant guilty of the less offense, will be cause for reversal, whether the instructions were asked or not."

In *People* v. *Rodawald*, 177 N. Y., upon page 428, the court say: "Only errors raised by exception require a new trial, and it is only when we are satisfied the verdict was against the weight of evidence, or against law, or that justice requires a new trial, that we are permitted to reverse, whether exceptions have been taken or not in the court below." *People* v. *Tobin*, 176 N. Y., 278.

In *Sutton* v. *State*, 2 Texas Criminal Appeals, 342: "But in view of the evidence adduced on the trial, and bearing in mind the nature of the defense necessarily relied on, we are of the opinion the rights of the accused were prejudiced by the failure of the court to charge the law of self defense otherwise than with reference to threats against the accused. Proper instructions on this subject were required by the evidence as a part of the law of the case which the Judge should have given, whether asked or not." *Citing Marshall* v. *State*, 40 Texas, 200.

In *Honesty* v. *Commonwealth*, 81 Va., 283: "It is well said that the accused has a right to a full and correct statement by the court of the law applicable to the evidence in the case, and that any misinstruction by the court in point of law or matters material to the issue, is ground for a new trial."

In *Potter* v. *State*, 85 Tenn., 88, the defendant was tried for the crime of murder, and it was assigned as error that the court failed to instruct the jury in regard to threats of the deceased communi-

cated and uncommunicated to the defendant. For the State it was urged that this omission was not error,

First,—"Because the finding of the jury that the offense was murder in the first degree negatives the idea that they considered the act as committed under any other circumstances justifiable or excusable, and the facts sustained the verdict."

Second,—"That no instruction on this point was asked, and therefore need not have been given."

The court say: "As to the first of these objections, it is sufficient to say that a verdict cannot negative the existence of a defense the jury was not properly instructed to consider, and we are not satisfied that the facts sustain a verdict which is not the result of the deliberate judgment of the jury after a full, fair and proper exposition of the law in a case involving the life of the citizen or his hopeless consignment to servitude and infamy. In such case this court would not stand upon any too nice technicalities of requiring the defendant to have demanded any instruction essential to a fair trial, which the law is supposed to guarantee to him without a demand, in order that he should be entitled to it. It is the duty of the circuit Judge to charge the law applicable to the evidence, and to give the defendant the benefit of it, and not decide for himself the case he supposes to be made out and apply the law to such suppositious case and leave to the jury only that of decision and to us to speculate on its effect and the possible injury, or want of injury, done the defendant. In this case it can be clearly seen that the omission to charge the law is as vital an error as it would have been to have charged it incorrectly, and we hold that the defendant was entitled to have it given without demand. We by no means intend to intimate that such is, or is to be the rule in ordinary cases, or in less vital omissions; but where life is to be taken, or devoted to punishment and the omission as serious as the affirmative injury of an erroneous charge, the verdict will not be allowed to stand."

People v. *Barberi,* 149 N. Y., 256: "In reviewing a capital case we must be satisfied that a fair trial has been had, and when we see that the case has been tried and submitted to the jury upon an erroneous theory, prejudicial to the accused, and which had a controlling influence upon the trial and the results, we ought to regard the principle which has been decided, rather than the concrete form

in which the question arose and became a practical one at the trial, and should not be astute to seek for some technical ground not urged upon the trial or here to sustain the ruling. . . .

Those portions of the charge are also fairly covered by the exceptions, and, even if they were not, an erroneous statement of the law, or improper comments upon facts, or the evidence bearing upon them, may be reviewed and corrected in this court in a capital case without exceptions, when it can be seen that they operated to the prejudice of the accused. . . . From an examination of the whole case, we are impressed with the conviction that the defendant has not had a fair trial, and that it should be submitted to another jury to the end that all competent proof may be given in the regular and orderly way, and all the questions presented in that temperate and dispassionate manner which is so important in the trial of a capital case, and so essential to the protection of all the rights of the accused."

Also see *State* v. *Westfall,* supra; *State* v. *Meyer,* supra.

To me it seems that an examination of the case shows that the defendant did not have a fair trial; that there was error in admitting testimony, in excluding testimony, and in the neglect to give the instruction to the jury that the defendant was entitled to; that those errors were prejudicial to the defendant, and that this court can and should review and correct them upon this appeal, and grant the defendant a new trial.

In Equity.

HERBERT A. FOGG *vs.* LINWOOD C. TYLER.

JAMES M. BARTLETT, Petitioner for allowance of claim as a priority.

Penobscot. Opinion June 11, 1912.

Agents. Brokers. Fiduciary. Trust. Insolvency. Rights of Creditors.

Payment for corporate shares to a stock brokerage firm does not give the buyer priority as to his claim for return of the money on receivership proceedings against the firm before the stock could be secured by the firm, though the firm's balance in the fund in which the payment was deposited never fell below the amount of the payment; the transaction being an ordinary stock sales contract, and involving no fiduciary relation between the parties.

On report. Petition dismissed.

Petition for the allowance of petitioner's claim as a priority in the matter of the receivership of Tyler, Fogg & Company of Bangor, Charles H. Bartlett, Receiver. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Charles J. Dunn, for petitioner.

Charles H. Bartlett, for defendant.

E. M. Simpson, by permission of Court, for committee of unsecured creditors.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HANSON, J. On report. Petition for allowance of claim as a priority.

The record shows that prior to April 26, 1911, the petitioner corresponded with Linwood C. Tyler, of the firm of Tyler, Fogg & Company, of Bangor, in relation to the purchase of stocks; that on that day he called at the office of Tyler, Fogg & Company, and

"told Mr. Tyler, after some little conversation, that I had decided to take ten shares of the Commonwealth Gas & Electric Company stock" . . . "and he very hastily calculated the interest and I made out a check for the amount he stated, which was $1004.33, I think, and I didn't have time that evening to get my receipt, for the car came right along. I gave him my check and the next morning Mr. Tyler mailed me a receipt, and stated I had overpaid him seventy-two cents, and enclosed 72c. in stamps."

The case shows that Tyler, Fogg & Company had contracted with Messrs. C. D. Parker & Company, of Boston, for 750 shares of the Commonwealth Gas & Electric Company "with the arrangement that they were to carry it and as fast as we desired it, we should take it up from them." Tyler, Fogg & Company had advertised the stock for sale and the petitioner says that Mr. Tyler had given him "literature and also written me in regard to the stock. I had looked it up somewhat."

Mr. Tyler, who had charge of stock sales, was called to Boston later in the evening and did not return until after the fire which destroyed his premises in the great conflagration of April 30, 1911. He returned immediately, and on May 5th received a letter from the petitioner, inquiring when the stock would be delivered. His letter in reply follows:

Tyler, Fogg & Co.
Bankers
Bangor, Maine.
Dealer in Bonds.

May 6, 1911.

Mr. J. M. Bartlett,
Orono, Maine.

DEAR SIR:

In relation to the delivery of your certificate carrying ten shares of Commonwealth Gas & Electric Co. Preferred Stock, we beg to say that, as soon as we can get established and our vaults open, we will be in a position to make delivery to you of your certificate carrying the ten shares of stock.

Our vaults look to be in good shape, and we expect that the contents will be found intact.

Yours very truly,
TYLER, FOGG & CO.

The stock was not delivered. The reasons given by Mr. Tyler for the non-delivery of the stock were that his call to Boston gave him no time in which to order it on April 26, 1911, and the confusion incident to the fire causing delay in re-establishing business quarters and having access to their books and papers after his return, and that later when delivery might have been effected he was prevented by suit for the dissolution of the partnership of Tyler, Fogg & Co., and the appointment of a receiver, against whom this petition is filed.

It is admitted that the check was deposited by the firm of Tyler, Fogg & Co., the payees named therein, to the credit of said firm, in the Kenduskeag Trust Company, at Bangor, Maine, on the 27th day of April, A. D. 1911, and collected by said bank for the account of said firm; and that ever after, to and including the time of the appointment and qualification of the Receiver, the balance of the account of said firm in said bank was ever in excess of said sum of $1003.61, and that said account between said times was not at any time overdrawn, and that the amount of the balance of said account in said bank has come to the possession of the Receiver in this cause.

It is further admitted that no certificate for any shares of the capital stock of said Commonwealth Gas & Electric Company have ever come to the possession of said Receiver.

It is admitted that Charles H. Bartlett, of Bangor, Maine, was appointed as Receiver for the partnership of Tyler, Fogg & Co. by decree dated June 6, 1911, and that he qualified as such and entered upon the discharge of the duties on the 9th day of June, 1911; and that on that date he took possession of the assets of the estate of said partnership.

And the petitioner prays, 1.—that the Receiver may be ordered to deliver the stock, if he be in a position to do so, or, 2.—to return the money paid, amounting to $1003.61, and for other relief.

In order to maintain this action the petitioner must show;—
1. That the Receiver had specific property belonging to him, or
2. That there was a fiduciary relation between the petitioner and Tyler, Fogg & Company, by and through which the latter agreed to procure for the petitioner as his agent ten shares of the capital stock of said Commonwealth Gas & Electric Company.

In view of the admission that "no certificate for any shares of the Commonwealth Gas & Electric Company have ever come to the possession of said Receiver," it is not necessary to consider the first item in the prayer for relief. The petitioner does not seriously urge its consideration, but does insist that there was a fiduciary relation between the parties, "that the relation between the parties was that of agent and principal, or of trustee and cestui que trust," and cites *Furber* v. *Dane,* 203 Mass., 108-112, in support of his contention. In that case the plaintiff was an employee of a firm of stock-brokers. He gave the firm an order to sell for him twenty shares of Copper stock, and they sold fifteen of these shares for $757.50, for which sum, upon delivery of the certificate they received a check in payment, which check they deposited in their general account with the American Trust Company which collected it. Upon the same day the firm gave to its customer a check for his share of the proceeds of the stock sale; on the next day it made an assignment for the benefit of its creditors, and on the following day the check was presented at the bank by the payee named therein for payment. The firm's balance in the American Trust Company, at no time after the deposit of the check for $757.50, fell below that amount. The plaintiff contended that the balance of the account in the bank was affected with a trust in his favor to the extent of the amount due to him. He contended that when the proceeds of his stock were received by the firm, he became entitled thereto, and that being able to trace these proceeds into the account and into the balance remaining on deposit at the time of the bank's failure, he showed a trust attaching in his favor to that balance, quoting *Cole* v. *Bates,* 186 Mass., 584, *National Bank* v. *Insurance Co.,* 104 U. S., 54-68, In re Hallett's Estate, 13 Ch. D., 696.

The decision of the case turned upon the point that the presentment of the check for payment was not in due season, but with reference to the contention of the plaintiff the court said: "It would be difficult to deny this contention if it appeared that the firm stood in a fiduciary relation to him as to the proceeds of his stock, and that none of the other parties had equities superior to and countervailing his."

After a careful consideration of the testimony we are unable to agree with counsel for the petitioner that the facts in the case sup-

port his theory. It is not contended that Tyler, Fogg & Company agreed to use the identical money represented by the check for the purpose of purchasing the ten shares of stock, and it does not appear that they were acting as agents of the petitioner. It does appear that the petitioner was a voluntary buyer of stock of his own selection, and so far as the case shows there was at the moment entire good faith on both sides of the contract. The transaction from petitioner's own showing did not create a trust relation between the petitioner and Tyler, Fogg & Company. The negotiations were such as ordinarily occur between a buyer and seller in ordinary financial and commercial transactions. Tyler, Fogg & Company had the stock for sale and wanted to sell; the petitioner wanted to purchase, and did purchase and pay for ten shares of stock, with the knowledge that the stock would not be delivered until some days later. There was no mention of agency and no language used from which the relation of principal and agent can be inferred. The petitioner stood in the same relation to Tyler, Fogg & Company as an ordinary buyer in an ordinary commercial transaction where no question of principal and agent is ever raised.

"One having purchased and paid for a specific quantity of an article, acquires no title to it until separated from the residue. Until such separation, the claim of the vendee rests in contract, for breach of which the remedy is by action. A purchase of growing crops, though paid for, passes no title against the creditors of the vendee, until possession or delivery be had. Unless such possession or delivery be had, prior to the death of the vendor and to the issuing of the commission of insolvency upon his estate, the title is in the administrator in trust for creditors." *Stone* v. *Peacock,* 35 Maine, 385.

In *Downing* v. *Lellyett,* Court of Chancery Appeals of Tenn., February 8, 1896, 36 S. W. Rep., 890, the plaintiff requested a bank to purchase for him certain stock on margins. The bank purchased it, through brokers, and made a draft on the plaintiff for the margins, which was paid. The bank remitted the amount by draft to its correspondent, and sent a check on such correspondent to the brokers, but by reason of the bank's failure, the brokers did not obtain the money, and re-sold the stock. The amount remitted was eventually recovered back by defendant as the bank's assignee.

Held that the transaction between the plaintiff and the bank did not contemplate the purchase of the stock with plaintiff's own money, but by the bank with its own funds, and created the relation of creditor and debtor between them, and not of principal and agent, and that the plaintiff could not recover the amount paid from the defendant's assignee as a trust fund, though traced into his hands. *Akin* v. *Jones,* 93 Tenn., 353, 27 S. W., 669, is quoted with approval. It is there said; "Any agreement or understanding, or course of dealing whereby a bank is not to use the identical money, and is to substitute its own obligation in its stead, destroys all idea of a trust."

It is the opinion of the Court that there was no fiduciary relation between the firm of Tyler, Fogg & Company and the petitioner, and the entry must be,

Petition dismissed with costs.

INHABITANTS OF PERU *vs.* ESTATE OF CHARLES FORSTER.

Oxford. Opinion June 11, 1912.

Taxation. Personalty. Employed in Trade. Employed in Mechanic Arts.

Toothpicks stored by a manufacturer thereof in a storehouse preparatory to shipment in the general course of business are not taxable under Rev. St., c. 9, sec. 13, par. 1, as amended by Pub. Laws 1909, c. 4, as personalty "employed in trade," or "in mechanic arts."

On an agreed statement of facts. Judgment for defendant.

Action of debt to recover a tax assessed by the plaintiff town against the estate of Charles Forster, deceased testate, for the year 1910. Plea, the general issue with a brief statement alleging "that said estate is not liable to a personal property tax in said town." An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

L. W. Blanchard, for plaintiffs.

Robert Treat Whitehouse, and Frank W. Butler, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HANSON, J. This case comes up on the following agreed statement of facts:

"Charles Forster died on the 9th day of March, A. D. 1901, in Portland, Maine, leaving a last will and testament, which was duly probated in Cumberland County. In accordance with the terms of said will, the property of the deceased was to be held in trust, during the lifetime of Annie E. Forster of Portland, Maine, Charlotte B. Forster of San Diego, California, and Maurice W. Forster of Dixfield, Maine, they to have the income thereof during their lifetime, and at their decease the principal to go to the heirs-at-law of said testator: That on the first day of April, A. D. 1910, Oscar H. Hersey of Strong, Maine, was Trustee of said estate, and as Trustee the said Hersey carried on the business which was left by the testator consisting of the manufacture and sale of toothpicks: That said estate of Charles Forster owned a toothpick factory in Mexico, in the County of Oxford, near the village of Dixfield: That said estate also owned a lot of land in the Plaintiff town, next to and adjoining the tracks of the Maine Central Railroad: That on said land was a building used as a storehouse, in which said toothpicks, which were manufactured just across the river, in Mexico, were stored before being shipped away in the general course of business: That on the first day of April, A. D. 1910, a large amount of toothpicks were stored in said building to the amount of more than five thousand dollars in value: That the said assessors of the town of Peru assessed upon the toothpicks, stored in said Defendant's storehouse in said town of Peru, a tax of one hundred twenty-seven and 50-100 dollars, for the year 1910.

"No questions are raised as to the regularity of the proceedings, in the Plaintiff town, in assessing the tax, if the defendant is liable for any part thereof.

"The real estate tax has been paid.

"If said estate is liable for the tax assessed on the toothpicks stored in the storehouse in said town of Peru, judgment shall be rendered for the Plaintiffs for the amount sued for; otherwise judgment shall be rendered for the defendant."

The plaintiff claims (1) that the toothpicks stored in the defendant's storehouse in the town of Peru cannot be taxed under the laws of this State in any other town, and if taxed at all they must be taxed in the town of Peru.

(2) That the toothpicks are personal property properly taxable in the plaintiff town, under the provisions of R. S., Chapter 9, paragraph 1 of Section 13, as amended by Chapter 4 of the Public Laws of 1909, as follows:

"All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, store-house, shop, mill, wharf, landing-place or ship-yard therein for the purpose of such employment."

The defendant contends (1) that the agreed statement brings the case clearly within the provisions of Specification 6 of Section 13 of Chapter 9, R. S., 1903, which is as follows:

"Personal property held in trust by an executor, administrator or trustee, the income of which is to be paid to any other person, shall be assessed to such executor, administrator or trustee, in the place where the person to whom the income is payable as aforesaid, is an inhabitant. But if the person to whom the income is payable as aforesaid, resides out of the State, such personal property shall be assessed to such executor, administrator or trustee, in the place where he resides." And (2) that the taxation of trust estates was the subject of a special statutory enactment and was not changed or modified by Chap. 4, Public Laws of 1909.

In view of the stipulation, it is necessary to consider the second contention of the plaintiff only. Were the toothpicks in question "employed in trade" "or in the mechanic arts" within the meaning of Chapter 9, paragraph 1 of Section 13, as amended by Chapter 4 of the Public Laws of 1909?

Counsel places much reliance on *Desmond* v. *Inhabitants of Machiasport*, 48 Maine, 478, where the non-resident occupied a wharf assigned to him by metes and bounds, to which he brought, from his mills in another town, lumber, placed it thereon, and it there remained for several months, *awaiting sale or shipment*, his right thus to use the premises being by a lease for a fixed, certain

and long period of time, and it was held to be an occupancy contemplated by the statute. In that case *Campbell* et al v. *Inhabitants of Machias,* 33 Maine, 419, is cited, in which Shepley, C. J., in announcing the opinion of the court, remarks "that the design of the statute was to render liable to taxation the property of individuals who *so* occupy a mill or wharf as that they should be entitled to receive, and not liable to pay mill rent for the lumber from time to time sawed in the one, or wharfage for lumber deposited in the other," and the court adds: "In this view, the statute requires an actual occupancy, *implying something more than a mere right to make temporary deposits* from time to time, or to pass in common with others, over the wharf, with goods, wares and *merchandise or lumber* for the purpose of immediate shipment."

In *Farmingdale* v. *Berlin Mills,* 93 Maine, 333, cited by plaintiff, it was held that logs in a river far from the plaintiff town, but which reached there subsequent to the first day of April, and were actually manufactured there, were employed in trade in that town, as defined by the statute, although sales of the product of the mill were negotiated in Portland and shipments made on orders from the Portland office,—and cites *Gower* v. *Jonesboro,* 83 Maine, 142, where it is held that wood piled on a wharf, and which was sold "*in small quantities to local parties,* but most of it shipped away," was personal property employed in trade and that the plaintiff was legally taxable in the defendant town.

The facts in the case cited by plaintiff's counsel are entirely different from the facts in this case, and the cases cited are, therefore, not in point. The following cases are in point.

In *Creamer* v. *Inhabitants of Bremen,* 91 Maine, 508, which was an action to recover a tax paid under protest, the non-resident was the owner on the first day of April, 1893, of a quantity of firewood piled upon a wharf and upon the adjacent shore in the defendant town. During the preceding winter the plaintiff had cut and hauled the wood from his own land in the same town. The wood was piled up awaiting shipment during the spring and summer to Thomaston. *Held:* That under these circumstances the personal property was not taxable to the plaintiff in defendant town by virtue of the provisions of R. S., Chap. 6, Sec. 14, clause 1. "This wood under the above circumstances cannot be said to have been "employed in

trade" in the defendant town. It was not hauled to the wharf to be there sold, nor even to be shipped to the place or different places where the owner might subsequently sell it. It was hauled there for the definite purpose of being shipped from there to a particular place when the river opened for navigation in the spring. It was merely in transit.

In *Hittinger* v. *Westford,* 135 Mass., 258, where a dealer in ice had in a town other than that in which he resided and had his office, a storehouse in which the ice which constituted his stock in trade was kept, and from which it was delivered on contracts principally made elsewhere; held, that the building in which the ice was kept was not a "store" within the meaning of Gen. Sts. sec. 12, clause 1, and that the ice was not taxable to him in that town. . . . "The ice houses were only storehouses, and the comparatively trifling amount of ice which may have been incidentally sold from the ice houses did not change their character into stores." . . . "It is obvious from the whole course of legislation that it has been the purpose as a rule to make personal property taxable where the owner is an inhabitant, with certain well defined exceptions, the important one, so far as questions raised in the cases at bar are affected, being, in effect, that if an inhabitant of one town has goods, wares, merchandise, or other stock in trade, in another town, with which he is engaged in trade or business in such other town, such stock in trade is taxable in such other town, *not if it is merely kept there, or traded in there,* but only in case the owner occupies a store in *which he carries on a trade or traffic* in such stock in trade as he has there."

In *Inhabitants of New Limerick* v. *Watson,* 98 Maine, 379, an action of debt to recover a tax assessed for the year 1900, the defendant resided in Houlton, and on April 1, 1900, owned and occupied a starch factory, dry houses and a storehouse in plaintiff town. In the season of 1899 the defendant manufactured about one hundred tons of starch in his mill, and not selling the same, he stored the starch in his storehouse to await shipment, and it remained there until after the first day of April, 1900. The defendant was in business in Houlton and there had his office, where all his books and accounts were kept, and where all business in connection with the manufacture and sale of starch was transacted. None of

the starch was intended for sale in New Limerick, and none was sold there. It was stored there to be shipped as sales were made by the defendant in his office in Houlton, or by correspondence conducted there. It was *held;* that under the circumstances of this case the starch in question was not employed in the mechanic arts, nor employed in trade within the meaning of R. S., (1888) c. 6, sec. 14, for the purposes of taxation. *Held,* further, that the defendant did not occupy any store or shop in the plaintiff town for the purpose of the employment of this starch in trade. . . . "While a storehouse may under some circumstances come within the meaning of the word 'store' as used in the statute, it does not in this case, because the defendant's storehouse was not occupied by him for the purpose of employing this starch in trade in plaintiff town. The starch was not in a store for trade, but in a storehouse for storage."

Counsel for plaintiff urges that the amendment was made for the purpose of reaching property which would otherwise escape taxation, because of the alleged uncertainty as to the meaning of the statute. But the amendment, adding the word "storehouse," does not enlarge the rights of the plaintiff in the case at bar beyond what they were before the amendment. The case before us is not to be distinguished in principle from *Inhabitants of New Limerick* v. *Watson,* supra. It is therefore the opinion of the court that the toothpicks were not "employed in trade" or "in the mechanic arts" in the town of Peru. The storehouse was not a store in the sense in which the word was used by the Legislature. The toothpicks were not placed there for the purpose of employment in trade, or in the mechanic arts, in that town. They had simply reached the first of many stages in the transit to their destination beyond the town of Peru.

The entry must therefore be,

Judgment for the defendant.

MARY E. CANNEY *vs.* DAVID W. COREY AND RALPH E. BRIDGES.

Cumberland. Opinion June 19, 1912.

Bills and Notes. Estoppel. Liability of Parties. Presumptions. Principal and Surety.

1. In the absence of agreement to the contrary, the parties to a note are presumed to be liable on it according to the legal effect of the instrument.
2. Defendant, an indorser of a note, who induced plaintiff to indorse by deceiving her into believing that by indorsing below his name she would become merely a surety for him, is estopped to deny that he assumed the relation of principal to plaintiff.

On report. Judgment for plaintiff. Plea, the general issue.

Action of assumpsit brought by Mary E. Canney against David W. Corey and Ralph E. Bridges, to recover the sum of $2548.63 paid by her to The Merchants Trust & Banking Company of Presque Isle, in satisfaction and discharge of an execution issued by the Supreme Judicial Court for the County of Aroostook, on a judgment in favor of said bank against said Corey, Bridges and Canney.

At the conclusion of the evidence, the case was reported to the Law Court for determination.

The case is stated in the opinion.

Payson & Virgin, for plaintiff.

Ralph E. Bridges, pro se.

Symonds, Snow, Cook & Hutchinson, George H. Smith and Charles F. Daggett, for defendant Corey.

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

WHITEHOUSE, C. J. This case is presented to the Law Court upon a report of the evidence. The question to be determined is the liability of the plaintiff and of the defendant Corey upon a

certain promissory note for $4600, dated December 12, 1907, signed by Ralph E. Bridges, the plaintiff's son, and one of the defendants, and on the back by the defendant Corey, and the plaintiff Mary E. Canney. The plaintiff claims that she is a surety for Bridges, the maker and for the defendant Corey, and hence has the right to be fully indemnified by Corey against any liability on the note. On the other hand Corey claims that he and Mrs. Canney are joint promissors for the accommodation of Bridges, and so as between themselves are co-sureties, and each liable for one-half of the note upon the default of the maker.

June 26, 1909, upon demand of the payee of the note, the defendant Corey paid one-half of the amount of it. Subsequently the payee recovered judgment against Bridges, Corey and Canney for the remaining one-half of the note, and after execution thereon had been issued and payment demanded, the same was paid by Mrs. Canney. This suit is brought by her to obtain reimbursement for such payment from the defendant Corey.

It is undoubtedly true that in the absence of an agreement to the contrary, the presumption of law is that the parties to a promissory note are liable on it according to the legal effect of the instrument, and the burden is on the plaintiff to show that there was an agreement or mutual understanding that Corey should assume the relations of principal as to her.

June 12, 1906, the defendant Bridges gave his promissory note to the defendant Corey for $4000 for capital stock of the Carter & Corey Company which he claims he purchased at the solicitation of the defendant Corey. This note was endorsed by Corey and discounted by the Trust Company at Presque Isle of which Bridges was treasurer, and thus in a position to grant favors to Carter & Corey Company. Bridges had already prior to that time purchased $10,000 of that stock at the solicitation, as he says, of Corey & Carter. At that time the defendant Corey was treasurer and a large stockholder of the Carter & Corey Company. The note for $4000 was not paid at maturity but renewed by a note made payable directly to the Trust Company and endorsed by Corey. When this note became due in June 1907, Bridges wished to borrow $600 more and to renew the note for $4600. From the cash that Bridges had put into the Company for all of the stock purchased

by him, Corey had received a benefit in the increased value of his own large holdings of stock and he readily consented to endorse a renewal note for $4600. But when this note became due in December, Bridges was not in financial condition to pay it, and Corey well knew it. Corey also knew that he himself was in the position of an original promissor on the note, and if the bank should refuse to renew it and proceed to enforce collection of the note at that time he would be obliged to pay the whole of it. There is no evidence in the case that he was not amply able to pay it. He testifies, it is true, that Bridges told him a few days before the maturity of the note that he had received a letter from Barker, the president of the bank, stating that he couldn't renew the note again without an additional endorser, but the letter is not produced, and Bridges says that the first information he had that the bank would require another endorser came from Corey himself. He says that Corey told him that the president had written to him that it would be satisfactory if Mrs. Canney would indorse the note.

There is no evidence that the bank questioned the financial responsibility of Mr. Corey. It appears from his testimony that the Carter & Corey Company had carried a large balance in 1907 as depositors in that bank. Corey was deeply interested in having the note renewed with an additional endorser who might relieve him of one-half of the amount of his liability on it. As far as appears in evidence, he was the only one specially interested in having Mrs. Canney endorse the note; but whether he requested the president of the bank to inform Bridges that the note would not be renewed without an additional endorser, does not expressly appear, but the evidence warrants the conclusion that the idea of having Mrs. Canney indorse the note was suggested by Corey.

The result was that Bridges arranged for an interview between Mr. Corey and Mrs. Canney. Bridges testifies that Corey then told Mrs. Canney in his presence, that "we only needed her name for a short time, for a few months, and that he would have,—that he would pay the note,—that the note would be paid before it became due June 12, 1908. Mrs. Canney replied that "it was impossible for her to endorse the note because if the note wasn't paid at maturity, she couldn't afford to pay, in fact, she didn't have the money to pay it and to take care of the sickness she had in the family. Mr. Corey seemed a little impatient that she should have any idea that

she would have to pay the note. He told her that there was no question of her having to pay the note, that it would be paid, taken care of before it became due, etc.

It is true that Mrs. Canney says in her testimony that Bridges told her, in answer to her continued protests against signing it, that she wouldn't have to pay but half of it in any event, as Mr. Corey's name was on there. And she replied that she couldn't "afford to pay half of it." Thereupon Mr. Corey repeated that there was no question of her having to pay the note, and said, "he would put his name above hers, so she wouldn't be called upon." Upon the strength of this final statement, she appears to have consented to endorse the note.

Mr. Corey does not deny in his testimony that he assured Mrs. Canney that "he would put his name above hers so that she wouldn't be called upon." He knew that she had no knowledge whatever of the previous history of their transactions in regard to this note and no acquaintance whatever with the law of promissory notes, and that she would believe what he said to her. In making that statement he must be presumed to have intended to create a belief in the mind of the plaintiff that he would so endorse the note as to protect her against any liability to pay any part of it. It was equivalent to an assurance that she was only required to sign as surety for him, as well as for Bridges, and a promise that as to her, he would assume the responsibility of a principal. He knew that she so understood it and believed it. His whole course towards her justified her in believing it. If he knew his statement as to the effect of placing his name above hers, to be false, he intended to deceive her. He did not know it to be correct, but recklessly stated as a fact what he did not know to be true. In either event he is estopped to deny that he assumed the relation of principal to the plaintiff, and should in justice be required to pay the full amount of the note.

The certificate must accordingly be,

Judgment for the plaintiff for $2548.63, with interest thereon from February 26, 1910.

INHABITANTS OF BOOTHBAY

vs.

E. I. DUPONT DENEMOURS POWDER COMPANY.

Lincoln. Opinion June 19, 1912.

Taxation. Personalty. Where Taxable. Property Employed in Mechanic Arts.

Logs and lumber used at a mill for manufacture of boxes for the manufacturer's use in shipping explosives are taxable as personalty "employed in the Mechanic Arts," within Revised Statutes, Ch. 9, sec. 13, par. 1, in the town where the mill is located.

On report. Judgment for defendant.

Action of debt to recover a personal property tax assessed against the defendant corporation for the year 1910. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

Tupper & Perkins, for plaintiffs.

William M. Bradley, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, KING, BIRD, HALEY, HANSON, JJ.

HALEY, J. This is an action of debt brought by the inhabitants of the town of Boothbay against the defendant for taxes assessed by the town of Boothbay on the personal property of the defendant, consisting of 550,000 feet of logs and 350,000 feet of sawed lumber, situated on the first day of April, 1910, in the town of Boothbay.

It is agreed that all preliminary steps necessary to authorize the action had been taken, and that the taxes were legally assessed and

committed to the collector, provided said personal property was legally taxable to the defendant in the town of Boothbay.

The defendant, a New Jersey corporation having its principal place of business at Wilmington, in the State of Delaware, on the first day of April, 1910, had a mill in the town of Standish, in the county of Cumberland, for the purpose of manufacturing boxes for the shipment of its explosives. For the purpose of supplying pine lumber to said mill, suitable both as to quality and dimensions to be there manufactured into boxes, it had bought stumpage in the town of Boothbay, and had caused to be erected a portable saw mill in said town on land leased by it for erecting and maintaining said portable saw mill for piling and sticking boards, plank and other lumber. The lease gave the defendant the right to use the shore of the lot leased for the purpose of shipping boards, plank and other lumber. There was a small amount of hemlock sawed with the pine, and, as the defendant did not use the hemlock in the manufacturing of its boxes, the hemlock was sold for the accommodation of the people of Boothbay, and the pine lumber was shipped to Standish, and there manufactured into boxes by the defendant.

It is admitted that the hemlock was a very small part of the lumber sawed, and no claim was made at the argument that, by selling such small quantity of hemlock, the defendant was engaged in the lumber trade, or that the lumber in plaintiffs' town on April 1, 1910, was employed in trade. The logs and lumber in the plaintiffs' town in 1910 was also taxed to the defendant in the town of Standish in the year 1910. The question before the court is: Were the logs and lumber taxable in the year 1910 in the town of Boothbay?

It is provided by section 12, chapter 9, R. S., that all property within or without the State, except in cases enumerated in the following section, shall be assessed to the owner in the town where he is an inhabitant on the first day of April. The owner (defendant) of the logs and lumber in question not being an inhabitant of the State, the property could not be taxed in the plaintiffs' town, unless section 13 so provides.

It was the intention of the Legislature to provide by the enumerated cases in section 13 for the taxation of personal property not

taxable under section 12. To determine under which paragraph of the enumerated cases in section 13 property shall be taxed, it should be ascertained if the property, its condition, and situation are such as are described in paragraph I of said section. If not, are they such as are described in paragraph II, and so on until the property is described in one of the paragraphs of section 13? When it is included within one of the paragraphs of section 13, it is taxable as therein stated, and all similar property similarly situated must be taxed under that paragraph, and cannot be taxed under any other. It being the intention of the Legislature by each paragraph to provide for the taxation of the property therein mentioned, it follows that, when the property is included within the cases mentioned in one of the paragraphs, it shall be taxed under that section and cannot be taxed under any other.

Paragraph I of section 13 is as follows:

"All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April, provided that the owner, his servant, sub-contractor or agent, so employing it occupies any store, storehouse, shop, mill, wharf, landing place or shipyard thereon for the purpose of such employment."

It is agreed that the lumber in question was intended for and was used by the defendant at its mill in Standish, and manufactured into boxes used by it to ship its explosives in. The manufacture of lumber into boxes is unquestionably a mechanic art, and is within the meaning of the term as used in paragraph I. If employed in the mechanic arts within the State, where was it so employed? There can be no question but what it was so employed where it was to be manufactured into boxes, namely, at the mill of the defendant at Standish.

Farmingdale v. *Berlin Mills Co.*, 93 Maine, 333.

Inh. of Bradley v. *Penobscot Chemical Co.*, 104 Maine, 276.

Georgetown v. *Hanscom,* 108 Maine, 131.

Property employed in the mechanic arts, as this lumber was employed, is not taxable in the town where found on April first, if it is so employed in some other town in the State. To render it liable to taxation in plaintiffs' town, (it being employed in the mechanic arts), it must appear that the defendant, its servants, sub-

contractors, or agents so employing the property, occupied for the purpose of the employment of the lumber in the mechanic arts; a store, shop, mill, wharf, landing place or ship-yard in plaintiffs' town.

McCann v. *Minot,* 107 Maine, 393.

The logs and lumber in question were taxable under paragraph I of section 13, chapter 9, and not under paragraph II, and therefore not taxable in plaintiff town, but in the town where employed in the mechanic arts on April 1, 1910, and the entry must be,

Judgment for defendant.

LUTHER J. IRELAND et al. *vs.* EDWARD L. CLARK and SCOTT REED.

Aroostook. Opinion June 19, 1912.

Animals. Teaming Contracts. Duty to Contractors. Master and Servant. Nature of Relation. Customs and Usages. Contributory Negligence.

1. Defendants, who employed plaintiff's team, sleds, and a driver to haul logs, were not bound to furnish them a safe road to team upon where the road was a public highway across a lake.
2. Plaintiffs, whose team, sleds, and a driver, who might be either one of plaintiffs or some one engaged by them, were employed by defendants to haul logs, bore the relation of contractors and not of employes to defendants, as affecting defendants' duty to provide a safe road to travel.
3. It was actionable negligence for defendants to leave unguarded a hole cut by them in the ice on a lake across which plaintiffs' team was driven in hauling logs for defendants.
4. Evidence of a custom is inadmissible, in the absence of proof of its common prevalence in the community and of the adverse party's knowledge thereof.
5. In an action for death of a horse hired by defendants from plaintiffs, and drowned in a hole cut in ice on a lake used as a public highway, whether plaintiffs were guilty of contributory negligence *Held,* under the evidence, a jury question.

On exceptions by plaintiff. Sustained.

Action on the case to recover damages for the alleged negligence of the defendants in leaving unguarded a hole cut in the ice on Saint

Croix Lake, Aroostook County, during a part of the logging season of 1909 whereby the plaintiff lost a horse by drowning. Plea, the general issue. At the conclusion of the plaintiffs' evidence a nonsuit was ordered and the plaintiffs excepted.

The case is stated in the opinion.

Powers & Archibald, for plaintiffs.

Harry M. Briggs, Amaziah G. Fenalson, Ira G. Hersey and Charles P. Barnes, for defendants.

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

HALEY, J. This is an action on the case, alleging negligence of the defendants in leaving unguarded a hole cut in the ice on St. Croix Lake, in Aroostook County, during a portion of the logging season of 1909, whereby the plaintiffs lost a horse by drowning.

During the trial the plaintiffs' counsel asked the witness Sinclair: "Now I will ask you what the custom among men in the woods who are hauling, in regard to cutting holes in the ice, was?"

The question was excluded, subject to exception.

At the close of the plaintiffs' testimony the presiding Justice ordered a nonsuit, to which the plaintiffs excepted, and bring the case before this court on said exceptions.

The undisputed facts are that on the 23d day of December, 1909, the defendants entered into a contract with the plaintiffs, whereby the plaintiffs were engaged with their team to haul pulp wood for the defendants.

The wood was on the side of St. Croix Lake furthest from the railroad wharf, and the plaintiff Luther, with the team owned by himself and the other plaintiff, hauled the pulp wood (under the contract with the defendants) from the woods through a section called the burnt district and across the St. Croix Lake to the railroad wharf. On the 19th day of January, 1911, the plaintiff Luther J. Ireland saw Mr. Sinclair, who was in the employment of the defendants, cutting a hole in the ice about twenty rods out from the railroad wharf, and about two rods from the road across the lake, that was being used by the plaintiffs and others to haul the pulp wood across the lake.

The plaintiff Luther knew that the hole was being cut to obtain water to put upon the road across the lake that was being used by the teams, that it might freeze and make the hauling easier. The next morning, at about a quarter before six o'clock, the plaintiff Luther, with plaintiffs' team, and other men with their teams, left their camp to go to work. With the teams they traveled upon the lake about a quarter of a mile toward the railroad wharf, then turned to the right, and started across the lake to strike the road that they had been using for teaming across the lake. It was dark, they had no lantern, and during the night there had been a snow fall of about two inches. They missed the road, and the plaintiff Luther got off the sleds and walked ahead looking for the road. He left a man on the sled to drive the horses, who kept them close to plaintiff Luther's right arm. The horses stepped into the hole cut by Sinclair on the previous day. When they went into the water they struck the plaintiff Luther, and he "grabbed them and called for a chain." One of the horses was saved, the other slipped from his harness and was drowned.

The plaintiff Luther testified that he was not looking for the hole that he saw Mr. Sinclair cutting the day before, that he did not think of the hole that morning. The evidence shows that one of the defendants was told when the hole was cut that it ought to be bushed, and that he told the man to go across the lake and make a lunch hole for the teams, and to bush it the next morning.

The plaintiffs claim to recover upon two grounds:

1st. Because the relation of master and servant existed between the plaintiffs and the defendants, and that the master (the defendants) was bound by law to furnish the servants (the plaintiffs) a safe place in which to perform their work, and that the road across the lake was furnished by defendants for the plaintiffs to drive upon, and that the master (defendants) was negligent in causing the hole to be cut so near the road used by the servants (plaintiffs) team furnished by the plaintiffs, without bushing it, or in some other way protecting it, and that the servant (plaintiffs) did not assume the risk, even if one of them did the day before the accident see the hole being cut through the ice; that they had a right to assume that the defendants had performed their duty and protected

the hole, and that, if the hole had been properly protected, the accident would not have happened.

2d. That the lake being a public highway, the plaintiff Luther was lawfully traveling thereon; that the defendants, by cutting the hole in the ice and not bushing it, or protecting it in such a way as to warn travelers, created a nuisance upon the public highway, by reason of which the plaintiffs, without fault on their part, sustained the injury complained of.

1st. We do not think the rules of law governing master and servant are applicable to this case. The plaintiffs' team was employed with a driver, either one of the plaintiffs or some one they might employ, to haul logs. The plaintiffs furnished the driver, horses, harnesses, and sleds. The defendants were under no obligation to furnish them a safe road to team upon. The St. Croix Lake is a great pond, and a public highway that any one may use to cross in boats, or to travel upon when frozen.

"The authorities, ancient and modern, are all consistent, and point in one direction. Highways, whether on land or water, are designed for the accommodation of the public, for travel or transportation, and any unauthorized or unreasonable obstruction thereof is a public nuisance in judgment of law."

Veazie v. *Dwinel,* 50 Maine, 479.

"All streams in the State of sufficient capacity in their natural condition to float boats, rafts, or logs, are deemed public highways, and as such are subject to the use of the public."

Veazie v. *Dwinel,* 50 Maine, 484.

Cited with approval in *Smart* v. *Lumber Co.,* 103 Maine, 37.

"The true test, therefore, to be applied in such cases, is, whether a stream is inherently and in its nature, capable of being used for the purpose of commerce, for the floating of vessels, boats, rafts, or logs."

Brown v. *Chadbourne,* 31 Maine, 9.

Approved in *Treat* v. *Lord,* 42 Maine, 552.

"The right in common to all the citizens to the use of its navigable waters has been established by judicial decisions; and that right is not limited in this State to waters, in which the tide ebbs and flows, but is admitted in lakes and fresh water rivers which are navigable."

Moor v. *Veazie,* 32 Maine, 343.

"By the principles of that ordinance 1641-7, which have been too many times recognized, sanctioned, and declared to be a part of the common law of the State, to be now disregarded, it is a public pond, and the use is free to all, who can reach it without trespassing upon the land of others."

Brastow v. *Rockport Ice Co.,* 77 Maine, 100.

In *Conant* v. *Jordan,* 107 Maine, 227, this court again declared that all great ponds in this State, without exception, belong to the public. St. Croix Lake being a public highway, the defendants were not bound, by reason of their contract, to keep the lake, or any part of it, safe, as the master is bound to furnish his servant a safe place to work in. They were under no more obligation, by reason of their employment, to furnish a safe highway than is the merchant who employs a teamster to haul his goods from the depot to his store. The owner or driver of a team has the right to use the highways for the purpose of passage; in winter, this includes the right to travel upon the ice, upon the public highway furnished by nature, viz., those rivers and great ponds that are made by our laws public highways, and if any person creates a nuisance upon the highway on the land, or nature's highways, viz., navigable rivers or great ponds, they are liable to the person who sustains an injury thereby, if in the exercise of due care; but their rights are not regulated by the law of master and servant.

Further, the evidence shows that the defendants hired the team of the plaintiffs, either to be paid for by the day, by the load or by the number of feet of lumber hauled, and the plaintiffs furnished the driver, either one of the plaintiffs or some one they might select. The plaintiffs furnished all the appliances used, horses, sleds, harnesses, and driver, and the law is well settled that, under such circumstances, the relation of master and servant did not exist between the plaintiffs and defendants; that the plaintiffs were contractors, not servants.

In the case of *Quarman* v. *Burnett,* 6 M. & W., 499, decided in 1846, and which has been followed by the English courts and most of the courts in this country where the question has arisen, the rule was established that, "where one hires a team or horses of another together with a driver to do a particular job or kind of work, the

driver is not the servant of the hirer. In that case it appears that the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day or a drive, the owner of the horses providing a driver. The driver on one occasion causing injury by his negligence, the owners of the carriage were held not responsible for this injury. And it was further held to make no difference that the owner of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for such drives, or that they had provided him with a livery which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery where he was accustomed to leave it. Baron Park in that case says, 'Upon the principle facet per alium, facet per se, the master is responsible for the acts of his servant, and that person is undoubtedly liable who stood in the relation of master to the wrong-doer—he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for his misconduct and whose orders he was bound to receive and obey.' That person was the owner of the horses, and not any one at whose service the horses and the driver were temporarily placed."

In *Joslin* v. *Grand Rapid Ice Co.*, 50 Mich., 516, Cooley, J., in the opinion states that the doctrine of *Quarman* v. *Burnett* has been too often and too generally recognized and followed to be questioned now, and that case held, that a driver of a team is the servant of the person who is his regular employer and who has the power to direct where and for whom his services shall be given, and to discharge him for misconduct or incompetency, and not of the person who hires the team for a day, although the latter has the right to direct his actions to the extent of indicating where the work was to be done, and may have actually asked for the services of that particular driver.

In *Quinn* v. *Electric Construction Co.*, 46 Fed. Rep., 506, the court recognized the rule as laid down in *Quarman* v. *Burnett,* and held that the driver of a horse and truck who, with them, was selected to perform services for a third party under a contract by his employer to furnish horse, truck and driver daily for a specified

price, was the servant of his regular employer while engaged in such service, and not the servant of the third party.

In *Jones* v. *Corporation of Liverpool,* L. R., 14, 2 B. D., 895, the corporation owned a water cart, and contracted with Mrs. Dean for a horse and driver, that it might be used in watering the street. The horse belonged to her, and the driver she employed was not under the control of the corporation, otherwise than that its inspector directed him what streets, or what portions of streets, to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart, and in an action against the corporation for the injury he recovered a verdict, which was set aside, upon the ground that the driver was the servant of Mrs. Dean who had hired both him and the horse to the corporation.

In *N. Y. Lake Erie Western R. R.* v. *Steinbrenner,* 47 N. J., 161, the court approved the doctrine of *Quarman* v. *Burnett,* and it was held that the hiring of horses to be driven by a driver regularly in the employ of the person from whom the horses were hired, did not create the relation of master and servant between the hirer and the driver.

In *Little* v. *Hackett,* U. S. Sup. Ct., 116, 366, the court held that a person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, nor prevented from recovering damages against the railroad for injuries suffered from a collision of its train with the hack, caused by the negligence of both the engineer of the train and the driver, and cites with approval *Quarman* v. *Burnett,* and *Jones* v. *Coropration of Liverpool,* supra.

In the case of *Huff* v. *Ford,* 126 Mass., 24, the defendant let to the City of Boston a horse, wagon, and driver by the day. At the time of the injury complained of, they were under the exclusive direction and control of the city as to where to go, where to unload, and what to do in the performance of the work. Suit was brought against the defendant, the owner of the team, for injuries sustained by the alleged negligence of the driver, and the court in its opinion said: "The driver, employed and paid by the defendant, who had

the entire management of the horses as to the manner of driving them, and whose duty it was to see that they were properly shod, was the servant of the defendant in so driving the horses and having them shod, and for the injuries to third persons by his negligence in these respects, the defendant was responsible."

The above cases, and cases cited in the opinions, show that the rule is well established that the person who hires his team, or teams, to another, which he manages and drives while engaged in doing the work for which the team is hired, is not a servant of the hirer, but a contractor, and if the driver of the team, not the plaintiff, is employed by the owner of the team, he is not the servant of the hirer, but of his employer, and the relation of master and servant does not exist between the hirer of the team and the driver. The facts in this case bring it within the doctrine of *Quarman* v. *Burnett,* and the court is of the opinion that the relation of master and servant did not exist between the plaintiffs and the defendants, and that the law applicable to master and servant does not apply in this case.

St. Croix Lake being a public highway, the plaintiffs had a right to travel upon it in any way they might choose, if they did not interfere with the rights of others to the use of the lake, in any manner recognized as lawful, and the defendants had no right to cut such a hole in the ice as the evidence shows they caused to be cut, without properly guarding it to protect travelers on the lake, as held by this court in *French* v. *Camp* et al., 18 Maine, 433. In that case the court instructed the jury, "that the citizens had a lawful right to travel on the river upon the ice, and that if they believed there had been a traveled path, as testified, and that if the defendants cut the ice so near as to render it dangerous to travel there, and that the plaintiff met with the loss of his horse in the manner stated in the testimony, and without any carelessness or fault on his part, but by reason of the cutting of the ice by the defendants, they would find for the plaintiff for the value of the horse so lost." The court held the instruction proper, and stated: "To cut a hole in the center of a road upon the ice, or so near it as to entrap a traveler, is a wanton and unnecessary disturbance of the rights of passage, . . . It is a violation of that great principle of social duty by which each one is required so to use his own rights, as not

to endanger the rights of others," and the verdict for the plaintiff was sustained.

The same doctrine was recognized in *Woodman* v. *Pitman,* 79 Maine, 456.

The cutting of the hole in the ice by the defendants, and leaving it unguarded, might well have been found by the jury to have been a wrongful act, and, under the facts of this case, to have been a nuisance, and that the damages sustained by the plaintiffs were caused by the wrongful act of the defendants in causing the hole to be cut and left unguarded, and that the defendants were liable therefor, if the plaintiff Luther, at the time of the accident, was in the exercise of due care and his own negligence did not contribute to the injury.

It is the opinion of a majority of the court that the question of the plaintiff's due care, and that of whether his negligence, if any, contributed to the injury, were questions of fact that should have been submitted to the jury.

The exclusion of the question asked the witness Sinclair was proper, as there was no evidence or offer to prove that the custom was of common prevalance and well known in the community, and that the defendants had knowledge of it.

Dodge v. *Favor* et al., 15 Gray, 82.

Collins v. *N. E. Iron Co.,* 115 Mass., 23.

Bourbonnais v. *West Boylston Mfg. Co.,* 184 Mass., 254.

Exceptions sustained.

SILAS HUBBARD *vs.* LIMERICK WATER AND ELECTRIC COMPANY.

York. Opinion June 21, 1912.

Motion to Dismiss. Pleading. Property. Process. Natural Flow. Waters.

1. A motion to dismiss lies only to some defect which can be seen on inspection of the writ alone. It does not lie, where to support or resist it, proof is necessary dehors the writ.
2. The plaintiff as a lower mill owner had the right to the natural flow of the river, which right is regarded and protected as property.
3. Before the defendant had a right to take and detain the waters of the river, it was incumbent upon him to take the water in the same manner as it would be required to take other property.

On report. Case remanded.

Action on the case to recover damages alleged to have been caused by the defendant unlawfully erecting and maintaining a dam across the Little Ossipee river, above the plaintiff's mill, "thereby diverting and cutting off a large part of the water which was accustomed to flow into the plaintiff's dam and pond, and stopping the natural course of the water and preventing the same from coming to the plaintiff's said mill." A motion to dismiss the action and an agreed statement of facts were filed. The case was then reported to the Law Court for determination.

The case is stated in the opinion.

Foster & Foster, for plaintiff.

Lord & Fenderson, and Frank M. Higgins, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HALEY, J. This is an action on the case brought by the plaintiff to recover damages alleged to have been sustained by the acts of the defendant in unlawfully erecting and maintaining a dam across the

Little Ossipee river, in the towns of Limerick and Waterborough, in York County, and wrongfully diverting the water from the river.

The declaration alleges, in substance, that the plaintiff was the owner and in possession of an ancient dam, mill and privilege, and entitled to have all the water of said stream, without obstruction or impediment, flow into the pond connected with the mill and privilege, and that the defendant unjustly erected a new dam above the plaintiff's dam, and thereby cut off a large part of the water flowing into the plaintiff's privilege, and stopping the natural flow of said water and diverted and detained the waters of said river, and that, by the acts of the defendant, the plaintiff was unable to obtain sufficient water to operate his mill, and that, by said obstruction and detention of the waters of the Little Ossipee river, as alleged, the plaintiff has been unable to obtain water to operate his mill in the manner he would have operated it, and did operate it, before the doing of the acts of the defendant complained of.

A motion to dismiss the plaintiff's writ was filed, in which it was alleged that the defendant was duly incorporated, as a corporation under the provisions of chapter 159 of the Private and Special Laws of Maine for the year 1907, as amended by chapter 117 of the Private and Special Laws of Maine for the year 1909; that said act, by section 4, reading as follows, "Said corporation shall be held liable to pay all damages that may be sustained by any person by the taking of land or other property, by excavating through any land for the purpose of laying down pipes and aqueducts, building dams, reservoirs, by flowage, the erection of poles and wires or other structures, and any person sustaining damages as aforesaid, if he cannot agree with said corporation upon the sum to be paid therefor, may cause his damages to be assessed in the same manner and subject to the same conditions, restrictions and limitations as is provided by law in the case of damages by the laying out of highways," has provided an express tribunal to have determined the damages, if any, sustained by him, and for that reason this action should be dismissed.

The case is before this court upon said motion and an agreed statement of facts relating to the filing in the office of the Register of Deeds, at Alfred, of a plan and description showing the land and

other property taken by the defendant under its charter, which plan is a part of the case.

The motion to dismiss must be denied. "Such a motion lies only to some defect which can be seen on inspection of the writ alone. It does not lie where to support or resist it proof is necessary dehors the writ." *Hunter* v. *Heath,* 76 Maine, 219; *Shurtleff* v. *Redlon,* 109 Maine. To sustain the defendant's motion, it is obliged to prove from the record in the Registry of Deeds the filing by it of a plan and description of the property taken by the defendant, which would be by evidence dehors the writ. The agreed statement shows that the defendant filed in the Registry of Deeds of York County, a plan containing a description of the land flowed by it, and the length of the dam it erected across the little Ossipee river six miles above the plaintiff's mill. The case does not now show that the defendant attempted by any plan or description filed in the Registry of Deeds, to take any of the waters of the Little Ossipee river, to what height its dam was erected, or what part of the time, if not all of the time, it intended to hold back the water. If the defendant would justify the taking of property under its charter, it must show that it has complied with the requirements of law in the taking of the property.

The plaintiff, as a lower mill owner, had the right to the natural flow of the river, which right is regarded and protected as property, and, before the defendant had a right to take and detain the waters of the river, it was incumbent upon him to take the water in the same manner as it would be required to take other property.

Hamor v. *Bar Harbor Water Co.,* 78 Maine, 127, and cases cited upon pages 134 and 135.

Williams v. *Water Co.,* 79 Maine, 543.

Ingraham v. *Water Co.,* 82 Maine, 335.

The plan and description filed in the office of the Register of Deeds by the defendant in its attempt to comply with section 5 of chapter 159 of the Private and Special Laws of 1907, only shows the length of the dam, and the land flowed above the dam. It does not purport to take any of the water of the river or contain any statement of the time it intends to detain the water not used by it in supplying water to its patrons. This is not a compliance with the statute, and, until the defendant complies with the act under

which it was organized, the owners of the property taken by it, and not taken in the manner prescribed by the act, are not bound to and cannot submit their claim for damages to the county commissioners, except by a reference to them as individuals. As a court, the county commissioners have no jurisdiction. There having been a taking of the water which the plaintiff was entitled to have flow to his mill, and the defendant, not having complied with the law authorizing it to take that water, cannot justify the taking, and the case must be remanded to *nisi prius* to be heard upon the question of damages.

Case remanded to be heard upon the question of damages only.

STATE OF MAINE *vs.* FLORENT SOUCIE.

Aroostook. Opinion June 21, 1912.

Allegation. Complaint. Demurrer. Intoxicating Liquors. Shop and Dwelling House.

In a process for Search and Seizure of intoxicating liquors, where neither the complaint nor the warrant contains any express allegation nor any allegation from which by necessary inference or intendment it appears that said dwelling house therein described, or any part of it, is used as an inn or shop, or for purposes of traffic, nor any allegation by the magistrate before whom the complaint was made that he was satisfied by evidence presented to him, that intoxicating liquor was kept in said dwelling house, or its appurtenances intended for illegal sale, demurrer will be sustained.

On exceptions by defendant. Sustained.

Complaint and warrant under Revised Statutes, chapter 29, section 49, authorizing the process for search and seizure of intoxicating liquors. The complaint, omitting formal parts, is as follows: "Elmer G. Bryson, of Houlton in said County, competent to be a witness in civil suits, on the eleventh day of July, 1911, in behalf

of said State on oath complains that he believes that on the eleventh day of July, in said year, at Grand Isle in said County of Aroostook, intoxicating liquors, were, and still are, unlawfully kept and deposited by Florent Soucie of Grand Isle in said County of Aroostook, in a certain shop and dwelling and its appurtenances situate on the easterly side of highway street in said Grand Isle occupied by Florent Soucie as a store and dwelling said Florent Soucie not being then and there authorized by law to sell said liquors within said State, and that said liquors then and there were, and now are intended by said Florent Soucie for sale in this State in violation of law, against the peace of the State, and contrary to the form of the statute in such case made and provided.

"I Therefore Pray that due process be issued to search the premises hereinbefore mentioned, where said liquors are believed to be deposited, and if there found, that said liquors be seized and safely kept until final action and decision thereon, and that said Respondent be forthwith apprehended and held to answer to said complaint, and to do and receive such sentence as may be awarded against him."

On this complaint a warrant was issued by the Trial Justice to whom the complaint was addressed, and which, omitting formal parts is as follows:

"In the name of the State of Maine, you are hereby commanded to enter the premises described and specially designated in the above complaint, which is expressly referred to as a part of this warrant, and therein to search for said liquors, and if there found, to seize and safely keep the same, with the vessels in which they are contained, until final action and decision thereon; and if you there find said liquors, or have reason to believe that said Respondent has concealed them about his person, or if you are prevented from seizing them by their being poured out or otherwise destroyed, you are hereby commanded to arrest said Respondent, if he may be found in your precinct, and bring him forthwith before me, the subscriber, or some other Trial Justice in and for said County, to answer to said complaint, and to do and receive such sentence as may be awarded against him. And you are in like manner required to summon the Complainant, and also to appear and give evidence touching the matter contained in said complaint when and where

you shall have said Respondent, and to make immediate return of this warrant."

Search was made, ninety-five bottles "each containing one pint lager beer" were seized, the defendant was arrested and brought before the Trial Justice where he waived hearing, pleaded not guilty, and was sentenced to pay a fine of $100 and costs and to be imprisoned 60 days in jail. The defendant then appealed to the Supreme Judicial Court, and when the matter came on for hearing in said court he demurred to the complaint and warrant. The demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

Perley C. Brown, County Attorney, for the State.

A. S. Crawford, Jr., and L. V. Thibodeau, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, BIRD, HALEY, HANSON, JJ.

BIRD, J. The question for determination in this case arises upon demurrer of defendant to a complaint and warrant under R. S., c. 29, § 49, authorizing the process for "search and seizure" of intoxicating liquors. The demurrer was overruled below, and the case is here upon exceptions of defendant.

In support of the demurrer defendant urged that neither the complaint nor the warrant contains any express allegation, nor any allegation from which by necessary inference or intendment it appears that said dwelling house therein described, or any part of it, is used as an inn or shop, or for purposes of traffic, nor did the magistrate before whom the complaint was made allege in said warrant that he was satisfied by evidence presented to him that intoxicating liquor was kept in said dwelling house or its appurtenances intended for illegal sale, thus invoking the provisions of R. S., c. 29, § 52.

We think the exceptions must be sustained. The complaint describes the place of alleged unlawful deposit to be "a certain shop and dwelling and its appurtenances situate on the easterly side of highway street in said Grand Isle occupied by said Florent Soucie as a store and dwelling."

There is no allegation that the dwelling or part of it is used "for the purposes of traffic" and we cannot regard the words "shop and dwelling" and "occupied as a store and dwelling" as, or equivalent

to, an allegation that the dwelling house "or some part of it, is used as an inn or shop." There may be two distinct buildings. It is urged by the State that the use of the words "its appurtenances" shows that the shop and dwelling are identical. But "its" would naturally refer to dwelling, and might refer to shop and the State claims it refers to both. If this be so, it cannot be said that the complaint possesses precise and sufficient certainty or that the allegation is made with reasonable precision and directness: *State* v. *Paul,* 69 Maine, 215, 218; *State* v. *Whalen,* 85 Maine, 469, 472; *State* v. *Hussey,* 60 Maine, 410; see also *State* v. *Spencer,* 38 Maine, 30, 32; *McGlinchy* v. *Barrows,* 41 Maine, 74, 77.

Exceptions sustained.
Demurrer sustained.

In Equity.

CHARLES J. DUNN, Trustee, *vs.* SARAH MORSE et als.

Penobscot. Opinion June 21, 1912.

Equity. Charitable Uses. Charitable Institution. Intention. Income. Trust Fund. Inheritance. Trustee. Will. Designation.

1. The will of J. P. P. provides that Robert W. and Esther A. during their life, or during the life of the survivor, may designate any needy relative of J. P. P. testator as heirs to the trust fund to such an amount as they deem advisable. This is construed as vesting in Robert W. and Esther A. a discretion as to whether or not any of the relatives of J. P. P. should inherit from the trust fund.
2. It was a personal privilege or confidence given to them and they not having designated in their lifetime any such needy relatives, it is to be presumed that it was their judgment that it was not advisable that the relatives should have any part of the trust estate and that the personal privilege of confidence cannot be exercised by the court.
3. That the residue of the trust fund, after the death of Robert and Esther and their widow or widower, if any, should be paid over to an institution, or institutions, for the relief of suffering humanity.
4. A person accepting a trust is bound to execute the trust and to carry out the intention of the testator.

5. R. W. and E. A. having accepted the trust, the power of selecting the institution, or institutions, becomes imperative and must be executed, and not having been executed in their lifetime, the court will not allow the trust to fail for lack of a trustee.

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

Bill in equity against eighteen defendants praying for the construction of the will of James P. Parker, late of Bangor. In addition to the defendants named in the bill, the Bangor Young Men's Christian Association located at Bangor, and the Good Samaritan Home also located at Bangor, were by leave of court admitted as parties defendant. Answers were filed by all the defendants. The cause was then reported to the Law Court "to be determined by that court upon the bill and answers," it being "agreed that the facts set forth in the bill and answers are true." It was also stipulated as follows: "If the court sustains the trust it is agreed that the Good Samaritan Home and the Bangor Young Men's Christian Association may be further heard before a single justice upon the merits of their application for a portion of the whole of the property in question."

The case is stated in the opinion.

Charles J. Dunn, pro se.

Charles H. Bartlett, for all defendants except three.

John Wilson, for Eastern Maine General Hospital.

Edgar M. Simpson, for Bangor Young Men's Christian Association, and Good Samaritan Home.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HALEY, J. This is a bill in equity brought by the plaintiff as trustee under the will of James P. Parker, asking for a construction of certain provisions of the will of said Parker, and directions as to his duties as trustee under said will, with the stipulation that, if the court sustains the trust, the Good Samaritan Home and the Bangor Young Mens' Christian Association may be further heard before a single justice upon their application for a portion or the whole of the property in question.

James P. Parker died at Bangor, of which city he was a resident, on August 1, 1892, leaving as his next of kin and heirs at law Robert W. Parker and Esther A. Crombie. His will was duly proved and allowed at the August term, 1892, of the Probate Court of that county; it being the court that had jurisdiction of the estate of said Parker. Robert W. Parker and Esther A. Crombie were named as executors in said will, and their appointment was confirmed by the Probate Court allowing the will. They were also, by the terms of said will, appointed trustees; but their appointment as trustees was never confirmed by the Probate Court, and they never gave bond as trustees, presumably thinking that, because they were by the will excused from giving bonds as executors, they were excused from giving bonds as trustees. They acted jointly as executors and as trustees under said will until the death of Robert, who died March 24, 1905, leaving a will, by the terms of which his entire estate was devised and bequeathed to his widow, Belle C. Parker, who died April 19, 1906, and whose heirs at law are defendants, and claim one-half of the residue of the estate of said James P. Parker as heirs of Belle C. Parker. After the death of Robert W. Parker, said Esther A. Crombie acted as sole and surviving trustee until, because of mental incapacity, she was removed, and Charles J. Dunn, the plaintiff, was appointed and qualified as trustee under the will of said James P. Parker. Esther A. Crombie died, intestate, on September 4, 1910, and her heirs at law are defendants, and claim one-half of the residue of the estate of said James P. Parker as heirs of said Esther A. Crombie.

By the first item of the will of James P. Parker, he gave and bequeathed to his brother Robert W. Parker and to his sister Esther A. Crombie, each, the sum of $2500. Item 2 of said will, which is the one item upon which there is a disagreement, is as follows:

"Second. I give, bequeath and devise to my brother, Robert W. Parker, and my sister, Esther A. Crombie, jointly or to the survivor, in trust, as hereinafter specified, all the rest, residue and remainder of my Estate, real and personal and mixed of every description, however located and wherever situated.

"I authorize my said trustees or the surviving Trustee, to lease, sell convey and invest, any and all of my said estate, and invest and

reinvest the proceeds of same, and all moneys that may come to hand from my said Estate in any way.

"And the income therefrom to be equally divided between the said Robert W. Parker and Esther A. Crombie said Trustees during their lives.

"In case of death of one of said Trustees, the surviving Trustee to have the sole management of the Trust Estate, retaining one-half of the income to him or her own use and benefit, and from the other half of the income paying to the husband or widow of the deceased Trustee, so much of said income not exceeding Five Hundred Dollars, provided, the half of the income amounts to Five Hundred Dollars. Where the one-half of the income exceeds the Five Hundred Dollars the Trustee may carry the Surplus to the Trust fund, or may use such part as he may designate to assist any needy relative of James P. Parker, or use it for any other purpose they may deem proper.

"The Trustees shall see that the family burial lot receives proper and perpetual care, and they shall have the right to make any change, or get any stones or monuments they may think best, drawing from the Trust fund the amount necessary for such expense.

"In case of death of both Trustees, a Trustee is to be appointed by the Probate Court on petition of the surviving husband or widow or the survivor of them, and said income as hereinbefore designated to be paid to them or the survivor during their life.

"The said Robert W. Parker and Esther A. Crombie during their lives or during the life of the survivor, may designate any needy relatives of James P. Parker as heirs to the Trust Estate, to such an amount as they deem advisable; and the residue to be given to Institution or Institutions for the relief of suffering humanity as may be deemed by said Robert W. Parker and Esther A. Crombie or the survivor of them, as most worthy of it, and shall be designated as the James P. Parker legacy. To be paid over and transferred at the expiration of the Trust, after the death of said Robert W. Parker and Esther A. Crombie and the widow and husband of said Robert W. Parker and Esther A. Crombie.

"In case the Trustees cannot agree in regard to the carrying out any of the provisions of this will, they shall refer all such matters to any Justice of the Supreme Judicial Court."

During the lifetime of said Robert W. Parker and Esther A. Crombie, they designated the Eastern Maine General Hospital as one of the institutions to receive four thousand dollars of the trust fund, and this sum was turned over to the said hospital in the lifetime of said trustees, with the agreement that, during the lifetime of either of them, or their surviving widow or husband, the income should be paid according to the terms of said will, and at the death of both of said trustees, and their widow and widower, if any, the fund should become the absolute property of the Eastern Maine General Hospital, and said hospital claims that by that designation they became one of the institutions mentioned in the will and entitled to share in the residue of the trust fund, and are defendants in this bill, and have filed an answer thereto claiming the fund. The Young Men's Christian Association of Bangor have, by leave of court, been made a defendant, and have filed an answer, claiming that they are an institution entitled to share in said fund. The Good Samaritan Home, a charitable corporation located at Bangor, have also, by leave of court, been made a defendant, and have filed an answer, asking the court to turn over to them said fund, or a part thereof, to be used by them for the benefit of suffering humanity.

It is the claim of the heirs of Robert W. Parker and Esther A. Crombie that, as said Robert W. Parker and Esther A. Crombie, during the lifetime of both, or said Esther A. Crombie during her lifetime as the surviving trustee, did not designate or select any institution, or institutions, for the relief of suffering humanity, to receive the residue of said estate held by them in trust, the gift to them as trustees determined, lapsed, and became part of the estate of James P. Parker and descended to his heirs or next of kin, and one-half thereof passed by the will of Robert W. Parker to Belle C. Parker, the widow of Robert W. Parker, and one-half to the heirs of Esther A. Crombie.

It is claimed, on the other hand, that the residue of the estate after the death of said Robert W. Parker and Esther A. Crombie, the widow of Robert W. Parker and the husband of Esther A. Crombie, should be used for the relief of suffering humanity and given to some institution, or institutions, for that purpose, as provided in the will; that said Robert W. Parker and Esther A.

Crombie, by neglecting during their lifetime to designate the institution, or institutions, which should receive the fund, did not defeat the object of the testator; that it was a gift for charitable uses; and that the court should not allow the bequest to be defeated, but devise a scheme whereby the intention of the testator may be carried out.

No claim is made but that it was the duty of the trustees to carry out the provisions of the will as far as it related to the burial lot of James P. Parker. This not having been done, it is the duty of the present trustees to carry out the wishes of the testator as to the burial lot and charge the trust fund with the expense thereof.

The first question raised is as to the right of the relatives of James P. Parker to share in the trust fund under the following provision of the will:

"The said Robert W. Parker and Esther A. Crombie during their life, or during the life of the survivor, may designate any needy relative of James P. Parker as heirs to the trust fund to such an amount as they deem advisable."

The above must be construed as vesting in Robert and Esther a discretion as to whether or not any of the relatives of James P. Parker should inherit from the trust fund. It was a personal privilege, or confidence given to them, and, they not having designated in their lifetime any such needy relatives, it is to be presumed that it was their judgment that it was not advisable that the relatives should have any part of the trust estate, and that the personal privilege or confidence cannot be exercised by the court. It was only such as they, or the survivor of them, deemed advisable that were to inherit, and the provision of the will that the residue of the trust fund, after the death of Robert and Esther, and their widow and widower, if any, should be paid over to an institution, or to institutions, for the relief of suffering humanity, clearly shows that the testator did not intend that any of his needy relatives should inherit unless they were designated to share in the fund by Robert and Esther, or the survivor of them.

That the bequest to Robert W. and Esther A. was a valid bequest for charitable uses is too well established to be questioned. *Drew* v. *Wakefield,* 54 Maine, 291; *Everett* v. *Carr,* 59 Maine, 325; *Fox* v. *Gibbs,* 86 Maine, 87; *Bartlett* v. *King,* 12 Mass., 537; *Minot* v.

Baker, 147 Mass., 350; *Bullard* v. *Chandler,* 149 Mass., 532; *Going* v. *Emery,* 16 Pick., 107; *Haynes* v. *Carr,* 70 N. H., 463; *Jones* v. *Habersham,* 107 U. S., 174.

In construing the will of the testator we must ascertain, if possible, from the will itself the intention of the testator. What was the object that James P. Parker had in mind in making the trust provision contained in his will? He had provided for his brother Robert and his sister Esther by giving to them absolutely $2500 each. He provided that they should have the income of the trust fund during their lifetime, or the lifetime of the survivor, and that the widow and widower, if any, should have the income during their life. His object seems to have been to protect his brother and sister, their husband and wife, during their lifetime, by the terms of his will and the trust created thereby. There seems to have been no other relative whom he desired should receive any part of his estate. Having made all the provisions that he desired to make for his relatives, his object was to give the trust fund, after the death of the parties therein named, to charity. He had made all the provisions for them that he desired, unless Robert W. and Esther A. should designate certain relatives as heirs to the trust fund, which he gave them the power to do. He intended to dispose of all his property by the will. That he did not intend to die intestate as to any of his property is conclusively shown by the provision that the remainder of the trust fund that included all not specifically disposed of, was to be paid over and transferred at the expiration of the trust, after the death of Robert W. and Esther A. and the widow and husband of said Robert W. and Esther A. It being the intention of the testator to dispose of all his estate, the residue was to be given to an institution, or institutions, for the relief of suffering humanity, and the power of selecting the institution, or institutions, who were to receive the residue of the trust fund was conferred upon Robert W. and Esther A., who were the trustees of the fund, held the legal title, and had a beneficial interest in the income for their lives.

They having accepted the trust, and received the income for themselves under the terms of the trust, it was their duty to exercise the power given them by the will under which they held the fund, and carry out the intention of the testator, and to designate the

institution, or institutions, for the relief of suffering humanity that they deemed most worthy of it; but, by reason of death and infirmity, they neglected to perform that duty.

"In this class of cases the power is so given that it is considered a trust for the benefit of other parties, and when the form of the gift is such that it can be construed to be a trust, the power becomes imperative, and must be executed." I Perry on Trusts, sec. 372. A person accepting a trust is bound to execute the trust, and to carry out the intention of the testator as expressed by the language creating the trust. In this case it was the intention of the testator that the residue of the trust fund should be given to an institution, or institutions, for the relief of suffering humanity, and Robert W. and Esther A. having accepted the trust, the power of selecting the institution, or institutions, became an imperative power or direction, and not having been executed in their lifetime, the court will not allow the trust to fail for lack of a trustee, but by its decree will execute the power, the execution of which was neglected in the lifetime of Robert W. and Esther A. In other words, the court will see to it that the intention of the testator is not defeated by the neglect of those to whom he had intrusted the power to designate the institution, or institutions, to receive the fund. The court will put itself in the place of the trustee, and will execute the power by the most equitable rule. "If the trust or power can by any possibility be exercised by the court, the non execution by the party intrusted shall not prejudice the party beneficially interested or the cestui que trust." Perry on Trusts, 249; *Drew* v. *Wakefield,* 54 Maine, 291; *Cutter* v. *Burroughs,* 100 Maine, 379; *Woodroof* et al. v. *Hundley,* 147 Ala., 287; *Sawtelle* v. *Williams,* 94 Wis., 412; *Towle* v. *Nesmith,* 69 N. H., 216; *Bullard* v. *Chandler,* 149 Mass., 532; *Minot* v. *Baker,* 147 Mass., 350; Perry on Trusts, sec. 20; I Perry on Trusts, sec. 249.

In constituting an imperative power or direction, it is not necessary that the appointing words shall be a command; it is sufficient if the language of the testator, in creating the trust, and stating its purpose and object, is such that the reasonable inference of the language shows that it was the intention that it should be imperative. "In the ordinary cases of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon

the trustee by implication, a general intent to benefit the class is recognized, and the trust will not fail if the trustee accept it and then fails to make a selection." *Minot* v. *Baker,* 147 Mass., 350, supra. In this case the trust fund, with its beneficial use for life, went to Robert W. and Esther A. It was to be paid over after their death, and the death of their husband and wife, to an institution, or institutions, for charitable purposes. They were given the power to designate that institution, or those institutions, and the reasonable inference to be drawn from the language is that he intended that they should carry out his intention and designate the institution, or institutions, and they so understood it and attempted by the gift to the Eastern Maine General Hospital of a part of the trust fund, to execute the power which it was their duty to execute.

This case differs from the case of *Fontaine* v. *Ravenil,* 17 How., 369, the court holding in that case that, as the property had never passed out of the testator, it necessarily remained as a part of his estate. In this case the property did pass out of the testator's estate; it was given in trust to Robert W. and Esther A. The legal title passed to them, and the testator so understood it when he said, "they are authorized to lease, sell, convey and invest any and all of my said estate," and a time was fixed when the residue should be given to an institution, or institutions, for the relief of suffering humanity. The legal, and beneficial interest (for the life of those mentioned in the will) passed from the estate of Robert to the trustees and a valid trust was created, and, as said by the court in the above case, "a power when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust in chancery is held to survive. . . . Had he declared that the residue of his estate should be applied to certain charitable purposes, under the statute of 43 Elz., or on principles similar to those of the statute, effect might be given to the bequest as a charity. The words as to the residue of his property were used in reference to the discretion to be exercised by his executors, without that action, he did not intend to dispose of the residue of his property."

In this case the testator did not intend, by giving to Robert W. and Esther A. the power of designating the institution, or institutions, to receive the fund, to confer a mere power; the property

had been given to them in trust, it had passed from the estate of James P. Parker, and had become a trust fund in which his estate had no interest, and by the will creating the trust the residue of the trust fund was to be applied to charitable purposes, and, as said in the above case, "effect might be given to the bequest as a charity."

It being the opinion of the court that the bequest in question was a valid gift to charitable uses, that it was the duty of Robert W. and Esther A. to have selected the institution, or institutions, to receive the residue of the trust fund, and that by their neglecting to do so during their lifetime, the trust did not fail and fall into the estate of James P. Parker. That it is the duty of the court to place itself in the place of the trustees, and to devise a scheme to carry out the intention of the testator whereby the residue of the trust fund may be given to an institution, or to institutions, for the relief of suffering humanity.

According to the stipulation, the case to be remanded and heard before a single Justice, as to the proper charitable institution, or institutions, to share in the fund. Bill sustained with cost. Decree accordingly.

In Equity.

WALTER L. MORSE, et als., Trustees, *vs.* WILLIAM R. BALLOU, et als.

Penobscot. Opinion June 28, 1912.

Joint Tenants. Tenants in Common. Trust. Executors. Vested Interest. Income. Distribution. Principal.

This is a bill in equity asking for the construction of the following residuary clause in the last will and testament of Llewellyn J. Morse, late of Bangor, deceased.

"The remaining one-third I give, bequeath and devise to Walter L. Morse, Carrie L. Higgins and Alfred J. Robinson above named, to have and to hold the same to the said Walter L. Carrie L. and Alfred J. their heirs, executors, administrators or assigns according to the nature and quality thereof respectively in trust, for the following purposes and uses, viz: to invest, manage and control the same as they may deem best, and during the lifetime of my deceased daughter's husband Willis B. Bridges, to pay over to the said Fannie Bridges Robinson and Louisa Bridges Hill, the net annual income and profits of the said one-third held in trust by them as aforesaid, said trust to continue until the death of the said Willis B. Bridges: and after his decease, then I order and direct said Trustees to transfer and convey said one-third to the said Fannie Bridges Robinson and Louisa Bridges Hill, each to share and share alike, and in case they or either of them are not living at the termination of said trust, then I order and direct said Trustees to transfer and convey said one-third to the persons who would be at the time the legal heirs of the said Fannie Bridges Robinson and Louisa Bridges Hill, or either of them, said heirs to take the same share the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living."

Willis B. Bridges is living so that the trust has not yet terminted. Fannie Bridges Robinson is also living but Louisa Bridges Hill died testate, March 22, 1907, leaving a husband and five children.

1. That the two daughters took a vested interest in the income as tenants in common, and not as joint tenants.

2. That upon the death of Mrs. Hill her one-half of the income became payable to the executor under her will and not to her heirs at law.

3. That the last clause in the portion of the will under consideration "Said heirs to take the same share the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living" refers to the principal of the trust estate at the termination of the trust, and not to the income before the termination.

4. That the second question proposed, as to who shall be entitled to the principal at the termination of the trust, and whether the husband can be considered as an heir in the distribution, is premature. Who the claimants may be at the death of Willis B. Bridges is now a mere matter of conjecture, and it may be that under the changed conditions no instructions from the court will then be needed or requested, and it is therefore unnecessary for the court at this time to consider the question.

In equity. On report. Decree according to opinion.

Bill in equity asking for the construction of the last will and testament of Llewellyn J. Morse, late of Bangor. 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 proof, "the Law Court to render such final judgment as the legal and equitable rights of the parties require."

The case is stated in the opinion.

Louis C. Stearns, Jr., for plaintiffs.

Irish & George, for Louisa Hill, Mark Langdon Hill, Walter Hill and Marion Hill.

George H. Worster, for William R. Ballou.

William H. Irish, for Fred D. Hill, Executor and Guardian.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

CORNISH, J. Llewellyn J. Morse died at Bangor October 24, 1902, leaving a last will and testament which was duly approved and allowed at the November Term 1902 of the Probate Court for Penobscot County.

The testator in the residuary clause of his will divided the residue of his estate into thirds and bequeathed one of these thirds to the plaintiffs, as trustees, in the following terms:

"The remaining one-third I give, bequeath and devise to Walter L. Morse, Carrie L. Higgins and Alfred J. Robinson above named,

to have and to hold the same to the said Walter L. Carrie L. and Alfred J. their heirs, executors, administrators or assigns according to the nature and quality thereof respectively in trust, for the following purposes and uses, viz: to invest, manage and control the same as they may deem best, and during the lifetime of my deceased daughter's husband Willis B. Bridges, to pay over to the said Fannie Bridges Robinson and Louisa Bridges Hill, the net annual income and profits of the said one-third held in trust by them as aforesaid, said trust to continue until the death of the said Willis B. Bridges; and after his decease, then I order and direct said Trustees to transfer and convey said one-third to the said Fannie Bridges Robinson and Louisa Bridges Hill, each to share and share alike, and in case they or either of them are not living at the termination of said trust, then I order and direct said Trustees to transfer and convey said one-third to the persons who would be at the time the legal heirs of the said Fannie Bridges Robinson and Louisa Bridges Hill, or either of them, said heirs to take the same share the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living."

Willis B. Bridges is living so that this trust has not yet terminated. Fannie Bridges Robinson is also living, but Louisa Bridges Hill died, testate, March 22, 1907, leaving a husband and four minor children by her marriage to him, and a son by a former marriage.

The plaintiff trustees, by bill in equity, in which all persons interested have been made parties, ask this court for a construction of the will.

1. The first question propounded is this:

"What disposition shall be made of one-half of the net annual income of said one-third of said residue from the death of Louisa Bridges Hill until said trust shall be terminated by the death of Willis B. Bridges?"

We think the intent of the testator as expressed in the will can be given effect under well established rules of construction. He desired his two daughters to share equally in this one-third. He provided for a trust to continue during the life of Willis B. Bridges, the husband of a deceased daughter. During that period the daughters are to share the income. At the termination of that period they are to share the principal, and in case of the death of either or both

prior to the termination of the trust, the then legal heirs of such deceased daughter are to take such daughter's share in the principal. For that contingency, express provision is made. But nothing is said as to what shall be done with the daughter's share of the income accruing between her death and the termination of the trust. The gift of the income, unlike the gift of the principal, is made to the daughters alone. The heirs are not mentioned. The general rule is that a devise or bequest to children gives a vested interest unless the contrary intention is shown by the will, and we fail to find any contrary intention here.

It is also a well settled rule that in the case of the bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants and in the case of the death of a legatee before the termination of the trust, the income must be paid to the legal representative of the estate of the deceased legatee.

The following cases are directly in point.

In *Jones* v. *Randall,* 1 Jac & W, 100, the testator gave his leasehold estate in trust to his executors, with directions to pay an annuity of four hundred and fifty pounds to his daughter during her life, and after her death to her surviving children in equal proportions, the trust to continue and the annuity to be paid during the life of the survivor of the children. The daughter died after the will took effect leaving four children, and subsequently one of these children died. The question then arose as to whom the share of the annuity belonging to the deceased child should be paid and it was held that it should be paid not to the three surviving children but to the administrator of the deceased child.

In *Eales* v. *Cardigan,* 9 Sim., 384, a testatrix gave to her servants, Samuel Eales and Charlotte, his wife, an annuity of two hundred pounds a year, which was made a charge upon the estate, for their lives and the life of the survivor. The court construed this to mean that each was entitled to the annuity during the joint lives of both and the life of the survivor, and upon the death of the husband, the wife must continue to receive her one-half, while the other one-half passed to the legal representatives of the husband.

The same rule was recognized and followed in *Bryan* v. *Twigg,* L. R. 3, Eq. Cas., 432.

In *Stanwood* v. *Stanwood,* 179 Mass., 226, the will under discussion closely resembled the one in the case at bar, so far as the point under consideration is concerned. The testator devised all his real estate to a trustee for the equal benefit of his four children, who were to receive the net income equally during a certain period, at the termination of which, the trustee was to divide the property held by him under the trust equally among the testator's "said children and their heirs and assigns." One of the children died after the testator but before the termination of the trust. The court held that the children took a vested interest in the income as tenants in common and that the share of this deceased child in the income went to the executor of the child.

The opinion cites and follows the three English cases above referred to. The very recent case of *Federhen* v. *Kibbey,* 204 Mass., 291, reaffirms the same principle.

But the learned counsel for the son of Mrs. Hill by her first marriage, while apparently admitting the force of these decisions contends that they do not apply here, because he claims that the last clause of this section "such heirs to take the same share the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living," in terms divides the income as well as the principal among the heirs, and negatives the idea that it should pass to the legal representative of the deceased daughter.

We do not think this clause was intended to have or has such an effect. It is not to be taken by itself, but is to be read with what precedes it, and when so read it is manifest that this last clause is intended to make clear the testator's meaning. At the termination of the trust he orders the trustees "to transfer and convey said one-third, to the persons who would be at the time the legal heirs of the said Fannie Bridges Robinson and Louisa Bridges Hill or either of them." This does not say in terms that the distribution is to be made by right of representation, but transfers the trust estate to all the heirs of the two daughters, if both had passed away. In order to make it perfectly clear that each branch shall receive only its share, he added the last clause which leaves it beyond a doubt, "such heirs to take the same share, the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living." Without this last clause the will might be given the same effect,

but with it, every possible doubt is cleared away as to who shall receive the principal and in what proportions.

This clause was therefore, not unnecessary as the son claims, but was wisely added.

Moreover this last clause cannot by any fair construction be made to apply to the income to be distributed before the termination of the trust estate. The word "such" forbids it. The preceding sentence provides for the distribution of the corpus of the estate among her then living heirs in case of the death of a daughter. The date of the termination of the trust fixes the heirs who shall be entitled to receive the principal, and this last clause says, "such heirs" shall take the share the daughter would have taken. How can it be possible for the income to be paid over to heirs, when the persons so entitled to take cannot be ascertained until years afterward when the trust ceases. For instance, William R. Ballou, the son who now claims a portion of the income, may never be entitled to any portion of the principal. His right depends upon his being alive at the termination of the trust estate. He will then be one of "such heirs." And only "such heirs" will then take. Until that time he has no interest in the estate.

1. In answer to the first question therefore, the court would say that, one-half the net annual income of said one-third of the residue, from the death of Mrs. Hill until the termination of the trust should be paid to Fred D. Hill, the executor of her will.

2. The second question propounded is this:

"At the death of said Willis B. Bridges and the termination of said trust, who will be entitled to the principal of one-third of said residue?"

We think this question is premature. The trust is still in existence. What the situation may be or who the claimants may be at the death of Willis B. Bridges is now a mere matter of conjecture. The situation now and the situation then will doubtless differ greatly. It may change so that no instructions will then be needed or requested. It is certainly a moot question at the present time and therefore it is unnecessary for the court to consider it.

Taxable costs and reasonable counsel fees, may be allowed by the Judge of Probate from the trust estate.

Decree in accordance with this opinion.

MARGARET H. PENNINGTON *vs.* EPHRAIM GARTLEY.

Aroostook. Opinion June 30, 1912.

Assumpsit. Account. Burden of Proof. Contract. Deed. Destruction of Deed. Delivery. Lease. Minor. Title. Novation.

1. The destruction of a deed once delivered cannot destroy the title which had been conveyed.

2. The plaintiff cannot recover for the use and occupation of real estate to which she had no title.

3. The plaintiff invokes the doctrine of novation based upon the alleged promise by the defendant to pay to her the amount due from the defendant to Hovey and an agreement on Hovey's part that this should be done, but the doctrine of novation does not apply. She was a stranger to the transaction, while novation implies the substitution of a debtor, of a creditor and of a new contract.

On report. Judgment for plaintiff.

Assumpsit on an account annexed for use and occupation of ten acres of land, and on a promissory note. Plea, the general issue. At the conclusion of the testimony the case was reported to the Law Court for determination.

The case is stated in the opinion.

Shaw & Shaw, for plaintiff.

Doherty & Tompkins, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

CORNISH, J. This is an action of assumpsit brought on a promissory note for thirty-six dollars dated July 15, 1910, due in three months with interest at eight per cent, and also on the following account annexed: "To use and occupation of ten acres of land on my farm in Houlton for season of 1910, same you used with Ulmont

H. Hovey, and which you agreed to pay to me, rent being $15 per acre, $150."

No defence is made to the note and the sole controversy is over the claim for rent. The case is before this court on report.

Two insuperable obstacles prevent recovery for use and occupation.

In the first place, it is the use and occupation of ten acres on the plaintiff's farm, that is sued for, but the evidence shows that the plaintiff was not the owner of the premises in question either in the season of 1910 or at any other time.

The history of the title as shown by the uncontradicted evidence is somewhat unique and is as follows:

George L. Pennington, the father in law, of the plaintiff was the owner of the farm in question up to about 1898 or 1899, when he conveyed it to his son George A. Pennington, the husband of this plaintiff. The deed was duly delivered to the son and retained by him until his death in 1907, but was never recorded for reasons well known to the parties but not appearing in evidence.

Then according to the plaintiff's statement, "after my husband's death and his property went through probate, and everything was settled, we decided the farm would be good property for my son and it was deeded right straight to my son." That deed was given in May 1910, after the lease in this case was given, and was put on record some time in 1911. This son whose name is George D. Pennington is a minor and the plaintiff is his legal guardian, having been appointed in February, 1908.

George L. Pennington died on June 26, 1911, and the administrators of his estate are James L. and Sarah A. Pennington.

It is clear from the foregoing that the plaintiff has never had any legal title to the premises, except perhaps an undivided interest by descent from her husband at his decease. The destruction of the deed once delivered could not of course destroy the title which had been conveyed, but in any event, the legal title during the season of 1910, when the controversy here took place was either in George L. or the heirs of George A. or George D. It was not in the plaintiff. She was the guardian of George D., but this suit is not brought by her as guardian. *Hutchins* v. *Dresser,* 26 Maine, 76; *Dorr* v. *Davis,* 76 Maine, 301.

Apparently it was treated by the father-in-law George L. as being still in himself, because on March 9, 1910, he executed and delivered a written lease of the entire farm of about two hundred and fifty acres to Ulmont H. Hovey the son-in-law of the defendant, for one year for a rental of fourteen hundred dollars. The plaintiff appears nowhere in the transaction except in some interviews as will hereafter be seen.

It is difficult to see therefore, how the plaintiff can recover for the use and occupation of real estate to which she had no title. *Porter* v. *Hooper,* 11 Maine, 170; *Carroll* v. *Hayward,* 124 Mass., 120.

But the plaintiff contends in the second place that while the legal title may have been in some other party, she was really to have the rents and profits from the farm and she relies upon an alleged express promise made by the defendant to pay her one hundred and fifty dollars for the use and occupation of these ten acres out of the whole tract. This contention is strongly resisted by the defendant, who says that he had made no such contract with the defendant, that his son-in-law Hovey took a lease of the entire farm, and he, the defendant, occupied these ten acres by arrangement with the lessee. A careful study of the evidence shows that the plaintiff has not sustained the burden of proof on this question of fact. Not only does the testimony preponderate toward the defence but the circumstances point in the same direction.

1. The written lease covers the entire two hundred and fifty acres, and makes the lessee, Hovey, liable for the entire rental of fourteen hundred dollars. There is no exception of ten acres to be occupied by Gartley, with rental to be paid by him. Hovey is left liable for the whole.

2. By the terms of the lease, the title to all crops raised on the leased premises was reserved to the lessor, George L. as security, for payment of the rent. No exception was made.

3. Under the date of September 5, 1910, the attorney for the plaintiff, who was evidently familiar with the entire transaction from the beginning, wrote the lessee Hovey, as attorney for the lessor George L. Pennington, in order to have an understanding in regard to all the crops raised on the premises, and said, "We will not allow you, your father and Mr. Gartley to dig the potatoes and

haul them off the place unless we know that enough of them are saved to pay the rent." This letter is entirely inconsistent with the plaintiff's present position. The lessor was then claiming of the lessee security on all the potatoes raised, and both the plaintiff on the one hand and Gartley on the other as an independent lessee are ignored.

4. Again on November 18, 1910, the same attorney wrote to the defendant Gartley, saying in part, "I have been expecting to see you every day with the money which is due Mr. Hovey on the potatoes you raised on his place and I am surprised that you have not attended to it. I am writing to give you fair warning so that there will be no misunderstanding about it. Mr. Hovey had no right to rent you the land and the crop which you raised on the land belonged to Mr. Pennington, and you cannot give a title to the same until you pay the land rent. I advise you to get the money somewhere and fix it up at once, because the parties are urging me to take some action in the case."

"Hoping that you will give this prompt attention and bring in the one hundred and fifty dollars at once, I am, &c."

This is an exact statement of the transaction as the defendant claims it and conclusively proves that Gartley was operating under Hovey. The plaintiff at that time apparently had no interest in the matter, the only parties concerned being the lessor, George L. Pennington, the lessee, Hovey and the sub lessee Gartley.

Subsequently the lessee Hovey went into bankruptcy and the defendant claims that this changed situation gave rise to the claim in this case.

The conclusion is well nigh irresistible that, the defendant sublet ten acres from Hovey for one hundred and fifty dollars, that he paid a portion of that sum to Hovey in the fall of 1910, forty dollars to the lessor's attorney by order of Hovey, and the balance to Hovey's mother also by his order, and that nothing was ever due from the defendant to the plaintiff in this action on any contract with reference to this farm, either express or implied.

The plaintiff seeks to invoke the doctrine of novation based upon an alleged promise by the defendant to her to pay her the amount due from defendant to Hovey and an agreement on Hovey's part that this should be done.

The evidence on this point falls far short of sustaining this contention, but aside from that, we have found as a fact that neither the defendant Gartley nor the lessee Hovey was the debtor of this plaintiff for use and occupation of this farm or any part thereof and therefore the doctrine of novation does not apply. She was a stranger to the transaction, while novation "implies the substitution of a debtor, of a creditor and of a new contract." *Hamlin* v. *Drummond,* 91 Maine, 175.

The liability on the promissory note being admitted, the entry must be,

Judgment for plaintiff for forty dollars and thirty-two cents with interest from June 15, 1912, and costs.

THOMAS E. GETCHELL

vs.

THE MERCANTILE AND MANUFACTURER'S MUTUAL FIRE INSURANCE COMPANY.

Somerset. Opinion July 1, 1912.

Contract. Equitable Interest. Indemnity. Insurable Interest. Interest. Tenant. Wagering Contract. Statute of Frauds.

1. A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss, not exceeding an agreed sum.

2. The plaintiff had contract with the owner of the property insured for a tenancy to continue during the owner's life, a specific term, and his rights are superior to the rights of ordinary tenants of will.

3. He was interested, pecuniarily and directly, in the preservation of the property and its destruction meant to him a personal financial loss.

4. The plaintiff had such an insurable interest in the property as permitted him to effect the insurance and to recover in case of loss.

5. If the relation between the insured and the property insured was such that injury to it will be a direct and actual loss to him, he had an insurable interest in the property insured.

On report. Judgment for plaintiff.

Assumpsit on a policy of fire insurance to recover for a loss. 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.

Manson & Coolidge, for plaintiff.

W. G. Chapman, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

CORNISH, J. On February 22, 1910, the defendant issued its policy of fire insurance insuring the plaintiff for one year to the amount of one thousand dollars on a two story, frame building and additions thereto, etc., situated at Pittsfield Village, Maine, the plaintiff paying a premium of three dollars and giving his premium note for the further sum of eighty-five dollars. The premises were destroyed by fire on January 9, 1911. The case is before this court on report.

The defendant introduced no evidence, but the following facts are fairly proved by the evidence introduced by the plaintiff. The plaintiff's mother, Amanda R. Brown was the owner of the building at the time of the fire and had been the owner for a period of fifteen years prior thereto. She had placed insurance upon the building in her own name to the amount of two thousand dollars and received eighteen hundred dollars in settlement of her loss after the fire.

The building was occupied by three tenants, the plaintiff occupying the street floor for a hardware store with rooms in the rear for storage purposes, and the other tenants occupying respectively the basement and the tenement in the second story.

About fifteen years ago, the plaintiff's mother was anxious for him to have a business of his own and agreed orally with the plaintiff to let him have this store 65 by 30, with two back rooms, at a rental of fifteen dollars per month, as long as she should live. Acting under that agreement the plaintiff entered into possession of the premises and has occupied them ever since; he has made improvements, rearranging the back rooms, changing the shelving

and putting an ell on the back side of the building, at a total cost of one thousand dollars or more. A fair rental value of the premises at the time the insurance was placed and also at the time of the fire was thirty dollars per month. It further appears that the President of the defendant company, who solicited this insurance, fully understood that the title to the premises was in the plaintiff's mother and what the plaintiff's interest actually was; that the plaintiff's application stated these facts although its precise terms are not in evidence because it was not produced by the defendant although it was filed with the Company when the policy was issued and is referred to by the Secretary of the Company in a letter written to the plaintiff after the fire in which he says: "Upon looking up your letter and application, I find that the building you occupy is owned by Mrs. Brown, who you state is your mother and that the amount placed in our Company was simply to take care of any interest which you might have." There is no claim of fraud or false representation in the procurement of the policy by the plaintiff, or in his application.

The plaintiff therefore claims that under the facts as stated above, he had a pecuniary interest in the preservation of the property, to the amount of one hundred and eighty dollars a year during the life of his mother, that being the annual difference between the rent charged under the agreement, fifteen dollars per month and the fair rental value of the premises, thirty dollars per month; that this was an insurable interest, that the defendant insured it, and should now respond in damages to the amount of his pecuniary loss.

The defendant on the other hand contends that the plaintiff's testimony as to the agreement with his mother is uncertain, unsatisfactory and in a measure self-contradictory, and that he was at most a mere tenant at will with no other or greater rights than the other tenants in the same building or than tenants at will generally, and that he had no such interest as the law regards as insurable.

It is true that the plaintiff varies somewhat as to the terms of the agreement with his mother but the fair conclusion from his testimony as a whole is, we think, as stated above. Assuming his statement to be true, did he have an insurable interest at the time when the policy was taken and also when the fire occurred?

The term "insurable interest" has been defined in somewhat varying terms yet with substantially uniform meaning. The scope of the rule that only an insurable interest can be legally insured, may be determined in some measure from the reason that created it. It was this. A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss not exceeding an agreed sum. Wagering policies are forbidden as against public policy. A should not be allowed to insure for his own benefit B's property in which A has no concern and by the loss of which A would not be directly and financially affected. To hold otherwise would be to increase the moral hazard and to permit one man to profit by the losses of another. The crucial question therefore is, will the insured be directly and financially affected by the loss of the property insured. If so he has such an interest as the law will recognize. The loss must not be indirect or sentimental but direct and actual. It is not necessarily an interest in the property in the sense of title, but a concern in the preservation of the property and such a relation to or connection with it as will necessarily entail a pecuniary loss in case of its injury or destruction. This opens a wide field and the decisions take an extensive range with a growing tendency to expand rather than to contract the scope of the term. It has therefore been held that it is sufficient if the insured has any legal interest whatever as an owner in fee, a mortgagee, a tenant for life or a lessee; or an equitable interest, as a mortgager, even after foreclosure proceedings begun but not perfected, or a purchaser under a bond for conveyance; or if the insured has a right derivable out of some contract relating to the thing insured, of such a nature that the insured may be benefitted by its preservation and prejudiced by its destruction, as a common carrier of goods of others in transportation, or a bargainee of goods who has advanced a portion of the purchase price.

In other words, without attempting to coin a new definition but reversing the usual order, it may be said that any direct pecuniary loss negatives the idea of a wagering policy and presupposes an insurable interest, and an insurable interest can be insured.

We find therefore as we would expect, the term defined in broad and comprehensive language: "If such a relation exists between the assured and the property that injury to it will, in natural con-

sequence, be a loss to him, he has an insurable interest therein." *Wilson* v. *Jones,* L. R. 2 Exch., 139: "Any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." *Eastern R. R. Co.* v. *Ins. Co.,* 98 Mass., 423.

"If a person has such an interest in property that he will suffer pecuniary loss by its destruction, he has an insurable interest." *Wainer* v. *Ins. Co.,* 153 Mass., 335. But no more comprehensive definition has been given than by this court in *Gilman* v. *Ins. Co.,* 81 Maine, 488, where the language is as follows: "It may be stated as a general proposition, sustained by all the authorities, that whenever a person will suffer a loss by a destruction of the property he has an insurable interest therein."

An application of this test brings the interest of the plaintiff in the case at bar clearly within the rule.

This is not the case of an ordinary tenant at will, whose sole interest in the property or in its preservation could not extend beyond the time which would be required to evict him.

But the Supreme Court of Iowa has held that even that interest constitutes a right of possession for a definite term of at least thirty days and is insurable. *Schaeffer* v. *Ins. Co.,* 113 Iowa, 652, 85 N. W., 985.

The rights of the plaintiff in the case at bar, however, are superior to the rights of the ordinary tenant at will. He had made a contract with the owner for a tenancy to continue during the owner's life, a specific term. It is true that the contract was not reduced to writing and was therefore voidable under the Statute of Frauds, but it was not thereby rendered absolutely void and non enforceable. "Parol leases are not void." *Elliott* v. *Stone,* 1 Gray, 571. Having entered into possession under the contract and partly performed it, having with the owner's knowledge made valuable improvements and additions, presumably in consequence of the contract, we are not prepared to say that equity would have left him remediless in case the owner had attempted to evict him. He had in effect paid the difference between the agreed rent of fifteen dollars per month and the fair rental value of thirty dollars per month in advance by the making of the improvements, and he could only be made whole

by a continuation in occupancy during the agreed term. These facts might have furnished ground for equitable interference had occasion required, and the fact that the agreement was oral would not have deprived the plaintiff of his remedy. Specific performance has been successfully invoked under oral contracts voidable under the Statute of Frauds, when part performance has been made. *Ash* v. *Hare,* 73 Maine, 401; *Green* v. *Jones,* 76 Maine, 563; *Woodbury* v. *Gardner,* 77 Maine, 68; *Bigelow* v. *Bigelow,* 95 Maine, 17.

But whatever the plaintiff's remedy may have been had the owner repudiated the contract, the fact remains in this case that she had never done so. She recognized the lease as existing at the time of the fire and the plaintiff as her tenant under it. That tenancy was admittedly of value to the plaintiff. He derived a profit of one hundred and eighty dollars a year under it. His removal to equally good quarters increased his annual rent by that amount. He was interested pecuniarily and directly in the preservation of the property and its destruction meant to him a personal financial loss. The following cases have a bearing upon the propositions involved. *Ins. Co.* v. *Mendenhall,* 164 Ill., 458, 36 L. R. A., 374; *Berry* v. *Ins. Co.,* 132 N. Y., 49, 30 N. E., 254; *Schaeffer* v. *Ins. Co.,* 133 Iowa, 205, 100 N. W., 847; *Welch* v. *Fire Assn.,* 120 Wis., 456, 98 N. W., 227; *Amsinck* v. *Ins. Co.,* 129 *Mass.,* 185.

It is therefore the opinion of the court that the plaintiff had such an insurable interest in the property as permitted him to effect the insurance and to recover in case of loss.

This conclusion is reached in this case with less hesitation because the president of the insurance company was fully informed of the situation when he solicited the insurance and the plaintiff's written application also stated the facts.

With a full knowledge of the plaintiff's relation to the property and of his mother's ownership in fee, the Company issued the policy and received and has since retained the premium and premium note. Under such circumstances it should require unusual reasons to satisfy the Court that the interest insured was not insurable.

The fact that the policy in terms covers the buildings and does not specify the plaintiff's interest is immaterial. The Company knew the facts and independent of that, in the absence of any specific inquiry on the part of the insurers, or express stipulation

in the policy, no particular description of the nature of the insurable interest is necessary. *Gilman* v. *Ins. Co.,* 81 Maine, 488, and cases cited.

The only question remaining is the amount of the plaintiff's loss. The determination of this question is not without difficulty as it is to some extent a matter of estimate, but while this may require a balancing of probabilities, it is not insurmountable. *Doyle* v. *Ins. Co.,* 181 Mass., 139, 144. Similar problems often arise in actions for personal injury. The life tables were introduced in evidence in the case at bar showing that the mother's expectancy of life, her age being seventy-six at the time of the trial, was 5.88 years and at the time of the fire a year before, it was 6.88 years. It was also shown that her health is good and that she comes of a long-lived family on one side at least, her mother living to the age of ninety-three and her maternal grandfather to the age of eighty-three. It would seem, therefore, conservative and just to reckon upon the plaintiff's tenancy continuing for a term of seven years after the date of the fire, and where a lease hold interest is insured, the value of the unexpired term is the measure of loss. *Niblo* v. *Ins. Co.,* 1 Sand., (N. Y.) 551; *Corey* v. *Ins. Co.,* 33 Hun., (N. Y., 315); May on Ins., 2nd Ed., p. 648. In *Schaeffer* v. *Ins. Co.,* 133 Iowa, 205, 110 N. W., 470, it was held that the loss to the insured from the destruction of a building which he had a right to occupy during his life was determined by the difference between the reasonable rental value and the rental cost to him for the remainder of the term, such term to be computed from the life tables and other material evidence. Reckoning therefore, on the basis of one hundred and eighty dollars a year for seven years from January 9, 1911, a total of $1260, the loss is approximately determined by taking the present worth of that amount on May 7, 1911, that being sixty days after proof of loss was received by the Company.

The amount so ascertained exceeds slightly the amount of the policy.

Therefore the entry must be,

Judgment for the plaintiff for $1000 and costs.

STATE OF MAINE *vs.* PETER A. HOULEHAN. No. 33.

Kennebec. Opinion July 26, 1912.

STATE OF MAINE *vs.* PETER A. HOULEHAN. No. 32.

Kennebec. Opinion July 26, 1912.

Appeal. Autrefois Convict. Complaint and Warrant. Exceptions. Motion in Arrest of Judgment. Instructions. Pleading. Intoxicating Liquors.

1. Upon the imposition of sentence, the taking of an appeal and filing an appeal bond, the jurisdiction of a magistrate or judge of a municipal court is at an end and he has no further jurisdiction of the case unless the appellant withdraws his appeal as, and in the manner, authorized by R. S., c. 133, S. 19.

2. When a motion is made by an appellant, under R. S., c. 133, S. 19, to withdraw his appeal, the powers of the magistrate are those only which are conferred by that section of the statute.

3. A record is a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and terminating with the judgment and only the records of magistrates which are made in the course of judicial duty are of force.

4. Even when the record of prior conviction is in the same court, an attempt to set up a prior conviction by way of motion instead of by plea is not to be encouraged nor departures from the requirements of such a plea favored.

5. Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law.

6. Like a demurrer, a motion in arrest of judgment is addressed only to the record and can introduce no facts not appearing therein.

On exceptions by the defendant. Exceptions sustained and new trial ordered in both cases.

In these cases the respondent was indicted at the September term, 1909, of the Superior Court for Kennebec County for keeping and maintaining a common nuisance. The material parts of the indictments are as follows:—That Peter A. Houlehan, of Farmingdale, in the County of Kennebec, at Gardiner, in said County of Kennebec, on the first day of January, A. D. 1907, and on diverse other days between said day and the day of finding this indictment, a certain tenement occupied by the said Peter A. Houlehan as a storehouse, situated in said Gardiner, unlawfully did use for the illegal keeping and illegal sale of intoxicating liquors. A trial was had before the jury; a verdict of guilty was rendered in both cases. To the admission and exclusion of certain testimony, the respondent excepted.

The case is stated in the opinion.

Joseph Williamson, County Attorney, for the State.

George W. Heselton, attorney for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, SPEAR, CORNISH, KING, BIRD, HALEY, HANSON, JJ. SPEAR AND CORNISH, JJ., dissenting.

BIRD, J. These two cases, against the same defendant, upon identical indictments for nuisance between the first day of January 1907 and the day of the finding of the indictment, are before us upon exceptions. The defendant was tried upon one of the indictments (No. 33) and found guilty and was immediately tried upon the other indictment (No. 32) with like result.

In the case first tried it is necessary to consider but one of the exceptions. The State offered as tending to prove the crime set forth in the indictment the docket entries of the Gardiner Municipal Court as follows:—"State v. Peter Houlehan. Charge, search and seizure. Complainant Frank E. Andrews. Plea, not guilty. August 26 continued to August 27 at 10 A. M. Found guilty August 27, 1909. Sentence, $100 and costs, $15.82, and 60 days in jail. Appealed, and furnished sureties in the sum of $200 for appearance at the Superior Court. September 6, jail sentence nol prossed, paid fine and costs. Paid $117.32 September 6, 1909."

Upon the imposition of sentence, the taking of the appeal and filing of the appeal bond, the jurisdiction of the magistrate was at

an end and he had no further jurisdiction of the case, (*Tuttle* v. *Lang,* 109 Me., 123, 127) unless appellant withdrew his appeal as, and in the manner, authorized in R. S., c. 133, § 19, which, so far as pertinent, is as follows:—"The appellant may, at any time before such copy has been sent to the appellate court, come personally before such magistrate, who may permit him, on motion to withdraw his appeal and abide by the sentence appealed from; whereupon, he shall be ordered to comply with said sentence and the sureties taken upon the recognizance upon such appeal shall be discharged."

Whether or not on September 6, 1909, the copy, "of the whole process, and of all writings before the magistrate" (R. S., c. 133, § 18) had then been sent to the appellate court does not appear but assuming that it had not and that the appellant personally came before the magistrate, there is no entry showing that he moved, either in writing or otherwise, to withdraw his appeal and abide by the sentence appealed from. Assuming, also, that this was done, the action of the magistrate was wholly unauthorized. The record shows neither withdrawal of the appeal nor an order to abide by the sentence. On the contrary instead of making an entry of "appeal withdrawn" without which he could make no further entry, he proceeds to modify the sentence, although his only authority in the premises was to order compliance with the sentence already imposed. If then, the Judge of the Municipal Court has no power after imposition of sentence, save in strict accordance with statute in matters of appeal, any entry he may make upon his docket or cause to appear, as of record, of an act respecting the person and case, not within his statutory powers regarding appeal, is as much beyond his power as the act itself. A record is a memorial or history of judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment. *Sayles* v. *Briggs,* 4 Met., 421. It is only records of magistrates which are made in the course of judicial duty which are of force. *Wells* v. *Stevens,* 2 Gray, 115, 118. It is the duty of every Justice to insert in the record of each cause before him a full narrative of everything which is necessary to exhibit its progress, and the final determination of it *so far as he has any official connection with it: Wells* v. *Stevens,* Id., p. 17. The entry of September 6, 1909, is a mere personal

memorandum—has no judicial effect—and, if given effect would result in modifying a record by parol: *Kendall* v. *Powers,* 4 Met., 533. The entry in the present case was beyond the power of the Judge to make and is not admissible as evidence to contradict the record. It was a nullity as was the similar entry in *Houlehan* v. *County,* 108 Me., 497.

The appeal was not withdrawn and the judgment of conviction, at the time of the docket entries were offered, was vacated by appeal: *Campbell* v. *Howard,* 5 Mass., 376, 378; *State* v. *Quinn,* 96 Maine, 496, 498; *Willet* v. *Clark,* 103 Me., 22, 23; *Com.* v. *Richards,* 17 Pick., 295, 298.

The exceptions must be sustained.

In the second case, it appears that before the opening argument, defendant "filed a motion, in substance, that this case had been covered by the case just tried, No. 33." The overruling of this motion constitutes the ground of the first exception. An examination of the motion reveals an attempt to plead a prior conviction by way of motion. The practice is not to be encouraged and, while strictness of pleading may be somewhat relaxed when the record of the prior conviction is in the same court in which the plea is filed, we may doubt if the motion complies with all the requirements of a plea of *autrefois convict.* This, however, it is unnecessary to determine. The bill of exceptions does not show the character of the reply of the State to the plea—whether an issue of law or an issue of fact was presented, nor whether upon the overruling of the motion any, or what judgment, was entered. Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law: *Fletcher* v. *Clarke,* 29 Maine, 485; *Vernon* v. *Bridges,* 98 Maine, 491; *Soufest* v. *Robbins,* 101 Maine, 176; *Hix* v. *Giles,* 103 Maine, 439. The exception is overruled.

After verdict defendant filed a motion in arrest of judgment which is in substantially the usual form with the additional matter "And the said indictment is bad because it alleges an offence covering the same period of time and the same alleged offence upon which respondent has heretofore been found guilty by a verdict of the jury, and said verdict is still in force and has never been reversed." The denial of the motion is the ground of the second exception. As a demurrer in a criminal case, reaches the indictment

as the same may be recorded, so a motion in arrest of judgment reaches the whole record of the cause as made up to the time of filing the motion. Each can reach only errors of record, neither can plead facts not of record. Another difficulty is that the record is not before us. The indictment is set out in full, but neither the plea of the defendant nor the motion above referred to nor the pleadings subsequent thereto appear of record and, while the nature of the motion is apparent from the bill of exceptions, this, however, is not part of the record, nor could have been of record before the overruling of the motion in arrest. This exception, also, is overruled.

In the charge of the presiding Justice, he said among other things, "In my judgment,—and this is matter for me to give you instructions upon,—in my judgment this action may be maintained against this respondent for maintaining a common nuisance in his saloon, provided, you find by the evidence presented in this case that during the period covered by this indictment he has kept intoxicating liquors in his saloon for sale, or has sold intoxicating liquors illegally, and if he has sold at all it is illegally, because there is no contention that he was licensed to sell."

To this portion of the charge defendant seasonably objected and had exceptions. We think the exceptions must be sustained. The evidence of the government was directed to proof of the maintenance of a nuisance in the defendant's saloon. The charge required evidence of keeping intoxicating liquors in the saloon, but the evidence of sales required is not so limited or restricted and might be understood to refer to sales anywhere while he occupied the saloon and especially in view of the words immediately following;—"and if he has sold at all it is illegally." The jury may have misunderstood. *King* v. *Ward,* 74 Maine, 349, 351; *Gilman* v. *McNeil,* 45 Maine, 599, 601; *Hopkins* v. *Fowler,* 39 Maine, 568, 570.

This exception is therefore sustained.

The entry will be, in each case,

Exceptions sustained and new trial ordered.

M. D. P. THOMPSON *vs.* JAMES B. SOULE.

Franklin. Opinion June 7, 1912.

Agreement. Commissions. Contract. Exceptions. Extension of Option. Motion. Quantum Meruit.

1. The plaintiff had two written options given by the defendant authorizing him to sell certain timber land at commission of 5% within a specified time and at a price named. The time named in both options had expired and no sale had been affected and no customer obtained ready and willing to pay the price named. The plaintiff claimed that, in addition to the written options, the defendant promised to pay him for his services in trying to find a customer for the property, even if the property should be sold to other parties by the defendant. Whether there was such a contract as the plaintiff claimed, in addition to the options, was an issue of fact for the determination of the jury.

2. The following instruction to the jury on the question of damages were held to be correct: "You are to make the plaintiff whole as near as you can. I don't know how you will figure it. It appears that the plaintiff did more or less work. It seems impossible for him to state what he did, but in arriving at the amount which he is entitled to, if entitled to anything, you will consider the value of the property and the effort he made, according to the evidence, and determine what would be a fair, a reasonable price for the services performed."

On Motion and Exceptions. Motion and Exceptions overruled.

This is an action of assumpsit. In the declaration are two counts. The first count is an account annexed to the writ for $6000 as commissions upon the sale of 12,800 acres of timber land. The second count alleges that, at the request of defendant, the plaintiff performed certain labor and services for him in selling and assisting in finding a customer for said land and that said services were reasonably worth $6000; that in consideration of said services the defendant promised to pay the plaintiff so much as he reasonably deserved. The jury rendered a verdict for the plaintiff for $1425.

Case stated in the opinion.

H. S. Wing, E. E. Richards, for Plaintiff.

A. Simmons, for defendant.

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

KING, J. This cause is before the Law Court on defendant's motion and exceptions. It is an action of assumpsit containing two counts. In the first the plaintiff alleges that the defendant is indebted to him, according to an account annexed, for $6000 as commissions upon the sale of 12,800 acres of timber land.

In the second count he alleges that at the defendant's request he performed certain labor and services for him in selling and assisting to find a customer for said land and that in consideration thereof the defendant promised to pay him so much money as he reasonably deserved to have therefor, which he avers is the sum of $6000. There was also the common money count with specifications thereunder.

The land was sold for $115,000, and it was admitted that if the plaintiff was entitled to recover under the first count for commissions the damages would be 5% on the selling price, or $5750. The verdict was $1425, showing that the jury did not find the plaintiff entitled to recover the commissions sued for, but that he was entitled to recover that sum for his labor and services sued for under the second count in his writ.

1. The motion. Two written options, or contracts, given by the defendant to the plaintiff were put in evidence, under which the plaintiff was authorized to sell the land on commission at 5%, within a specified time, and at a price named. The first option was dated March 15, 1905, and continued up to May 1 following. The other option was given February 18, 1908, for thirty days with the privilege of an extension for thirty days more. The plaintiff contended that between the time the first option expired and February 18, 1908, two other options were given him. This the defendant denied. The property was not sold during the life of either of the written options, but was conveyed by the defendant to the Great Northern Paper Company by deed dated September 1st, 1909.

The plaintiff contended and introduced evidence tending to show that from the time the first option was given to the time of the sale of the property he was acting as the defendant's broker and agent in an effort to find a customer for the land, notwithstanding the fact that during a considerable part of that time he had no written option in actual force. And the evidence does show that during that time the plaintiff corresponded with many persons in relation to a sale of the land, and showed the property to several parties whom he had interested in it. It appears that a Mr. Record —representing himself and others—became interested in the property through the plaintiff's efforts and had it examined and estimated by Prof. Austin Carey, the then State Forester. After that exploration the plaintiff and defendant met Mr. Record in an effort to close a sale with him, which was not done. This interview was after the option of February 18, 1908, had run out. The plaintiff testified that at that time the defendant said to him "It is for your interest for me to sell this property to this party on account of your commission," and that he replied: "Mr. Soule, lay that right one side, work for your own interest; I have other parties, and if we can't sell these parties we will work at the other parties, and see if we can't get your price," to which the defendant replied: "Mr. Thompson, I will see that you have your pay for your trouble if your party don't buy." The plaintiff also testified that at another time the defendant said in a conversation concerning his right to sell the property himself free from the plaintiff, "But if I do sell it free from you I will satisfy you for your trouble you have been to."

In answer to questions on cross examination the plaintiff further stated that before the time of the Record conference and soon after the option of March 15, 1905, was given, the defendant promised him that he would pay him for his services in trying to find a customer for the property, even if the property should be sold to other parties by the defendant. On the other hand, the defendant testified that he never at any time promised to pay the plaintiff anything for his services in case he did not sell the property under the written options, or produce a customer for it able and willing to buy it under the terms of the options. Whether there was such a contract, as the plaintiff claimed, in addition to

the options, was an issue of fact submitted to the jury. The presiding Justice gave the jury explicit instructions as to this precise issue. Among other things he said: "But the plaintiff says that after, or at about the time of this meeting of the plaintiff and defendant and Record, when they tried to carry through this deal, where $93,000 had been offered, they had some talk in regard to the commission, and that he gave certain advice to Mr. Soule, and that at practically the same time the defendant told him to continue and to keep his parties interested—that is in substance what he said—and if he didn't procure a customer, and the defendant got no return for the work he had done and would do, if he continued in advertising and forcing the property upon the market, he would pay him for his services and disbursements. Now the defendant denies that. That is a contract the plaintiff sets up, and he must prove it by a greater weight of evidence. There must be a preponderance of the evidence in his favor upon that branch of the case." And the jury were further instructed: "If you find that the plaintiff is not entitled to his commission because he has not sustained the burden of proof upon that branch of the case, and you do find that the other contract or agreement that is claimed was made after the Record deal fell through, then you will come to the question of damages upon that branch of the case."

That issue was stoutly contested, with the testimony of the plaintiff and defendant sharply in conflict, and the jury found the issue in the plaintiff's favor. If they believed him and accepted his testimony as against the defendant's their finding in his favor on this branch of the case was justified. After a careful examination of all the evidence in the case the court does not find that the jury's conclusion was unmistakably wrong.

The defendant complains further that the damages awarded are so excessive that a new trial should be granted. It is to be borne in mind that the plaintiff contended, and the jury may have so found, that the defendant had promised to pay him (in case he should not be entitled to commissions under the options) for all his services and disbursements in trying to find a customer for the land during the whole period from the time of the first option in March, 1905, to the time of the sale of the property in September, 1909, a period of 4½ years. The extent and character of the

plaintiff's services during that period, and the amount he should receive therefor, were matters of fact to be determined by the jury. The parties were entitled to their judgment on those matters, and the jury awarded the plaintiff $1,425. The court might not have awarded as much. Difference of opinion and judgment is perhaps to be expected in such matters. But a careful reading of the evidence in the case does not show that the damages awarded by the jury are so manifestly excessive that they ought not to stand.

The exception. The defendant excepted to the following instructions to the jury as to the damages the plaintiff might recover under his claim for services as sued for in the second count in the writ: "You are to make the plaintiff whole as near as you can. I don't know how you will figure it. It appears that the plaintiff did more or less work. It seems impossible for him to state what he did, but in arriving at the amount which he is entitled to, if entitled to anything, you will consider the value of the property and the efforts which he made, according to the evidence, and determine what would be a fair, a reasonable price for the services performed."

The defendant contends that the instructions excepted to were erroneous because the jury were told to consider the value of the property. We think the value of the property was a proper element for the jury to consider. It was material to the question whether the services claimed to have been rendered were reasonable in kind and extent, for what would be a reasonable service and expense in an effort to sell a tract of land valued at $100,000 might be grossly unreasonable concerning a tract worth only $100. The plaintiff claimed that he was employed by the defendant to continue his efforts to find a purchaser for the property, and keep it upon the market, under an express promise that even if he did not make a sale of the property, so as to be entitled to commissions, he should nevertheless be paid for his services and expenses.

That employment, if it existed as the plaintiff claimed, was confidential and responsible, and what would be a reasonable compensation for the services rendered under that employment would depend somewhat at least upon the extent of the responsibility.

In *Kentucky Bank* v. Combs, 7 Pa. St., 543, Combs claimed compensation for his services in ineffectually endeavoring to procure

the return of one Lewis from Texas so that the Bank might use him as a witness in support of a claim for which it had brought suit. The court instructed the jury that as to the amount of their verdict they might consider the importance of the business intrusted to Combs and might "consider the extent of the claim of the Kentucky Bank on the Schuylkill Bank." In sustaining the instruction Gibson, C. J., said: "It is not to be doubted that responsibility, in a confidential employment, is a legitimate subject of compensation, and in proportion to the magnitude of the interests committed to the agent."

In the case at bar a fair and reasonable compensation for plaintiff's services in trying to sell the defendant's land, recoverable under the special promise of payment therefor as claimed by the plaintiff, might not be fully ascertainable from the mere fact of the number of letters the plaintiff wrote concerning the land, or the number of conferences he had with prospective purchasers, or the precise number of days actually employed in the service, but also from a consideration of the responsibility imposed upon the plaintiff by the employment, and that responsibility was determinable to some extent by the value of the property.

It is therefore the opinion of the court that the instructions complained of were not erroneous.

Motion and exceptions overruled.

BANGOR RAILWAY & ELECTRIC COMPANY

vs.

INHABITANTS OF ORONO.

Penobscot. Opinion July 26, 1912.

Appeal. Adjudication. Apportionment. Decree. Electric Cars. Legislature. Highway Bridge. Jurisdiction. Notice. Railroad Commissioners. Repairs. R. S., Ch. 51, Sec. 75.

1. For many years prior to the organization and operation of the Bangor Electric Railroad, the town of Orono had maintained a bridge across the Stillwater branch of the Penobscot River which was in every respect adapted and suitable for all purposes of a highway bridge.
2. Upon the extension of the railroad into the town of Orono, the railroad company, under proper authority, appropriated a part of the bridge to its own use and operated its cars thereon.
3. In consequence of this increased weight imposed upon the bridge, the structure gradually weakened under the weight and vibration of the cars, until the 28th day of July 1911, when its further use was prohibited to the railroad company by order of the Railroad Commissioners.
4. The Railroad Commissioners suo moto gave notice of a hearing to be held on July 28, 1911, at which time the Commissioners determined, ordered and decreed that said wooden bridge shall be rebuilt by constructing in place thereof a steel bridge resting upon granite or concrete piers and abutments which shall be suitable and safe for both highway and street railway uses. That said bridge shall be built by the Bangor Railway and Electric Company under the direction of said board of railroad commissioners and to its satisfaction.
5. The railroad commissioners were vested with authority to direct the railroad company to order a renewal of the bridge in the place of the old one in accordance with their order, and to determine who shall bear the expense of repairs, renewals, strengthening or rebuilding or to apportion the expense between the railroad company and the town of Orono.

On report. Appeal denied. Decree of Railroad Commissioners affirmed.

This is an appeal of the Bangor Railway and Electric Company from a decree of the Railroad Commissioners ordering the Railway and Electric Company to build a new steel highway bridge across the Stillwater branch of the Penobscot River at Orono in place of the present wooden structure.

E. C. Ryder, for plaintiff.

C. J. Dunn, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, SPEAR, CORNISH, KING, HANSON, JJ. BIRD, J., did not concur.

SPEAR, J. For many years prior to the organization and operation of the Bangor Electric Railroad the town of Orono had maintained a bridge, across the Stillwater branch of the Penobscot River, which was in every respect adapted and suitable for all the purposes of a highway bridge. Upon the extension of the railroad into the town of Orono the railroad company, under proper authority, appropriated a part of this bridge to its own use and operated its cars thereon. In consequence of this unusual and increased weight imposed upon the bridge, which was neither anticipated nor necessary in its original construction, the structure, although repaired and strengthened from time to time, gradually weakened under the weight and vibration of the cars, until on the 28th day of July, 1911, its further use was prohibited to the railroad company by order of the railroad commissioners. This suspension of the use of the bridge resulted in operating the road by running the cars from each end of the bridge, the passengers, whatever the weather conditions, being obliged to walk the bridge in order to take the car and pursue their journey in either direction. This condition of inconvenience to the company and annoyance to the public has continued to the present time.

On the 22nd day of July, 1911, the railroad commissioners, suo moto, gave notice of a hearing to be held on July 28, 1911, at which they would "determine the repairs, renewals for strengthening of parts, or if necessary, the manner of rebuilding said bridge, required to make the same safe for the uses to which it is put. And said railroad commissioners will then and there further determine by whom the expenses of such repairs, renewals, strengthening or

rebuilding of said bridge shall be borne, or will apportion the same in such manner, as shall be deemed by said board just and fair." Upon this notice the commissioners met and adjourned the hearing thereon to August 9, and again from August 9 to October 13, 1911, when all parties in interest were fully heard and the various matters involved in the notice were adjudicated as follows: "It is therefore hereby determined, ordered and decreed that said wooden bridge shall be rebuilt by constructing in place thereof a steel bridge resting upon granite or concrete piers and abutments, which shall be suitable and safe for both highway and street railway uses.

"Said new bridge shall be built by said Bangor Railway and Electric Company upon plans to be submitted to and approved by the Board of Railroad Commissioners, and all work thereon shall be done under the direction of said Board and to its satisfaction.

"The expense of rebuilding said bridge is hereby apportioned between said Bangor Railway and Electric Company and said town of Orono in the manner following:

"Upon the completion of said new bridge by said Bangor Railway and Electric Company, and its approval by the Board of Railroad Commissioners, the town of Orono shall pay said Bangor Railway and Electric Company, as its just and fair proportion of said expenses, forty per cent of the same; but said town of Orono's proportion of said expenses so to be paid said Bangor Railway and Electric Company shall in no event exceed the sum of twelve thousand dollars.

"And it is hereby further decreed that after the completion of said new bridge, the Bangor Railway and Electric Company shall thereafter maintain the planking between its rails, and the town of Orono shall maintain all planking for the roadway; and all other expenses of repairs and maintenance of said bridge shall be borne equally by said railway and said town."

From this adjudication the railroad company seasonably appealed to the next succeeding term of the Supreme Judicial Court to be held in Penobscot County, and within the proper time filed in the office of the board of railroad commissioners its reasons of appeal in substance as follows:

1. That the bridge described in the decree is a highway bridge which the town was bound to maintain and keep in repair and not

the railroad company, and that the commissioners had no authority in law to order the company to build a new structure or bridge.

2. The second reason in its effect upon the decision of the case is precisely like the first.

3. That if the railroad company can be required to build a new bridge, then the railroad commissioners have not fairly or justly apportioned the expense of such building between the railroad company and the town of Orono.

4. That if the railroad commissioners had authority to compel the railroad company to build a new bridge, then they have not fairly and justly apportioned the expense of maintaining said bridge after it is constructed.

The real issue in this case is, whether the railroad commissioners were vested with authority to direct the railroad company to rebuild a new bridge in the place of the old one in accordance with their order and decree, and depends entirely upon a question of statutory construction. Revised Statutes, Chapter 51, Section 75 contains the following provision relating to the power of railroad commissioners over the repair, maintenance and construction of bridges appropriated for use in the operation of electric cars, to wit: "Bridges erected by any municipality, over which any street railroad passes, shall be constructed and maintained in such manner and condition, as to safety, as the board of railroad commissioners may determine. Said board may require the officers of the railroad company and of the municipality to attend a hearing in the matter, after such notice of the hearing to all parties in interest as said board may deem proper. Said commissioners shall determine at such hearing the repairs, renewals, or strengthening of parts, or if necessary, the manner of rebuilding such bridge, required to make the same safe for the uses to which it is put. They shall determine who shall bear the expenses of such repairs, renewals, strengthening or rebuilding, or they may apportion such expenses between the railroad company and the city or town, as the case may be, in such manner as shall be deemed by the board just and fair, and shall make their report as hereinafter provided."

The defendant in argument raises two fundamental objections to the decree of the commissioners.

1. The railroad commissioners have no jurisdiction to order the Bangor Railway and Electric Company to construct a new bridge, in renewal of the old one.

2. After said bridge has been constructed by the Bangor Railway and Electric Company, in accordance with the decree, the railway company has no power to enforce payment of any part of the costs from the town of Orono.

It is the opinion of the court that a fair and reasonable construction of the above statute is calculated to answer both of the above contentions in the negative. In construing this statute the appellant's counsel in argument admits, and very properly, that the Legislature had undoubted power to confer upon the railroad commissioners full authority to issue orders and decrees in harmony with those issued in the case at bar, but that the present statute does not in terms, and was not intended, to confer such authority. In other words, the constitutional right of the Legislature to delegate such power to the railroad commissioners is not questioned, and it may be proper to add, could not be reasonably questioned, in view of the numerous decisions in the courts of the various states, and especially in the Supreme Court of the United States.

The defendant contends, in view of the plain statutory requirements, that towns shall be responsible for the building of highways and erection of bridges and for the maintenance thereof, that it was the duty of the railroad commissioners in the first instance to impose the renewal or rebuilding of this bridge upon the town of Orono, and then apportion the expenses between the town and the railroad company. While this contention is undoubtedly true, with reference to building bridges required for the vehicles of travel when these statutes were enacted, it hardly seems credible that the Legislature in enacting the above statute intended to impose upon the towns, for the benefit of private corporations, a burden so oppressive, if not destructive, as that of compelling a municipality to assume the enormous expense of erecting a bridge suitable for the operation of electric cars. But it is said the relief involved in this contention is found in the right of the railroad commissioners, after the structure is completed to apportion the expense; but in case of a bankrupt road, or even one without available assets, such an apportionment would become a formal declaration of ruthless

injustice. We are unable to believe that the Legislature ever contemplated any such construction of this statute, nor does the language of the statute in any sense require it. While, as the defendant contends, statutes are to be construed, in pari materia, it is yet apparent that the statute in question was not calculated to bear any relation to the various statutes cited by the defendant, tending to establish the primary duty of municipalities to see that highways, including bridges, are opened and kept open "so as to be safe and convenient for travelers with horses, teams and carriages." In *Doherty* v. *Ayer,* 197 Mass., 241, it was held that a similar statute referred only to carriages drawn by animal power. Nor did this case define the status of an electric car, operated under a franchise conferring special privileges, but that of an automobile, differing from carriages in its use of the road, only in applying automatic instead of animal power.

On the other hand, it must have been evident to the Legislature, when the statute was enacted, and, in fact, it had been so held in this State, that the location of electric roads and the operation of electric cars constituted a new use of the highways, specially granted to private corporations, involving a method of locomotion akin to that of steam railroads and fraught with similar dangers to the public, and demanding for the protection of the public similar oversight on the part of the railroad commissioners. In view of these new privileges and uses, the Legislature contemplated, in fact knew, that the bridges along the highways, traversed by electric roads, would, to a greater or less extent become the carriers of electric cars, subjected to an unintended and dangerous weight, and would at once become a subject of controversy between the railroads and municipalities as to upon whom, under the law regulating the maintenance of bridges by municipalities, and the franchises granting the use of the bridges to the railroads, should devolve the duty of repairing, strengthening or rebuilding the bridges for the new use to which they were to be put. It is obvious that it was impossible for the Legislature to prescribe by law in advance or to designate in a charter just what should be done to any particular bridge in order to make it safe for electric travel. It was, therefore, compelled in the very nature of things to legislate in somewhat general terms with reference to this subject, and to vest in some tribunal,

under general powers, authority to investigate and discretion to determine the particular thing to be done, in the particular instance under investigation, essential to the protection and safety of the public. It is also perfectly clear that it was the intention of the Legislature to impose these duties, whatever they might be, upon the railroad companies. In view of these purposes they enacted the statute in question. It should be observed that this statute relates to repairs, renewals, strengthening and rebuilding and not to the original erection of bridges. In the light of these general observations now arises the question at issue. Did the Legislature intend to confer upon the commissioners authority to direct the railroad company to rebuild the bridge in question? That part of the statute conferring the authority to be exercised by the commissioners reads as follows: "Said commissioners shall determine at such hearing the repairs, renewals, or strengthening of parts, or if necessary the manner of rebuilding such bridge required to make the same safe for the uses to which it is put." From this language it will be observed that the right of the commissioners to determine the "repairs," "renewals," "strengthening of parts" and "the manner of rebuilding" the bridge fall in precisely the same catagory. In other words, this language confers upon the commissioners the same authority to order the company to rebuild the bridge as it does to order the repairs, renewals or strengthening of parts. It nowhere, in terms, confers upon the commissioners authority even to order repairs. If then the contention of the defendant is sound, that the railroad commissioners were authorized to determine only what repairs, renewals, etc., were to be made or in what manner the bridge was to be rebuilt, then it left the time in which all these things should be done entirely to the discretion of the railroad company, and withheld from the commissioners the only authority which would render their determination of any value to the public, namely, authority to order done what they determined necessary to be done. To be sure they could inhibit the use of the structure until repaired or rebuilt, but this would be inconsistent with the duty imposed upon the railroad company by its franchises by which it is bound to keep its entire road in operation for the convenience of the public. It cannot be reasonably conceded that the Legislature ever intended to enact a statute, purporting to enable the commissioners to issue

decrees, but so impotent as to strip them of power to enforce their execution. While the statute does not in words say that the commissioners may order the construction of repairs, renewals or strengthening of parts, or the rebuilding of a bridge, it was nevertheless, in view of the purpose of the statute and the end to be reached, the unquestioned intention of the Legislature to confer such power.

Under the rules of statutory construction, it is unnecessary that the language of the statute shall be specific in conveying the meaning which the Legislature intended. These rules have become matters of common knowledge. We refer, however, to a few cases. In *Orono,* applts. v. *Bangor Railway and Electric Co.,* 105 Maine, 428, between these same parties, it is said: "That which is within the intention of a statute, is within the statute, as if it were within the letter of it." Also: "The literal import of language used in statutes is often seemingly at variance with what was obviously intended. In such case the intention and not the literal import is to govern." In *Carrigan* v. *Stillwell,* 99 Maine, 434, in an opinion by the late Chief Justice Wiswell, it is said: "A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within the letter. The intention of the law-maker is the law." In *Winslow* v. *Kimball,* 25 Maine, 495 the court say: "Statutes are to receive such a construction as must evidently have been intended by the Legislature. To ascertain this, we must look at the object in view, to the remedy to be afforded and to the mischief intended to be remedied." In *Board of Com's.* v. *Anderson,* 68 Federal Reporter, 341, it is said: "The guiding star and controlling principle of all statutory interpretation is always the intent of the Legislature." It is further said in many decisions: "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." It is the opinion of the court that a reasonable construction of the statute in question conferred upon the railroad commissioners jurisdiction to issue the order and decree, imposing upon the railroad company the duty of rebuilding the bridge in controversy.

The second objection that the railroad company could not enforce its claim against the town for the proportion of the costs imposed upon the town by the commissioners is also untenable. The clauses

of the statute relating to the apportionment of the expenses between the railroad company and the town are unambiguous and clear. That the Legislature has a right to impose upon the town the burden of aiding in rebuilding this bridge for the accommodation both of the railroad company and the municipality cannot be questioned. In the recent case of *Inhabitants of Orono,* appellants, v. *Bangor Railway and Electric Company,* 105 Maine, 423, it was so decided. This was a case in which the railroad commissioners ordered the railroad company to repair this same bridge and apportioned the cost of repairs, to be paid respectively by the railroad company and the town. Upon appeal by the town, all questions raised involving the authority of the commissioners to impose and apportion the cost of repairs were settled in the opinion of the court and the jurisdiction of the commissioners to adjudicate the questions fully established; the only question left open to review being one of fact as to whether the apportionment was manifestly illegal or unjust. It therefore follows that the town will become responsible to the railroad company for the amount which it may be required to pay by the decree of the commissioners provided such amount is not manifestly illegal or unjust.

The third reason of appeal is based upon the ground that the commissioners have not fairly or justly apportioned the expense of the building of the bridge between the railroad company and the town of Orono; and the fourth reason of appeal declares that they have not fairly and justly apportioned the expense of maintaining the bridge after it is constructed. Both these reasons raise questions of fact which are clearly within the province of the commissioners to determine. In view of the fact that the town had a bridge that was in all ways proper and suitable for the travel for which the town was to maintain it, and so far as appears, would have continued in this condition for many years, and that the necessity of a new bridge is occasioned wholly by the act of the railroad company, we find no data which would warrant us in the conclusion that the decree of the railroad commissioners with reference to the apportionment of costs or the apportionment of maintenance were manifestly illegal or unjust.

Appeal denied.
Decree of railroad commissioners affirmed.

DOYLESTOWN AGRICULTURAL COMPANY

vs.

BRACKETT, SHAW & LUNT COMPANY.

York. Opinion August 13, 1912.

Assumpsit. Account. Agent. Contract. Consignment. Delivery. Damages. Exceptions. False Representations. Inducement. Purchaser. Rescind. Recoup. Waiver.

1. On March 12, 1909, the plaintiff and defendant made a contract in writing, whereby the plaintiff sold and the defendant bought a certain number of cultivators. In the contract it was agreed that all of these cultivators remaining unsold September 1, 1909, should revert and become the property of the plaintiff, without recourse to the defendant. It was further agreed, by the plaintiff, "as a condition," that one J. P. Algire should go to Caribou with the defendant's president, and endeavor to the best of his ability to make sales of the cultivators, and the defendant agreed to bear Algire's travelling expenses. The defendant received the cultivators. Algire went to Caribou and elsewhere with the defendant's president, and assisted in the sale of the cultivators to various retail dealers.
2. In a suit to recover the contract price, held that Algire in negotiating the sales to dealers was the agent of the defendant, and not of the plaintiff, and that his false and material representations to the purchasers respecting the physical construction of the cultivators afford no defence to the suit, even though Algire may have been, for other purposes, the plaintiff's agent.
3. Also held that cultivators "consigned" by the defendant to dealers were not "sold" within the meaning of the contract; that cultivators delivered to dealers on their written orders, by which they become bound to pay for them, with a stipulation that the title should remain in the defendant, until the price was paid, were "sold" within the meaning of the contract.
4. That a sale of cultivators upon an order which stipulated that all cultivators not sold by the purchaser this season will remain the property of the vendor is in effect a sale of so many only as the purchaser shall sell during the season.

5. An excepting party must set forth enough in his bill of exceptions to enable the court to determine that the point raised is material, and that the ruling complained of is both erroneous and prejudicial, or he can take nothing by his exceptions.
6. When a bill of exceptions states that the report of the evidence on the motion for a new trial may be referred to as explaining the bill, the evidence is not thereby made a part of the bill. It may be referred to to explain the bill, but not to add to it.

On motion and exceptions. Exceptions overruled. Motion overruled, if plaintiff remits all of the verdict in excess of $2133.28 within thirty days after the certificate is filed; otherwise motion sustained.

This is an action of assumpsit to recover the price of certain agricultural implements and fittings sold and delivered to the defendant, amounting to $4,607.35. The plaintiff recovered a verdict for $3,958.35. Plea, general issue and brief statement.

The case is stated in the opinion.

Leroy Haley, for plaintiff.

Mathews & Stevens, for defendant.

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

SAVAGE, J. Assumpsit upon an account annexed to recover the price of certain agricultural implements and fittings sold and delivered to the defendant, amounting to $4,607.35. The plaintiff recovered a verdict for $3,958.44. The case is before this court upon the defendant's motion for a new trial, and twenty-eight exceptions to the exclusion of evidence.

As the merits of nearly all the exceptions are necessarily involved in the determination of the rights of the parties under the motion, it will not be necessary to consider them in detail.

These facts appear. On March 12, 1909, the parties made a written contract, which, so far as material to the discussion of the case, contained the following provisions:—The plaintiff sold and the defendant bought fifty cultivators for $1125. The delivery was to be F. O. B. cars at Caribou, Maine. Additional orders for like merchandise, shipped during the life of the contract, were to be subject to its prices, terms and conditions. The agreement was to

terminate September 1, 1911. The terms of settlement were "Net cash, October 1, 1909." All cultivators remaining unsold by the defendant September 1, 1909, were to revert and become the property of the plaintiff, without recourse to the defendant. It was agreed "as a condition" that one J. P. Algire should go to Caribou with the defendant's president, Brackett, and endeavor to the best of his ability to make sales of the number of cultivators specified. The defendant agreed to bear Algire's actual traveling expenses from Philadelphia and return, and his hotel bills while making the sales. It would seem that this contract was originally made by Algire as special agent for the plaintiff, subject to approval, and it was afterwards approved by the plaintiff.

The fifty cultivators specified in the contract, and one hundred and eight others, under the terms of the contract, were delivered to the defendant, or on the defendant's order, at different places in Maine in April or May, 1909, at agreed prices, amounting to $3552.50. The defendant is charged with $310.56 for certain fittings and other merchandise, of which it acknowledges a liability for $81.99. Its liability for the remainder depends upon its liability for the cultivators. The rest of the account relates to threshers and fittings, and for one of these, with articles accompanying it, amounting in all to $235, the defendant denies any liability whatever.

Of the one hundred and fifty-eight cultivators received by the defendant, it disposed of one hundred and four to various local dealers in agricultural machinery on their written orders by which they respectively became bound to pay for the cultivators ordered, with a stipulation in each order "that the title to said machinery shall remain in and with Brackett, Shaw & Lunt Co." until paid for. And in one such order for fifty cultivators, dated March 31, 1909, it was also stipulated that "all cultivators not sold this season will remain the property of Brackett, Shaw & Lunt Co." The price, to the defendant, of these cultivators was $2373.50. The orders or contracts which the defendant took from dealers for the other fifty-four cultivators were not put into the case. But the plaintiff's president on cross-examination was shown these contracts, and inquired of, without objection, as to their contents. The contracts themselves, of course, were the best evidence. But the witness's

testimony is the best we have before us, and having been given without objection, it must be considered. That testimony shows that twenty-seven cultivators were sold outright to dealers for $607.50, and twenty-seven were consigned to dealers at the same price. And while some of these orders from dealers were taken in the plaintiff's name, they were taken on the defendant's account, and were so recognized.

The defense, as to the cultivators, as outlined in the defendant's brief statement, is two-fold. First, that as an inducement to the defendant to contract for the cultivators, the plaintiff or its agents, falsely represented that the cultivator in question, known as the New Age cultivator, was identical with the Iron Age cultivator which was then being sold and which was well and favorably known among the farmers of Aroostook County, in which locality the larger part of the cultivators were intended to be put on sale; and that the parts of the New Age were interchangeable with those of the Iron Age. As to this defense, it is necessary to say only this. While it is true, that under the circumstances of this case, such representations about the physical characteristics of the cultivators to be purchased, made to one who had no opportunity to know the true facts, would be material, and, other necessary elements being proved, if the representations were false, the defendant would be entitled either to rescind, or to recoup in damages, but unfortunately for that defense, there is no evidence in the case to support it. The defendant did not rescind and restore, for any cause; nor is there any basis shown for recoupment on account of material false representations.

Secondly, that in accordance with the original contract Algire went to Aroostook County, with Brackett, and helped him secure orders from dealers for substantially all of the one hundred and fifty-eight cultivators; and that in selling these cultivators Algire made false representations, on the strength of which the sales were made. Many of the representations claimed to have been false were manifestly immaterial, for they were merely the expression of Algire's opinion. But it is claimed, and proven too, that Algire did represent the cultivator as being like the Iron Age, with which the purchasers were familiar, so like it, indeed, that the parts of the two cultivators were interchangeable. That we think was material.

And it is shown that the representations were false. It is not shown that Mr. Brackett knew them to be false.

The dealers undertook to sell the cultivators to their customers. They did sell some. But in the end the customers, all but two, returned them to the dealers. The complaint in general was that the cultivator was not adapted to the Aroostook soil, which was probably true, but which so far as we can see, is not material to any legitimate issue in this case. But the specific complaint in many cases concerned a wooden pin brake in the New Age, which was one of the many features in which the New Age was not like the Iron Age. Although some of the dealers notified the defendant of the troubles, none of them appear effectually to have rescinded their contracts. They stored, but did not restore, the goods, without which, or a waiver of it, rescission is ineffectual.

Under this condition of things, and assuming that the individual purchasers were justified in returning the cultivators to the dealers, (though it does not anywhere appear upon what terms or representations any individual purchaser had made his purchase, or whether he had a right to rescind) we come now to consider the defendant's contentions respecting the consequences of Algire's false representations. It contends that in selling or consigning cultivators to dealers, Algire was the plaintiff's agent, for whom the plaintiff was responsible. From this premise it is argued that if Algire made false representations, they were the plaintiff's false representations, and that if in consequence of these representations the dealers had the right to rescind and did rescind, the plaintiff cannot justly claim, nor lawfully maintain a claim, that the cultivators were sold prior to September 1, 1909, within the meaning of the contract. Even if all the defendant's premises were sound, it is unnecessary to inquire whether the conclusion would follow, and whether the cultivators would have remained unsold September 1, 1909, and would have reverted and become the property of the plaintiff, as provided by the contract, and no action for their price would lie against the defendant.

For we think the essential premises of the defendant's contention are not sound. We have already noticed the failure on the part of the dealers to make complete rescission. We think also that Algire must be regarded as the defendant's agent. It may be granted that

Algire was in the employment of the plaintiff in some capacity. And it must be assumed, under the language of the contract relating to Algire's expenses, that, unless Algire worked for nothing, which is not to be assumed, the plaintiff paid him for his services in selling these cultivators. Nevertheless, in making these sales he was the defendant's agent. The legal relationship, whatever it was, was created by the written contract, and what it was must be determined by the terms of the contract, read in the light of existing conditions. The situation contemplated by the contract was the one which actually existed. The contract for the purchase was executed. The defendant was the purchaser and owner. It had the cultivators to sell, and wanted to sell them. That was the defendant's business, not the plaintiff's. The plaintiff was not the seller. It was not interested in the business, alone, or jointly with the defendant. It had no interest in the sales, except as any manufacturer is interested to increase his output, and as in this case it was interested to have as many cultivators as possible sold before September 1. For these reasons, as well as for the sake of inducing the defendant to contract at all, the plaintiff may have been willing to help the defendant make its sales, to the extent of paying for the service of the helper. Still it was, primarily, the business of the defendant, and at the most, the plaintiff's interest was only incidental and secondary. In this aspect, it is immaterial what the relations of Algire to the plaintiff were in other respects. Nor was the legal relation changed by the fact that Algire in some contracts assumed to sign for and represent the plaintiff, because, in the first place, there is no authority shown from the plaintiff, and, besides, the defendant recognized those contracts as its own, and ordered from the plaintiff the cultivators which those contracts called for. In short, on the assumption that Algire was in other respects the plaintiff's servant, the plaintiff loaned him to the defendant for a particular service. And while he was engaged in that service, he was, as to that service, the servant and agent of the defendant. *Wyman* v. *Berry*, 106 Maine, 43; *Coughlan* v. *Cambridge*, 166 Mass., 268; *Clapp* v. *Kemp*, 122 Mass., 481. The defendant assumed the responsibility for whatever Algire might do or say. Algire's representations, in law, were the defendant's representations, for the consequences of which the defendant cannot have

recourse to the plaintiff. Whether the dealers had a right to rescind their contracts, or whether they did effectually rescind is immaterial in this suit. The defendant cannot avail itself of Algire's false representations as a defense.

In thus overruling the contention of the defendant we necessarily overrule the defendant's exceptions to the exclusion of evidence which are based upon that contention.

Of the remaining exceptions, one requires particular examination. Mr. Brackett, the president of the defendant, after testifying generally in direct examination about the interview between himself and Mr. Shaw, the defendant's treasurer, on one side, and Mr. Mills and Mr. Algire, respectively treasurer and agent of the plaintiff, on the other side, in which the parties were negotiating the contract for the purchase of the New Age cultivators, was asked, "What did Mr. Mills and Mr. Algire say to you and Mr. Shaw in regard to the cultivators?" The question was objected to upon the ground "that the negotiations resulted in a written contract, which contract is the best evidence." The answer was excluded, and an exception was taken. This is all that the record before us discloses. The purpose of the inquiry does not appear.

If the proposed testimony related to matters subsequently embodied in the written contract, and tended to alter the terms of that contract, the objection was well taken. But if, as is claimed in the brief for the defendant, the purpose was to show that Mills and Algire made representations concerning the physical characteristics of the cultivators, which afterwards turned out to be false, namely, that they were like the Iron Age in construction, then the testimony was admissible. For if false representations material in character, are made to induce the making of a written contract, and they are relied upon, and a written contract is made accordingly, the false representations underlie the written contract itself. They do not alter the contract, but they may afford a reason why the contract itself may be avoided or rescinded, or if that be not done, why the injured party may recover damages, or recoup damages if sued on the contract. Representations of the physical characteristics of a thing sold, and not open at the time to inspection, when made by a vendor as an inducement to purchase, are in the nature of warranties, for breach of which the purchaser may rescind the con-

tract and restore the articles purchased, or may recoup in damages, when sued for the purchase price. So that if the defendant could have shown false representations material in their character, made as an inducement to the written contract, and relied upon by it, and had offered to show them, it would have been error to exclude them.

But the difficulty is that that purpose nowhere appears in the record. It does not appear in the bill of exceptions. There is nothing in the bill itself to show that the inquiry was relevant or material. It is true that the bill states that the report of the evidence on the motion for a new trial may be "referred to as explaining this bill of exceptions." Even so, the evidence is not made a part of the bill of exceptions. It may be referred to to explain, but not to add to the bill. But if it were a part of the bill, it would not aid the defendant, for as we have seen, the report of the evidence is silent on the subject. So far as the record goes, we can only surmise, and that we are not permitted to do.

It is the well settled rule in this State, too well settled to be now shaken, that the excepting party, in his bill of exceptions, must set forth enough to enable the court to determine that the point raised is material, and that the ruling excepted to is both erroneous and prejudicial, or he can take nothing by his exceptions. The exceptions must show error affirmatively, and that the excepting party is aggrieved. *Jones* v. *Jones,* 101 Maine, 447, and many cases there cited. In order to sustain an exception to a ruling excluding a conversation, the exceptions must disclose what the conversation was. *Johnson* v. *Day,* 78 Maine, 224. To lay the basis for an exception, when a party offers evidence which is objected to, he should state the grounds, as he claims, of its admissibility. *McKown* v. *Powers,* 86 Maine at p. 295; 1 Wigmore on Ev. p. 51; 2 Cyc., 697, and cases cited. It follows that this exception must be overruled.

The exception to the exclusion of the York contract falls within the same principle. The York contract was one of those already referred to by which the defendant sold cultivators to dealers. It was unquestionably admissible. But the defendant had already cross-examined the plaintiff's president with reference to this contract, and in that way had got into the record all of the contract which was relevant to any issue which has been raised, so far as

the record advises us. If there were still other pertinent matters in the contract, the bill of exceptions should have shown it. It is not made to appear that the defendant was aggrieved by the exclusion.

The few remaining exceptions have been examined, but we find no merit in them,—nothing that calls for discussion. They relate to matters that are manifestly immaterial.

We find no defence to so much of the plaintiff's claim as relates to cultivators and fittings which were sold by the defendant before September 1, 1909. As already stated, the case shows that twenty-seven were sold to dealers outright. There were one hundred and four contracted for by dealers who obligated themselves to take and pay for them, but the title to which was to remain in the defendant until they were paid for. And of these one hundred and four, there were fifty concerning which it was agreed "that all cultivators not sold this season will remain the property of Brackett, Shaw & Lunt Co." There were twenty-seven consigned to dealers.

We think that the fifty-four cultivators which were sold on the special contracts, reserving title as security for payment and without other stipulation as to ownership, should be regarded as "sold" within the meaning of the contract, and that the twenty-seven cultivators which were consigned were not "sold." Those in the first class were "sold" within the common acceptation of that word. The dealers ordered them and agreed to pay for them. The title was reserved merely as security for payment. The transaction had all the characteristics of a sale of chattels, with mortgage back to secure payment of the purchase price. *Westinghouse Co.* v. *Railroad Co.*, 106 Maine, 349. In the case of cultivators consigned for sale, there was no contract to buy, no agreement to pay, unless the goods were sold. The consignee was under no obligation, except to account for the proceeds of the cultivators sold. The cultivators were merely placed with the consignee on sale. All this must be inferred, since there is nothing to show that these consignments were out of the ordinary. As between the plaintiff and defendant, they remained unsold September 1, 1909.

The fifty cultivators which were sold on special contract, reserving title, concerning which it was also agreed that all remaining unsold during the season should remain the property of the defend-

ant, present a different question. It was not merely a reservation of title. It was a limitation of the number sold, for which the purchaser was accountable. It was in effect a sale of so many only as the purchaser should sell during the season. The purchaser was bound for no more. The evidence shows that only one was sold.

A word as to the threshers sued for. They are three in number. The defendant denies liability for one. It claims that it did not order it. The evidence strongly supports the defendant's contention. And a careful analysis of the figures leads us to believe that the jury disallowed that thresher. On the other two threshers, the defendant claims and is entitled to have a discount of $160.36, in accordance with the contract.

In summarizing, we will start, for convenience, with the amount charged in the plaintiff's bill, $4607.35. From this amount should be deducted the amount charged for one thresher, and items connected with it, $235; the discount on the other threshers, $160.36; the amount charged for the consigned cultivators, $607.50; the amount charged for the forty-nine other cultivators remaining unsold September 1, 1909, $1102.50. At the trial it was admitted that the defendant was entitled to credit for $500.16 for freight paid and other credit items. It may be that the discount on the threshers was included in this amount, but the record fails to show it, and we must take the record as it is. Making these deductions, there is left $2001.83 which was due at the date of the writ. If interest be added on this amount to the date of the verdict, the total amount is $2133.28. And for this amount the plaintiff was entitled to a verdict, and for no more. The verdict rendered for $3958.44 was therefore demonstrably excessive.

Accordingly the certificate will be,

Exceptions overruled. If the plaintiff within thirty days after the certificate is filed remits all of the verdict in excess of $2133.28, motion overruled; otherwise, motion sustained.

NEWTON S. COAN et al *vs.* AUBURN WATER COMMISSIONERS.

Androscoggin. Opinion August 13, 1912.

Action on the Case. Blasting. Corporation Damages. Liability. Negligence. Party. Waiver. Water System. Chapter 243 of Private and Special Laws of 1895.

Points not made at the trial are not open to the party at the hearing before the Law Court. It is the well settled rule that points not made at the trial are considered as waived.

A party should not be silent when he ought to speak.

It is true that there are exceptions to this rule and that the court, sometimes, will of its own motion, consider and determine issues upon points not suggested by either party, in the furtherance of justice.

On motion by defendant. Overruled.

This is an action on the case to recover damages for injuries to the plaintiff's house in Auburn, caused by the alleged negligent blasting in the street adjacent thereto. The defendant, a corporation having the control and management of the public water system in the City of Auburn, was excavating a trench through a ledge for the laying of a pipe. The blasting caused the injuries complained of. Verdict for the plaintiff for $429.32. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

George C. Webber, for plaintiff.

Harry Manser, for defendant.

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

SAVAGE, J. Action on the case to recover damages for injuries to the plaintiff's house in Auburn caused by alleged negligent blasting in the street adjacent thereto. The defendant, a corporation

having the control and management of the public water system in the city of Auburn, was excavating a trench through a ledge, for the laying of a water pipe. The necessary blasting caused the injuries complained of. The plaintiffs recovered a verdict for $429.32. The case is before us on defendant's motion for a new trial.

The defendant contends, first, that under the provisions of Chap. 243 of the Private and Special Laws of 1895, under the authority of which the defendant was managing and operating the Auburn Water system, the defendant is not liable for negligence of this sort, but that the city is made expressly and solely liable for the defendant's negligence; secondly, that the defendant was not negligent; and lastly that the verdict was excessive.

It is admitted that the first point was not made at the trial. For that reason, it is not open to the defendant now. It is the well settled rule that points not made at the trial are considered as waived. *Eaton* v. *Telegraph Co.*, 68 Maine, 63; *Cowan* v. *Bucksport*, 98 Maine, 305. It is obvious that such should be the general rule. A party should not be silent when he ought to speak. He ought to speak at the earliest practical moment in the progress of a trial, if he has, or thinks he has, a point which may be decisive. He should not wait until great expense has been incurred and great costs have accumulated, which latter burden must be borne in the end by the defeated party. It is true that there are exceptions to the rule, as shown in *Belmont* v. *Morrill*, 69 Maine, 305. It is true, also, as suggested at the argument, that the court, sometimes, will of its own motion consider and determine issues upon points not suggested by either party. This it does in the furtherance of justice.

But this case we think comes within the general rule. Justice does not require that the plaintiff should be remitted to a suit against the city of Auburn for their remedy. The defendant is an active trustee, created such by statute. It holds the title to the Auburn Water system as security for bonds issued by it to pay the purchase price, and for improvements and extensions. While it holds the title, it manages the property. The individual commissioners are elected from time to time by the city council. When the bonds are paid, the property will revert to the city of Auburn. So that the entire equitable interest in the system, subject to the bonds,

is in the city. Chap. 243, Private and Special Laws, 1895. It follows then, that the burden of a judgment for the plaintiff in this case will fall, not immediately, but ultimately, on the city. Whether the point, if taken seasonably, would have availed the defendant, we do not decide.

As to the questions of the defendant's negligence, and the size of the verdict, it is only necessary to say that we think the evidence warranted the verdict of the jury. It must stand.

Motion overruled.

W. D. HUTCHINS, et al. *vs.* CHARLES D. MERRILL.

Kennebec. Opinion Sept. 17, 1912.

Action. Arbitrator. Carelessness. Count. Contract. Damages. Lumber. Mathematical mistake. Negligence. Scale. Scaler. Surveyor. Quasi Arbitrator. (Appraisal).

This is an action to recover damages resulting from the negligence of the defendant in scaling logs. The plaintiff made a written contract with one Foster to cut and haul the merchantable logs on the timber lands owned by them in the town of Guilford and then stipulated that the timber and wood should be scaled by a disinterested sworn surveyor and the defendant was selected by the parties to that contract to survey the logs cut thereunder and it was mutually agreed that his scale should be final and binding between the parties as the basis of payment under the contract. *Held:* that when parties have mutually agreed upon a surveyor to scale logs, his scale will be binding and conclusive upon them in the absence of fraud or mathematical mistake. It was admitted that the defendant was an experienced and competent scaler, and there was no allegation or evidence of fraud or collusion on his part in making his scale or mathematical mistake which would release the plaintiff from paying Foster for cutting and hauling according to the defendant's scale. But it was contended that he was negligent and careless in counting the logs, and accepted the count made by the teamsters, who hauled the logs. *Held;* that if the defendant exercised his best skill and judgment in making the scale by the mutual agreement of the parties that he should scale the logs and that his scale should be final and conclusive, the action will not lie for negligence in the exercise of his honest judgment.

On exceptions by defendant. Sustained.

This is an action to recover damages alleged to have resulted from the negligence of the defendant in scaling certain logs. The plaintiffs made a written contract with one Foster to cut and haul merchantable logs on the timber lands owned by them in the town of Guilford, and therein stipulated that the timber and wood should be scaled by a disinterested sworn surveyor, "to be paid by the plaintiffs. The defendant was selected by the parties to that contract, to survey the logs cut thereunder and it was mutually agreed that his scale should be final and binding between the parties as the basis of payment under that contract. There was a discrepancy between the scale made by the defendant in the woods and that made by another scale at the mill in Foxcroft of 49,326 feet. The plaintiff claimed to recover as damages the sum of $221.97, being the contract price of $4.50 per thousand feet on 49,326 feet.

The presiding Judge was requested to rule, "that if the defendant was appointed by plaintiff and Robert Foster to scale lumber cut by Foster, under contract with plaintiff, and in the contract it was then and there agreed that the scale so made by this defendant should be final and binding between the parties, then the defendant acted in the capacity of an arbitrator between the parties, or at least as a quasi arbitrator, and if the performance of his said duty requires the exercise of skill and judgment, then the defendant is not liable in this action, there being no proof or allegation of fraud."

The presiding Judge declined to give this instruction but upon this branch of the case, instructed the jury as follows:

"I say, too, that if upon all the testimony in this case, upon one side and the other, weighing it as I have suggested, you should find from a fair preponderence of the evidence, that you are convinced thereby that the defendant in this case was negligent or careless in the scaling of these logs, and that through his negligence and carelessness a mis-scale was made or a misstatement was made of the amount of the scale, and that thereby the plaintiffs paid any amount of money, under the original contract, that then this defendant is liable."

To which ruling and refusal to rule the defendant excepted.

The jury returned a verdict for the plaintiffs of $82.98.

Plea, the general issue and brief statement alleging good faith in the scaling of said lumber.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for Plaintiff.

C. W. Hayes, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

WHITEHOUSE, C. J. This is an action to recover damages alleged to have resulted from the negligence of the defendant in scaling certain logs. The plaintiffs, made a written contract with one Robert W. Foster to cut and haul the merchantable logs on the timber lands owned by them in the town of Guilford, and therein stipulated that the timber and wood should "be scaled by a disinterested sworn surveyor," to be paid by the plaintiffs. Foster was to receive $4.50 per thousand feet for cutting, yarding and hauling the logs; and the evidence tended to show that the fact that the plaintiffs were to pay the scaler was taken into consideration in fixing the price of cutting and hauling. It was not in controversy that the defendant was selected by the parties to that contract to survey the logs cut thereunder, and that it was mutually agreed that his scale should be final and binding between those parties as the basis of payment under that contract.

It was not in controversy that the scale made by the defendant in the woods made 1891 pieces and 106,500 feet of lumber, while another scaler at the mill in Foxcroft found but 1746 pieces and only 57,000 feet, showing a discrepancy of 49,326 feet. There was evidence, however, tending to show that after the logs were landed and before the booms were hung at the mill in Foxcroft, some of the logs were carried away by high water. But upon this point the testimony was conflicting, and the plaintiffs claimed to recover as damages the sum of $221.97, being the contract price of $4.50 per thousand on 49,326. The jury rendered a verdict for the plaintiffs of $82.98, showing that the discrepancy found by them was only 18,440 feet.

It was expressly admitted by the plaintiffs that the defendant was an experienced and competent scaler and there was no allegation or evidence of fraud or collusion on his part in making his scale. It is

admitted that there was no fraud or mathematical mistake which would release the plaintiffs from paying Foster for cutting and hauling according to the defendant's scale. But it was contended that he negligently omitted either to count the logs so that he knew the number of them, or to scale a sufficient number to estimate the average contents, but carelessly accepted the count made by the teamsters and averaged the number of feet per log from pencil marks found by him upon the logs.

The defendant admitted that by reason of the difficulty in counting the logs as they were piled in the yards, he did not actually count all of them, but contended that he counted a sufficient number of them to satisfy his judgment, and that the tally kept by the teamsters of the number of pieces hauled by them was correct. He also earnestly contended that he scaled enough of the logs of the various sizes to satisfy his judgment that he had scaled a sufficient number to obtain a fair average of all the logs, and introduced evidence to support both of these contentions.

In view of the fact that the proper discharge of the duties of a scaler involves the exercise of skill and judgment, as well as absolute impartiality on his part, and of the mutual agreement of the parties that the defendant should scale the logs and that his scale should be final and conclusive, the defendant contended that he must be deemed to have acted in the capacity of an arbitrator, or quasi arbitrator, between the parties to the contract, and accordingly requested the presiding Judge to instruct the jury "that if the defendant was appointed by plaintiff and Robert Foster to scale lumber out by Foster, under contract with plaintiff, and in the contract it was then and there agreed that the scale so made by this defendant should be final and binding between the parties, then the defendant acted in the capacity of an arbitrator between the parties, or at least as a quasi arbitrator, and if the performance of his said duty requires the exercise of skill and judgment, then the defendant is not liable in this action, there being no proof or allegation of fraud."

The presiding Judge declined to give this instruction but upon this branch of the case, instructed the jury as follows:

"I say, too, that if upon all the testimony in this case, upon one side and the other, weighing it as I have suggested, you should find

from a fair preponderance of the evidence, that you are convinced thereby that the defendant in this case was negligent or careless in the scaling of these logs, and that through his negligence and carelessness a mis-scale was made or a misstatement was made of the amount of the scale, and that thereby the plaintiffs paid any amount of money, under the original contract, that then this defendant is liable." "When you go out to your rooms, you go out those three different times on to the bank of that river, with the defendant in this case, and ascertain from the testimony in this case what Mr. Merrill did there; determine if what he did there was done carelessly or negligently or not. That is the question for you to determine. If you conclude that it was done properly, that is the end of the case and your verdict should be for the defendant. On the other hand, if you are satisfied that it was done carelessly or negligently, then you are to determine what was the amount of the lumber under a fair and perfected scale that was cut and hauled and yarded in this operation."

The question thus presented is in some respects one of novel impression in this State and in all respects one of more than ordinary importance in determining the duties and responsibilities of quasi arbitrators and those agreed upon to perform judicial functions, as well as the rights of those affected by their acts.

It is a familiar rule of law in this State, established by a uniform line of decisions, that when parties have mutually agreed upon a surveyor to scale logs, his scale will be binding and conclusive upon them, in the absence of fraud or mathematical mistake. In *Bailey* v. *Blanchard,* 62 Maine, 168, it is said in the opinion that "neither party is at liberty to set aside or impeach the scale except on such evidence as would avoid the award of an arbitrator mutually chosen." In *Bangor Savings Bank* v. *Insurance Company,* 85 Maine, 68, it was held that an appraiser to determine the amount of the damage or loss under an insurance policy may call in the aid of a third person skilled in a special branch of the appraisal, and may give to the estimate of such third person, such weight and credence as he sees fit, even to the point of founding his judgment upon that estimate, provided he adopts that as his real judgment. In the opinion the court say:

"It is not necessary to follow the different courts in their ingenious efforts to trace, for all cases, a line of distinction between a mere appraisement and an ordinary submission to arbitration. The result may be that such appraisers are properly considered arbitrators for some purposes but not in all respects. All are invested with quasi judicial functions, which must be discharged with absolute impartiality, without the improper interference of either party, or undue influence from any source. But appraisers may be said to act in the two-fold capacity of arbitrators and experts. In their character of experts they not only give effect to opinions based directly on their personal experience and knowledge, but also opinions founded in some measure upon information which may not be so direct and original as to be competent in itself as primary evidence. A witness called as an expert is expected before testifying to refresh his memory and confirm his judgment by an examination of authorities and conference with other experts. The umpire did precisely this and no more in the case at bar. After making an examination of the premises and certain estimates of his own, he made inquiry of an experienced and disinterested painter respecting the cost of painting. His conclusions may have been affected and modified to some extent by the information thus obtained, but he declares that his report correctly represented his own judgment. He was not only unconscious of any impropriety in seeking this information but was evidently engaged in a careful and conscientious effort to reach a just and correct appraisal."

So in *Earl* v. *Johnson,* (Minn.) 84 N. W., 352, it is said in the opinion of the court: "A person acting in the capacity of an appraiser under a lease, which requires a valuation to be fixed upon real property, is to all intents and purposes an arbitrator at common law. The proceeding is in effect, a common law arbitration."

So in *Palmer* v. *Clark,* 106 Mass., 373, it was stipulated that a party to a contract should only pay to the contractor a sum proportionate to the amount of earth filling upon a lot of land to be measured on the ground by the city engineer whose measurements should be conclusive between the parties. It was held by the court that such a reference to a third person in some respects differs from an ordinary submission to arbitration but that in one respect, it is to be treated precisely like an award under arbitration, in that "it

could not be impeached for mistake arising from error in judgment or in drawing conclusions from evidence and observation."

In *Flynt* v. *Gibson,* 106 Mass., 391, there was an agreement between a merchant and ship builder that certain alterations should be made in the vessel and that they should be made according to specifications under the inspection and subject to the approval of an experienced ship builder and that any question arising under the agreement was to be referred to this ship builder, whose decision should be final. It was held that this ship builder was thus made an arbitrator between the parties, and that his approval was binding upon them as an arbitrator, however much he might have erred in judgment.

In *Robbins* v. *Clark,* 129 Mass., 145, the parties contracted with the plaintiff to put certain spiral springs into the defendant's boiler, that these should be tested by the engineer, and if in the judgment of that engineer, there should be as much as 12% saving of fuel, the contract was to be binding. It was held that the decision rendered was to be considered as the award of a referee under submission to arbitration, and that it could not be "impeached on the ground of any error in judgment on his part in drawing conclusions from the evidence before him."

See also *Norcross* v. *Wyman,* 187 Mass., 25; *Evans* v. *County* of *Middlesex,* 209 Mass., 274.

It is an elementary principle respecting the judicial character and function and a firmly established rule of law that judges and arbitrators enjoy immunity from private actions for damages against them for judgments rendered while acting within their jurisdiction in the due course of the administration of justice. *Hoosac Dock and Elevator Co.* v. *O'Brien,* 137 Mass., 424; *Jones* v. *Brown,* 54 Iowa, 75; *Pratt* v. *Gardiner,* 2 Cush., 63; Cooley on Torts, 411; Cyc., Vol. 3, page 809; 12 Am. & Eng. Enc. of Law, 38; *Fath* v. *Koeppel,* 72 Wis., 39, N. W., 539.

The English cases clearly and strongly support the defendant's contention that an action will not lie against an arbitrator or quasi arbitrator for negligence in the exercise of his honest judgment. *Pappa* v. *Rose,* 7 L. R. C. P., 32, affirmed on appeal 7 L. R. C. P., 535; *Tharsis Sulphur and Copper Company* v. *Loftus,* 8 L. R. C. P., 1; *Stevenson* v. *Watson,* 4 L. R. C. P. Div., 148.

In *Tharsis S. and C. Company* v. *Loftus* above cited, the owners of a cargo and the ship owner agreed that the defendant, an average adjuster, should determine the proportion of loss which the ship and cargo had respectively to bear and that they would be bound by his decision. It was held that an action would not lie against the adjuster at the suit of the plaintiffs, or owner of the cargo for want of care in the performance of his duties as average adjuster, inasmuch as he was in the nature of an arbitrator between the parties.

In his opinion, Chief Justice Bovill said: "It must constantly happen that parties are dissatisfied with the decision of an arbitrator or quasi arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought upon the slenderest grounds, that there is no precedent for such an action for negligence as this. It appears to me that the principle upon which *Pappa* v. *Rose* (1) was decided applies to this case; and, looking to the inconveniences that would arise if an arbitrator were liable to an action for negligence, I am not disposed to lay it down for the first time that such an action is maintainable. I therefore think our judgment should be for the defendant."

Judge Keating said: "I am of the same opinion. I think that it would be a very dangerous principle to establish that a person in the position of the defendant may be liable to an action for negligence in the discharge of his functions." . . . "Now without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule when parties agree to be bound by the decision of a third party on any matter is, that they take him in such a case for better or for worse; and if he discharges his duty faithfully and honestly they must be satisfied."

Judge Brett concurring, said, "With respect to the first ground taken, it is admitted that as an arbitrator he would not be liable for want of skill, but it is suggested that he would be for want of care. It appears to me that there are the strongest grounds for deciding otherwise. There must have been thousands of such cases in which an allegation of want of care or dilligence might have been

made, and yet there is no case in the books in which such an action has been brought."

Judge Denman concurred for substantially the same reason.

In *Stevenson* v. *Watson,* supra, a contract provided that the architect might order additions to or deductions from the plans to build a hall and that the amount of them should be ascertained by the architect; that the contractor and the company would be bound to leave all questions or matters of dispute which might arise during the progress of the work, to the architect whose decision should be final and binding upon all parties. It was held that the functions of an architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion and skill and that he therefore occupied the position of an arbitrator against whom no fraud or collusion being alleged, an action for negligence in the discharge of his duties could not lie.

In his opinion Chief Justice Coleridge said: "This claim is for that which has been over and over again attempted without success. It is an action against a man for the negligent performance of a duty, in the doing of which the exercise of judgment or opinion is necessary." . . . "I think this case is within the authority of the cases cited which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised."

Judge Denman concurring, said: "But it seems to me that the architect is an arbitrator from the beginning to the end of the contract; he is throughout to have his eye on the work, and give certificates from time to time, all having reference to his final certificate, and, unless he gave the duty up altogether from the first appointment, he is from the first a person exercising judgment on a matter on which the parties cannot exercise judgment.

"I think, therefore, that the parties have trusted to him, and that from the beginning he must exercise his functions fairly and honestly between them, and that if he violates that duty he is liable to

an action. If he honestly performs them then he honestly performs his bargain, if it be a bargain, or his duty, if it be a duty, arising from the acceptance of the functions, and the parties must abide by it."

The Maine cases cited by the plaintiff relating to official inspectors, are not applicable. Their duties were prescribed by statute and they were not acting in the capacity of arbitrators by virtue of a mutual agreement between the parties. Neither is *Gates* v. *Young,* et al., 47 N. W., 275 (Wisconsin) shown to be a case in point. That was an action on a lumber inspector's official bond. The provisions of the statute of that state requiring such a bond and prescribing his duties are not in evidence; but it sufficiently appears in that case also, that the inspector was not charged with negligence while performing any service in the capacity of an arbitrator between the parties. The case, therefore, is not an authority in support of the plaintiff's contention in the case at bar.

It is obvious that the rule contended for by the plaintiffs would in every case expose the surveyor to the vexations and hazards of a suit at the instance of the dissatisfied party, and thus be destructive of the surveyor's independence and his power to discharge his duties as an arbitrator properly and efficiently. Such a doctrine would be fraught with consequences too mischievous to receive the sanction of the court.

The certificate must therefore be,

Exceptions sustained.

ALBION K. GUPTILL et al.

vs.

PINE TREE STATE MUTUAL FIRE INSURANCE COMPANY.

Hancock. Opinion September 30, 1912.

Application. Agent. Assent. Avoidance. Contract. Loss. Material misrepresentation. Policy. Occupancy. Vacancy. Unoccupied. Verdict. Warrant. Waiver.

Where there is evidence upon which the jury is warranted in finding that the fact of non-occupancy was known to defendant's agent who procured the application for a policy of fire insurance, the agent's knowledge must be deemed to be the knowledge of defendant and all misdescription regarded as waived (R. S., Chap. 49, Sec. 93) and the policy issued upon such application is not void by reason of false representation.

Where an application for renewal of a policy of insurance is signed in blank by the insured and subsequently filled out by the agent of the insurer, the act of the agent is that of the insurer.

A motion for a new trial on the ground of excessive damages will not be granted when the court finds in the verdict, viewed in the light of the evidence, no indication of bias, prejudice or improper motive on the part of the jury.

On motion. Overruled.

This is an action on a policy of insurance against loss by fire. Plea, the general issue, and brief statement in substance as follows:

1. That the plaintiffs at time of the application for the policy of insurance warranted that the buildings sought to be insured by the policy declared upon in plaintiffs' writ were occupied by a tenant, when, in fact, the premises were not so occupied by a tenant, and such non-occupancy rendered the policy, according to the terms of the contract for insurance, void ab initio.

2. That the plaintiffs, at the time of the application for the policy, warranted that the value of the buildings sought to be insured to be greatly in excess of their true value.

3. That the buildings insured by said policy were vacant without the assent in writing of the Company and so remained vacant for more than thirty days.

4. That the title to the buildings insured at time the policy was issued was not in the plaintiffs.

Verdict for plaintiff for $952.05. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

G. B. Stuart, for plaintiff.

W. C. Conary, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

BIRD, J. An action on a policy of insurance against loss by fire. The jury found for the plaintiff, assessing the damages at $952.05, and the defendant filed a general motion for new trial. In support of its motion defendant urges three grounds which will be considered in order.

First: that the insured in their written application for insurance were guilty of a material misrepresentation as to the occupancy of the buildings insured. The original application alleges the buildings to be in occupation of a tenant. They were in fact unoccupied and remained so throughout the life of the policy. But the agent of defendant well knew the buildings were unoccupied when the application was made and it must be held that defendant waived the requirement and that the first policy was not invalidated: *Hilton* v. *Phoenix Ins. Co.,* 92 Maine, 272; *Bigelow* v. *Ins. Co.,* 94 Maine, 39, 45; R. S., c. 49, § 93. Nor is the result, in the absence of fraud, affected by plaintiffs' oral statement or promise as to occupancy subsequent to the making of the application; *Kimball* v. *Ins. Co.,* 9 Allen, 540. About the time of the expiration of the first policy, plaintiffs made application for its renewal. From this application it appears that plaintiffs represented the buildings as occupied by a tenant. The renewal was undoubtedly a new contract, *Jenkins* v. *Cor etc. Ins. Co.,* 171 Mo., 375. But it was claimed by plaintiffs that the blank renewal application, when signed by them, was not filled in and was after signature completed by defendant or its

agents. The evidence was conflicting upon this point and we find no warrant for disturbing the verdict as to this finding. The act of the agents of the corporation in filling out the application was that of the defendant: *Washburn* v. *Casualty Co.*, 108 Maine, 429, 434.

Second: It is claimed that the policy was void for violation of the clause providing for its avoidance "If the said property hereby insured shall become vacant for more than thirty days by the removal of the owner or occupant, and so remain vacant for more than thirty days without" the assent of the defendant. It is clear that the buildings were unoccupied at the date of the policy in suit and so remained until the loss which occurred some months later. But "it cannot be said that the house became unoccupied, because it is undisputed that it was unoccupied when the policy issued:" *Hilton* v. *Phoenix Ins. Co.*, 92 Maine, 272, 277.

Third: The evidence as to the actual value of the buildings at the time of the loss was conflicting, that adduced by plaintiffs being considerably above the amount of the verdict and that offered by defendant being as much below. We are, however, unable to find in the verdict, viewed in the light of the evidence, any indication of bias, prejudice or improper motive on the part of the jury.

The entry must be,

Motion overruled.

GILBERT L. FENLASON *vs.* HAROLD J. SHEDD, et als.

Penobscot. Opinion September 11, 1912.

Trespass Tax. Tax Collector. Assessment. Exceptions. Refusal to pay tax. Assessors. Arrest. Premature arrest. R. S., Ch. 10, Sec. 20. Demand. Waiver of Exception from arrest.

1. The plaintiff contends that his arrest, even if in all other respects legal, was premature. This contention must prevail, R. S., Ch. 10, Sec. 20.
2. It is not in controversy that the demand was made on the plaintiff for payment of the tax on February 24, 1909, and that he was arrested for non-payment of the tax on March 8th following.
3. It is unnecessary to note the fraction of the days of demand and arrest.
4. The phrase "for twelve days after demand," in the common meaning of the language gives the tax payer twelve full days after the day of demand in which to pay the tax or point out property.
5. The day of demand being excluded, twelve full days must pass before the time "after twelve days" can begin to run.
6. The contention of the defendants that if the arrest was prematurely made, the plaintiff waived his claim of exemption from arrest for the full length of time prescribed by the statute by peremptorily declining to pay the tax cannot prevail.
7. The refusal to pay contemplated by the Statute is presumed to continue for twelve days, and the refusal to pay during the whole twelve days is the basis of the arrest.

On exceptions by the plaintiff. Sustained.

This is an action of trespass in which the plaintiff alleges that he was illegally arrested and imprisoned upon a tax illegally assessed. The conceded facts show that the defendant, Shedd, tax collector of the town of Mattawamkeag, arrested the plaintiff for refusal to pay the tax assessed against him in 1908 by the other defendants, Webster, Wyman and Applebee, purporting to be the legally qualified assessors for that year.

Plea, the general issue with brief statement justifying his acts.

On motion and exceptions. Motion waived. Exceptions sustained.

Case is stated in the opinion.

George E. Thompson, Edgar M. Simpson, for plaintiff.

James H. Burgess, Martin & Cook, for defendants.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

SPEAR, J. This is an action of trespass in which the plaintiff alleges that he was illegally arrested and imprisoned upon a tax illegally assessed. The conceded facts show that the defendant, Shedd, tax collector of the town of Mattawamkeag, arrested the plaintiff for refusal to pay the tax assessed against him in 1908 by the defendants, Webster, Wyman and Applebee, purporting to be the legally qualified assessors for that year. The case comes up on fifteen exceptions of the plaintiff, only one of which, inasmuch as it is decisive of the case, need be considered. The plaintiff contends that his arrest, even if in all other respects legal, was premature. This contention must prevail. R. S., Ch. 10, Sec. 20 provides: "If a person so assessed, for twelve days after demand, refuses or neglects to pay his tax and to show the constable or collector sufficient goods and chattels to pay it, such officer may arrest and commit him to jail, until he pays it, or is discharged by law." It is not in controversy that demand was made on the plaintiff for payment of the tax on February 24th, 1909, and that he was arrested for non-payment on March 8th following. It is unnecessary to note the fraction of the days of demand and arrest. The defendants, however, contend that the arrest being made on the 12th day after demand, complied with the requirement of the statute, and confidently cite *Cressey* v. *Parks,* 75 Maine, 387 as a conclusive precedent. But it will be observed that the language of the statute construed in this case is entirely different in its "common meaning" from that of the statute now under construction. In the former statute the officer was directed to keep such distress "for the space of four days." . . . The court held that the day of seizure should be excluded in computing the time, and that the four days then began to run. This was the time the officer could keep it. This language is unambiguous and clear. The fifth day or any part of

it would be more than four days. The meaning of the statute now under consideration is also as definite and specific as the use of the English language can make it. The phrase "for twelve days after demand," as was here used "in the common meaning of the language," gives the tax payer twelve full days after the day of demand within which to pay the tax or point out property. In other words, the day of demand being excluded, twelve full days must pass before the time "after twelve days" can begin to run.

The case of *Taylor* v. *Jacoby*, 2 Penn. State, 495, 45 Am. Dec., 615, is in point. The syllabus states the issue and holds that "an action on a promissory note payable one day after date cannot be maintained until the day after the day of payment," and that the maker of such note "is entitled to the whole of the last day to make payment." Chief Justice Gibson after referring to the conflict of decisions with reference to reckoning the days of grace and to the beginning of suits on promissory notes and bills of exchange, and stating that they depend upon commercial usage, then announces the rule applicable to the beginning of a suit upon a note or contract make payable a certain number of days after a given date, as follows: "The case put to illustrate the consequences of a different rule, is the very case before us; and to say that the day of payment is not the day after the date, but the day of the date itself, would be contrary to the plain meaning of the words and obvious design of the parties, who evidently intended that the debt should be payable on the second day; and as the defendant was entitled to the whole of it for performance of his engagement, he could not be called on by process, original or judicial, before it had expired." We are unable to discover any distinction between the principle announced in this case and that involved in the interpretation of the statute before us. It was intended, undoubtedly, that the tax should be payable on the twelfth day precisely as this note was payable on the second day, and that the tax payer was entitled to the whole of the twelfth day for the performance of his engagement precisely as the maker of the note was entitled to the whole of the second day for the payment of the note, and that no process could be served upon him before the twelfth day expired, precisely as it could not have been served upon the maker of this note until the second day had expired. To make the parallel exact, suppose the statute had

said "if a person so assessed, for (one) day after demand, refuses or neglects to pay," etc., would it be contended that the plaintiff could be arrested the next day after the demand? If so, the demand could be made just before midnight and the arrest just after midnight, an act instanter with the demand, and entirely defeat the purpose of the law. This illustration is used in *Bigelow* v. *Wilson,* supra, with reference to the computation of time in the redemption of a mortgage.

In *Butts* v. *Edwards,* 2 Denio, 164, a statute similar in language to our statute, is construed by the court in full harmony with the Penn. case. The court say: "'After,' as used in Rev. St., Ch. 24, making it the duty of an officer making a distress for rent to appraise the goods five days 'after' making the distress, means five full days from the time the distress was made, and, where distress was made on the 9th day of March, the earliest date on which an appraisal could be made was on the 15th day of March." Here it will be observed by comparing the dates in this case that five full days, the 10th, 11th, 12th, 13th and 14th, between the day of distress and the day of appraisal were allowed the officer for making the appraisal. But in the case at bar only eleven full days were allowed between the day of demand and the day of arrest. To have allowed twelve full days the arrest should have been made on the 9th. While as before suggested, exceptions to this rule lie in the case of computing time upon bills of exchange and days of grace, based, as Chief Justice Gibson says, "on arbitrary and inveterate usage which make up the body of commercial law," yet the decisions are by no means uniform upon these instruments, and the late Justice Field of the Supreme Court of the United States, in *McFarland* v. *Pekoe,* 8 Cal., 626, says: "While the endorser becomes liable to pay on the last day of grace, immediately upon default of the maker, and while notice given to him on such default on that day will be sufficient, he could not be sued until the next day for he has the whole of the last day to make payment." In harmony with these rules is the principle laid down in *Bigelow* v. *Wilson,* I Pick., 485. "No moment of time can be said to be after a given day, until that day has expired." Our conclusion is that both upon reason and authority the explicit language of our statute should be construed to give the person assessed twelve full days

between date of demand and the date of arrest. But the defendants contend that if the arrest was prematurely made, the plaintiff waived his claim of exemption from arrest for the full length of time prescribed by the statute by peremptorily declining to pay the tax. But this contention cannot prevail inasmuch as the twelve days is predicated upon a refusal by the tax payer to pay. The refusal contemplated by the statute is presumed to continue for twelve days. Refusal to pay during the whole twelve days is the basis of arrest. We are unable to discover how under the language of this statute there could be a waiver of the very thing which the statute contemplated the tax payer must do in order to make himself amenable to arrest.

Exceptions sustained.

JESSE WILMOT BERRY *vs.* ATLANTIC RAILWAY.

York. Opinion September 23, 1912.

Accident. Amendment. Burden of Proof. Exceptions. Motion for New Trial. Negligence. Prima Facie. Verdict.

1. The defendant was described in the writ as the Atlantic Shore Railway Company, otherwise known as the Atlantic Shore Line Railway Company. The plaintiff was allowed to amend by striking out the word "Company" in both places. The amendment was properly allowed.

2. When a plaintiff fails to prove any one essential element of his case, exceptions lie to a refusal to direct a verdict for the defendant.

3. There was sufficient evidence, prima facie, at least, to warrant a jury in finding that the defendant company was operating the car on which the plaintiff received the injury complained of. Hence a motion to direct a verdict for the defendant for want of such proof was properly denied.

4. When in a suit against an electric railway company it is shown that an electric car was derailed, and the plaintiff, a passenger, was injured in consequence of the derailment, that is sufficient evidence prima facie of the defendant's negligence. The burden of explanation then falls upon the defendant.

On motion and exceptions by the defendant. Overruled.

An action on the case to recover damages for injuries alleged to have resulted from the negligence of the defendant company. The plaintiff alleges that he was a passenger on one of the defendant's cars, and that the car was derailed, causing him the injuries complained of. Plea, the general issue. Verdict for the plaintiff for $155.80. 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.

Leroy Haley, for plaintiff.

Cleaves, Waterhouse & Emery, for defendant.

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

SAVAGE, J. Action on the case for negligence of the defendant company. The plaintiff alleges that he was a passenger on one of the defendant's cars, and that the car was derailed, causing him injury. He obtained a verdict for $155.80. And the case comes here on the defendant's exceptions and motion for a new trial.

In the original writ the defendant was described as the "Atlantic Shore Railway Company, otherwise known as the Atlantic Shore Line Railway Company." The plaintiff was allowed to amend by striking out the word "Company" in both places. The defendant excepted to the allowance of the amendment. We think the amendment was allowable. The defendant contends that it amounted to the substitution of a new defendant for the only original defendant, which is not permissible. *Glover Co.* v. *Rollins,* 87 Maine, 434. On the contrary, it seems to us to have been a case of misnomer, and a circumstantial error or mistake, which is amendable under R. S., chap. 84, sect. 10. "Amendments of names of parties," said Walton, J., in *Griffin* v. *Pinkham,* 60 Maine, 123, "are an every day occurrence." The logic of the defendant's argument would have applied equally well to the amendment changing Augustus to Augustine, in the Christian name of a defendant in *Fogg* v. *Greene,* 16 Maine, 282; to one striking out an initial letter in the name of a defendant in *Wentworth* v. *Sawyer,* 76 Maine, 434; to one changing Wright to Wight, in a plaintiff's name in *Wight* v. *Hale,* 2 Cush.,

486; to one striking out the words "Elder and" in the description of a plaintiff as the "Elder and deacons" of a religious society, in *Elder and Deacons of Baptist Church* v. *Bancroft,* 4 Cush., 281; and to changing "Mary Cain" to "Ann Cain" in the name of the plaintiff in *Cain* v. *Rockwelll,* 132 Mass., 194. Yet in all these cases the amendments were allowed, or held to be allowable. The point taken is not tenable.

At the conclusion of the plaintiff's testimony, the defendant requested the court to direct a verdict for it, which the court declined to do, and the defendant excepted. If the plaintiff failed to prove any one essential element of his case, the motion was a proper one, and exceptions would lie in case it was denied. *Frederickson* v. *Central Wharf Towboat Co.,* 101 Maine, 406. The case does not state upon what ground the motion was based. But in argument the defendant claims that there was error in the ruling only in one respect. It contends that there was "no proof that the car upon which the plaintiff was riding was at any time being operated by the defendant." We think otherwise.

The plaintiff testified that he took the car which left Springvale, and that his destination was Biddeford; that the accident occurred between Springvale and Sanford; that in going from Springvale to Biddeford upon the line of the Atlantic Shore Line Railroad, passengers change cars at Sanford; that "the company" (manifestly referring as the context shows, to the Atlantic Shore Line Railroad) operates one car between Springvale and Sanford and another car between Sanford and Biddeford. Then after describing briefly the passengers in the car he testified that the car on which he was riding had gone half a mile "on the line of the company" before the accident occurred. The Atlantic Shore Line Railroad was the only "company" which had been mentioned. He testified further that after the accident a car came from Sanford, and took the passengers, himself included, to the station or waiting room at Sanford, and that when he arrived at the station, the "company,"—the Atlantic Shore Line Railroad, had a team there and took him to his residence in Springvale. A witness, Dr. Moulton, testified that he was "a passenger upon a car of the Atlantic Shore Line Railway on April 14, 1911, which had an accident," and that the plaintiff was on the same car. His description shows that the

accident he referred to was the one in which the plaintiff was injured.

We think that this evidence clearly would warrant a jury in finding that the plaintiff was riding in one of the defendant's own cars on the line of its own road. This is sufficient ground on which to base an inference, prima facie, at least, that the defendant was operating the car. The refusal to order a verdict for the defendant on this ground was correct, and this exception must be overruled.

Under the motion for a new trial but little need be said. The plaintiff showed that the car was partially derailed. The rear trucks left the rails, and bumped from sleeper to sleeper for a little distance. This caused the injury. The defendant offered no evidence, and the cause of the derailment does not appear. The action is based upon the defendant's negligence. The plaintiff alleges it, and must prove it. But when it is shown that a car was derailed, and bumped along the sleepers, instead of following the rails, that the plaintiff was a passenger, was himself in the exercise of due care, and was injured because of the derailment, that is sufficient, prima facie. The burden of explanation then falls upon the defendant operating the railway. *Stevens* v. *E. & N. A. Railway,* 66 Maine, 74; *Feital* v. *Middlesex R. R. Co.,* 109 Mass., 398. In this case no explanation is attempted. We must regard the defendant's liability established.

The damages awarded are small, and though perhaps large for the case they are not manifestly excessive. The physical injuries were to all appearances very slight. The suffering was not great, but it was something. The plaintiff was confined to the bed or the house about two weeks. He testified that he was unable to attend to his business for three weeks longer. Though it is claimed that he has grossly exaggerated his inability to work, it is not clear that the jury were not warranted in believing him. He testified that he was earning about $18 a week. On the whole we find no sufficient reason for disturbing the verdict.

Motion and exceptions overruled.

BRUNSWICK AND TOPSHAM WATER DISTRICT

vs.

INHABITANTS OF TOPSHAM.

Cumberland. Opinion September 24, 1912.

Appeal. Bill in Equity. Burden. Burden of Proof. Contract. Degree of Proof. Equity. Mutual mistake. Modification of Contract. Water.

1. To sustain a bill in equity to reform a contract, the plaintiff must show that the contract executed does not express the terms to which the parties actually agreed, and which were intended to be expressed, and that the mistake was mutual. The proof must be full, clear and decisive, and beyond reasonable doubt or uncertainty, but it is not necessary that the testimony be free from contradiction.

2. That there was a mistake in drafting the contract in question in this case, and that it was a mutual mistake, is established by the requisite burden of proof.

On appeal from the decree of a single justice who ordered a reformation. Appeal denied. Decree below affirmed with additional costs.

This is a bill in equity to reform a contract, between the Brunswick and Topsham Water District and the Inhabitants of Topsham for an extension of the Water System by the Water District across the Androscoggin River into the village of Topsham. The plaintiff claims that the contract drafted and executed does not express the terms to which the parties actually agreed and which were intended to be expressed. To sustain the bill, the plaintiff must show that there was a mistake and that it was mutual by a very high degree of proof.

Case stated in the opinion.

Wheeler & Howe, for complainant.

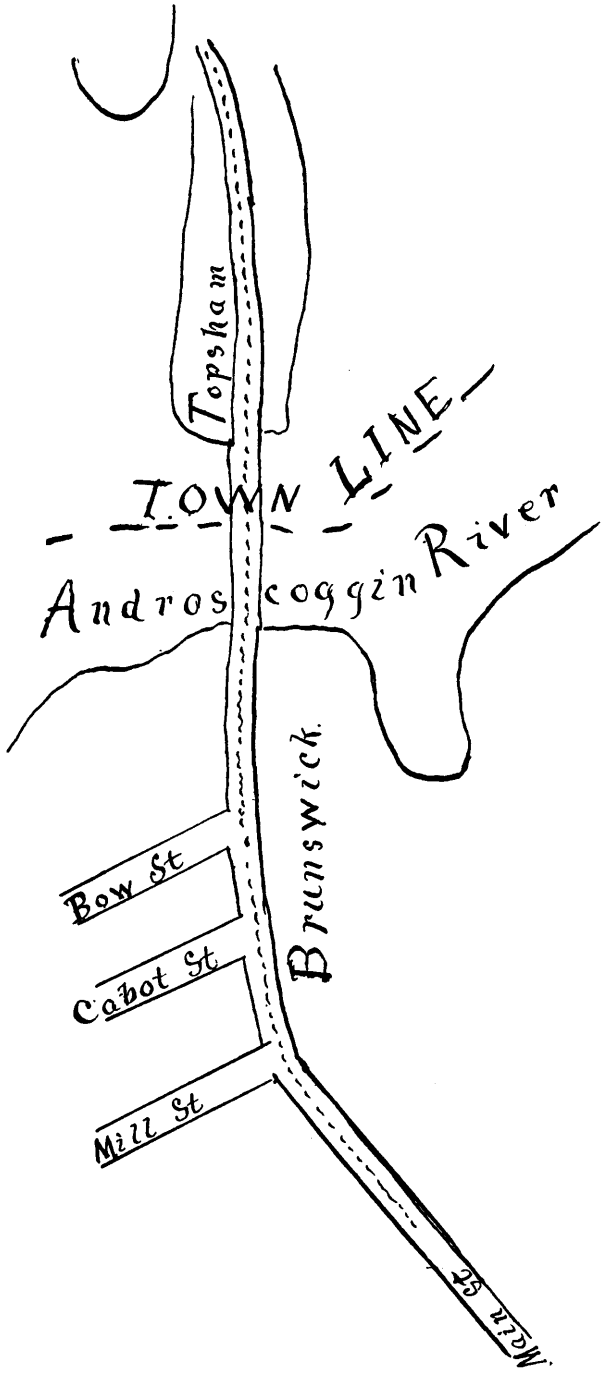
Oakes, Pulsifer and Ludden, for respondents.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

SAVAGE, J. Bill in equity to reform a contract. The case comes up on appeal from the decree of a single justice, who ordered a reformation.

To sustain the bill, the plaintiff must show that the contract drafted and executed does not express the terms to which the parties actually agreed, and which were intended to be expressed, and that the mistake was mutual. That there was a mistake, and that it was mutual must be shown by a very high degree of proof, as may be seen from the following expressions gathered from our own reports. The proof must be "full, clear and decisive," "strong, satisfactory and convincing," free from all doubt and uncertainty," "beyond fair and reasonable controversy," "beyond reasonable doubt," such as "entirely to satisfy the conscience of the court." *Farley* v. *Bryant,* 32 Maine, 474; *Young* v. *McGown,* 62 Maine, 56; *Fessenden* v. *Ockington,* 74 Maine, 123; *Andrews* v. *Andrews,* 81 Maine, 337; *Cross* v. *Bean,* 81 Maine, 525; *Linscott* v. *Linscott,* 83 Maine, 284. But this does not mean, of course, that the testimony on the whole must be free from contradiction. A burden as severe as that required by law in this case is well sustained in numberless cases, where life or liberty are at stake, though the testimony is in sharp conflict.

The general history of the case is not in dispute. Prior to the making of the contract in controversy, the plaintiff's physical plant was confined to Brunswick alone. It did not extend into Topsham. The inhabitants of Topsham wished the system extended across the Androscoggin river into the village of Topsham. So much of the proposed extension as concerns this case is approximately represented by the following sketch.


Topsham
TOWN LINE
Androscoggin River
Brunswick
Bow St
Cabot St
Mill St
Main St

At that time the plaintiff had a twelve inch main, along Main Street in Brunswick, which ended at Mill Street. From Mill Street there was a six inch pipe extending "to the foot of Mill Hill," towards the river.

The plaintiff made a written proposal to the town of Topsham to "put water across to Topsham through a 12 inch pipe," and through certain streets named, "the town of Topsham to guaranty the yearly payment of a sum for the use of water from above service to equal the rate which the gross earnings of the Brunswick system on its total investment figured on the basis of the past six months." The proposal estimated that "the basis of figuring would mean about 8½% to 9% on the cost of putting in the mains as described." It provided that if the percentage in Brunswick should increase or diminish from any causes, the amount to be guaranteed by Topsham should be increased or diminished in the same proportion. It also provided that if the cost of repairs "in the Topsham service should in any year exceed the relative proportion of repairs to investment in Brunswick the town of Topsham will pay any and all such deficiency." The town of Topsham appointed a committee of three, and authorized the committee "to contract on behalf of the town" with the plaintiff District, "for a supply of water for municipal uses for such time and upon such terms as may be mutually agreed, and particularly to contract with said District for such supply on the terms of the paper hereto annexed, (which was the proposal of the plaintiff already referred to), or on such modifications thereof as may be mutually agreed." After many conferences between the trustees of the District and the committee of the town, a draft of a contract was made by counsel for the plaintiff, and examined and approved by counsel for the defendant, after certain modifications had been made. The draft was modified with reference to the length of time the contract was to run, and also by the provision that if the cost of repairs in Topsham were less in proportion than the cost of repairs in Brunswick, computed with reference to construction cost, the District should pay the difference to the town. The draft as prepared and approved by counsel was undoubtedly in accordance with their understanding of the proposed contract. But it does not appear how familiar the counsel had been with the progress of the negotiations and discussions. The case does not

show that the counsel for the plaintiff had been present at any meetings of trustees and committee until after the draft was prepared, while the counsel who then assisted the committee of the town testifies that he was present at two conferences. The case shows that there were perhaps twenty conferences in all. In the end, the draft finally prepared was read to all the trustees and members of the committee, and was then executed by them.

The contract as signed, after providing for hydrant rentals to be paid by the town, contained this clause: "In addition to such hydrant rental the town of Topsham agrees to pay to said district annually on the first day of December during the continuance of this contract such further sum as may be required to assure and yield to said district a total gross income from water rates in said town which shall bear the same ratio to the construction cost of the plant of said district in the limits of the the town of Topsham, as the total gross income of the district from water rates in the town of Brunswick shall bear to the construction cost of the plant and property of the district in said Brunswick."

By this contract, as expressed, the plaintiff was guaranteed to receive from Topsham and the users of water in Topsham the same percentage of income, based on cost of construction within the limits of Topsham, as it received from water rates in Brunswick, based on the cost of the construction of that part of the plant which was in Brunswick. Each territory was to contribute the same percentage, Topsham the same as Brunswick. And the amount to come from Topsham was to be computed on the basis of the cost of construction within Topsham. The Brunswick percentage was to be applied to the cost of construction in Topsham, and if there was any deficiency in the receipts from other sources, the town agreed to make up the deficiency. The town of Topsham now claims that this is precisely the result which was reached and agreed to in the oral negotiations, and is correctly expressed in the written contract.

On the other hand, the plaintiff claims that it was agreed that the construction cost, on which the amount which Topsham might have to pay was based, was the cost of the construction of the entire extension, from Mill Street in Brunswick, down Mill Hill, across the river into Topsham, and within Topsham; and that the clause in the contract which made the town line the dividing line

between the respective portions of construction cost was a mistake. The distance between Mill Street and the town line is about 900 feet.

Here then is the question. In fixing cost of construction as a basis on which income was to be computed, was it agreed that Topsham's part of construction cost was to begin at Mill Street, or at the town line? The plaintiff must show the former. The question is of importance. The more the construction cost that is charged to Brunswick, the less will be the Brunswick rate or percentage of increase or cost, and the less Topsham will have to pay to equal the Brunswick percentage. And the less the construction cost that is charged to Topsham, the smaller will be the basis upon which the Brunswick percentage is to be applied.

To support its contention the plaintiff introduced the testimony of all three of its trustees, and of one of the committee of the town. They all agree. And it is sufficient to say, without analysis, that if their testimony is true, the plaintiff's contention is fully proved. One of the committee is now dead. The remaining member testified for the defendant. This last witness testifies clearly enough that he understood the Topsham percentage was to be reckoned on that part of the plant that was in Topsham, that Topsham was not to pay interest(?) on the cost of the plant from Mill Street to Topsham line. He says that he did not understand interest(?) was to be paid. He says: "I understood that, if we put in a twelve inch pipe and paid for it, all the expense of putting in a twelve inch pipe in place of an eight inch or six inch pipe, that was all that was required of Topsham." And to the question, "You understood that Topsham was to pay the cost of substituting the twelve inch pipe?" he answered, "Yes, Topsham would pay those bills." Since the substitution of the twelve inch pipe was between Mill Street and the town line, and since the town was in no event to pay the cost of substitution, but only an income based upon it, in case the plaintiff is right, it is not easy to interpret the witness's testimony, or his conception of the contract. He may have been misled or confused. But taking the last part of his testimony as it stands, the witness evidently was under the impression that in some way the laying of that 12 inch main was to be a burden upon the town of Topsham.

The plaintiff claims, and the testimony of its witnesses substantiates the claim, that it was understood on both sides, that the

Brunswick end of the plant was not to be called upon to help out any deficiency at the Topsham end; nor vice versa; that each end should take care of itself; that the extension from Mill Street to the town line was of no benefit to the Brunswick end; that it was essential to the Topsham end; that it was really a part of the Topsham plant. And so, it is argued, this was the fair and natural way, the probable way, to make the division, and that this probability tends to strengthen the effect of the testimony of the witnesses.

To this it is answered that if it had been intended to place on Topsham the burden of raising income on the cost of the extension from Mill Hill to the town line, in order to proportion burdens according to benefits to be received, then it would have been fair to give Topsham the benefit of the income received from that part of the extension, and that the failure to do so raises a probability that the parties did not understand that Topsham was concerned with anything on the Brunswick side of the line,—either cost or income. The plaintiff replies that it had already, prior to the contract, a sufficient pipe for service of customers from Mill Street to the river, and had the income therefrom assured; and, therefore, that it had no occasion to build, and received no benefit from building, the larger main, and that there was no reason, under such circumstances, why it should yield the benefit of that income to the defendant.

But we pass by arguments on both sides which seem to us of minor importance, to note two undisputed facts which are of importance, and of which one seems almost conclusive. First, the proposal originally made by the plaintiff to the defendant was to "put water across to Topsham through a twelve inch main," for which, with other things, the town was to guarantee a gross income "computed as a percentage *on the cost of putting in the mains as described.*" This cost began at Mill Street. The defendant town authorized its committee to contract *on the terms of that proposal,* or on modifications thereof. The action of the town was public, and was undoubtedly known to the trustees of the plaintiff. If so, why should these trustees have agreed to other and less favorable terms, when they knew that the town was willing to treat with them on their own terms, and had instructed its committee so to do? The case of the defendant does not answer that question.

Secondly, the case does not show that during the negotiations there developed any difference of views concerning the question now in dispute. There is no evidence that it was the subject of debate. But there were two subjects about which for a time there was a disagreement. One was the length of time the contract was to run, and the other the size of the main pipe from Mill Street to Topsham. The plaintiff's proposal was to put in a twelve inch pipe. The defendant's committee thought an eight inch pipe was all that was necessary for their town's needs. It was made a matter of some argument, but the committee seem to have yielded to the insistence of the plaintiff. If the defendant's present contention is correct, we do not see why the size of the pipe on the Brunswick side of the line should have been a matter of discussion at all; certainly not, if the plaintiff was willing to put in a larger pipe than the committee thought was necessary. Whatever the size of that pipe, the cost of construction in Topsham was not affected. Topsham was not concerned that way. Indeed, the larger and more expensive the pipe put in in Brunswick, the larger would be the cost of construction of the Brunswick part of the plant, and the less would be the percentage of income, and so the less would be required of Topsham, which was to guarantee the same rate of percentage, and no more, from her side of the river. Topsham could only be interested in the cost and size of the pipe in question, in the case it was to be added to the construction cost of the Topsham plant. The fact as we have stated it is undisputed, and we are unable to construe it otherwise than as meaning that the Topsham committee then understood that the expense of construction from Mill street to the town line was to be a part of Topsham's construction cost.

We need go no further. That there was a mistake in drafting the contract, we think is established by the legal burden of proof. The decree of reformation made by the single justice was sufficiently supported by the evidence, and must be affirmed. We add that we do not regard it as very strange that the trustees and the committee did not detect the error when the draft was read to them. The paragraph is involved, necessarily so, and we think it quite likely that the mind of a layman would not be able to follow the words and get their drift correctly in one reading.

Appeal denied. Decree below affirmed with additional costs.

THOMAS SAUCIER *vs.* THE MAINE SUPPLY AND GARAGE CO., et al.

Androscoggin. Opinion September 24, 1912.

Bill in Equity. Contractor. Contract. Estoppel. Labor. Lien. Materials. Priority. Waiver.

1. A mechanic's lien for labor and materials furnished under a contract takes precedence over a mortgage given subsequently to the making of a contract, though the labor and materials, or some of them, may not be actually furnished until after the mortgage is given.

2. The testimony of the officers and trustees of the defendant bank affords good grounds for the conclusion that the bank officers understood, when they took the mortgage and parted with the bank's money, that the plaintiff was then constructing under a contract the building on which a lien is claimed. That being so, there is no basis for the bank's claim of estoppel. Whether the contract existed at the time of the original negotiations for a loan or not, and, if it did, whether the plaintiff disclosed it or not, are alike immaterial.

3. The evidence does not sustain the bank's claim that the plaintiff has waived his lien.

On appeal from decree below. Appeal denied. Decree below affirmed with additional costs.

1. This is a bill in equity, brought to enforce a mechanic's lien under the provisions of Revised Statutes, Chapter 93, Section 29. The plaintiff was the contractor and furnished labor and materials in erecting the building under a contract with the Maine Supply and Garage Company, dated October 20, 1910. The Androscoggin County Savings Bank, on January 4, 1911, took from the Maine Supply and Garage Company a mortgage of the building and the land on which it stood to secure a loan of $15,000.

2. The plaintiff has a valid lien, for the amount of $4,543.15 due him, upon the property owned by the Maine Supply and Garage Co.

3. That said lien is entitled to priority in payment over the right of said Androscoggin County Savings Bank under the mortgage given it by said Maine Supply and Garage Company.

J. G. Chabot, for plaintiff.

White and Carter, for defendants.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

SAVAGE, J. This bill in equity was brought to enforce a mechanic's lien under the provisions of R. S., ch. 93, sect. 29, et sequitur. The plaintiff, a contractor, furnished labor and materials in erecting a building under a contract with the Maine Supply and Garage Company, made and dated October 20, 1910. The Androscoggin County Savings Bank, on January 4, 1911, took from the Supply and Garage Company a mortgage of the building and the land on which it stood, to secure a loan of $15,000. The money was loaned for the purpose of paying for construction work and materials in and upon the building. The entire amount of the loan was not advanced at the date of the mortgage. Some of it was advanced then, and more was advanced later from time to time upon the architect's certificates, showing the progress of construction. The case comes before us as on the appeal of the defendant bank from a decree by a single justice. The decree established the plaintiff's lien for $4,354.31, and adjudged that it was entitled to priority in payment over the mortgage right of the bank.

Under principles well settled in this State and elsewhere, a mechanic's lien for labor and materials furnished under a contract takes precedence over a mortgage given subsequently to the making of the contract, though the labor and materials, or some of them, may not be actually furnished until after the mortgage is given. *Morse* v. *Dole,* 73 Maine, 351; *Farnham* v. *Richardson,* 91 Maine, 559; *Central Trust Co.* v. *Bodwell Water Power Co.,* 181 Fed. Rep., 735; 27 Cyc., 234. This doctrine, if nothing else appeared, would sustain the decree.

But the defendant bank contends that under the circumstances of this case, the decree is erroneous upon two grounds, namely, that as against the bank the plaintiff is equitably estopped from claiming a lien, and, that he has waived the right to a lien.

In support of the first contention, the bank claims that when the treasurer of the Garage Company came to the defendant bank's banking rooms to apply for the loan he was accompanied by the plaintiff who produced a plan of the proposed building, discussed somewhat the details of construction, and made an estimate of the cost, and that the treasurer, in the presence of the plaintiff, explained to the officers of the bank that the difference between the amount of the loan and the estimated cost, about $9,000, was expected to be obtained from the stockholders. But it is claimed that the plaintiff did not disclose that he already had a contract for the erection of the building. And it is further claimed that from what was said by the plaintiff, or in his presence, and from what was not said, the officers of the bank understood, and had good reason to understand, that the plaintiff did not then have a contract, the liens under which would take precedence over the proposed mortgage, but that the making of such a contract was contingent upon obtaining the loan. Hence, it is argued, it is contrary to equity and good conscience for the plaintiff to assert a lien under his contract as against the mortgage, and he is equitably estopped to claim it.

Whether, if this were all there was to the case, the doctrine of equitable estoppel would apply, we do not need to inquire. There are other facts. And we think there are several answers to the bank's contention, upon the facts, gathered from the testimony of the officers of the bank themselves.

In the first place, inasmuch as the bank officers, or some of them, testified that the application for the loan was made, some said, "the fore part of October," and some "about the middle of October," and the contract for the building was not made until October 20, it was open to the Justice who heard the case, whose findings of fact are conclusive, unless clearly wrong, *Young* v. *Witham*, 75 Maine, 536; *Proctor* v. *Rand*, 94 Maine, 313, to find that no contract existed at the time of the application for the loan, and therefore the plaintiff had none to disclose. But passing this point, as perhaps of minor importance, we come to another.

In any event, the loan was applied for in October. It was not voted by the bank trustees until November 7. It was then found by the bank that the title to the land was not in the Supply and Garage Company, being, in fact, held by several individuals for the cor-

poration. The title was made good in the corporation, December 31. The mortgage was given and the loan made (in part) on the following January 4. In the meantime, the building was in process of construction by the plaintiff, and the work had reached the third story when the mortgage was given. The evidence clearly shows that the bank officers knew that the plaintiff was the contractor, and not the borrower, though, naturally, the money borowed would come to him. They expected that he would build the building. The treasurer of the bank testifies that he assumed that building operations would commence shortly after the loan was voted (November 7) and that the plaintiff was to be the contractor. The president of the bank testifies that the plaintiff "told me what he was doing when he first asked for the loan;" that he understood there was to be a contract for the building; that the plaintiff told him he had a contract for it, "a good contract;" that he himself saw the building in the process of construction, and all this, before the mortgage was taken and loan made. The testimony of these officers, with that of other trustees of like tenor, which it is unnecessary now to particularize, affords abundant grounds for a conclusion that the bank officers understood when they loaned the money and took the mortgage, that the plaintiff was then constructing the building under a contract. If so, there is, in that respect, no basis for the claim of estoppel. Whether the contract existed at the time of the original negotiations or not, and if it did, whether the plaintiff disclosed it or not, are alike immaterial. The bank seems to have parted with its money upon a correct understanding of the essential facts as they existed at that time.

Intimately connected with the claim of estoppel, perhaps so intimately as not to make it easily distinguishable, is the claim of a waiver of lien. This is based upon the contention that at the time the loan was applied for the plaintiff in effect agreed that, with the aid of the $15,000 loan, the building could and should be completed free of mechanic's liens, so that the mortgage should be an underlying security; or if the words and conduct of the plaintiff did not constitute an agreement, the plaintiff did so represent and hold out to the bank that the building would be so completed that he ought now to be bound by its statements, and be held to have waived any lien. We do not think that the evidence sustains the claim.

The evidence is plenary that both the plaintiff and the bank expected that the funds necessary to complete the building, in excess of the loan, would be provided by the stockholders. And in that sense it was understood that the bank's mortgage would be a first lien. There is an intimation in the record that the stockholders did provide means of some character and to some extent, but that they were diverted, without the knowledge or fault of either the plaintiff or the bank. However this may be, the evidence falls far short of showing any agreement by the plaintiff to complete the building free of liens as against the bank, or any representations, beyond estimates and expectations, that it would be so completed. In these expectations, the bank officers seem to have shared. They apparently had the same information and grounds for expectation that the plaintiff had. But the expectation failed. And it cannot fairly be gathered from the evidence either that the plaintiff intended to waive his lien, or that the bank officers had any reason then to think that he intended, in case the expectations failed, to bear himself any loss which might be occasioned by the failure. In fact, the evidence leads us to conclude that none of the parties contemplated that there might be such a failure, and that while the bank officers understood that there would be no liens as against their mortgage, they relied for that understanding, not on any waiver of lien by the plaintiff, but on the expectation and belief that the owner of the building had made, or would make, sufficient provision for the funds necessary in excess of the mortgage loan.

We are of opinion, therefore, that the decree below should be affirmed.

Appeal denied. Decree below affirmed, with additional costs.

SUSAN D. TUTTLE *vs.* EMMA H. MERROW.

Kennebec. Opinion September 24, 1912.

Advancement. Action. Exceptions. Evidence. Gift. Motion. Pleadings. Resulting Trust.

1. To establish a resulting trust by parol evidence the proof must be full, clear and convincing. But the rule may be satisfied though there be only one witness against one, or one against several. The circumstances, the conditions and the probabilities speak, as well as the witnesses.
2. When the issue was whether a transaction in which the plaintiff delivered certain moneys to the defendant, to be used in paying for land, constituted a resulting trust, or was a gift, or advancement from mother to daughter, and the plaintiff, the mother, on cross-examination was asked whether the amount of money was not about what the defendant's interest in her property would be, if she were dead, the answer was properly excluded as immaterial. It had no legitimate tendency to prove a gift.
3. An admission made by a defendant tending to support the plaintiff's contention may be shown by the plaintiff in the first instance, or it may be shown in rebuttal after the defendant has testified.

On motion and exceptions by the defendant. Overruled.

This is an action for money had and received. The plaintiff and defendant are mother and daughter. The plaintiff claims that the defendant took title to certain real estate in Hallowell. That the sum of twelve hundred dollars was paid therefor, four hundred dollars of which were paid by the plaintiff for one-third interest, and that the title to the whole was taken in the name of the defendant by mutual agreement. The defendant, thereafter, sold said real estate for $1350.00, and refused to account to the plaintiff for any part of the money so received. The defendant claims that the four hundred dollars contributed by plaintiff towards the purchase price was a gift or advancement of the inheritance which might come to her upon her mother's death. Plea, the general issue. The jury returned a verdict for the plaintiff for $413.40.

The defendant filed a general motion for a new trial and exceptions.

M. H. Simmons, for plaintiff.

M. E. Sawtelle, for defendant.

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

SAVAGE, J. Action for money had and received. The plaintiff and defendant are mother and daughter. The plaintiff's claim is that the defendant took title to certain real estate in Hallowell, paying therefor the sum of twelve hundred dollars; that of this purchase price the plaintiff contributed four hundred dollars for a one-third interest in the real estate; that the title to the whole, by mutual agreement, was taken in the name of the defendant; that the defendant mortgaged the real estate to raise the balance of the purchase price; that by reason of said contribution and agreement the defendant held title to an undivided third of said real estate in resulting trust for the plaintiff; that thereafter the defendant sold the real estate and received therefor the sum of thirteen hundred and fifty dollars; and that the defendant refuses to pay over, or account for to the plaintiff any part of the money so received.

On the other hand, the defendant, admitting the receipt of the four hundred dollars from her mother, claims that it was a gift, or to be more exact, an advancement of the inheritance which might come to her upon her mother's death. These contentions raised the sole issue of fact. The jury returned a verdict for the plaintiff, and the case comes up on the defendant's motion for a new trial and exceptions.

Concerning the motion little need be said. Under the pleadings it was incumbent on the plaintiff to show that the defendant held title to an undivided third of the real estate in trust for the plaintiff, and that, by a resulting trust. Then, if such a trust were shown, the defendant would be accountable to the plaintiff for her share of the proceeds of the sale of the property. It is true, as contended by the learned counsel for the defendant, that in order to establish a resulting trust by parole evidence, the proof must be full, clear and convincing. *Burleigh* v. *White,* 64 Maine, 23; *Anderson* v. *Gile,*

107 Maine, 325. The application of this rule usually arises in equity proceedings, where the justices are triers of the facts; but the rule is the same when the question arises in cases tried before juries, as it has in this case. But the rule does not mean that the party seeking to show such a trust must introduce a larger body of evidence, or a larger number of witnesses, than may be introduced by the adverse party. The proof may be full, clear and convincing, though there be only one witness against one, or one against several. The circumstances, the conditions and the probabilities speak, as well as the witness, and sometimes speak with great effect. The appearance of the witness upon the stand counts for much. In this case there is nothing unnatural nor unreasonable in the plaintiff's claim. The jury saw the witnesses. We cannot. The jury believed the plaintiff. We cannot say that they were not warranted in doing so, and in finding, by the requisite degree of proof, that the transaction constituted a trust, and was not a gift. The motion must be overruled.

So must the exceptions. We have examined them all, though only two are much relied upon. We find no merit in them. The two that are relied upon are these:—for the purpose of showing a gift of the money to the defendant, the plaintiff was asked on cross examination the following question: "As a matter of fact was not this $400 about what Mrs. Merrow's interest in your property would be if you died?" The answer was excluded as immaterial, and an exception was taken. The exclusion was correct. If the answer had been admitted, and had been in the affirmative, it would have had no legitimate tendency to prove a gift.

In rebuttal, the plaintiff, against the objection and exception of the defendant, was permitted to introduce a letter written by the defendant to her sister, in which, among other things more or less significant, was this sentence:—"The $400 that she [the plaintiff] *put in the place* would not do *us* any good unless *we* keep the payments up and taxes paid." (The italics are ours.) The word "payments" doubtless refers to payments on the mortgage debt. This statement made by the defendant certainly had a tendency to rebut her claim and testimony that the $400 was a gift to her, and so it was clearly admissible in rebuttal. It also would have been admissible, in support of the plaintiff's contention, in the first

instance, as being an admission by the defendant. And it was properly open to the consideration of the jury in both aspects.

It follows that the entry must be,

Motion and exceptions overruled.

MURRAY BROTHERS COMPANY

vs.

AROOSTOOK VALLEY RAILROAD COMPANY.

Aroostook. Opinion September 24, 1912.

Abandonment of Contract. Contract. Change of Location. Credibility of Witnesses. Charter. Location. Survey. Street Railway. Supplemental agreement.

1. The plaintiff made a contract in writing with the defendant to construct for it a road bed for a single track railroad from Presque Isle to Washburn. The contract itself was silent as to the precise location of the railroad. The plaintiff claims that the contract was understood to be, and was in reality for a road bed along an approved location, mostly within highway limits. The defendant claims that it was understood to be for a road bed along an intended location through fields, woods and swamps, mostly outside of highway limits. The road bed was in fact constructed along the intended location, outside of the highway. The plaintiff claims that it consented to a modification of the contract, changing the location from the highway to the place where the road bed was constructed in consideration of the defendant's promise to compensate it for the additional expense and difficulty occasioned by the change, and to pay what the labor and materials used in constructing the road bed along the new location were reasonably worth. This suit is brought to recover additional compensation under this alleged promise.

Upon this principal issue in the case, the court is of opinion that the plaintiff has failed to show by a preponderance of the evidence that the original contract was understood to be for a road bed within the highway

limits, or that there was a modification of the contract, or that it is entitled to receive more than the original contract prices, so far as the location is concerned.

2. Some of the timber furnished by the defendant for the plaintiff to use in erecting trestles was unsound and unsuitable, and was on that account more expensive to the plaintiff to work, than would have been the case if the timber had been reasonably sound and clear. The court is of opinion that the plaintiff should be allowed $200 additional, on account of this timber.

3. The plaintiff, a contractor, agreed to do certain work "on force account," the defendant to pay the actual cost, plus ten per cent. In the contract it was provided that the wages of common laborers was not to exceed $2 a day. This is not to be construed as authorizing the plaintiff to pay $2 a day under all circumstances but only so much as was reasonably necessary, and in no event to exceed $2 a day. The defendant complained to the plaintiff that it was paying higher wages than was reasonably necessary. The complaint resulted in the plaintiff's leaving the work, and it now claims that it was discharged. The evidence shows that the defendant was justified in the complaint that was made, and that the plaintiff could not complain, and take it as a breach of contract, if the defendant refused to continue to pay unreasonably high wages.

On report. Judgment for plaintiff.

This is an action of assumpsit and is before the court on report. It involves only a determination of certain disputed questions of fact. The plaintiff, on June 9, 1909, entered into a written contract with the defendant to construct for it the road bed of a railroad. The contract itself was silent as to the location of the proposed railroad on the face of the earth, except that the plaintiff's bid, which was a part of the specifications, stated that it was to be from "Presque Isle to Washburn." The plaintiff claims that prior to making the contract, the proposed location was pointed out to him as being wholly within the limits of the highway leading from Presque Isle to Washburn. This the defendant denied, and claimed that the location of the road was out of the highway, through fields, woods and swamps for practically the entire distance. The road as finally built was along the location claimed by the defendant.

The plaintiff claims that the change in the location was assented to by him in consideration of the promise of the defendant to compensate him for the additional expense occasioned by the change. This suit is brought to recover such additional compensation.

The case is stated in the opinion.

Louis C. Stearns, Madigan & Madigan, Hersey & Barnes, for plaintiffs.

George H. Smith, Charles F. Daggett, for defendant.

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

SAVAGE, J. This case comes before the court on report. It involves only a determination of certain disputed questions of fact. The plaintiff, on June 9, 1909, entered into a written contract with the defendant to construct for it the roadbed of a railroad. The contract itself was silent as to the location of the proposed railroad on the face of the earth, except that the plaintiff's bid, which was made a part of the specifications, stated that it was to be from "Presque Isle to Washburn." But the plaintiff claims that prior to the making of the contract the defendant's president, and promotor, Mr. Gould, pointed out to the plaintiff's president, Mr. Charles Murray, and his brother Michael, also connected with the plaintiff company, the proposed location as being wholly within the limits of the highway leading from Presque Isle to Washburn, and that the contract was made with reference to such a location; that after it had begun work at a point on that location, the defendant directed the work to be changed to a new line which was out of the highway, and which if continued would run through fields, woods and swamps, for practically the entire distance; that it thereupon protested against the change for the reason that the proposed location was not the one contemplated by the contract, and that to build a roadbed on this line would be less profitable to it than to build one within the highway limits; that thereupon, and in consideration of the plaintiff's assenting to the change in location, the defendant agreed in effect to compensate the plaintiff for the additional expense and difficulty occasioned by the change, and to pay what the labor and materials used in constructing the roadbed on the new location were reasonably worth, and that under this new agreement, which was an abandonment of the original contract as to prices, the plaintiff continued the work until October 5, 1909, at which time a further change in the contract was agreed to.

The plaintiff brings this action to recover the following amounts in excess of what would have been earned under the original contract prices; for "clearing and close cutting," $394.36; for "grubbing," $571.18; for "common excavation," $17,157.31; for "rock excavation," $16.35; for "erection of timber in culverts," $167.80; for "erection of timber in trestles," $457.48, in all, $18,764.48. The plaintiff also claims damages for being wrongfully discharged and prevented from completing the supplemental contract of October 5, and it is stipulated in the report that if the defendant is liable on this claim, the damages shall be assessed at $1,000. It is admitted that the defendant is indebted to the plaintiff in any event in the sum of $2,136.14, being a balance yet unpaid, for labor reckoned at original contract prices. It may be noted that in the original contract the price for clearing was fixed at $40 an acre; for grubbing at $75 an acre; for common excavation at 30 cents a yard; for rock excavation, $1.35 a yard; for erection of timber in culvert, $5 a thousand, board measure; and for erecting timber in trestles, $10 a thousand, board measure.

The defence, in a word, is that no location within the highway limits was ever pointed out to the plaintiff as the one on which the roadbed was to be constructed, and that the location upon which the roadbed was constructed was the one, and the only one, contemplated by the contract, and was so understood by the defendant's officers at the time the contract was made. And it is denied that the plaintiff was prevented from completing its contract, as it now claims. This states the major issues. But the case is filled up with denials and contradictions, back and forth, as to the circumstances which the parties respectively rely upon in support of their contentions under the major issues. The question resolves itself largely into one of credibility of witnesses.

To illustrate. Mr. Charles Murray, plaintiff's president, testified that he and his brother, since dead, were shown along the whole length of the highway route by Mr. Gould personally, before the contract was made, Mr. Gould denies this, and testifies that instead of going himself with the Murrays, he sent an employee, since dead, with instructions to show them another route, called the Marston survey, substantially the one afterwards built upon. Mr. Gould says that before the contract was made, he showed the

Murrays a blue print profile of the cuts and fills along the Marston survey. Murray denies it. Murray says they were working on the highway location when Gould moved them onto the new line. Gould says the Murrays began on the new line. Murray says that Gould admitted, in effect, that the new location was not the one the contract related to, but that he wanted to build for a freight road, instead of a street railway, and therefore wished to avoid the grades of the hills in the highway, and agreed to "make the price all right." Gould denies that there ever was any such conversation. It seems that about August 1 the defendant's engineer made a certificate of the amount of work then done, and gave it to Murray. In the certificate, the amount then due was reckoned at the original contract prices. Murray says he showed this certificate to Gould, and complained that the prices were not according to the new agreement, and that Gould then admitted that the prices were not carried out right, but said that he would make the prices satisfactory, as soon as he could sell his bonds, that he would pay as much as any other railroad for the same work when he got his bonds floated. Gould says that there was an interview at the time referred to by Murray, but says there was nothing said about prices, and that Murray's only complaint was that the engineer was not giving the plaintiff quantity, or "yardage," enough. In the succeeding months other engineer's certificates were made at the old prices, and delivered to Murray. He says he made similar complaints to Gould, who made similar excuses and promises. Gould denies all this. This labyrinth of assertion and denial might be continued much further, but it is unnecessary. Each of these principal witnesses is supported, more or less, by other witnesses, and each party seems to rely confidently in support of the respective contentions upon other matters which appear in the case, some of which it is necessary to state.

It appears that the defendant was chartered by the State as a street railroad company, and that its chartered powers have never been enlarged. In 1902, a location was surveyed from Presque Isle to Washburn by one Southard, and a map thereof was made. This location was mostly in the highway. It seems to have been legally approved. In 1903, another location was surveyed by one Marston. This location was mainly out of the highway, and avoided

the grades and hills of the highway. It was never approved. No approval was ever asked. No map of it was made. But it followed, with some variations, the general line of the location where the road was afterwards built. Nothing further was done at that time. And matters remained in the same condition until the spring of 1909. The defendant had an approved location within the highway limits, but none without. On July 6, 1909, which was seventeen days after the plaintiff's crew had begun to work, and some time, even according to Murray's testimony, after they had begun to work on the new line, on or near the Marston survey, the defendant filed in the office of the clerk of the county commissioners a copy of the 1902 location in the highway, with a map of the Southard survey thereof. R. S., ch. 53, sect. 7. No map of any other location has ever been filed.

Upon these facts, that the defendant is chartered only as a street railroad company, and that, about the time the work begun, it filed with the county commissioners its approved location in the highway, with map, and has filed no other, the plaintiff bases a strong contention that at the time the contract was made the defendant contemplated building only a street railway in the highway, and not a freight railroad through the fields and woods, and therefore that the contract related only to such a street railway. And of course that is the vital issue in this part of the case.

Inasmuch as on July 6, 1909, the defendant was actually having its roadbed constructed outside of the highway, along the general line of the Marston survey, which was tied to the highway only at certain points, it is difficult to see what was the purpose of filing the Southard highway location with the county commissioners. It was necessary to file that location before commencing construction thereon, but it was not necessary to file it before constructing elsewhere. The case, we think, clearly shows that the defendant was constructing its railroad over land it had purchased or bargained for, and not over land that then had any status as a location. It was taking its chances as to getting an approval from the railroad commissioners afterwards. It had a right to erect a railroad structure on its own land, but it would not have a right to operate it as a railroad without an approval of its location by the railroad commissioners. We cannot help thinking that the place where they

were working July 6, which was out of the highway route, is quite as significant as the filing of the location of the highway route.

Further, as bearing on the claim that the line actually built upon was not the one intended when the contract was made, it appears that though it closely followed the Marston survey, it was not coincident with it. The actual line had not been surveyed through when the work of construction was commenced, but the defendant's engineer's surveyed it along just in advance of the plaintiff's work.

In August following, the defendant petitioned the railroad commissioners for an approval of the route upon which the roadbed was being constructed. The commissioners approved it in part only. And at the northerly, or Washburn end, the defendant was obliged to abandon, for a time at least, some work already constructed, turn its road into the highway, and follow the 1902 location. The plaintiff then objected to going on with the work under the existing agreement, whatever it was. To use Mr. Murray's own language, "The work was so light, comparatively, the yardage was very small, and it was so late in the season, and he wanted us to build a temporary road on the highway, I refused to do that work under any price, considering the location and the time of year." The result was that on October 5, 1909, a supplemental written agreement was made to continue the work on "force account," as it was called, that is, the defendant agreed to pay for grading on a basis of the cost of the same to the plaintiff, plus ten per cent. The supplemental contract also provided for track laying and ballasting, which was not named in the original contract, and for payment therefor on the same basis of cost, plus ten per cent. In the supplemental contract it was agreed that in all respects not modified or varied therein the contract of June 9 should remain in full force and effect.

The defendant, in argument, places great reliance upon these facts, (1) that although the plaintiff claims the original contract was abandoned at the outset as to prices, nevertheless all the payments from month to month until the supplemental contract was made were computed, and were made and received, strictly in accordance with the terms of the first contract; (2) that although when the supplemental contract was made the defendant was owing it, as it now claims, more than $18,000 in excess of what was due

at original contract prices, and although the claim was unadjusted and unsettled, and was based upon an oral agreement merely, no reference was made to this claim in the new contract, and none appears to have been made in the negotiations; (3) that the plaintiff objected, for want of sufficient yardage, to continue the work when they came to the highway, without some new arrangement; and (4) that the plaintiff, in the supplemental contract, recognized, as is contended, that the original contract was in force, and agreed that it should remain so, except as therein modified. As to the first and second of these points nothing further need be said than that they speak for themselves, and are entitled to some consideration. As to the third, it may be observed that the plaintiff does not really claim that the original contract was entirely abrogated and abandoned, but that the location and the provisions for compensation were changed. As to the fourth, it should be said that the plaintiff claims that its reason for objecting to build the roadbed in the highway was that only a temporary structure was contemplated, and therefore that the yardage would be less than normal. On the other hand, it may be suggested that if the plaintiff then understood that it was working under the defendant's agreement to pay what was "right," there would seem to be no good reason why it should have been unwilling to proceed, as it had been proceeding, under that agreement; while if it then understood that it had been working under the contract of June 9, and that that contract referred to the construction of the roadbed through fields and woods where there were cuts and fills, and corresponding yardage, it might with reason object to being transferred to the highway, where necessarily there would be comparatively little yardage.

These are the arguments of the parties based upon the testimony of witnesses, and upon conduct. And without making further special analysis, we may say that if this were all that appeared in the case, we should have grave doubts whether we ought to hold the plaintiff has fairly sustained the burden of proof.

But the defendant contends, and we think justly, that there is internal evidence in the original contract itself that is decisive in its favor. Remembering now that the primary issue is whether that contract was understood by the parties to refer to a railway roadbed constructed along a highway, and necessarily within its limits,

or whether it referred to a roadbed through fields, woods and swamps, and remembering, too, that along the highway there were no woods to clear except a few alders, and no swamps, and that the grubbing was comparatively light and that the highway location was limited to ten feet in width, we will examine the contract.

No fraud or deceit is suggested. The contract seems to have been fairly entered into by the plaintiff, and we must assume that its contents were known to the plaintiff's officers who authorized its execution. In the first place it makes no reference in terms to either of the disputed locations, nor does it suggest that a street railway,—a railway in the highway,—was contemplated. It mentions only "a first class single track railway" from "Presque Isle to Washburn."

The contract provides "for clearing off all the timber, brush, and stumps, where the line passes through wooded land;" for cutting off "all trees and stumps" close to the ground, or, in some cases, two feet below sub-grade; for constructing cross-ways "in swamps or soft places;" for laying the track "across farm crossings and public highways;" for constructing "farm crossings;" for commencing work "before the fencing is built," and holding the plaintiff responsible for all damage "to crops on adjoining lands;" for "earth cuttings" twenty feet wide; for widening the cuttings when material is required "to make up fills;" for "embankments" fourteen feet wide at sub-grade; for "rock cuttings" twenty feet in width; in rock cuttings for " a water channel" on each side of the roadway "two feet wide and eight inches deep;" "in standard earth cuttings," for a channel on each side "four feet wide and one foot deep;" for "ditches at the side of embankments;" for the excavation of "off-take ditches beyond the limits of the railway grounds," where the drainage could not be conveniently carried off by the side ditches; for "embankments on side hill grounds;" for "stones or boulders found in excavations measuring more than twenty-seven cubic feet;" for the construction of roads "to and from any point on the line of railway for the convenience of the contractor;" for the construction of convenient passing places, wherever the line "is intersected by public or private roads."

These are the only provisions in the contract which throw any light upon the question at issue. And it requires no argument to

show that these are not the description of a roadbed intended to be built within the limits of a highway. The enumeration is sufficient. These provisions are applicable rather to a road built outside of a highway, and sometimes crossing it. And upon a view of the whole case, we are strongly persuaded that the defendant is right in its contention that the contract of June 9 was made with reference to a location substantially where the plaintiff afterwards constructed the roadbed, and that the plaintiff, until the supplemental contract was made was entitled to be paid, only according to the original contract prices.

This disposes of the main controversy. There are however two minor disputes. The plaintiff claims that even if the defendant's contention is sustained on the main question, it is entitled to extra compensation for the erection of "timber in trestles." This claim is based upon the fact, not disputed, that some of the timber furnished by the defendant for this purpose was in some respects unsound, and, having been used in construction elsewhere, had spikes and bolts in it, and was, for these reasons, more expensive to the plaintiff than would have been the case if the timber had been reasonably sound and clear, such as the defendant ought to have furnished to use. This claim is not strenuously resisted. We think it is well founded. But it is almost impossible, from the scanty evidence before us on this question, to determine how much should be allowed. The contract price was $10 a thousand. The amount earned, at contract prices, was $914.97. The plaintiff claims that it should be allowed $15 a thousand, or $1,372.45. That would mean that it took half as long again to do the work as it would have done. The evidence does not support the claim to that extent. We think that an allowance of $200 in excess of the amount due by contract will amply compensate the plaintiff.

The plaintiff claims, further, that it was wrongfully discharged before the completion of the work under the supplemental contract. Under that contract, as already stated, the work was done "on force account." The plaintiff furnished the laborers and charged their wages, plus ten per cent, to the defendant. The wages of common laborers, however, were not to exceed $2 a day. At the time of the alleged discharge, November 29, the plaintiff was paying its laborers the maximum rate of $2. Mr. Gould, the

defendant's president, evidently thought the wages were too high for that season of the year, and wanted to have them reduced. Gould and Michael Murray, plaintiff's manager, (since deceased) had an interview. Curry, plaintiff's book-keeper, was present. Curry testifies that Gould said to Murray, "I want you to stop the work, call your men all in and pay them off tonight. This is the last day. I am all done paying these fancy prices. If there is anybody that wants to work for a dollar and a half a day ——" The witness left the sentence unfinished. On the other hand, Gould testifies that he told Murray that he thought the crew was too large and that he was paying the men too much, that $2 a day for the short days at that season of the year was a little more that he could stand, that the men had hired out in the spring for $1.50 a day, and that he thought the proper thing would be to put them back to $1.50 a day, pick out those that wanted to stay, and pay them by the hour, fifteen cents an hour. And he says that Murray agreed with him in these views, and said he thought the suggestion was good. The next day, however, the plaintiff ceased to work, and now claims that it was discharged. The defendant was able to hire men, including some of the plaintiff's men, at $1.50 a day, and completed the work itself.

We cannot say, upon this evidence, that the plaintiff has sustained the burden of proof. Even taking Curry's version of the interview to be the correct one, it may be doubted whether Murray had reason to understand that Gould intended an absolute discharge. He still left it open to see if men could be hired at $1.50 a day. But there is another view of the question which we think may properly be taken. Although the supplemental contract provided that the wages of common laborers should not exceed $2 a day, that is not to be construed as meaning that the plaintiff under all circumstances was authorized to hire men and pay them $2 a day. Under this contract the plaintiff was bound to use good judgment and to act reasonably and in good faith. It was authorized to pay such wages as were reasonably necessary, but no more, and in no event in excess of $2 a day. To pay more than was reasonably necessary would not only at the best be an exercise of poor judgment, but, in a case like this, where the more that was paid for wages, the larger the amount of the plaintiff's percentages, or profit, would be,

it would be strong evidence of bad faith. Considering the wages the plaintiff was able to hire men for during the summer season, and the wages the defendant was able to hire men for after the plaintiff left the work, and in the absence of evidence to show any material change in conditions making a higher rate of wages necessary, we think the defendant was justified in the complaint its manager made, and that the plaintiff could not complain, and take it as a breach of contract, if the defendant refused to continue to pay unreasonably high wages.

The result is that the plaintiff is entitled to judgment for the $2,136.14 which the defendant admits to be due, and $200 for extra labor on the timber in the trestles, with interest from August 16, 1911, the date of the writ. All other claims are disallowed.

Judgment for the plaintiff for $2,336.14 and interest from August 16, 1911.

EVIE M. ADAMS *vs.* LEMUEL B. HODGKINS.

Franklin. Opinion September 30, 1912.

Abandonment. Conveyance. Deed. Disclaimer. Easement. License. Non-user. Prescription. Trespass. Quare Clausum. Title. Way.

An easement created by deed or grant, whatever may be the rule as to one acquired by prescription, may be extinguished among other modes, by abandonment, so called, or non-user and adverse possession for twenty years.

Where the owner of the servient estate alleges its loss by abandonment, he assumes the burden of proof.

Abandonment of an easement must be established by evidence clear and unequivocal of acts decisive and conclusive.

A right of way, whether acquired by grant or prescription is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is intentional abandonment of the former way.

Abandonment necessarily implies non-user but non-user alone of an easement created by grant or reservation does not create abandonment.

It is the general rule that an easement or way created by deed or grant is not lost by mere non-user without proof of intention to abandon and adverse possession by the owner of the servient estate or expenses or damages sustained by him and when these elements concur they operate as a present abandonment.

When an easement is spoken of as lost by abandonment, it is intended that the circumstances are such that a release can be presumed.

No case can be put in which any presumption has been made except where a title has been shown by the party who calls for the presumption, good in substance but wanting in some collateral matter necessary to make it complete in point of form. In such cases where possession is shown to have been consistent with the fact directed to be presumed, and in such cases only, has it been allowed.

On report. Judgment for defendant.

This is an action of trespass quare clausum against defendant for breaking and entering the plaintiff's close, situate in Farmington, in the County of Franklin, and cutting trees and destroying wood and bushes, etc.

Plea, the general issue and brief statement as follows: Defendant says that he had a right of way over and across the plaintiff's close and that the alleged trespass was only the rightful use of said way. The case was reported for the determination of the Law Court upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

Elmer E. Richards, for plaintiff.

Frank W. Butler, for defendant.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

BIRD, J. This is an action of trespass quare clausum. The defendant justifies under a claim of a right of way and plaintiff replies alleging abandonment. It is here upon report.

In June 1876 one Sylvester conveyed to Samuel D. Knowlton a lot of land in Farmington bounded upon three sides by land of strangers and upon the fourth side by land of the grantor which extended easterly to the highway or "River Road." Neither did Knowlton own nor have his successors in title owned any right of way to the premises conveyed him over adjoining lands not at the

time of the conveyance owned by his grantor, and his deed is silent as to any right of way. In August 1876, Sylvester conveyed his remaining land to one Goodwin. At the time of the alleged trespass, plaintiff and defendant had succeeded to the respective titles of Goodwin and Knowlton. That a way of necessity was impliedly granted under the circumstances by the deed of Sylvester to Knowlton does not seem to be seriously questioned by plaintiff.

The latter, however, urges that the right of way of necessity of defendant has been extinguished by abandonment and in support of his contention relies upon a declaration in the nature of a disclaimer made by Knowlton after his purchase in June 1876 and prior to the conveyance of the alleged servient premises to Goodwin, the use by defendant and his predecessors in title of ways over lands other than the alleged servient estate and non-user.

It is agreed that neither Knowlton nor any of the other predecessors in title of the defendant made use of any way over the premises lying between their land and the highway—the alleged servient estate—until August 27, 1911, the day of the alleged trespass. It also appears that for fifteen or eighteen years after his purchase Knowlton obtained access to his premises by a way over land of a relative situated in the rear of the premises and extending therefrom to a cross road running westerly from and at right angles with the "River Road" on which cross road the farm of Knowlton was apparently located. For the enjoyment of this way he paid a nominal sum, obtaining, however, no permanent right. It also appears that at some time during his ownership he cleared his lot and, by permission and license of the owner of land adjoining his lot upon the south, hauled the lumber through the pasture of the latter to the "River Road." The son of the purchaser from Sylvester of the alleged servient estate testifies that prior to his purchase, his father in his presence inquired of Knowlton "if he had or claimed any right of way from that land in an easterly direction across the remainder of the farm—the balance of the farm" and that Knowlton replied that "he had no right of way, that he had no use for a right of way in that direction, and that he claimed none whatever." As to the character and uses of the tenements little evidence is offered, but we are, we believe, warranted to infer from the plead-

ings and the evidence that the servient estate consisted of woodland and pasture and that the dominant estate was either wholly or in great part woodland.

In this case we are concerned with an easement arising from deed or grant, *Nichols* v. *Luce,* 24 Pick., 102, 104; *Morse* v. *Copeland,* 2 Gray, 302, 305; *Viall* v. *Carpenter,* 14 Gray, 126, 127. The distinction between easements created by deed and those acquired by prescription was early recognized *obiter* in *Farrar* v. *Cooper,* 34 Maine, 394, 400 and, although the distinction is doubted in *Pratt* v. *Sweetser,* 68 Maine, 344, 345, the right of way there under consideration being acquired by prescription, as it was in *Farrar* v. *Cooper,* we do not consider that the distinction has been abolished by the case. The distinction is preserved in Massachusetts and other jurisdictions; *Owen* v. *Field,* 102 Mass., 90, 114; *White* v. *Crawford,* 10 Mass., 183; *Arnold* v. *Stevens,* 24 Pick., 106, 112, 113; *Welsh* v. *Taylor,* 134 N. Y., 450, 460.

An easement created by deed or grant, whatever may be the rule as to one acquired by prescription, may be extinguished among other modes, by abandonment, so called, or non-user and adverse possession for twenty years; *New York &c. R. R.* v. *Benedict,* 169 Mass., 262, 267. Of adverse possession, however, there is no evidence in this case. Has the easement claimed by defendant been lost by abandonment? The burden of proof upon this issue is upon the party alleging it and it must be established by evidence clear and unequivocal of acts decisive and conclusive: *Dyer* v. *Sanford,* 9 Met., 395, 402; *Eddy* v. *Chace,* 140 Mass., 471, 472; *Hayford* v. *Spokesfield,* 100 Mass., 494; *Waring* v. *Crow,* 11 Cal., 366; *Richardson* v. *McNulty,* 24 Cal., 339.

It seems to have been stated *obiter* in one case at least that a parol disclaimer might work an abandonment of a way, a release being presumed: *Norbury* v. *Meade,* 3 Bligh, 211, 241-2; and it has been held in other cases that the denial of the right to an easement or a declaration of relinquishment of it coupled with acts on the part of the declarant in furtherance of and conformity to the denial or declaration are evidence of abandoment and adverse possession; *Warshauer* v. *Randall,* 109 Mass., 586, 588; *King* v. *Murphy,* 140 Mass., 254.

Assuming for the moment that full credence may be given to the evidence of a disclaimer by Knowlton, it worked no estoppel because it does not appear that he was advised of the proposed purchase by the person to whom it was made; *Morton* v. *Hodgdon,* 32 Maine, 127, 129; but while the declaration does not operate as an estoppel, it is, if entitled to weight, evidence to be considered. But the court is not impressed with the character of the evidence. The witness who testifies was but nineteen years of age at the time of the alleged conversation which occurred thirty-five years prior to the trial. While disposed to believe that some conversation between the parties may have occurred, we feel that the testimony of a single witness, subject to suspicion, at least, of unfriendliness to defendant, after the decease of the declarant and the lapse of so many years, is not evidence of that clear and convincing character from which a release may be presumed. *Liberty* v. *Haines,* 103 Maine, 182, 192; *Wilbur* v. *Toothaker,* 105 Maine, 490; Lord's Appeal, 106 Maine, 51, 56.

As to use by defendant's predecessors in title of ways other than a way over the alleged servient estate: A right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is intentional abandonment of the former way; *Jamaica etc. Corp.* v. *Chandler,* 121 Mass., 3, 4; *Hayford* v. *Spokesfield,* 100 Mass., 491, 494. There is no evidence that the ways used by Knowlton were not equally convenient and the burden is upon the plaintiff to show otherwise. The ways used were obtained by the mere revocable permission of the owners of adjoining lands and the use of a way so obtained has been held not to extinguish the right: *Lide* v. *Hadley,* 36 Ala., 627, 628; 76 Am. Dec., 338, 339.

Abandonment necessarily implies non-user but non-user does not create abandonment no matter how long it continues: *Welsh* v. *Taylor,* 134 N. Y., 450, 457; *Eddy* v. *Chace,* 140 Mass., 471, 472, and an easement proved by grant or reservation is not lost by non-user alone: *Tabbutt* v. *Grant,* 94 Maine, 371, 373; *White* v. *Crawford,* 10 Mass., 183, 189; *Barnes v. Lloyd,* 112 Mass., 224, 231; *Butterfield* v. *Reed,* 160 Mass., 360, 369; *Smyles* v. *Hastings, 22* N. Y., 217, 224. It has been said that an easement acquired by grant cannot be lost by mere non-user, though it may be by non-

user coupled with an intention of abandonment: *Welsh* v. *Taylor,* 134 N. Y., 450. And in this case the court says, "This conclusion leaves the case to rest entirely upon the fact of non-user. And the easement having been created by deed, that is not sufficient to sustain the finding that it had been given up and was extinguished.

"A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land and it is no more necessary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by non-user, and unless there is shown against him some adverse possession or loss of title in some of the ways recognized by law, he may rely on the existence of his property with full assurance that when occasion arises for its use and enjoyment he will find his rights therein absolute and unimpaired." See also *Arnold* v. *Stevens,* 24 Pick., 106; *Seaman* v. *Vawdry,* 16 Ves, Jr., 390.

Indeed it seems to be the general rule of law that a right of way or easement created by deed or grant is not lost by mere non-user without proof of intention to abandon, and adverse possession by the owner of the servient tenement; *Tabbutt* v. *Grant,* 94 Maine, 371; *Bannon* v. *Angier,* 2 Allen, 128, 129; *Jennison* v. *Walker,* 11 Gray, 423, 425; *Owen* v. *Field,* 102 Mass., 90, 114; *Kiecken* v. *Voltz,* 110 Ill., 264, 271; *Noll* v. *Railroad Co.,* 32 Iowa, 66, 70-71; *Butterfield* v. *Reed,* 160 Mass., 361; *Horner* v. *Stillwell,* 35 N. J. L., 307, 314; *Curran v. Louisville,* 83 Ky., 628, 632; or expense or damage sustained by him; *Vogler* v. *Geiss,* 51 Md., 407, 411; *Snell* v. *Levitt,* 110 N. Y., 595, 602; *Barnes* v. *Lloyd,* 112 Mass., 224, 231. When these elements concur, they operate as a present abandonment and without regard to the length of the cesser to use.

In the case under consideration there is no evidence that the plaintiff or her predecessors in title have held possession of the servient estate adversely to the defendant or his predecessors in title, or have held it under any claim of right or have at any time taken any action to prevent the enjoyment of the right: *Farrar* v. *Cooper,* 34 Maine, 394, 400-1. And the case is equally barren of evidence of any acts of the owner of the alleged dominant estate done upon either of the tenements indicating an intention to abandon the right of which the enjoyment was suspended. See *Ballard*

v. *Butler,* 30 Maine, 94, 98-99; *Farrar* v. *Cooper,* 34 Maine, 394, 400; *New York &c. Railroad* v. *Benedict,* 169 Mass., 262, 267; *Curran* v. *Louisville,* ubi supra.

It has been stated that the only way in which an easement can be extinguished by the act of the parties interested is by release, actual or presumed; that abandonment will not have that effect unless a release can be presumed from that and the surrounding circumstances; that when an easement is spoken of as having been lost by abandonment, it is intended that the circumstances are such that a release can be presumed. Goddard on Easements (Bennett's Ed.) 461. In harmony with this statement are *Lovell* v. *Smith,* 3 C. B., 120, 127; *Ballard* v. *Butler,* 30 Maine, 94, 99; *Jennison* v. *Walker,* 11 Gray, 423, 425-426; *Arnold* v. *Stevens,* 24 Pick., 106, 112; 3 Kent (13th Ed.) (636) *448-*449.

But no case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter, necessary to make it complete in point of form. In such cases, where the possession is shown to have been consistent with the fact directed to be presumed, and in such cases only, has it ever been allowed. Tindal, C. J., in *Doe* v. *Cooke,* 6 Bing., 174, 179; see *Doe* v. *Butler,* 3 Wend., 149, 153.

It has been held that a way, created by the necessity for its use, cannot be extinguished so long as the necessity exists. *Blum* v. *Weston,* 102 Cal., 262; 41 Am. St. Rep., 188. This statement of the law evidently requires modification or restriction, see *Attleborough* v. *Railroad Co.,* 153 Mass., 120, 122. And in *Smyles* v. *Hastings* it is held that a right of way acquired by deed cannot be extinguished by mere non-user but only by a holding strictly adverse for twenty years; 22 N. Y., 217, 224. However this may be, upon the evidence presented, the court must hold that plaintiff has not shown abandonment, either as a conclusion of law or of fact.

Judgment for defendant.

SUSIE A. RADCLIFFE v. CITY OF LEWISTON.

Androscoggin. Opinion October 7, 1912.

Accident. Contributory Negligence. Damages. Defect. Exceptions. Motion. Negligence. Notice. Substitute for Road Commissioner.

1. The alleged defect was a hole between two planks of the sidewalk into which the plaintiff stepped her heel and was thereby thrown upon the walk. The testimony of the witnesses for the plaintiff and the defendant, as to the size of the hole, varied from 6 inches in length by 3 1-2 inches in width to 10 inches in length by 1 7-8 inches in width. *Held;* whether the jury determined the size of the hole to be precisely as claimed by plaintiff or defendant may not be very material, for they were justified in finding that it was large enough at least for a woman's heel to go down into it easily. And it was for them to decide whether this sidewalk on the bridge between the cities of Lewiston and Auburn, with such a hole in it, was defective within the meaning of the statute—or, in other words, was not safe and convenient for travel over it. Their decision was that it was defective and in the opinion of the court that decision was justified by the evidence.
2. One of the essentials required by R. S., Ch. 23, Sec. 76, to be shown by the plaintiff in order to maintain an action for damages for injuries received by reason of any defect or want of repair of a highway or town way against the county or town required by law to keep the way in repair is that 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' notice of the defect, or want of repair before the accident. Whether Hiram T. Spencer was authorized to act as a substitute for the road commissioner of Lewiston, within the meaning of the statute, and whether he had twenty-four hours' actual notice of the alleged defect were questions of fact for the jury and the evidence justified the jury in deciding these questions in the plaintiff's favor.

On motion and exceptions by defendant. Overruled.

This is an action to recover damages for personal injuries alleged to have been caused by a defect in the sidewalk on the south side

of the North Bridge connecting Lewiston and Auburn, which sidewalk the city of Lewiston was bound to maintain and keep in repair. Plea, the general issue. The jury returned a verdict for the plaintiff for fifteen hundred dollars.

The defendant filed a general motion for a new trial and exceptions to certain portions of the charge to the jury. The case is stated in the opinion.

George C. Webber, for plaintiff.

Fortunat Belleau, for defendant.

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

KING, J. Action to recover damages for personal injuries alleged to have been caused by a defect in the sidewalk on the south side of the North Bridge connecting Lewiston and Auburn, which sidewalk the city of Lewiston was bound to maintain and keep in repair. The jury returned a verdict of $1500 for the plaintiff and the case is before this court on defendant's motion and exceptions.

The defendant's contentions under its motion, as stated in the brief of its counsel, may be thus summarized: that there was no such defect in the sidewalk as claimed by the plaintiff; that if there was any such defect the defendant did not have actual notice thereof at least twenty-four hours before the accident as required by statute; that if such defect existed the plaintiff had knowledge of it, and was guilty of contributory negligence; and finally that the plaintif was not injured to the extent claimed, and that the damage awarded are excessive.

1. The alleged defect was a hole between two planks of the sidewalk into which the plaintiff stepped her heel and was thereby thrown upon the walk. In her examination the plaintiff expressed her judgment of the size of the hole by "indicating 6 inches by $3\frac{1}{2}$." The lady who was walking with the plaintiff at the time of the accident described the hole as "large enough for a woman's heel to go down into it easily,—a good sized heel—that is the hole itself." Benjamin S. Young, who assisted in getting the plaintiff into a team and taking her home after the accident, gave his judgment of the size of the hole as "six inches long and three or four inches wide."

In behalf of the defendant Mr. Ryan, Superintendent of Public Works of Lewiston, testified that he measured the hole and it was "scant two inches in the widest place" and ten inches long. Hiram T. Spencer who put a patch over the hole after the accident, under the direction of Mr. Ryan, gave the size of the hole as "about an inch and seven-eighths, the widest place." Cornelius C. Cronin and Daniel E. Murphy, members of the Public Works Commission of Lewiston, called by defendant, testified respectively that the size of the hole in its widest part was "two inches" and "scant two inches."

It was for the jury to ascertain from the evidence as to the size and location of the hole, and then to determine if it was a defect in the sidewalk.

Whether they determined the size of the hole to be precisely as claimed by plaintiff or defendant may not be very material, for they were undoubtedly justified in finding that it was large enough at least for a woman's heel to go down into it easily. And it was then for them to decide whether this sidewalk on the bridge between the cities of Lewiston and Auburn, with such a hole in it, large enough at least to admit the heel of a woman's shoe, was defective within the meaning of the statute,—or, in other words, was not safe and convenient for the travel over it. Their decision was that it was defective, and in the opinion of the court that decision was justified by the evidence.

2. It is provided by Statute (R. S. Ch. 23, Sec. 76), as one of the essentials required to be shown, in order to maintain an action for damages, for injuries received by reason of any defect or want of repair of a highway or town way, against the county or town required by law to keep the way in repair, that "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" before the accident.

Upon this branch of the case the issues were, whether Hiram T. Spencer was authorized to act as a substitute for the road commissioner of Lewiston within the meaning of the statute, and

whether Spencer had twenty-four hours actual notice of the alleged defect. It appears that Lewiston had no road commissioner as such, but that Mr. Ryan, the Superintendent of Public Works, had the care and superintendence of the streets and was vested with the same power and charged with the same duties with respect to the streets, sidewalks and bridges in Lewiston as a road commissioner of that city would have been. Mr. Spencer testified that his duties with respect to the bridges in Lewiston were "To inspect them, and fix them; keep them in repair," and that he received his authority from "the Superintendent," Mr. Ryan, and that he inspected the bridges, including the sidewalk in question, "twice a week." Mr. Ryan also testified that Spencer was authorized by him to inspect the bridges as often as twice a week and "if he finds anything that needs repairing, to repair it."

It was the duty of Mr. Ryan as the Superintendent of Public Works of Lewiston to see that all the town ways, streets, sidewalks and bridges in the city were kept in suitable repair. And to this end frequent inspections were necessary for the timely discovery of such defects and want of repair as might exist. All this he could not do personally, and it was therefore necessary for him to authorize others to act as his substitute. It was a question of fact for the jury whether Mr. Spencer was authorized by Mr. Ryan to act as a substitute for him in inspecting and keeping in repair the sidewalk in question. And we think the evidence fully justified the jury in deciding this question in the plaintiff's favor.

Again, is was for the jury to determine whether Spencer had the twenty-four hours' actual notice of the hole in the sidewalk. It was not claimed that any one notified him of the hole, but the plaintiff contended that Mr. Spencer must have seen the hole, since it was shown by three or four witnesses that the hole had existed for three or four weeks, and had been observed by them as they walked along the sidewalk, and that Mr. Spencer had inspected the sidewalk twice a week during all that time. As to his inspections Mr. Spencer said: "I generally go over those bridges Mondays—sometimes I can't get over Mondays, and I go Tuesdays—and Saturdays. There aint a Saturday but what I go over them. No matter what the work is, every Saturday I go over every bridge." The plaintiff was injured on Tuesday, June 20, 1911, and Spencer

testified that he had no notice or knowledge of the existence of the hole before that time.

This issue of notice was submitted to the jury with clear and pertinent instructions, in which they were told that it was not enough for them to find that Spencer might have seen the hole by the exercise of reasonable care, but that the jury must be satisfied by the evidence that he did see it. We think the jury's finding upon this issue must stand. It was a question for them to decide whether Spencer did see the hole, and we find nothing to indicate that they misunderstood that question.

3. We find nothing in the evidence sufficient to sustain the contention that the plaintiff knew of the existence of the hole in the sidewalk before her accident. She says she had no previous knowledge of it, and that she had not passed over the sidewalk very frequently, and did not remember when she had been over it before in the daytime. It appears that at the time of the accident she was walking as usual, and there is nothing to indicate that she was not in the exercise of reasonable care.

4. The plaintiff is shown to have received a violent fall. No bones were broken, but she sustained a severe nervous shock. Dr. S. E. Sawyer who was immediately called found her in an extremely nervous condition, partly unconscious, and vomiting. He testified that "she complained very bitterly of her back in trying to move her about to see if she had sustained any fractures or not." Dr. Renwick, who was called the second day after the accident, in the absence of Dr. Sawyer, found the plaintiff still vomiting which indicated to him that the plaintiff had sustained "An awful shock; and she was suffering a great deal of pain." As to her recovery he said: "I should expect it would take a long time to recover from the injury. She might have very grave symptoms, varying from time to time; but the thing you would be absolutely sure of, she would be a long time recovering from the injury." Dr. William Ness, who examined the plaintiff in April 1912—nine months after the accident—found "that there is trouble with the appendix, or right ovary, or both," which "is the result of mechanical disturbance"—the result of injury rather than disease. The plaintiff claimed that at the time of the trial she was still suffering pain as the result of her injuries, that she was unable to do even her work

about the house, and was still under the doctor's care. After an examination and consideration of all the evidence relating to the nature and extent of the plaintiff's injuries we do not feel that the damages awarded by the jury are so manifestly excessive that a new trial should be granted.

5. The defendant's exceptions are not particularly urged in argument. But the court finds no ground on which they could be sustained. The instructions complained of were appropriate and unobjectionable.

Motion and exceptions overruled.

ROBERT R. HARRIS, Trustee, *vs.* CHARLES LARRABEE et als.

Androscoggin. Opinion October 7, 1912.

Appeal. Award. Bounds and Admeasurements. Damages. Highway. Highway Surveyor. Justification. Trespass Quare Clausum. Waiver.

Trespass quare clausum, on report. The defendants admit the acts complained of but plead in justification that they were done by them in building a town road as laid out by the selectmen.

The way was laid out around a hill for a distance of about fifty rods over cleared land, and the defendants built an ordinary road about fifteen feet wide over the way as laid out. The work was done on Friday and on the following Monday the plaintiff plowed and harrowed the way, in part at least, and planted it in connection with the cultivation of the adjoining land.

It clearly appears that the defendants did the acts complained of without authority of any vote of the town, or direction of the selectmen, highway surveyor or road commissioner. They acted in their own discretion as private individuals and without permission of the plaintiff express or implied.

Held; that the statutory laying out of a town way affords no legal justification for the acts of a private individual in building a road over the way unless at least he was acting as a highway surveyor or road commissioner, or was in some way authorized and directed by the town to build it.

The acts complained of were committed without legal justification and the defendants are liable therefor in this action of trespass.

The actual damages sustained by the plaintiff on account of the defendants' acts were comparatively small, and in the opinion of the court the facts and circumstances do not require that any punitive damages should be awarded.

On report. Judgment for plaintiff for ten dollars and costs.

Trespass quare clausum for breaking and entering plaintiff's close, situate in Durham, in the County of Androscoggin, and committing the acts complained of. The defendants admit the acts complained of, but plead in justification that they were done in building a town road as laid out by the selectmen. Plea, the general issue with brief statement justifying the acts of the defendants.

The case is stated in the opinion.

Clarence E. Sawyer, for plaintiff.

McGillicuddy & Morey, for defendants.

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

KING, J. Trespass quare clausum, on report. The defendants admit the acts complained of but plead in justification that they were done by them in building a town road as laid out by the selectmen. The material facts, as shown by the report, are these:

The selectmen of the town of Durham undertook to lay out a town way over land then owned by Clarence E. Carville. The return of their doings, dated June 18, 1909, filed with the town clerk, did not contain by express recital the bounds and admeasurements of the way, but it did recite that "such laying out with the bounds and admeasurements has been filed with the town clerk," and they did file with the town clerk the original petition which contained the bounds and admeasurements of the way as prayed for, together with a map. August 14, 1909, Carville conveyed the land to the plaintiff. The town at a meeting held April 30, 1910, voted to accept the doings of the selectmen in laying out the way. Carville appealed from the decision of the selectmen whereby he was awarded $30 damages for the land taken for the way, and the plaintiff joined in and signed that appeal "so far as his interest may appear."

The appeal was entered in the Supreme Judicial Court for Androscoggin County, and at the April Term thereof 1912 the judgment of the selectmen was affirmed with costs. The legality of the laying out of the way being questioned the selectmen declined to build it, whereupon the defendants in this action voluntarily and as private individuals entered upon the land and built the way.

It is unnecessary in this case to determine whether the laying out was legal, or, if not legal, whether the plaintiff waived any defects in the laying out by joining in and signing the appeal from the award of damages, for we think the alleged justification cannot be sustained even if the laying out was legal in all respects.

When a town way is legally laid out the town is authorized by statute to cause the way to be opened and made suitable for travel, but no private individual is authorized by statute to do so. In the building of the way the rights of the individual proprietor of the land over which the way is laid out are still to be regarded and not unnecessarily invaded. It is we think the right of the land owner to have the way constructed by some person entrusted with that duty under authority of the town, and not by private individuals acting in their own discretion. The statutory laying out of a town way therefore affords no legal justification for the acts of a private individual in building a road over the way unless at least he was acting as a highway surveyor or road commissioner, or was in some way authorized and directed by the town to build it. *Small* v. *Pennell,* 31 Maine, 267; *Hunt* v. *Rich,* 38 Maine, 195; *Ruggles* v. *Lesure,* 24 Pick., 187, 189.

It clearly appears that the defendants did the acts complained of without authority of any vote of the town, or direction of the selectmen, highway surveyor or road commissioner. They acted in their own discretion as private individuals and without permission of the plaintiff express or implied, for it appears that the entrances to the way were closed by obstructions which had been placed there and notices were posted, presumably forbidding persons from entering thereon.

It follows, therefore, as the necessary conclusion of the court that the acts complained of were committed without legal justification and that the defendants are liable therefor in this action of trespass.

It remains to determine the amount of the damages. The way was laid out around a hill for a distance of about fifty rods over cleared land. The defendants built an ordinary road about fifteen feet wide over the way as laid out, and the plaintiff says it was "mostly clear loam that they went through." Some few bushes were removed, but no trees were cut down. The work was done in one day—on Friday, and the following Monday the plaintiff plowed and harrowed the way, in part at least, and planted it in connection with the cultivation of the adjoining land. The actual damages sustained by the plaintiff on account of the defendants' acts were comparatively small.

We do not think the facts and circumstances of this case require that any punitive damages should be awarded. It is the opinion of the court that the entry should be,

Judgment for the plaintiff for ten dollars and costs.

CLARA LANDRY *vs.* MAX MANDELSTAM.

Androscoggin. Opinion October 7, 1912.

Agreement. Contract. Damages. Demand. Holmes Note. Possession. Title. Trover.

This action of trover for a watch and chain comes before the Law Court on plaintiff's exceptions to an order of nonsuit.

In order to maintain her action it was incumbent upon the plaintiff to prove that she had title to the property, or was entitled to the immediate possession of it. This in the opinion of the court she failed to do, and accordingly the nonsuit was properly ordered.

On exceptions by plaintiff. Overruled.

An action of trover for a watch and chain. The plaintiff obtained the property from the National Jewelry Company under a written contract dated September 9, 1911, when she agreed to pay $29.50 therefor, $1.00 upon signing of contract and $1.00 per week

until the whole sum was paid. It was stipulated in the contract that the plaintiff should not acquire title to the watch until the whole sum was paid. The plaintiff paid only $1.00 and claimed that her husband stole the watch from her and that a Mrs. Hemond pawned it with the defendant. Plea, the general issue.

At close of plaintiff's evidence, a nonsuit was ordered and the plaintiff excepted.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

John A. Morrill, for defendant.

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

KING, J. This action of trover for a watch and chain comes before this court on exceptions to an order of nonsuit.

The plaintiff obtained the property from the National Jewelry Company under a written contract dated September 9, 1911, wherein she agreed to pay $29.50 therefor, $1.00 upon the signing of the agreement and $1.00 per week until the whole sum was paid. It was expressly provided in the agreement that the plaintiff should acquire no title to the property until the amount stipulated was fully paid, and further that "the National Jewelry Co. may, if it choses, upon any violation of this agreement by me, terminate my right of possession to the property herein mentioned." The plaintiff paid the $1.00 when the agreement was signed but no more, although the collector called several times for the weekly payments. She claimed that her husband stole the watch and chain from her room, and that a Mrs. Hemond pawned them with the defendant. On February 20, 1912, the plaintiff and one Cayo, an agent of the National Jewelry Company, went to the defendant's store and the watch and chain were demanded but not obtained. This action of trover was then brought.

In order to maintain her action it was incumbent on the plaintiff to prove that she had title to the property, or was entitled to the immediate possession of it. *Haskell* v. *Jones,* 24 Maine, 222; *Ekstrom* v. *Hall,* 90 Maine, 186; *Ames* v. *Palmer,* 42 Maine, 197; *Martin* v. *Johnson,* 105 Maine, 156, 158. The plaintiff did not have title to the property, for it was otherwise expressly provided in

the agreement. Did she have the right to its possession? We think not. The Jewelry Company was authorized to terminate her right of possession, because she had violated the agreement by neglecting and refusing to pay any and all the weekly installments. And the evidence is plenary that her right of possession was so terminated. It appears from Mr. Cayo's direct testimony that as the representative of the National Jewelry Company he was searching for the watch in order to get possession of it. He testified: "I found out where the watch was, and found out where the lady was living, and I called on her and asked her . . . I asked her to come and she did." When they reached the defendant's store the plaintiff asked for the watch and upon the defendant's refusal to produce it Mr. Cayo demanded it of him as the property of the National Jewelry Company, exhibiting the written agreement and telling him "The watch is not paid for, and belongs to us. I demand the watch." This demand was made in the plaintiff's presence, and must have been understood by her as an exercise on the part of the Jewelry Company of its right to have possession of the property, and as terminating her right to have psosession of it. Her testimony on cross-examination clearly shows that such was her understanding at the time.

Q. Mr. Cayo came over and told you where it (the watch) was, and you went with him? A. Yes, sir.

Q. And he was after the watch for the National Jewelry Company, wasn't he? A. Yes, sir.

Q. You not having paid anything more than one dollar for it, he was after the watch for the Jewelry Company? That was the situation that day, wasn't it? A. Yes, sir.

Q. And you did not make any claim to the watch at all, did you? A. No, sir.

The plaintiff therefore failed to show either title to the property or the right to the immediate possession of it, and accordingly the nonsuit was properly ordered.

Exceptions overruled.

JOHN A. BURPEE, Applt.,

vs.

SAMUEL A. BURPEE AND RICHARD H. BURPEE, Appellees.

Knox. Opinion October 10, 1912.

Appeal. Bequest. Decree. Device. Executors. Fraud. Jurisdiction. Power of Attorney. Testator. Trust. Trustees. Will.

An appeal from a decree of the Judge of Probate of Knox County, appointing Samuel A. Burpee, Trustee under the will of Samuel H. Burpee, who died testate in May, 1906, leaving six children, four sons and two daughters. The fifth item of the will is as follows:

"Fifth—I hereby nominate and appoint my sons Samuel A. Burpee, Charles E. Burpee, Richard H. Burpee and John A. Burpee, executors of this will and hereby direct that no bond be required of them, nor shall they be required to return inventory or settle account in either capacity as Executors or Trustees."

The four sons named in the will as executors and Trustees never qualified as trustees by giving bonds as required by statute, and their nomination as trustees was never confirmed by the Judge of Probate. But during the four years succeeding the death of the testator, the affairs of the estate appear to have been managed by the appellee Samuel A. Burpee with the acquiescence of his co-executors.

In March, 1907, a power of attorney was given to the appellant by the executors to collect and distribute the income of the estate, but was surrendered by the appellant upon complaint of the co-executors that he had exceeded his authority thereunder and abused his trust.

Soon after the withdrawal of this power of attorney, the appellant and his brother Charles filed a petition in the Probate Court asking that they be appointed Trustees and thereupon the appellee and his brother Richard filed a similar petition as to themselves. After a full hearing the Judge of Probate appointed the appellee Samuel A. Burpee to be sole trustee.

John A. Burpee appealed from this decree and filed thirteen reasons. But the evidence introduced in support of the appeal fails to substantiate any of the objections stated in the reasons of appeal.

The question of the jurisdiction and authority of the Judge of Probate to appoint a sole trustee under this will in which four were named as trus-

tees by the testator, but none of them qualified, is not one specifically raised by the reasons assigned for the appeal and hence is not now before the court.

It is a well settled and familiar rule in this State that on such appeals the appellant is strictly confined to such matters and questions as are specifically stated by him in his reasons for appeal.

On appeal from a decree of the Judge of Probate. Appeal dismissed. Decree below affirmed.

This is an appeal from a decree of the Judge of Probate of the County of Knox, appointing the appellee Samuel A. Burpee, trustee under the will of his father, Samuel H. Burpee, who died testate in May, 1906, leaving six children, four sons and two daughters. The four sons named in the will as executors and trustees never qualified as trustees as required by law and their nomination as trustees was never confirmed by the Judge of Probate. Later, upon the petition of the appellee and his brother Richard, the appellee Samuel A. Burpee was appointed by the Judge of Probate sole trustee, from which decree the appellant appealed.

The case is stated in the opinion.

R. I. Thompson, for appellant.

E. B. Burpee, for appellees.

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

WHITEHOUSE, C. J. This is an appeal from a decree of the Judge of Probate of Knox County, appointing the appellee Samuel A. Burpee trustee under the will of his father Samuel H. Burpee, who died testate in May 1906, leaving six children, four sons and two daughters. The second and fifth items of the will are as follows:

"Second—I give, bequeath and devise, in trust, for and during the term of ten years after my decease, to my sons, Charles E., Samuel A., Richard H., and John A. Burpee, all the real estate that I may own or die possessed of, and all the stock that I own or may own in the N. A. and S. H. Burpee Furniture Company, to have, to control, and manage, giving unto the said trustees the authority to sell, if in their judgment it shall be necessary, all and

any of the property thus conveyed in trust, for the use and benefit of all my children, viz:—the aforesaid Charles E., Samuel A., Richard H., and John A. Burpee and my daughters Annie T. Tyler and Kittie B. French.

"Said trustees are hereby charged to distribute annually the rents, profits and income of all the estate hereby conveyed in trust, in equal proportions, to each of my said children during the term, and at the termination of said trust, I hereby give, bequeath and devise all the estate herein conveyed in trust in equal parts to the said Charles E., Samuel A., Richard H., and John A. Burpee, in fee simple and absolutely share and share alike.

"Fifth—I hereby nominate and appoint my sons, Samuel A. Burpee, Charles E. Burpee, Richard H. Burpee and John A. Burpee, executors of this will and hereby direct that no bond be required of them, nor shall they be required to return inventory or settle account in either capacity as executors or as trustees."

It appears that the estate consisted of 120 shares of the capital stock of the N. A. & S. H. Burpee Furniture Company, and an undivided half of a brick block on Main Street in Rockland; and it was claimed in behalf of the appellee, and there was evidence tending to show, that the business of the Furniture Company was so thoroughly organized, and systematically conducted by an experienced and competent manager, that ordinarily the only service required of the trustee in practically discharging the trust after the death of the testator, was to collect the income and disburse it according to the terms of the will.

The four sons named in the will as executors and trustees, never qualified as trustees by giving bonds as required by statute, and their nomination as trustees was never confirmed by the Judge of Probate. But during the four years succeeding the death of the testator, the affairs of the estate appear to have been managed by the appellee, Samuel A. Burpee, with the acquiescence of his co-executors, except that in March 1907, a power of attorney was given to the appellant by the executors to collect and distribute the income of the state; but this was surrendered by the appellant not long thereafter upon complaint of the co-executors that he had exceeded his authority thereunder and abused his trust.

Soon after the withdrawal of this power of attorney, the appellant and his brother Charles filed a petition asking that they be appointed trustees and thereupon the appellee and Richard filed a similar petition as to themselves. After a full hearing, the Judge of Probate appointed the appellee Samuel A. Burpee to be sole trustee.

In support of the appeal taken from this decree, the appellant John A. Burpee assigns thirteen reasons. But the evidence introduced in support of the appeal fails to substantiate any of the objections stated in the reasons of appeal which would constitute sufficient cause for reversing the decree below whereby Samuel A. Burpee was appointed sole trustee. His interests in the successful management of the estate were identical with those of the other heirs, and whatever would benefit or injure him must have the same effect upon them. There is abundant evidence to show that Samuel A. Burpee who has for many years been a director in the Rockland Trust Company and also in the Rockland Loan and Building Association, is a man of integrity and good business capacity and thoroughly competent to discharge the duties of the trust. This is not denied in the testimony of any of the heirs, and it is expressly admitted by them all, that barring some heated discussions respecting the necessity of an investigation of the accounts of the Furniture Company prior to the death of the testator, and the wisest policy to pursue in the management of some of the affairs of the estate since his decease, the attitude of Samuel A. towards all of his brothers and sisters has uniformly been friendly, and his treatment of them helpful, kindly and just.

There seems to have been no sufficient ground for dissatisfaction or complaint in regard to the management of the Furniture Company either before or after the death of the testator. It is evident from the practical results that the business of the Company had been financially successful from the beginning, but much larger dividends have been paid since the death of the testator than before. Indeed there is ground for the inference that that primary cause for the complaints on the part of the appellant and his brother Charles and sister Annie, was a feeling of dissatisfaction with the terms of the will creating a trust for ten years, and a purpose to make the situation so uncomfortable that a proposition to purchase

their interests would be made by the appellee and the other heirs. The appellant admits that he made a suggestion of that kind for the purpose of preventing further litigation.

Under the conditions of his appointment, the appellee is performing all the duties of the trust without compensation. The evidence fails to show the existence of any such "hopeless division of sentiment" or feelings of "mutual distrust," as will interfere with the proper and successful conduct of the affairs of the estate by the present trustee. Nearly two-thirds of the ten years named in the will as the limitation of the trust, have already expired, and it is manifestly for the interest of all the heirs that there should be no change in the present management.

The question of the jurisdiction and authority of the Judge of Probate to appoint a sole trustee under this will in which four were named as trustees by the testator, but none of them qualified, is one not specifically raised by the reasons assigned for the appeal, and hence is not now before the court. In *Hughes* v. *Decker,* 38 Maine, 153, it was distinctly held that on an appeal from the decree of a Judge of Probate, the question of his jurisdiction in the case cannot arise, in the absence of fraud, unless it is embraced in the reasons assigned for the appeal. And it is a well settled and familiar rule in this State on such appeals that the appellant is strictly confined to such matters and questions as are specifically stated by him in his reasons of appeal. *Gilman* v. *Gilman,* 53 Maine, 184; *Bradstreet* v. *Bradstreet,* 64 Maine, 204; *Barnes* v. *Barnes,* 66 Maine, 286; Thompson, Apt., 92 Maine, 563.

The certificate must accordingly be,

Appeal dismissed.
Decree below affirmed.

OAKLEY C. CURTIS et als., Petr's *vs.* LESLIE C. CORNISH et als.

Cumberland. Opinion October 12, 1912.

Constitution of Maine, Article III, Section 2. Corrupt Practices in Elections. Section 12 of Chapter 122 of Public Laws of 1911. Executive Function. Inferior Tribunal. Justices of Supreme Judicial Court. Petition to establish Exceptions. Writ of Prohibition.

1. The tribunal provided for in Section 12 of Chapter 122 of the Public Laws of 1911 for the inquiry into alleged corrupt practices in elections, to be composed of two Justices of the Supreme Judicial Court, or of two Justices of the Superior Courts, or of one Justice of each court, is a special and inferior tribunal.
2. Under the limitations of the Constitution of Maine, Article VI, Section 6, and Article IX, Section 2, no Justice of the Supreme Judicial Court can be appointed to, or be a member of, an inferior court, or tribunal; and no Justice of the Superior Courts can be appointed to, or be a member of, another inferior court, or tribunal.
3. The appointment of the members of an inferior court or tribunal, or any of them, is an executive function, not a judicial one. And the requirement in Section 12 of Chapter 122 of the Public Laws of 1911, that the Chief Justice of the Supreme Judicial Court shall appoint one member of the tribunal therein provided for, for an inquiry into alleged corrupt practices in elections, is in violation of Article III, Section 2, of the Constitution of Maine, which privides that "no person or persons, belonging" to either the legislative, the executive or the judicial department of the government "shall exercise any of the powers properly belonging to either of the others."
4. Whether the tribunal provided for in Section 12 of Chapter 122 of the Public Laws of 1911 is judicial, or inquisitorial and political, is not decided. If judicial, the Justices of the Supreme Judicial and Superior Courts cannot be members of it; if inquisitorial or political merely, its functions do not belong to the judicial department, and, therefore, under the limitations of constitutional power, cannot be exercised by members of the judicial department.
5. So much of Section 12 of Chapter 122 of the Public Laws of 1911, as provides for the creation of a special tribunal to be composed of Justices

of the Supreme Judicial or Superior Courts, or both, for the inquiry into alleged corrupt practices in elections, is held to be unconstitutional and void.

6. Where an inferior tribunal is attempted to be created in violation of the Constitution, and it therefore has clearly no jurisdiction of the proceedings instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and there is no other adequate remedy that is available, he is entitled to a writ of prohibition as a matter of right. And the denial of it as a matter of law is error in law, to which exceptions lie.

7. In such a case, the Justice who heard the case having declined to allow exceptions, it is the duty of the Law Court, upon proper petition therefor, to establish the exceptions, under the provisions of Revised Statutes, Chapter 79, Section 55.

On petition to establish exceptions to a ruling by the court denying a writ of prohibition. Exceptions established.

This is a petition to establish exceptions to a ruling by the court denying a writ of prohibition brought under the provisions of Revised Statutes, Chapter 79, Section 55.

On January 3, 1912, certain electors in Portland presented to one of the Justices of this court their petition alleging that corrupt practices, contrary to the provisions of Section 11 of Chapter 122 of the Public Laws of 1911, had been committed by the present petitioners in connection with a municipal election in Portland in December previous. Notice was ordered on this petition and the Chief Justice designated another Justice of this court to hear the petitioner with the Justice to whom this petition was presented.

On the return day of that petition, the respondents moved to dismiss that petition on two grounds, namely, that it was not alleged in the petition that these petitioners were electors or voters at said municipal election, and that Section 12 of Chapter 122 of the Public Laws of 1911 was unconstitutional. The two Justices denied the motion. Thereupon these petitioners presented to another Justice of this court their petition for a writ of prohibition. A hearing was had on this petition at the April term, 1912, and the presiding Justice ruled as matter of law that the petition should be denied. At the same term the petitioners presented to the presiding Justice their written bill of exceptions to this ruling and the presiding Justice refused to allow the bill of exceptions and these proceedings were commenced to establish the truth of the exceptions.

The case is stated in the opinion.

Eben Winthrop Freeman, for petitioners.

Fred V. Matthews, for respondents.

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

SAVAGE, J. Petition to establish exceptions to a ruling by the court denying a writ of prohibition. This petition is brought under the provisions of R. S., Chap. 79, Sect. 55. A commissioner was appointed to take depositions as is provided by rule XLIII. The depositions have not been brought before us, but instead we have a finding of facts made by the commissioner. But since no question has been made by interested parties but that the facts are correctly stated by the commissioner, we shall proceed upon that assumption.

The following facts appear in the commissioner's report. On January 3, 1912, certain electors in Portland presented to one of the Justices of this court their petition, alleging that corrupt practices, contrary to the provisions of Section 11 of Chapter 122 of the Public Laws of 1911, had been committed by the present petitioners in connection with a municipal election in Portland the previous December, in which these petitioners were declared elected respectively to the offices of mayor and aldermen of that city. That petition was brought under the provisions of Section 12 of said Chapter 122 of the Laws of 1911. Notice was ordered, and the Chief Justice of this court was notified. The Chief Justice designated another Justice of this court to hear the petition in conjunction with the Justice to whom the petition was presented, and all proceedings so far were in accord with the provisions of the statute. On the return day, these petitioners, the respondents in that proceeding, moved to dismiss that petition on two grounds, namely, that it was not alleged in the petition that the petitioners were electors or voters at said municipal election, and that said section 12 was unconstitutional in that it purported to authorize the court or tribunal named therein to be composed of Justices of the Supreme Judicial Court, or of the Superior Courts, or of both. The two Justices denied the motion. Thereupon these petitioners presented to another Justice of this court their petition for a writ of prohibition. On this petition notice was ordered returnable at

the next term of the court, and, in the meantime, the two Justices and the original petitioners were restrained from proceeding further. A hearing was had on the petition for a writ of prohibition at the April term of this court in Cumberland county. At the hearing all matters alleged in said petition were shown or admitted to be true. The presiding Justice ruled as matter of law that the petition should be denied, and that the restraining order should be dissolved. Thereafter, during the same term, these petitioners presented to the presiding Justice their written bill of exceptions to this ruling, and asked that the same be allowed. The commissioner found that all matters contained in the bill of exceptions were true and correctly stated. The presiding Justice refused to allow the bill of exceptions. Then these petitioners began this proceeding to establish the truth of their exceptions.

The record does not show why the presiding Justice refused to allow exceptions, but we think the only ground on which the refusal could have been based is that exceptions do not lie in any case to the denial of a writ of prohibition. And if the granting of such a writ is purely discretionary in every case, the refusal was right, for exceptions do not lie to rulings which are discretionary with the court. On the other hand, if the granting of the writ is not always discretionary, but may sometimes be claimed as a matter of right, the denial of it as a matter of law raises a question of law, to a ruling on which exceptions lie.

In considering the case, it should be observed that the presiding Justice gave no real consideration to the constitutional question involved. He assumed the constitutionality of the statute without giving it the weight of his own views. These are his words:—"It is undoubtedly true, however, that the constitutionality of the statute might be open to attack, but according to the established and uniform course of procedure in this State, a statute will be presumed by a single Justice to be constitutional until the contrary has been established by the Law Court." The other question, that of the want of sufficient allegation in the original petition, and incidentally of the power of amendment, he did consider, and with respect to this he used the following language concerning the nature and uses of writs or prohibition, which we adopt. "A writ of prohibition is an extraordinary writ to be used with great caution

and forbearance for the furtherance of justice and for securing order and regularity in all the tribunals where there is no other regular and ordinary method. The legitimate purpose of the writ is to keep inferior courts within the limits of their own jurisdictions and to prevent them from encroaching upon the jurisdiction of other tribunals. 32 Cyc., 598. It is a writ which should be employed only in cases of extreme necessity, and not for grievances which may be remedied by ordinary proceedings at law or in equity. *People* v. *Westbrook,* 89 N. Y., 152; *Norton* v. *Emery,* 108 Maine, 472. It will not issue when there is another adequate remedy available to the applicant, either by appeal, certiorari or writ of error. Indeed, it is established by a substantially uniform line of authorities that this ancient writ is granted only for the purpose of preventing a lower court from exercising a power with which it has not been vested, and not for the purpose of controlling its proceedings or preventing or correcting its errors respecting the admission or exclusion of evidence, and the amendment of pleadings or other errors committed in the ordinary exercise of its unquestioned jurisdiction." He also said that according to the great weight of authority, "the writ of prohibition is not a writ of right, certainly not where other adequate remedies are available, but its issuance is addressed to the sound discretion of the court, to be granted or withheld by the court exercising supervisory control, according to the nature of each particular case." We agree that a writ of prohibition is not to be regarded as a writ of right "where other adequate remedies are available." And in such cases the "issuance is addressed to the sound discretion of the court." But it is not enough, we think, that there be another remedy which in form and legal scope is, or may hereafter be, applicable to the petitioner's grievance. It must be adequate to afford relief. It must give bread, and not a stone. It would seem to be a mockery and a denial of justice to remit a petitioner to a remedy which is only adequate in the sense of being technically appropriate. So that, we think, the fact that the petitioner may have another remedy is not necessarily conclusive against the issuing of a writ of prohibition. As was said by this court in *Norton* v. *Emery,* 108 Maine, 472:— 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 remedy must be prompt, efficient and equally adequate. *Connecticut River R. R.* v. *County Commissioners,* 127 Mass., 50, was a case where a land owner was seeking relief by writ of prohibition against unconstitutional condemnation proceedings. The court said:—"The fact that the remedy by petition for writ of certiorari will be open to the land owner after final judgment affords no reason why the court should now refuse a writ of prohibition, and thereby put the petitioner to the trouble, expense and delay of a trial before a tribunal which has no jurisdiction of the case, and to whose jurisdiction the petitioner has objected at the outset of the proceedings," citing *Vermont & Massachusetts R. R. Co.* v. *County Commissioners,* 10 Cush., 12; *Gould* v. *Gapper,* 5 East. 345; *Burder* v. *Veley,* 12 Adolphus & Ellis, 233, 263, 265, 313, 314.

But passing by these general considerations, we come again to the specific question, were the petitioners here entitled to the writ as of right? And as bearing upon the precise point, and as applicable to this case, we quote the language of Mr. Justice Gray, speaking for the court, in *Smith* v. *Whitney,* 116 U. S., 167. He said: "It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject of a writ of error. . . . But where that court has clearly no jurisdiction of the suit or prosecution instituted, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed than in the older authorities. In re Forster, 4 B. & S., 187, 199; *Mayor &c. of London* v. *Cox,* L. R., 2 H. L., 239, 280; *Worthington* v. *Jeffries,* L. R. 10, C. P., 379, 380; *Chambers* v. *Green,* L. R. 20 Eq., 552; *Weston* v. *Charleston,* 2 Pet., 449." This doctrine is affirmed in In re Cooper, 143 U. S., 472; In re Rice, 155 U. S., 396; In re N. Y. S. S. Co., 155 U. S., 523; In re Alix, 166 U. S., 136. And it seems to be sound and wholesome.

And we think this case fairly comes within the rule.

I. In the first place, it is clear that the tribunal was an unconstitutional tribunal, and therefore had, and could have, no juris-

diction. If it were a matter of doubt, the presiding Justice might well have denied the writ as a matter of discretion. *Smith* v. *Whitney,* 116 U. S., 167. But it seems to us that the question is so clear as to be free from all doubt. It is so clear that the counsel for these respondents, in argument, attempts to save the statute only on the ground that the statute tribunal is a constituent part of the Supreme Judicial Court, a position without any merit, as will be seen hereinafter.

Section 12 of Chapter 122 of the Laws of 1911 provides that "at any time within thirty days after such election any elector or voter at such election may present to any judge of the Supreme Judicial or Superior Courts a petition upon oath, upon information or personal knowledge that corrupt practices, contrary to the provisions of any section of this act, were committed at or preliminary to such election, naming the successful candidate as defendant, and praying that the facts alleged may be inquired into. If such judge shall be of the opinion that the interests of public justice require such proceedings, he shall order reasonable notice of such petition to be given the defendant, and shall notify the chief justice of the Supreme Judicial Court of such petition. The chief justice shall designate another judge to hear such petition in conjunction with the judge to whom the petition was presented, and in case of the latter's disqualification or inability, the chief justice shall appoint two judges to hear such petition. Such petition shall be tried without a jury, and the petitioner and all candidates at such election shall be entitled to appear and be heard as parties." The section also provides that the trial judges shall file with the governor their joint decision as to whether the defendant was or was not guilty of corrupt practices, and as to whether or not the election was void. And in case the joint decision is that any successful candidate, who is a defendant, is guilty, the election, with some exceptions, is declared to be void, and the governor is required to issue a writ for a new election.

The point of attack is the composition of the tribunal. It is contended, on one hand, that the tribunal provided for in the section is a special, statutory, inferior, judicial tribunal, to which a justice of either the Supreme Judicial or Superior Courts cannot constitutionally be appointed, and in which he cannot constitu-

tionally sit. The Constitution, Art. IX, sect. 2, reads as follows: "No person holding the office of justice of the Supreme Judicial Court, or of any inferior court, attorney general, . . . shall be a member of the legislature; and no person shall be capable of holding and exercising at the same time within this State more than one of the offices above mentioned." Article VI, section 6 of the Constitution provides that,—"The Justices of the Supreme Judicial Court shall hold no office under the United States, nor any State, nor any other office under this State, except that of justice of the peace."

It is further contended that the provision in the statute requiring the Chief Justice of the Supreme Judicial Court to designate one Judge to hear the petition in conjunction with the Judge to whom the petition was presented, and in some contingencies to appoint two Judges, is in conflict with Article V, section 8 of the Constitution which provides that the governor "shall nominate, and, with the advice and consent of the council, appoint all judicial officers."

On the part of these respondents, it is conceded, as we think it must be, that, if the tribunal is a special or inferior one, then the statute providing for it is, and should be declared unconstitutional. A justice of the Supreme Judicial Court can hold no other office, judicial or otherwise (that of justice of the peace excepted). He cannot constitutionally be a member of an inferior court. Nor can a justice of a superior court, which is an inferior court in the constitutional sense, be a member of any other inferior court, for he would then be holding "more than one of the offices" mentioned in the prohibitory clause of the constitution above referred to.

It is also conceded that it would be contrary to Article V, section 8 of the Constitution to impose upon the Chief Justice the duty of appointing a judge of a special or inferior judicial tribunal. We think it would also be repugnant to Article III, section 2, of the Constitution. Section 1 of this article provides that "The powers of this government shall be divided into three distinct departments, the Legislative, Executive and Judicial." It is then, in section 2, declared that "No person or persons, belonging to one of these departments shall exercise any of the powers properly belonging to either of the others." To appoint the judges of an inferior court,

or indeed, to appoint to any civil office, judicial or otherwise, is an executive function, not a judicial one. The duty of making such appointments cannot be constitutionally imposed upon, or exercised by, a judicial officer. The Chief Justice is a judicial officer, belonging to the judicial department. He cannot perform executive functions.

But it is suggested that the tribunal provided for in section 12 is a constituent part of the Supreme Judicial Court, and not a special or inferior tribunal; and if so, that it is not an unconstitutional function for the Chief Justice of the Supreme Judicial Court to designate another Justice of the same court to perform some particular part of the court's work. And since, of course, a judge of a Superior Court cannot be a part of the Supreme Judicial Court, or sit therein, it is argued that the statute may be, and ought to be, construed to mean that while a petition may be presented to a judge of the Superior Court, and he may order notice thereon, that is the extent of his power; that he is disqualified to sit in the tribunal; that this very disqualification was anticipated by making it the duty of the Chief Justice to appoint two Judges in such a contingency; and therefore that the Chief Justice can designate or appoint only Justices of the Supreme Judicial Court. If such was the legislative thought, we do not think it would be discourteous to say that it was unhappily expressed.

But such, clearly, was not the legislative intent. Nowhere in the act is any distinction made between Justices of the Supreme Judicial Court and Justices of the Superior Courts. The petition may be presented to a judge of either court. The additional Judge to be designated by the Chief Justice may be a justice of either court. The two that may be appointed, in certain contingencies, may be both from one court, or both from the other, or one from each. Such is the language of the statute, and nothing appears in the context to indicate that the Legislature meant to express any other intention.

The tribunal then might be composed of two Supreme Court Justices, or two Superior Court Justices, or of one Justice from each court. If composed of two Superior Court Justices, it certainly could not be a part of the Supreme Judicial Court; if of one Justice from each court, no more would it be a part of the Supreme Judicial Court, for a Superior Court Justice cannot constitutionally

sit in, or be a part of, the Supreme Judicial Court. That court is a constitutional court and can be held only by constitutionally appointed Justices of that court. Nor is the statutory character of the tribunal changed, if it happens that both the Justices,—the one designated by the petitioner and the one designated by the Chief Justice,—or the two, as the case may be, appointed by the Chief Justice, are of the Supreme Judicial Court.

Therefore we feel bound to declare that the legislative intention, as expressed, was to create a special tribunal, apart and distinct from either the Supreme Judicial or Superior Courts. It was an inferior tribunal, because constitutionally all other tribunals than the Supreme Judicial Court are inferior tribunals.

We have so far assumed that the tribunal provided for is judicial, or at least, quasi-judicial. But it is suggested that the statute does not contemplate adversary parties whose conflicting rights are to be determined by a judgment, that therefore the tribunal is not a judicial one, and that the tribunal is merely an inquisitorial or political one, whose functions belong to the political departments of the government. However this may be, it is not necessary now to determine whether the tribunal be of the one character or the other. We have already seen that, if judicial, it is special and inferior. and that the Justices cannot be members of it. If it is inquisitorial or political merely, its functions do not belong to the judicial department, and therefore cannot be exercised by members of the judicial department.

Therefore so much of section 12 of chapter 122 of the Public Laws of 1911 as provides for the creation of the tribunal therein provided for, to be composed of Justices of the Supreme Judicial or Superior Courts, or both, is held to be unconstitutional and void.

II. Have the petitioners another adequate remedy? We think not. We think they have no such remedy as should in law bar a writ of prohibition. They may have a remedy in form, but none in substance. The statute made no provision for exceptions, and denied the right of appeal, except on the question of the ineligibility of the candidate to public office. It is suggested that certiorari or a writ of error will lie. But no other such remedy will lie until after the unconstitutional tribunal has completed its hearings, made futile findings which it has no jurisdiction to make, and the same has become a matter of record. No such remedy will lie until after the

parties have been put to pecuniary expense necessarily great, and to an inquiry vexatious, because unconstitutional. And even then their remedy would be a fruitless one. For looking at the case as it stood when the writ of prohibition was denied, and assuming that the tribunal should act with all promptness possible, no remedial process could be entered in court or obtain a hearing until the second Tuesday of October, 1912. Proceedings in court would be open to exceptions. And in view of the practice already adverted to, a universal practice in the history of this court, that a single justice will not feel himself justified in overturning a legislative enactment, on the ground of its unconstitutionality, until it has been so determined by the Law Court, it may be regarded as a certainty that the petitioners, to obtain their remedy, would have been obliged to take the case on exceptions to the Law Court in December, 1912. In the meantime their terms of office would have expired. The question would have become entirely moot so far as these parties are concerned. The case would have been defunct, and, in accordance with invariable practice, the Law Court would have declined to answer the moot questions, and would have dismissed the exceptions. Can it be said that such a proceeding would afford a "remedy" such as the law contemplates? We think not. We think, taking into account the practice and procedure of the court, as we may properly do, that such proceeding must necessarily have ended in no remedy at all.

This situation presents a case, as we think, upon the authorities cited, where the petitioners should have had a writ of prohibition as a matter of right. Whatever may have been the result, if it had been denied as a matter of discretion, to deny it as a matter of law was error in law, to which exceptions would lie. Besides what has been said already, to deny the writ as a matter of law was in effect to decide that the statute is constitutional, and to such a ruling exceptions would lie.

And although the exceptions cannot be reached for argument or decision until the next December term of the Law Court, when they will have ceased to have any practical value, we have no option under the statute. It is our duty to establish the exceptions as presented for allowance. The case will be entered on the law docket and stand for argument on the exceptions at the next term.

So ordered.

FRANCIS F. PRINCE *vs.* EASTERN STEAMSHIP COMPANY.

Androscoggin. Opinion October 15, 1912.

Burden of Proof. Contributory Negligence. Exceptions. Interpretation of United States Statutes, and Rules and Regulations of Navigation. Decision of Federal Courts. Sailing Rules. The "could not" rule.

1. The collision between the plaintiff's motor boat, Carolyn, and the defendants' Steamer, City of Rockland, occurred about 7.15 in the evening of September 21, 1909, on the Kennebec River, abreast the southerly end of the City of Bath. At the time of the collision the night was dark, but good for seeing lights, and there was a moderate breeze from the southward. The plaintiff and a friend was in his launch bound up the Kennebec River, and the defendants' Steamer, City of Rockland, was on one of her passages from Gardiner to Boston.

2. It is conceded that the United States Statutes and the rules and regulations of navigation are to be interpreted in accordance with the decisions of the Federal Courts.

3. The plaintiff presents and argues several exceptions to the rulings and charge of the presiding Justice, and during the progress of the trial, the defendant introduced certain sailing rules and regulations established by the Federal Government to show that the plaintiffs' boat was not equipped and managed in accordance with the requirements of law, and contended that a failure to comply with these provisions of law was, per se, an act of contributory negligence.

4. The presiding Justice in submitting the contention of the defendant upon the question of contributory negligence in violating the rules and regulations and defining the burden resting upon the plaintiff charged the jury as follows: "Now it is incumbent upon the plaintiff to prove by a preponderance of the testimony not only that the lack of these statutory requirements, if there was a lack, did not contribute towards the injury, but he must go a step further, and prove that it could not have contributed to the injury. Not merely that you find that it did not, but that you must go further and find that it could not have contributed to the injury. That burden is upon the plaintiff. I think I make that clear." *Held;* 1st, that the instruction imposed upon the plaintiff the positive duty of proving that his failure to observe the regulations did not contribute to his injury; 2nd, it imposed upon him the additional positive duty of

showing it could not have done so. It required that the plaintiff must prove, not only an absolute negative, but in some way to go further and prove that his failure not only did not but could not have contributed to the injury. 3rd, that notwithstanding the exceptionable error in the charge, under the statement of facts in the exceptions, it becomes harmless error.

On exceptions by plaintiff. Exceptions overruled.

This is an action on the case to recover for injuries to the plaintiff's person and property resulting from a collision between the plaintiff's motor boat, Carolyn, and the defendant's steamer, City of Rockland, which occurred about 7.15 in the evening of September 21, 1909, on the Kennebec River, near the City of Bath. Plea, the general issue. The jury returned a verdict for the defendant. The plaintiff excepted to several rulings of the presiding Justice during the trial.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

Benjamin Thompson, for defendant.

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

SPEAR, J. This case comes up on the plaintiff's exceptions to the rulings and charge of the presiding Justice. It is an action on the case for injuries to the plaintiff's person and property resulting from a collision between the plaintiff's motor boat, Carolyn, an open launch 23 feet in length and 6 feet beam, and without any pilot house, and the defendant's steamer, City of Rockland, a vessel of 274 feet in length, 38½ feet beam, and of the burthen of 1696 gross tons.

The collision occurred at about 7.15 in the evening of September 21, 1909, on the Kennebec River abreast the southerly end of the City of Bath. At the time of the collision the night was dark, but good for seeing lights, and there was a moderate breeze from the southward.

The plaintiff and a friend were in his launch bound up the Kennebec River, having left the New Meadows River the same afternoon. The defendant's steamer, the City of Rockland, was on one of her regular passages from Gardiner to Boston, and was proceeding down near the center of the river on her regular course.

It is conceded that the United States statutes, and the rules and regulations of navigation are to be interpreted in accordance with the decisions of the federal courts. Upon this rule of interpretation the discussion both of the plaintiff and defendant proceeds.

The plaintiff presents and argues several exceptions to the rulings and charge of the presiding Justice. During the progress of the trial the defendant introduced certain sailing rules and regulations established by the federal government for the purpose of showing that the plaintiff's boat was not equipped and managed in accordance with the requirements of law, and contended that a failure to comply with these provisions of law was, per se, an act of contributory negligence. It is unnecessary to insert a statement of all the rules which the defendant contended were violated, as that part of the charge of the presiding Justice to which exceptions was taken is based upon the assumption that one or all of these rules may or may not have been violated, and submitted to the jury the question whether such violation, if found, contributed to the accident. In submitting the contention of the defendant upon the question of contributory negligence in violating the rules and regulations, and defining the burden resting upon the plaintiff in rebutting it, the presiding Justice charged the jury as follows: "Now it is incumbent upon the plaintiff to prove by a preponderance of the testimony not only that the lack of these statutory requirements, if there was a lack, did not contribute towards the injury, but he must go a step further, and prove that it could not have contributed to the injury. Not merely that you find that it did not, but that you must go further and find that it could not have contributed to the injury. That burden is upon the plaintiff. I think I make that clear."

To that part of the charge above quoted stating "but he must go a step further, and prove that it could not have contributed to the injury. Not merely that you find that it did not, but that you must go further and find that it could not have contributed to the injury. That burden is upon the plaintiff. I think I make that clear," the plaintiff objects and contends that it is a matter of exceptionable error.

While it is contended that the language of the presiding Justice in giving the above rule is in substantial accord with the language

of the United States Courts in stating the rule, it nevertheless required the jury to find that the failure to comply with the rules and regulations not only did not contribute to the injury, and could not have done so in the case at bar, but was incapable of so contributing in any case that might arise.

An analysis of the phraseology claimed to be erroneous will, we think, clearly show that it was either meaningless or required a degree of proof that would establish more than an absolute negative, a thing impossible. 1st. The instruction imposed upon the plaintiff the positive duty of proving that his failure to observe the regulations did not contribute to his injury. 2nd. It imposed upon him the additional positive duty of showing it could have done so. The question was whether the plaintiff's failure to comply with the federal regulations contributed to his injury. If it did, that was the end of his case. If it did not, then this phase of the defense disappeared. The court said to the jury it was incumbent upon the plaintiff to show as a positive duty, that his failure did not contribute. That was the absolute end of the burden which could be imposed upon him. It was impossible for him to do more. To establish that a thing absolutely does not exist is the end of negative proof. But the instruction did not stop here. It required that the plaintiff must prove not only an absolute negative, but in some way go further, and, as the instruction says, prove that his failure not only did not, but, as an additional positive duty, could not have contributed to the injury. At this juncture arises the perplexity to be solved by the jury. When they had taken this case under consideration and had concluded, as they might, that the failure of the plaintiff to observe these regulations had not in any degree contributed to the collision, it is obvious that, to their minds, it was then incumbent upon them to do something more. But what more? How could they go a step further? If they had already decided it did not contribute, and hence, as a corollary, could not contribute, then to their minds what more must the "could not" instruction have required? It seems obvious that lay minds might have concluded that this language required them to go beyond the case on trial and apply it to any similar case that might arise. This is the only interpretation that could give any meaning, by the context, to the "could not" phraseology. This language was at least capable of confusing

the jury with reference to the excess of duty which the instruction imposed upon the plaintiff.

We think the language of the instruction fails to express the idea intended. It is too apparent for discussion that if the plaintiff had shown that his failure to observe the navigation rules did not contribute to his injury, that he was entitled to recover upon this aspect of the case; he might, however, be unable to prove by direct testimony that his failure did not contribute. But this would not end his rights. He could still show by the facts, circumstances and probabilities that his failure could not have contributed and, hence, did not.

The misleading feature of the instruction is found in the phrase "must go a step further." It required that "could not" must be proven in addition to "did not." We think the instruction should have been, that it was incumbent upon the plaintiff to establish: (1) that his failure to comply with the rules and regulations did not cause nor in any degree contribute to the collision; (2) that he might do this either by direct testimony or by any other facts and circumstances tending to prove that such failure could not have contributed; (3) and that, if he had shown that such failure could not have contributed, he had then produced sufficient evidence to rebut the presumption that it did contribute.

As before remarked, it was contended that the language of the instruction under consideration was in phraseology and effect substantially that employed by the federal courts in defining, what we may term, for the sake of brevity, the "did not" and "could not" rules. But we are unable to so construe it. We think a fair interpretation to be given the language employed by the federal courts in the various cases involving a consideration of these rules is in harmony with the foregoing conclusion as to what the instruction in the case at bar should have been.

The "could not" rule was first promulgated in the case of the Pennsylvania, 19 Wall, 125. The facts in this case arose out of a collision in a very dense fog between a sailing bark and a large steamer. The bark was under way at a slow rate of speed, ringing a bell as a fog signal. The steamer was going about 7 knots an hour. In an action of the bark against the steamer it was held that the bark was guilty of contributory negligence in violating an Act

of Congress providing that "sailing vessels when under way should use a fog horn and when not under way a bell," inasmuch as it was unable to rebut the presumption that its failure to blow a fog horn was a contributory cause of the collision."

That part of the opinion laying down the rule is as follows: "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute. In the case of the Fenham, the Lords of the Privy Council said, 'It is of the greatest possible importance, having regard to the admiralty regulations, and to the necessity of enforcing obedience to them, to lay down this rule; that if it is proved that any vessel has not shown lights, the burden lies upon her to show that her non-compliance with the regulations was not the cause of the collision.' In some cases it is possible to show this with entire certainty. In others it cannot be. The evidence in the present case leaves it uncertain whether if a fog horn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way."

The Pennsylvania obviously adopts the English rule laid down in the Fenham. Law Reports, 3 Privy Council Appeals, 212. But the English rule does not refer either directly or by inference to the "could not" doctrine, as claimed by the defendant. It is stated in this direct language: "The burden lies upon her to show that her non-compliance with the regulations was not the cause of the collision." Following this rule the Pennsylvania case nowhere declares that it must show that the ship's fault did not contribute, and then further, as a matter of independent proof, that it could not have contributed. The reasoning of the court negatives any such conclusion. Having by the process of elimination, declared that it was not enough to show, "not merely that her fault might not have been one of the causes, or that it probably was not, and, the

ship having failed to establish that her fault did not contribute, the court required her to prove that her fault "could not have contributed" and, arguendo, did not. The Pennsylvania having adopted the rule of proof laid down in the Fenham, undoubtedly intended to declare that the "could not" rule in the one case and the "did not" rule in the other were identical in meaning and that proof of "could not" was equivalent to proof of "did not."

No cases are cited which attempt, by way of argument, to distinguish the identity in meaning of these two rules, nor does counsel in his brief undertake to differentiate them. In fact, only two cases are cited which employ the language of the instruction complained of. In the Livingstone, 87 Fed., 778, the court say: "The libellant must prove that it did not and could not have caused or contributed to cause the accident." An examination of this case discloses that this phraseology was a mere academic statement of the law and had no application whatever to the decision of the case in which it was cited. After stating the rule the court immediately discarded it, as a precedent, as the very next sentence unequivocally declares the principle for which we contend. It reads: "The fact being established that there was no look-out, no red light, no range light and no checking of speed, the libellant must be condemned *unless it appears that these omissions did not produce or contribute to produce the collision.*" The latter rule, which is indicated by the Italics, was the one upon which the case was decided. The former was a mere abstract statement of law which was completely ignored by the court in its application to the facts. This case cites The Pennsylvania which we have shown affords no precedent for the phraseology used. In the Lansdown, 105, Fed., 436, the court in stating the law used this language: "It is incumbent upon her to show in case of collision or other disaster that the violation of the statute not only did not but could not have contributed to the collision." This was also an abstract statement of law. It had no application whatever to the facts. The could not rule was not involved or referred to by the court in discussing the law and the facts. As a precedent, the case cites first the Fenham and then the Pennsylvania. But it already appears that the "could not" rule is not alluded to in the Fenham at all, and was not warranted by any phraseology used in the Pennsylvania. Moreover both cases

state an incompatible rule of law. It is then manifest that these two cases, which the presiding Justice used as precedents for the language employed in his charge to the jury, and upon which, without a careful examination, he had a right to rely, were erroneous interpretations of what might appear, upon a casual reading, to be the language of the rule laid down in the Pennsylvania, obviously the parent of these inapt expressions of the law. It is unnecessary to analyze the other cases in the defendant's brief in support of his contention upon this branch of the case, as none of them appears to go to the extent of sustaining that part of the charge complained of in the case at bar.

But notwithstanding the exceptionable error in the charge, we think under the statement of facts in the exceptions it becomes harmless error. It is admitted in the bill of exceptions that the plaintiff, it being dark, did not carry a stern white light, that is, did not have range lights, which would, or at least might, have enabled the pilot on the steamship to determine the course in which the plaintiff's vessel was proceeding, and to take the steps necessary to avoid a collision, either by giving a warning whistle, stopping, or going out of the course. From the cases already cited, the following conclusions may be gathered:

1. That the presumption is that a violation of the navigation rules contributed to the disaster.

2. That the presumption is the strongest—made so as a matter of policy—but yet rebuttable.

3. That the burden is on the vessel in fault to rebut the presumption.

4. That the presumption may be rebutted by showing in any way that the fault actually did not contribute.

5. That the presumption is not rebutted so long as the proof is doubtful. It must exclude every other hypothesis. And this, we are of the opinion, is what is meant by the "could not" rule.

Therefore, in the case at bar the "could not" rule, as above defined would seem applicable. The case is in the same class as those from which citations have been made. This being so, we are unable to see why the case should not fall precisely in the line of the Pennsylvania and other cases cited, where it was held that it was impossible to determine whether as a matter of fact the fault

contributed to the disaster or not, and therefore that the presumption against the vessel was not rebutted. The plaintiff did not show range lights, as the rules require. The fact being admitted, upon the decisions cited the plaintiff cannot recover in any event, because it is impossible for him to show that the omission did not contribute, therefore the exceptions should not be sustained, and the case sent back for a useless trial.

Exceptions overruled.
Bird and Haley, JJ.,
concur in the result.

CHABOT & RICHARD COMPANY *vs.* L. T. CHABOT.

Androscoggin. Opinion October 15, 1912.

Authority of Directors, President, Treasurer, and General Manager of Corporations to Increase Wages or Salary. Fixing own Salary. Money had and received.

1. The findings of facts made by the court hearing a case without a jury, or such as necessarily formed the basis of the court's conclusion, are conclusive, if there is any evidence to support them, and exceptions do not lie.
2. If there is no evidence to support the findings of such facts as must necessarily have formed the basis of the judgment, in a case heard by the court without a jury, or, if only one inference can be drawn from the existing facts, and if that inference does not support the judgment, the finding is an erroneous decision of the legal conclusions to be drawn from the evidence, and is error in law, to correct which exceptions will lie.
3. No officer of a corporation can fix or increase his own salary. That power is vested in the directors as a board. But it is not necessary that the power be exercised at a formal meeting, or by a formal vote, nor that the exercise be shown by record. A mutual understanding of all the directors is sufficient.
4. Under the evidence, a finding that the plaintiff's directors authorized the defendant, the "manager" of the corporation, to increase his own salary is not open to attack. So as to the action of the defendant, in raising the salary of the clerk, Richard.
5. The defendant, as treasurer of the plaintiff corporation, had no power to employ counsel in litigation in which he and other individuals were the

only interested parties, at the expense of the corporation, and to pay them out of the corporate funds, even though the corporation was a necessary, but only a nominal, party, to the suit. No contrary inferences can properly be drawn from the evidence. The plaintiff is entitled as a matter of law to recover back the amounts so paid out for counsel fees.

On exceptions. Sustained.

This is an action for money had and received to recover back divers sums of money paid from the treasury of the plaintiff corporation, unlawfully and without authority. The plaintiff corporation, in 1908, was conducting a dry goods business in Lewiston. The defendant was president, treasurer, director and general manager of said corporation, and one Richard was clerk of the corporation, and also clerk in the store and manager of one of the departments. In October, 1908, the defendant, without any formal vote of the corporation, or of the directors, raised his own salary and the salary of Richard and paid same out of the treasury of the corporation. The defendant also employed counsel in defense of two bills in equity in which he was defendant in one and he and Mr. and Mrs. Richard were defendants in the other, and paid them for their services out of the treasury of the corporation. The case was heard before the presiding Justice, without a jury, with the right to except. Judgment was ordered for the defendant and the plaintiff excepted. Plea, the general issue.

The case is stated in the opinion.

Newell & Skelton for plaintiffs.

McGillicudy & Morey, for defendant.

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

SAVAGE, J. Action for money had and received to recover back divers sums of money which the plaintiff, a corporation, alleges that the defendant, who was at one time its treasurer, paid out of its treasury, unlawfully and without any authority. The case was heard before the presiding Justice, without a jury, with the right of exceptions. Judgment was ordered for the defendant, and the plaintiff excepted.

In such a case, the findings of facts by the Justice hearing the case, if there is any evidence to support them, are conclusive, and exceptions do not lie. *Treat* v. *Gilmore,* 49 Maine, 34; *Keen* v.

Jordan, 53 Maine, 144; *Shrimpton* v. *Pendexter,* 88 Maine, 556. On the contrary, if there is no evidence to support the findings of such facts as must necessarily have formed the basis of the judgment, or, if one inference only can be drawn from the existing facts, and if that inference does not support the judgment, the finding is an erroneous decision of the legal conclusions to be drawn from the evidence, and is error in law, to correct which exceptions will lie. *Morey* v. *Milliken,* 86 Maine, 464.

In this case the presiding Justice made no specific findings of fact. But inasmuch as he ordered judgment for the defendant, it must be assumed that he found for the defendant upon all issues of fact necessarily involved. And his decision thereon must be taken as conclusive, and not open to exceptions, if the evidence, with the legitimate inferences to which it is susceptible, viewed most favorably for the defendant, can support the judgment.

The record shows the following facts. In 1908 the defendant was president, treasurer, director and general manager of the plaintiff corporation, which was then conducting a dry goods business in Lewiston. One Richard was clerk of the corporation, and was also clerk in the store, and manager of one of the departments. In October of that year the defendant, without any formal vote of the corporation or of the directors, raised his own salary from $37.50 a week to $50, and the salary of Richard from $20 a week to $35. The defendant, as treasurer, paid the increased salary to himself and Richard from October 5, 1908 to January 7, 1911. The plaintiff in this suit seeks to recover back the increase, both that which the defendant received himself, and that which he paid to Richard.

It is doubtless true that the defendant, neither as president, nor as treasurer, nor as director, nor as manager, had any authority to fix his own salary, or to increase it. *Camden Land Co.* v. *Lewis,* 101 Maine, 78. That power was vested in the directors as a board. But it was not necessary that the directors should exercise that power at a formal meeting, or by a formal vote, nor that the exercise of the power should be shown by record. It was sufficient for the defendant's purpose for him to show that the increase in salary was made in accordance with a mutual understanding of all the directors. *Peirce* v. *Morse-Oliver Co.,* 94 Maine, 409; *York* v. *Mathis,* 103 Maine, 67. And such an understanding may be shown

by conduct, as well as by evidence of specific agreement. In this case one of the directors, Langley, testified that he never agreed to the increase of salary, and that in fact he never heard anything about it until long afterwards. But this was disputed. The defendant testified that the increase was made with the consent, and even at the suggestion, of Langley. It is not shown how many directors there were, nor who they were, besides the defendant and Langley, nor whether the other directors assented or not, to the increase. But no point is made by counsel as to the want of assent by other directors, and therefore we make none. Viewing the testimony of the defendant, and the conduct of the parties as shown, we think that a finding that the defendant was authorized by the directors to increase his own salary is not open to attack.

So far as concerns the increased salary paid to Richard, less need be said. The defendant was manager. Richard was clerk. The defendant had for a long time exercised, without any question, the authority to fix the salaries of clerks, and to increase them at his discretion. Though the directors passed no vote on the subject, their acquiescence in the exercise of the authority by the defendant abundantly appears. The finding below on this question was conclusive.

But the plaintiff also seeks to recover certain sums of money paid by the defendant out of the plaintiff's treasury for legal services in defence to two bills in equity, one of which was brought against the defendant, and the other against the defendant and Mr. and Mrs. Richard, in each of which the present plaintiff was made a party defendant.

The facts, which are not in dispute, briefly stated, are these. Mr. Langley, either alone or with his family, was the owner of the majority of the stock of the corporation, but he was only a minority of the board of directors. The defendant, without authority, and without the knowledge even of the other stockholders, issued to himself fifty shares of stock, for which, or for the greater part of which, he gave his personal unsecured note. This stock, with what he had before, constituted a majority of all the stock issued, and gave the defendant the virtual control of the corporation. Langley brought a bill in equity to compel the defendant to cancel and surrender the fifty shares of stock so issued. The bill was sustained,

and the defendant was ordered to return and cancel the shares of stock. This case is silent on the matter, but it may be assumed that he did so. But immediately thereafter, and without authority, the defendant issued one share to Mr. Richard and thirty-nine shares to Mrs. Richard. Langley then brought another bill, this time against the defendant and Mr. and Mrs. Richard, to compel the cancellation and surrender of these latter shares. This bill was likewise sustained, and the Richards ordered to cancel and return the shares of stock. In both of these bills the plaintiff was made a party defendant. This defendant, Chabot, employed counsel to defend these bills, and the counsel were paid by him for their services out of the plaintiff's treasury. He claims and testifies that he, as officer or manager, employed the counsel to defend or "protect" the corporation.

But although the corporation was a necessary party to those bills, it is most manifest that it was only a nominal one. As a corporation it had nothing at stake. It had no pecuniary interest in the result of the litigation. Langley, on one side, and the defendant and Mr. and Mrs. Richard on the other, were the contending litigants. The corporation was only the stake or prize for which they were contending. The defendant, in one case, and Mr. and Mrs. Richard in the other, were the ones to make or lose by the result of the suits. Against them only did Langley seek any relief. The suits were private matters. The defendant had no authority to defend himself and Mr. and Mrs. Richard at the expense of the corporation. He could not employ counsel for that purpose, and lawfully pay them out of the corporate funds. It is not a question of what the defendant undertook to do in the matter of counsel, but of what he had power to do. And that presents a question of law. The payment of the counsel fees, out of the corporate funds, was, under the circumstances disclosed in the record, unauthorized and unwarranted. We think no contrary inference can properly be drawn from the facts. The plaintiff, therefore, was entitled, as a matter of law, to recover back the amounts paid out for counsel fees. The conclusion of the presiding Justice to the contrary, accordingly, must be regarded as error in law.

The plaintiff's exceptions are, in this respect, well taken, and must be sustained.

Exceptions sustained.

MARY A. WHITE, Petitioner, *vs.* JAMES E. MANTER.

Cumberland. Opinion October 15, 1912.

Alternative Writ. Corporation. Inspection. Limitation. Motive or Purpose Immaterial. Statute Mandatory. R. S., Ch. 47, Sect. 20. Stockholders.

1. Under the statutes of this State, R. S., chapter 47, section 20, the right of a stockholder to inspect the corporate records and the list of stockholders is absolute and unlimited. The purpose of a desired inspection is immaterial. The right to take copies and minutes from the records is limited to such parts as concern the stockholder's interests.
2. A petition for mandamus by a stockholder to compel the officers of a corporation to permit him to inspect the corporate records is not faulty for the reason that it fails to allege the purpose for which inspection is desired.
3. Assuming that the court may not be required in every case to afford the aid of the discretionary writ of mandamus to a stockholder who desires to inspect corporate records, the writ will not be denied for the reason that it appears that the stockholder's purpose is to ascertain how much stock is owned by her former husband, with whom she is in litigation over the question of alimony, or, to gain from the records information which will assist her in litigation hostile to the corporation.
4. Upon exceptions to an order for the issuing of a peremptory writ of mandamus, the court cannot direct a modification of the decree. It can only sustain or overrule the exceptions.
5. When a decree, otherwise properly ordered, follows the language of the statute upon which it is based, it cannot be held to be erroneous in law, on exceptions, on the ground that the court failed to limit or define the meaning of a statutory term, which is susceptible of two meanings.

On exceptions by defendant. Overruled.

This is a petition for mandamus to compel the defendant, as clerk of the New England Land Company, a corporation, to allow the petitioner to examine the records and stock book of the corporation and to take copies and minutes therefrom of such parts as

concern her interests as stockholder in said corporation. The defendant moved to quash the alternative writ, because the petitioner did not state in her petition the purpose for which she desired to examine the books. This motion was denied and the defendant excepted. After a hearing a peremptory writ was ordered to issue and to that order the defendant excepted.

The case is stated in the opinion.

Charles E. Gurney, for plaintiff.

John Burke and Verrill, Hale & Booth, for defendant.

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

SAVAGE, J. Petition for mandamus to compel the defendant, as clerk of the New England Land Company, a corporation, to allow the petitioner to examine the records and stock book of the corporation and to take copies and minutes therefrom of such parts as concern her interests.

The petitioner is a stockholder in the defendant corporation. In her petition she does not state the purpose for which she desires to examine the books. And for this reason the defendant moved to quash the alternative writ. The motion was denied, and the defendant took an exception. After hearing a peremptory writ was ordered to issue, and to that order the defendant excepted.

It is provided by R. S., chap. 47, sect. 20, that all corporations, existing by virtue of the laws of the State, shall have a clerk, and a clerk's office within the State where shall be kept their records and a book showing a true and complete list of all stockholders, their residences, and the amount of stock held by each. . . . "Such records and stock book shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests."

The common law gave to stockholders the right to examine the books, records and papers of the corporation, when the inspection was sought at proper times and for proper purposes. 10 Cyc., 954; In re Steinway, 159 N. Y., 250. And it is generally held at common law that the purpose must relate to the interest of the stockholder as such. *Varney* v. *Baker,* 194 Mass., 239, and cases cited; In re

Steinway, supra; *Stone* v. *Kellogg,* 165 Ill., 192; *Venner* v. *Chicago City Railway Co.,* 246 Ill., 170.

The defendant contends that the statute above cited is affirmatory of the common law, and that the right under the statute to inspect is subject to the same limitations as the right under the common law. Starting with this premise, the defendant contends, first,—as to pleading, that the petitioner must allege and prove a proper purpose, and secondly,—as to the merits, that the petitioner's purpose is not a proper one.

We think that the statute is affirmatory of the common law, and that it is more. It adds to the common law right, it removes some of the common law limitations. In other words, the statute right of inspection of corporate records and of the list of stockholders by a stockholder is absolute and unlimited. The statute does not make the purpose material, and we cannot. We are now speaking of the statutory right, and not of any particular remedy. Where the right is guaranteed by statute, the great weight of authority is to the effect that the motive or purpose of seeking to exercise it is not the proper subject of judicial inquiry. The court, in *Henry* v. *Babcock & Wilson Co.,* 196 N. Y., 302, said:—"No doubt the Legislature could make the stockholder's privilege of inspection dependent upon the motive or purpose with which it is sought; but it has not seen fit to do so. The language of the statute is plain and mandatory. It recognizes the absolute right in the stockholder and imposes an absolute duty upon the corporation and the custodian of the stock book. The law requires no statement of any particular interest upon the part of the person demanding the inspection. He must be a stockholder, and must prefer his request during reasonable hours; that is all." So in *Venner* v. *Chicago City Railway Co.,* 246 Ill., 170, the court, pointing out the distinction between the common law right and an unlimited right given by the statute, said:—"When the right is conferred by statute in absolute terms, the purpose or motive of the stockholder in making the demand for an inspection is not material, and he cannot be required to state his reasons therefor. To the same effect are *Foster* v. *White,* 86 Ala., 467; *Wilson* v. *St. Louis & San Francisco Ry. Co.,* 29 N. W. App., 301; *Hub Construction Co.* v. *Breeders' Club,* 74 N. H., 282; *Ellsworth* v. *Dorwart,* 95 Iowa,

108 (58 Am. St. Rep. 427); *Johnson* v. *Langdon,* 135 Cal., 624; *Cincinnati Volksblatt Co.* v. *Hoffmeister,* 62 Ohio St., 189; *Weihenmayer* v. *Bitner,* 88 Md., 331, (45 L. R. A., 456). According to the tenor of these cases, which we approve, the petitioner was not required to allege and prove her purpose, and the refusal to quash the writ for that reason was right.

The foregoing discussion applies also to the main question, whether the peremptory writ was properly ordered to issue. The stockholder's right to inspect is unlimited. The purpose he seeks to promote is not confined to his interest in the corporation as a stockholder. It has been held that the fact that he is a competitor in business is not a sufficient reason for denying the right. *Weihenmayer* v. *Bitner,* supra. And so, when the purpose is to enable the stockholder to enforce a claim against the corporation itself.

But to avoid any misconstruction, it should be observed that while the right of stockholders to inspect the records of the corporation and the list of stockholders is unlimited, the right "to take copies and minutes therefrom" is limited to such parts "as concern their interests." It has been frequently held that the right to make copies and minutes is at common law necessarily incidental to the right to inspect. However this may be, the statute in this state is restrictive. The stockholder has no statutory right to make copies or minutes of more than concerns his interests.

Although we have used the language of the cases in saying that the motive or purpose of seeking to exercise the right is immaterial upon the question of right, the courts are not agreed that it is compulsory upon the court in all cases to enforce the right by mandamus, which is a discretionary writ, and not a writ of right. Some courts seem to hold that when the right to inspect is guaranteed by statute, mandamus must issue as a matter of course, and that nothing is left to the discretion of the court. See In re Steinway, 159 N. Y., 250; *Venner* v. *Chicago City Railway Co.,* 246 Ill., 170; *Ellsworth* v. *Dorwart,* 95 Iowa, 108; 10 Cyc., 956. It is elsewhere held that the statutory right, while absolute in terms, is subject to the implied limitation that it shall not be exercised from idle curiosity, or for a merely vexatious or an unlawful purpose. *White* v. *Foster,* 86 Ala., 467; *Stone* v. *Kellogg,* 165 Ill., 192; *O'Hara* v. *National Biscuit Co.,* 69 N. J. Law, 198; *Weihenmayer*

v. *Bitner,* 88 Md., 325. It is impossible as yet to extract a rule that may be called well settled.

But whatever may be the precise limitations, if there are any, we find no case under a statute that goes farther than *White* v. *Foster,* supra, except *O'Hara* v. *National Biscuit Co.,* supra. In the last case cited, the court attaches to the statute guaranty the common law limitation that the inspection must relate to the stockholder's rights as a stockholder. This is contrary to the great weight of authority. We are not called upon in this case to fix the limitations, for if we assume that we have the authority to deny the writ, when to issue it would be merely to serve curiosity, or to promote a vexatious or unlawful purpose, in other words, enable the petitioner to abuse the writ rather than use it, we do not think the facts in this case warrant any such limitation. The petitioner swears that her purpose in inspecting the records is to enable her to judge better of the value of her stock. The defendant contends that her real purpose is to find out what amount of stock is owned by her former husband, from which she has been divorced, and against whom proceedings are now pending to determine the amount of her alimony; that another purpose is to gain from the records information which will assist her in litigation hostile to the corporation, in which she is seeking to recover a dower interest in certain real estate which her husband has conveyed to the corporation; and that she is looking for information which may assist her brother, who is a competitor of the corporation. This last contention is not supported by the evidence. Assuming that the other contentions of the defendant are well founded, we do not think that under the broad right of inspection given by the statute, the purpose should be adjudged vexatious, improper or unlawful, even if that question is open. Accordingly, we hold that the power of the court was properly exercised in this case.

The defendant's last contention is that the form of the peremptory writ which was ordered to issue should be modified so as to command the defendant to permit an inspection of the corporation records only, as distinguished from the records of the directors' meetings. We cannot order the decree modified. In the form in which the case comes up we can only sustain or overrule the exceptions. But the decree below was that a peremptory writ issue as

prayed for, and the prayer of the petition was that the defendant be "commanded" to allow the petitioner to inspect "the records and stock book" of the corporation and "to take copies and minutes therefrom of such parts as concern her interest." The prayer follows the language of the statute precisely. So will the peremptory writ. It does not appear that the court was asked to define the word "records" in the statute, or to limit its meaning in the peremptory writ, or that the point was made in any form at the hearing. When a decree, otherwise properly ordered, follows the language of the statute upon which it is based, it cannot be held to be erroneous in law, on exceptions, on the ground that the court failed to limit or define the meaning of a statutory term, which is susceptible of two meanings. If a limitation is desired, it must be asked for and denied, or the point otherwise ruled upon, before error can be predicated. So, without expressing any opinion as to more than the records of the meetings of a corporation, we merely decide that the exceptions cannot be sustained.

Exceptions overruled.

MELLEN A. YORK *vs.* CLIFTON F. PARKER.

Cumberland. Opinion October 15, 1912.

Action. Assault. Damages. Exceptions. Private Way. Town Way. Use of Private Way.

1. Exceptions to a refusal to instruct cannot be sustained unless the requested instructions are correct in their entirety. A requested instruction based upon the assumption that municipal officers may lay out a private way for an owner of cultivated land *over his own land* is faulty, for the reason that municipal officers have no such authority.
2. Whether a way laid out by municipal officers is a town way or a statutory private way is a question of law to be determined by the records of the laying out. And the court in this case having ruled that the town "did lay out a town way," a requested instruction respecting the character of a statutory private way and the rights of parties therein related to an immaterial issue and was properly refused.

On exceptions by defendant. Overruled.

This is an action of trespass for assault and battery and comes to this court from the Superior Court of Cumberland County upon exceptions by the defendant. In the course of the trial, the defendant requested the court to instruct the jury that "if a private way was laid out by a town or its municipal officers for an owner of cultivated land in said town, as the law provides, over the land of such owner, such owner would still own the land where the road is constructed, and could lawfully prevent the use of it or any interference with it by any other person than by those for whose use such private way was laid out." The court declined to give this instruction and the defendant excepted.

The case is stated in the opinion.

Walter P. Perkins, for plaintiff.

M. P. & H. P. Frank, and Reynolds & Sanborn, for defendant.

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

SAVAGE, J. Trespass for an assault and battery. After a verdict for the plaintiff the case comes before us on the defendant's exceptions. The bill of exceptions states that "at the time the assault is alleged to have been committed, the plaintiff was at work upon a certain road or way leading from a town way over the defendant's land to his buildings, and continuing beyond his land and buildings to cultivated land of an adjoining owner. It was claimed on the part of the plaintiff, and there was evidence tending to show, that the way was a town way, while on the part of the defendant it was claimed, and there was evidence tending to show, that it was a private way, and had been treated and used as such. The plaintiff claimed and introduced evidence to show that he was there at work repairing the way by consent of the municipal officers, and by direction of the road commissioner of the town of Baldwin, in which the way was located. While the plaintiff was so repairing the way and digging the earth, within the limits of the way, defendant accosted him, told him it was a private way and forbade his continuing the work. The plaintiff replied that it was a town way and continued at digging the soil, and the parties persisting in their respective claims, an assault resulted, which each party claimed the other commenced, and for which each claimed the other was responsible." For the assault thus committed this action was brought. No other facts are stated. Some portions of the Judge's charge to the jury, to which no exceptions were taken, are recited in the bill.

The defendant requested the court to instruct the jury as follows: "If a private way is laid out by a town or its municipal officers for an owner of cultivated land in said town, as the law provides, over the land of such owner, such owner would still own the land where the road is constructed, and could lawfully prevent the use of it or any interference with it by any other person than by those for whose use such private way was laid out." The court declined to give this instruction, and the defendant excepted. No other question of law is raised.

The term "private way" as used in the bill of exceptions and in the requested instructions manifestly means a statutory private way laid out under the provisions of the statute which empowers municipal officers on petition therefor to lay out "private ways for any

inhabitant or for owners of cultivated land therein, if such inhabitant occupies, or such owner has cultivated land in the town which such private way will connect with a town way or highway," R. S., chap. 23, sect. 16. The constitutionality of this statute has been mooted, but never decided. *Lyon* v. *Hamor,* 73 Maine, 56. The question is not raised now, and we have no occasion to pass upon it.

Exceptions to a refusal to instruct cannot be sustained unless the requested instructions are correct in their entirety. *Grand Trunk Railway* v. *Latham,* 63 Maine, 177; *Duley* v. *Kelley,* 74 Maine, 556. This requested instruction is faulty in one particular, if not more, and for that reason the Judge was not required to give it. It assumes that municipal officers may lay out a private way for an owner of cultivated land *over his own land.* Such is not the law. A land owner may construct roads over his own land at his pleasure, and needs no action by municipal officers. The statute provides for an eminent domain proceeding to impose an easement upon the land of others.

The plaintiff contends that the requested instruction was also erroneous because it restricted the right to use a private way to those for whom it was laid out. But this we need not consider.

Passing by the obvious inperfection in the request, we think that the exceptions must be overruled for another reason. The plaintiff's contention is that the way in question was laid out as a town way, which is a public way, and which the town was bound by statute to keep in repair, and therefore that he was lawfully upon the ground, and was lawfully repairing the way. On the other hand, the defendant contends that it is a statutory private way, that the town was not bound to keep it in repair, and therefore had no right to do so. Accordingly it is claimed that the plaintiff in digging up the soil was a trespasser, and that the defendant had a right to prevent him from continuing to do so, using so much force as was reasonably required.

We assume that the rights of the parties respectively would not be the same if the way were private as they would be if it were public, like a town way or highway, so that the question is a material one.

Whether this way was a town way, or whether it was a statutory private way was a question of law for the court, to be determined

from the records of the laying out. The court below decided this question, and instructed the jury, as appears from that portion of the charge which is made a part of the bill of exceptions, that the town in 1866 "did lay out a town way." And the context shows the court was referring to the way in question. No exception was taken to this instruction. And nothing in the bill of exceptions has any tendency to show that the ruling was wrong. We must assume that it was right.

Under this ruling, the character of a private way, and the respective rights of parties therein, became entirely immaterial, and the requested instruction related to an immaterial issue. There was no reason for so instructing. There was good reason for not so doing. The court properly declined to do so.

Exceptions overruled.

FRED D. STEVENS *vs.* VINAL S. ODLIN.

Androscoggin. Opinion November 4, 1912.

Agreement of purchase. Agents. Burden of Proof. Contract. Damages. Deceit. False representations. Forfeiture. Material Alteration.

In an action of deceit brought against a real estate agent to recover back a forfeiture of three hundred and fifty dollars alleged to have been paid under the terms of a written contract because of the false and fraudulent representations made by the agent at the time of payment, the jury having rendered a verdict for the plaintiff.

Held:

1. That the representations made by the defendant as to the signing of the original contract of sale by the owner were not false and actionable but in accordance with the facts.
2. That under the overwhelming evidence in the case, the forfeiture clause was binding upon both parties, and the plaintiff paid only what he was legally bound to pay.
3. That even if the defendant made a false statement as to a subsequent interview, the plaintiff was not thereby defrauded because being legally liable, he was induced, even if the false representations were proved, merely to pay his own legal debt, and therefore was not damaged.

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

This is an action on the case for deceit in connection with the sale of real estate to recover a forfeiture on the ground of alleged false representations by the defendant. Plea, general issue.

The jury rendered a verdict for the plaintiff for $319.50, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

R. W. Smith, for plaintiff.

John E. Nelson, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

CORNISH, J. The outline of facts is this. On October 13, 1909, one W. B. Jordan entered into a written agreement by which he placed certain real estate in the hands of the Odlin and Odlin Real Estate Agencies for sale, "giving them full and exclusive power to sell and assign the same." Jordan agreed to convey the property by good and sufficient deed and to deliver possession of the same to the purchaser within thirty days after sale for the sum of $3000 net, all sums received in excess of said amount to belong to the brokers. This provision was also inserted: "I further agree that in case any money is paid to bind the trade, and the same is forfeited, it shall be equally divided between the said Odlin and Odlin and myself."

Acting under the authority conferred by the foregoing instrument, Odlin and Odlin made a written contract in the name of Jordan for sale of the property to the plaintiff Stevens on December 13, 1909, for the sum of $3500, $1000 to be paid down and the remainder to be agreed upon. The agreement of purchase was signed by Stevens, and contained this clause: "It is mutually agreed and understood that should either party to this contract fail or neglect to fulfill his part of the agreement, he shall forfeit forthwith as damages to the party of the other part, the sum of three hundred and fifty dollars."

On the same date, a memorandum of agreement was made and signed by Mr. Stevens and by Vinal S. Odlin, acting for Odlin and Odlin, which stated that in consideration of the purchase of the Jordan farm, the Odlins agreed to take a certain horse as part pay-

ment at the agreed price of two hundred and fifty dollars, to be delivered at any time when desired.

The remainder of the purchase price was not paid within thirty days as agreed, and on February 2, 1910, the plaintiff went to the defendant and wished to withdraw from the trade. The defendant informed him that this could not be done without payment of the stipulated forfeiture of three hundred and fifty dollars. After some conversation it was agreed that if the plaintiff would give the defendant a check for three hundred dollars the defendant would give back the horse taken in part payment, and this was done.

This action of deceit is brought to recover the forfeiture so paid on two grounds as alleged in the writ.

First, the false representation on the part of the defendant at the time of settlement on February 2, 1910, that Jordan had signed the contract of sale dated December 13, 1909, which contained the forfeiture clause.

Second, false representation by the defendant on the same day that he had seen Jordan at the request of the plaintiff and Jordan had refused to waive his rights under the forfeiture clause.

The testimony of the plaintiff himself upon the first allegation is that at the interview of February 2, 1910, the defendant "said we had both signed the contract, if either party backed out he would have to pay the forfeiture of three hundred and fifty dollars." The testimony of the plaintiff's brother who was present at the interview is as follows:

"Well they talked it over, and he said the contract couldn't be broken, and Mr. Jordan signed the forfeiture, they both signed, and they would have to pay it either the one side or the other if they throwed it up; there was a lot other little talk made. I don't remember just what the words were."

It is difficult to find any actionable false representations in these statements made by the defendant even as repeated by the plaintiff and his brother. They set forth the legal situation as the defendant understood it, and from a careful study of the evidence we are bound to say that the defendant's understanding was undoubtedly correct. Both parties were bound by the forfeiture clause.

Two attempts were made to negative the defendant's legal liability on the forfeiture.

First, it was intimated that a seal was affixed to the agreement of October 13, 1909, by which Mr. Jordan placed the property with the defendants, after it left Mr. Jordan's hands and without his knowledge or consent, and if so, it was such a material alteration as would vitiate the instrument entirely. The burden of proving such alteration was upon the plaintiff, the party alleging it, but the evidence on this point utterly fails. The insinuation may have affected the jury in rendering their verdict, but the basis for such insinuation is lacking.

In the second place, the plaintiff claimed that his contract of purchase of December 13, 1909, was signed neither by Jordan the owner, nor by Odlin the agent. On this point also the burden was on the plaintiff and he fell far short of sustaining it. The transaction was in the ordinary course of business and no reason is shown why the ordinary business methods should not have been employed, the agreement being signed by both parties, the agents signing in place of the owner. When the settlement was made on February 2nd, 1910, the plaintiff says that the original agreement was torn up, so that it could not be produced at the trial and he does not claim to know whether that original agreement was signed by Mr. Jordan or the Odlins or not, while the defendant emphatically states that it was signed by both the plaintiff and by himself as agent, and in this he is corroborated by the bookkeeper. It was certainly within the agents' authority to insert the forfeiture clause in the contract of sale, and that contract signed by the agent was as valid as if signed by Jordan himself.

A weighty if not conclusive argument upon the question of the agents' authority not only to insert the forfeiture clause but to exact the forfeiture itself, may be drawn from the fact that Jordan himself upon learning a few months later that the agents had obtained the forfeiture, demanded and received his one-half thereof amounting to one hundred and fifty dollars. No stronger evidence of ratification could be expected. *Rogers* v. *White,* 6 Maine, 1903; *Hilton* v. *Hanson,* 101 Maine, 21.

Upon the first allegation of fraudulent representation in connection with Mr. Jordan signing the contract of sale, the evidence is overwhelming in favor of the defendant. The forfeiture was legally binding upon both parties.

The second allegation in the writ to the effect that the defendant falsely represented that he had seen Mr. Jordan at the plaintiff's request and Jordan had refused to waive his legal rights, affords the plaintiff no legal remedy, even if the statement was made, which is denied by the defendant. The forfeiture clause being valid, the plaintiff was legally liable to pay the amount, one-half of which belonged to the defendant and one-half to Jordan, and it was not defrauding the plaintiff to induce him by means of a false representation, even if proved, to pay his own debt. *Brown* v. *Blunt, 72* Maine, 415.

It is unnecessary to consider the exceptions, because the verdict is so manifestly wrong upon the evidence that the motion for a new trial must be granted.

Motion sustained.

WILLIAM H. NEWELL, Judge of Probate,

vs.

DELIMA DELORME, et al.

Androscoggin. Opinion November 4, 1912.

Administrator de bonis non. Appointment of Administrator de bonis non. Bill of Exceptions. Fixed days and times for holding Probate Courts. R. S., Chapter 65, Section 4. Judicial Act. Petition.

1. The single question now before the court is the validity of the appointment of Ralph W. Crockett as administrator de bonis non of Hubert DeLorme.

2. It appears from the bill of exceptions that the petition under which he was appointed was in due form and unopposed, but that the decree appointing him was signed by the Judge of Probate in his law office at Lewiston, instead of in the Probate Office at the Court House in Auburn, and that the petition was forthwith filed with the Register of Probate in Auburn and letters of administration were thereupon issued dated the same day as the decree, proper record made and notice of the appointment duly published.

3. That the simple fact that the Judge of Probate affixed his signature to the decree in his law office in Lewiston instead of in the Probate Office in Auburn did not invalidate the decree.

4. There must be fixed places and stated times for holding the sessions of the court at which all matters requiring public notice may be made returnable and all hearings may be held.
5. The Judge of Probate cannot, in the interim between terms, lawfully perform any judicial act, except such as are authorized by statute, to be performed in vacation.
6. In this case no session of the court was attempted to be held in the Judge's office in Lewiston, no hearing had there and no judicial act was performed there.

On exceptions by plaintiff. Exceptions sustained. Action to stand for trial.

This is an action brought in the name of the Judge of Probate of Androscoggin County by Ralph W. Crockett, as administrator de bonis non on the estate of Hubert DeLorme and for the benefit of said estate against the sureties on two probate bonds given by Henri P. Bechard, late of Lewiston, the original administrator of said estate. The defendants pleaded separately the general issue with brief statement.

The case is stated in the opinion.

Ralph W. Crockett, for plaintiff.

McGillicuddy & Morey, for Delima DeLorme.

Louis J. Brann, pro se.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

CORNISH, J. This is an action brought in the name of the Judge of Probate of Androscoggin County by Ralph W. Crockett as administrator de bonis non on the estate of Hubert DeLorme and for the benefit of said estate, against the sureties on two probate bonds given by Henri P. Bechard late of Lewiston, the original administrator of said estate.

The single legal question now before the court is the validity of the appointment of Ralph W. Crockett as administrator de bonis non.

It appears from the bill of exceptions that the petition under which he was appointed was in due form and unopposed, but that the decree appointing him was signed by the Judge of Probate in his law office at Lewiston instead of in the Probate Office at the Court House in Auburn; that the petition and decree were forthwith duly filed with the Register of Probate in Auburn and letters

of administration were thereupon issued, dated the same day as the decree, a proper record duly made, and notice of the appointment duly published.

Did the simple fact that the Judge of Probate affixed his signature to the decree in his law office in Lewiston instead of in the Probate Office in Auburn invalidate the decree? Obviously not.

It is true that the Probate Court is a statutory court, and that the statute provides that, "Judges of Probate shall have certain fixed days and places for holding their courts and making and publishing their orders and decrees, where no express provision is made by law; such days shall be made known by public notifications thereof in their respective counties and all matters requiring public notice shall be made returnable thereto." R. S., Ch. 65, Sec. 4. It is also true that the Judge of Probate for Androscoggin County on January 11, 1898, promulgated an order to the effect that thereafter the Probate Court for said County should be held at Auburn on the second Tuesday of each month and be continued until final adjournment, which order is still in force.

These provisions are essential to the preservation of the rights of parties in interest. There must be fixed places and stated times for holding the sessions of the court at which all matters requiring public notice may be made returnable and all hearings may be held. Such a session cannot be held in a place or at a time other than the place and time legally designated. *White* v. *Riggs,* 27 Maine, 114. Nor can the Judge in the interim between terms, lawfully perform any judicial act except such as are authorized by statute to be performed in vacation, at least without the consent of all parties interested. Merrill Trust Company, Appellant, 104 Maine, 566, 573.

In the case at bar, however, no session of the court was attempted to be held in the Judge's office in Lewiston, no hearing was there had, no testimony taken. No judicial act was really performed there. The Judge affixed his signature to a decree upon an unopposed petition, it may have been to save time, placed it in his pocket and carried it over to the Probate Court Room in Auburn and then and there filed the petition and decree with the Register of Probate. To hold that the Judge could not sign such a decree in advance and in another place or room than the Probate Court room would be injecting a technicality into the statute that was never contemplated.

Suppose after a long hearing in Probate Court on an administrator's account, the Judge had taken all the papers to his home over night, in order to review and study them, and then in the morning had signed the decree in his home and carried it to the Probate Office and filed it. Is it possible that the signing in advance in another room than the Probate room would vitiate the official act? We do not think so. Signing the name under such circumstances is more in the nature of a clerical than a judicial act, and neither the letter nor the spirit of the statute is violated thereby.

The presiding Justice having ordered a nonsuit, the entry must be,

Exceptions sustained.
Action to stand for trial.

ALFRED P. CATE *vs.* FREDERICK T. MERRILL, et al.

Cumberland. Opinion November 4, 1912.

Contract. Computation of Interest. Demand. Interest. Legal Rate. Mortgage. Possession. Replevin. Title. Public Laws of 1899, Ch. 67, R. S., 1903, Ch. 46, Sec. 2, Public Laws, 1905, Ch. 90. Public Laws, 1907, Ch. 97.

1. The right of a mortgagee of personal property to take possession after default is so well established as to need no citation of authorities.
2. The only question involved so far as Frederick T. Merrill was concerned was whether the note, which was for four hundred and ninety dollars and interest at five per cent per month, for which the mortgage was given as security, had been fully paid.
3. A mathematical computation of the accumulated interest with deductions for payment both on interest and principal proves that a substantial balance was overdue at the time this action was brought.
4. A contract of this sort entered into between the parties in good faith and whose validity has been recognized by payment of interest at the agreed rate for several months cannot be regarded as unconscionable and illegal.
5. The default of the defendant being established, the right of the plaintiff to maintain replevin against Frederick T. Merrill is clear.
6. The uncontroverted evidence proved a demand on Carrie C. Merrill before suit brought, so her defense fails.

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

This is an action of replevin by a mortgage of personal property against the mortgagors after default.

fendant, Carrie C. Merrill, and denying plaintiff's title. The other

Frederick T. Merrill, one of the defendants, pleads the general issue with brief statement claiming title in himself and his co-de-defendant, Carrie C. Merrill, pleads the general issue with brief statement that she and her co-defendant retained possession of the goods in question by virtue of the terms of the mortgage and by permission of the plaintiff.

The presiding Judge refused to grant the plaintiff's motion to order a verdict for the plaintiff and the plaintiff excepted to said refusal.

The case is stated in the opinion.

William C. Eaton, for plaintiff.

Fabius M. Ray and Harry C. Wilbur, for defendants.

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

CORNISH, J. Action of replevin brought by the mortgagee of personal property against the mortgagors after default. One defendant, Frederick T. Merrill, pleaded the general issue with a brief statement denying plaintiff's title and claiming title in himself and his co-defendant Carrie C. Morrill. Under this plea the only issue was the title of the plaintiff. *McLeod* v. *Johnson,* 96 Maine, 271. The other defendant, Carrie C. Merrill, wife of Frederick T. Merrill, pleaded the general issue with a brief statement that she and her co-defendant retained possession of the goods in question by virtue of the terms of the mortgage, and by permission of the plaintiff. Proof of demand before bringing suit was necessary under the latter pleadings but not under the former.

The right of a mortgagee of personal property to take possession after default is so well established as to need no citation of authorities. The only question involved, so far as Frederick T. Merrill was concerned, was whether the note for which the mortgage was given as security had been fully paid. This note was for the sum of four hundred and ninety dollars, dated February 20, 1909, due

in one month with interest at the rate of five per cent per month until fully paid.

A mathematical computation of the accumulated interest with deductions for payment both on interest and principal proves that a substantial balance was overdue at the time this action was brought. While admitting the accuracy of this computation at the agreed rate, the defendants say that the contract was unconscionable and that therefore the jury had a right to compute interest at the legal rate of six per cent per annum and on that basis the note had been fully paid. Even upon the basis claimed by the defendants we think the evidence shows a small balance to have been due the plaintiff, but if there were none the legal claim cannot be conceded to be the rule in this State. A contract of this sort entered into between the parties in good faith, and whose validity has been recognized by the payment of interest at the agreed rate for several months cannot be regarded as unconscionable and illegal.

Prior to 1870, interest in excess of six per cent per annum was made usurious by statute, and such excess could be deducted from the amount due on the contract. R. S., 1857, Ch. 45, sec. 1, 2 and 3. This was repealed by chap. 124 of the Pub. Laws of 1870, which provided that "in the absence of any agreement in writing the legal rate of interest shall be six per cent per annum," and all acts inconsistent therewith were thereby expressly repealed. *Holmes* v. *French,* 68 Maine, 525. Subsequent amendments have limited the rate of interest allowable upon loans for less than two hundred dollars secured by mortgage or pledge of personal property. Pub. Laws, 1899, Ch. 67, R. S., 1903, Ch. 46, Sec. 2, Pub. Laws, 1905, Ch. 90, and Pub. Laws, 1907, Ch. 97, but there is now no statutory limitation upon the rate of interest collectible upon loans of over two hundred dollars. *Lindsay* v. *Hill,* 66 Maine, 212.

The default of the defendant being established, the right of the plaintiff to maintain replevin against Frederick T. Merrill is therefore clear.

So far as the co-defendant Carrie C. Merrill is concerned, it need only be said that the uncontradicted evidence abundantly proved a demand before suit brought, so that her defense fails also.

It is unnecessary to consider the motion, which the defendants claim was not seasonably filed, being a term subsequent to the

trial term and therefore in violation of Rule XIX of the Superior Court of Cumberland County. This point is well taken. Inasmuch, however, as the presiding Judge refused to grant the plaintiff's motion to order a verdict for the plaintiff, and a verdict for the defendants upon the undisputed evidence would not be allowed to stand, *Wellington* v. *Corinna,* 104 Maine, 252, the plaintiff's rights are as fully protected by his exceptions to this ruling as by a motion that the verdict is against the evidence.

The entry should therefore be,

Exceptions sustained.

MILO ELECTRIC LIGHT AND POWER CO., et als.

vs.

SEBEC DAM COMPANY.

Piscataquis. Opinion November 6, 1912.

Charter. Constitution. Corporations. Dam. Gates. Injunction. Log-driving. Mills. Property Rights. Sufficient Water. Vested Rights.

Defendant corporation was incorporated by c. 130, Priv. and Sp. Laws of 1866 and authorized to raise an existing dam at the outlet of Sebec Lake to a height to enable it "to obtain a sufficient head of water to drive logs and run the mills on Sebec River" and to collect tolls for logs driven. The act of incorporation was amended by c. 141, Priv. and Sp. Laws of 1903 and c. 339, Priv. and Sp. Laws of 1905. The latter provided that, whenever from the first day of March to the first day of July in each year the waters of Sebec Lake shall be needed for log driving and manufacturing purposes or at any time for manufacturing including power purposes on the several privileges of Sebec River, the gates of the dam shall be hoisted to the extent required to allow the escape of sufficient water therefor.

Held: that, the gates are not required to be raised to furnish water to float logs as needed for use in a mill located upon the river below the dam;

That, "sufficient water" is not merely the natural flow of the river;

That, "the mills on Sebec River" does not refer alone to those upon the dam of defendant but also to those upon privileges below the dam and not only to the mills then on the privileges below the dam but to such mills as might, in the development of industries, be located on those

privileges, provided the requirement for power be not in excess of the ability of the river to furnish when managed reasonably in the usual manner or in accordance with rights acquired by prescription, if any such exist;

That, the Legislature used the term "sufficient water" in the sense of sufficient water having due regard to the right of others "having property rights affected or which may be affected;" and

That, the act of 1905 is not unconstitutional but within the power reserved to the Legislature, of amendment, alteration or repeal of acts of incorporation.

On report. Decree may be entered and injunction granted by sitting Justice in accordance with opinion. Bill dismissed as to complainant, American Thread Company.

This is a bill in equity in which the plaintiffs seek an injunction restraining the Sebec Dam Company from holding water in Sebec Lake, contrary to its right and its charter. The defendant filed an answer and the plaintiffs filed the usual replication. The cause was then heard before the Justice of the first instance on bill, answer and evidence, and at the conclusion of the evidence, the cause was reported to the Law Court under the following stipulations. Questions of law having arisen of sufficient importance, or doubt, to justify the same, and the parties agreeing thereto, this cause is reported to the Law Court for decision. Upon so much of the evidence as is legally admissible the Law Court is to render such judgment as the legal rights of the parties may require.

The case is stated in the opinion.

J. B. & F. C. Peaks, and Guernsey & Hale, for plaintiffs.

Hudson & Hudson, for defendant.

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

BIRD, J. Prior to the year 1866 John Morrison and two associates had erected a dam at the outlet of Sebec lake to provide water power for the operation of their mills located at or near the outlet. Neither the height not date of erection of this dam is shown by the record. In the year 1866, Morrison and his two associates were incorporated as the Sebec Dam Company. The corporation was authorized "to raise their dam to a height to enable them to obtain a sufficient head of water to drive logs and run the mills on

Sebec river," and to demand and receive tolls on logs driven through the dam. Ch. 130, Priv. and Sp. Laws of 1866. We assume the charter was accepted and the dam increased in height. This act has been thrice amended. The first amendment, in point of time, simply reduced the tolls for driving logs (ch. 26, Priv. and Sp. Laws of 1899) and will not be hereafter referred to. The other amendments, enacted in the years 1903 and 1905, are devoted principally, if not wholly, to provisions restricting or regulating the use of the water held by the dam of defendant. They will be considered later.

Of the complainants, one, Milo Electric Light and Power Co., is the owner of a dam across Sebec river some distance below defendant's dam and engaged in the generation of electricity for light, heat and power. Some months before the bringing of the bill of complaint it entered into a contract to pump the water required for the plant providing the town of Milo with water. The third complainant, Boston Excelsior Co., is the owner of a dam below Sebec dam and a mill at Milo Village which it employs in the manufacture of excelsior. The other complainant, the American Thread Company, has a saw mill at Milo Village upon the river upon the water of which it depends for the floating of logs as required in its mill. In their bill, they allege that they are entitled to sufficient water, the first and third complainants to run their mills, and the other, to float its logs as required; that in the fall of 1910 the water was insufficient for their respective purposes; that they made demand upon defendant for sufficient water; that the demand was refused; that thereupon they opened the gates in Sebec dam which defendant closed; that the gates were again opened and that the agents of the complainants who opened the gates were subjected to arrest at the instance of defendant to the great loss and expense of complainants. They pray, first, that defendant be ordered and decreed to hoist its gates in its dam to the extent required by its charter to allow the escape of sufficient water whenever necessary for the purposes of manufacturing, including power purposes on the several privileges on Sebec river below Sebec dam and, second, that defendant be enjoined from closing its gates when water is necessary for the purposes set out in the first prayer for relief. The answer is a substantial denial of all the important allegations of the bill and a claim that complainants are entitled only to the natural

flow of the river, which it alleges they have enjoyed, or, if held to be entitled under the amendment of 1905 to more than the natural flow, the amendment is unconstitutional and therefore void. The case is here upon report.

As we have seen, the original charter of 1866 authorized the corporation to raise its dam to a height to enable it to obtain a sufficient head of water on Sebec pond to drive logs and run the mills on said Sebec river.

The act of 1903 restricts the defendant from July first to October fifteenth of each year from drawing the water below one foot from the bottom of the flood gates in the dam then existing, except the use of the water for manufacturing and other purposes for which power may be used on said dam and for creating power for the same and manufacturing on Sebec river, and the proper repair of the dam. This is coupled with a provision for seasonable notice to each cottage owner, mill owner and steamboat owner and hotel keeper on Sebec Lake and to the proprietors of the hotels on Sebec lake and Sebec village before making repairs.

The amendment of 1903 further provides that "Any person injured by any violation of the provisions of this charter shall have a remedy by injunction and by an action for damages." C. 141, Priv. and Spec. Laws of 1903.

In 1905 the act of 1866, as amended by the act of 1903 (c. 141, Priv. and Spec. Laws, 1903), was further amended by adding the following sections:

Section 7. All gates of said dam shall be kept tightly closed from the first day of March to the first day of July in each year. And during said period of time, from the first day of March to the first day of July in each year, none of said gates shall be hoisted except when necessary for log driving and manufacturing purposes on Sebec river as specified in said Chapter and amendments, but whenever during the period aforesaid the waters of Sebec Lake shall be needed for said purposes or at any time for manufacturing including power purposes on the several privileges of Sebec river, said gates shall be hoisted to the extent required to allow the escape of sufficient water therefor.

Section 8. The County Commissioners of Piscataquis County on petition of any person having property rights affected, or which

may be affected, under the provisions of the foregoing section, may appoint a resident of said county an agent who shall have the management of the gates of the Sebec Dam Company for such time as said commissioners may determine . . . c. 339, § 1, Priv. and Special Laws of 1905.

The defendant urges that the use of water by American Thread Company for the purpose of floating logs to its mill is not within the original act or its amendments. We are of the opinion that it is not. We think none of the amendments enlarges the purpose of the act of 1866 to afford water to run the mills which we must hold to mean to provide water for the turning of the machinery of the mills.

Under the amendment of 1905, is sufficient water simply the natural flow of the river as contended by defendant? We think not. The original act of 1866 authorized the raising of the dam to a height to enable the corporation to obtain a sufficient head of water to drive logs and run the mills on Sebec river. The word head was used in the sense of reserve and the authority granted was to make and maintain a reservoir of water sufficient to drive logs and run the mills. The inference is that the existing dam was inadequate and that the increase in the height of the dam was to provide stored waters for the purposes mentioned and consequently enable those in management of the gates of the dam to vent at times, when needed, more than the natural flow. Nor do we think "the mills on Sebec river" referred alone to those upon dam of defendant but to those upon the privileges on the river below the dam as well and not only to the mills then on the privileges below the dam but to such mills as might, in the development of industries, be located on those privileges, provided that the requirement for power be not in excess of the ability of the river to furnish when managed reasonably in the usual manner, or in accordance with rights acquired by prescription, if such exist. *Gould* v. *Boston Duck Co.*, 13 Gray, 442, 450, 452; *Keeney etc. Co.* v. *Union Mfg. Co.*, 39 Conn., 577; *Lockwood* v. *Lawrence*, 77 Maine, 297, 316; *Barrett* v. *Parsons*, 10 Cush., 367, 372; *Springfield* v. *Harris*, 4 Allen, 494, 496.

But the privileges below cannot require sufficient water in the broad meaning of the term. It is evident from the provisions of

Section 8 of the amendment of 1905 that the Legislature used the term "sufficient water" in a modified sense and in the sense of sufficient water regarding the rights of other interested persons "having property rights affected or which may be affected." The mills upon the dam, when in operation, are by the terms of the act entitled to sufficient water as well as the privileges below.

Moreover, the act of 1866, as we have seen made provision for water to run the mills on Sebec river by raising the height of the dam. The waters thus stored were to be available for the purposes mentioned. Even if the Legislature repealed the act of 1866, the result would be a reduction of the dam to its former height with the right of the mills upon the river below the dam to its natural flow.

Nor can we believe that it was the intention of the Legislature in the enactments under consideration to require the venting of sufficient water at any time without regard to the duty which defendant owed the public of driving logs seeking a passage down the river.

Defendant contends that the act of 1905 with the construction we have given it, is unconstitutional. Again we are unable to assent. Under the construction we have given to the various acts of the Legislature under consideration, no vested rights are impaired by the act of 1905. The act is but a regulation on the part of the Legislature of the use of the waters, provision for the storage of which was made by the act of 1866, for the purposes indicated by that act. This it had power to do by virtue of the provisions of § 2 of c. 47, R. S., reserving to the Legislature the power of amendment, alteration or repeal of acts of incorporation. As construed, we must hold the alterations made by the Legislature in the charter of defendant are not unreasonable, nor made in bad faith nor inconsistent with the object and scope of the act of incorporation; Sinking Fund Cases, 99 U. S., 700, 721. See also *Bienville Wat. Sup. Co.* v. Mobile, 186 U. S., 212, 222-223.

A decree may be entered and an injunction granted by the sitting Justice in accordance with this opinion, the injunction to be granted upon a renewed motion therefor and hearing thereon. The bill is dismissed as to complainant, American Thread Company.

So ordered.

FLORENCE E. HICKEY *vs.* GEORGE W. KIMBALL.

Cumberland. Opinion November 9, 1912.

Breach of Contract of Marriage. Condonation. Damages. Exceptions. Meretricious Relations. Motion. New Trial. Pari Delicto. Seduction.

1. In an action for breach of contract of marriage, if seduction is alleged, it may be shown in aggravation of damages on the ground that the damages resulting to the plaintiff by reason of the breach of the marriage contract cannot be justly estimated without taking into consideration that increased humiliation and keener sense of shame and disgrace, on account of the seduction which the breach of the contract of marriage subjects her to.

2. The plaintiff was not entitled to recover damages for the seduction itself, because she was a participant in the wrong. But having been seduced by the defendant, if his subsequent refusal to marry her according to his promise subjected her to keener humiliation and deeper shame, because of the seduction than otherwise would have been the case, then that additional element of aggravation of feeling was to be considered by the jury in estimating her damages because of the breach.

On motion and exceptions by defendant. Overruled.

This is an action for breach of promise of marriage wherein seduction is alleged in aggravation of damages. Plea, general issue with brief statement alleging a waiver by plaintiff and release from promise, if any. That the alleged promise of marriage by him was conditional upon the plaintiff's conducting herself in a womanly manner, which condition was broken and disregarded by her.

The jury returned a verdict for the plaintiff for $3500, and the defendant excepted to certain rulings of the presiding Justice and filed a general motion for a new trial.

The case is stated in the opinion.

L. E. Vernon, and Foster & Foster for plaintiff.

Guerney, Sturgis & Chaplin, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, KING, HALEY, JJ.

KING, J. This case is before the Law Court on defendant's exceptions and motion for a new trial. It is an action for a breach of promise of marriage, wherein seduction is alleged in aggravation of the damages. The verdict was $3500.

It is contended in support of the exceptions that it was incompetent to allow evidence of the alleged seduction. There are a very few decisions which so hold. The reason given for those decisions is, that, since a woman is not permitted, at common law, to recover for her seduction, she should not be permitted to do so indirectly by showing a seduction to increase her damages in an action for breach of promise of marriage. See *Wrynn* v. *Downey,* 27 R. I., 454, where Douglas, Ch. J., discusses the cases at length and argues in favor of the reason of the minority decisions.

But the great weight of authority is to the effect that evidence of seduction committed under promise of marriage is admissible in an action for the breach of such promise. *Lawrence* v. *Cooke,* 56 Maine, 187, 194; *Tyler* v. *Salley,* 82 Maine, 128; *Sherman* v. *Rawson,* 102 Mass., 395, 399; *Kelley* v. *Riley,* 106 Mass., 339; *Stokes* v. *Mason,* (Vt. 1911) 81 Atl., 162; *Wells* v. *Padget,* 8 Barb. (N. Y.) 323; *Kniffen* v. *McConnell,* 30 N. Y., 285; *Coil* v. *Wallace,* 24 N. J. L., 291; *Tubbs* v. *Van Kleek,* 12 Ill., 446; *Burnett* v. *Simpkins,* 24 Ill., 265; *Poehlmann* v. *Kertz,* 204 Ill., 418, 68 N. E., 467; *Sheahan* v. *Barry,* 27 Mich., 217; *Bennett* v. *Bean,* 42 Mich., p. 351; *Schmidt* v. *Dunham,* 46 Minn., 227, 49 N. W., 126; *Geiger* v. *Payne,* 102 Iowa, 581, 69 N. W., 554; *Lauer* v. *Banning,* (Iowa 1911) 131 N. W., 783, 786; *McKinsey* v. *Squires,* 32 W. Va., 41, 9 S. E., 55; *Kaufman* v. *Fye,* 99 Tenn., 145, 42 S. W., 25; *Spellings* v. *Parks,* 104 Tenn., 351, 58 S. W., 126; *Matthews* v. *Cribbett,* 11 Ohio St., 330; *Osmun* v. *Winters,* 25 Ore., 260, 35 Pac., 250; *Musselman* v. *Barker,* 26 Neb., 737, 42 N. W., 759; *Graves* v. *Rivers,* 123 Ga., 224, 51 S. E., 318; *Anderson* v. *Kirby,* 125 Ga., 62; *Bird* v. *Thompson,* 96 Mo., 424, 9 S. W., 788; *Liese* v. *Meyer,* 143 Mo., 547, 45 S. W., 282.

The doctrine established by this decided current of authority is, that, while damages for seduction, as a distinct cause of action, cannot be added to the damages for the breach of the promise of

marriage, yet if the fact of seduction is alleged it may be shown in aggravation of the damages, on the ground that the damages resulting to the plaintiff by reason of the breach of the marriage contract cannot be justly estimated without taking into consideration that increased humiliation and keener sense of shame and disgrace, on account of the seduction, which the breach of the contract of marriage subjects her to.

If it be conceded that the plaintiff and defendant are to be regarded as in pari delicto with reference to the act of seduction allowed to be shown, nevertheless, it is not to be overlooked that the wrongful act was committed in reliance upon a promise of marriage, the consummation of which in the contemplation of the parties undoubtedly would quite condoned the wrong, and place the plaintiff within the protection and respect of an actual marriage to her seducer where it is improbable, if not unnatural, that she would suffer any material mortification and shame because of their previous unlawful act.

But the breach of the promise to marry deprived her of all such protection and left her feelings, wounded by the rejection, exposed to the pains and sorrows incident to the humilation and shame of her seduction. That was the situation of the plaintiff at the time of the breach of the promise, and that situation should be shown and taken into consideration in ascertaining the full damages she is entitled to by reason of the breach. In *Sherman* v. *Rawson,* 102 Mass., p. 399, the court well said: "The plaintiff is entitled to compensation, but that term implies indemnity for all that she has suffered by the defendant's bad faith. It includes injury to her affections and wounded pride. It involves necessarily a consideration of all the circumstances of the plaintiff's actual situation at the time of the breach of the promise. If, by reason of an imprudent or criminal act in which both participated, she is brought to such a state that the suffering occasioned to her feelings and affections must necessarily be increased by his abandonment, then that would be but an inadequate and poor compensation which did not take it into account."

The jury were accurately instructed by the learned presiding Justice as to the purpose for which the evidence of seduction was admitted. They were told that the plaintiff was not entitled to

damages for the seduction itself, because she was a participant in that wrong. But, having been seduced by the defendant, if his subsequent refusal to marry her according to his promise; subjected her to keener humiliation and deeper shame, because of the seduction, than otherwise would have been the case, then that additional element of aggravation of feeling was to be considered by the jury in estimating her damages because of the breach. The instructions were correct, and the evidence of seduction properly admitted, in accordance with a doctrine well settled in practice and decision, and which seems to us reasonable and just.

An exception was also taken to the admission of evidence tending to show that an abortion was performed upon the plaintiff in which the defendant participated, either by performing it himself or procuring it to be done. This evidence was admissible as tending to show that the defendant was guilty of the alleged seduction of the plaintiff. That was the only significance of that evidence, and the court in charging the jury expressly so instructed them.

As to the other exceptions taken we find no error in the rulings complained of, and they are not urged in the brief of the learned counsel for the defendant.

The motion. The plaintiff's contention, briefly stated, as we gather it from the record, is this: That after she and the defendant had been "keeping company" with each other for several months, an engagement of marriage was entered into between them in the year 1905 or 1906; that she was then about 24 years of age, and he 30; that he had been married, and was keeping a country grocery store adjoining her father's dwelling house; that about six months after the engagement their relations became meretricious resulting in her pregnancy, and that an abortion was performed upon her by him or by his procurement; that the marriage ceremony was deferred by mutual consent during the lifetime of the plaintiff's parents because of their opposition to the defendant; that, although they had petty quarrels, the engagement continued in force and effect; that the subject of their marriage was often discussed between them, and that on at least two other occasions he specifically promised to marry her—in 1909 after the death of her father, and in 1910 after the death of her mother; that she had never released him from his promise or in any manner waived it, and that

it was a subsisting contract between them at the time of his marriage to a Miss Brown in January, 1911.

The defendant on the other hand, admitting that he kept company with the plaintiff during the period as claimed by her, and that their relations were meretricious, claimed that he never promised to marry her until the fall of 1909; that they had been having more or less trouble, and finally he then promised to marry her on condition that she should conduct herself in a becoming manner for six months; and that she did not fulfill that condition, whereby he was released from his promise. All this she denied.

The presiding Justice in his charge to the jury, presented the issues involved in the question of the defendant's liability in these words: "If you find either that there was no subsisting valid contract between them at the time of his marriage to Miss Brown, that is, a contract made by both and still subsisting so far as she was concerned, she never having waived it or abandoned it—if you find there was no such contract, your verdict will be for the defendant. If, on the other hand, you find that there had been a promise of marriage which she never had waived, and which she had not forfeited by misconduct, then you will be authorized to return a verdict for the plaintiff."

In addition to the testimony of the parties there were other facts and circumstances shown more or less in corroboration of their respective claims and contentions. The evidence is voluminous. We have examined it with care, and we are not pursuaded that the finding of the jury in the plaintiff's favor is unmistakably wrong.

As to the damages. The law furnishes no precise or definite rule of damages in a case like this, and their assessment is peculiarly within the province of the jury. They were to be computed on the principle of indemnity and reasonable compensation for the plaintiff's loss by reason of the breach of the promise of marriage. The jury had the right to consider, and undoubtedly did consider, as elements of the plaintiff's damage, the loss to her by reason of the disappointment of her reasonable expectations, in other words, the money value or wordly advantage to her of a marriage with the defendant, also the wound and injury to her affections caused by the rejection, and finally the distress of mind and mortification that she had suffered and will suffer as a result of the defendant's bad

faith in breaking his promise to marry her in view of their meretricious relations under the promise of the marriage.

Although the damages awarded in this case seem quite liberal in view of the evidence of the defendant's financial worth at the time of the breach, nevertheless they do not appear to us to be so clearly excessive or disproportioned to the plaintiff's loss, resulting from the defendant's breach of his promise to marry her, under all the circumstances disclosed, that the verdict ought to be disturbed on that ground.

Exceptions and Motion overruled.

NANCY M. DENSMORE *vs.* WILLIAM T. HALL.

Sagadahoc. Opinion November 9, 1912.

Action. Abatement. Demurrer. Equity. Limitation. Motion. Matter of Form. Sec. 94, Ch. 83, R. S., Ch. 62, Laws 1821. Sec. 17. Ch. 146, revision of 1840. Returnable. Statute. Writ.

1. On the 28th of July, 1910, an action was commenced on a promissory note which would otherwise have been barred by the six years limitation on the first day of August, 1910. The writ was made returnable on the fourth Tuesday of December, 1910, of the Supreme Judicial Court for Sagadahoc County, and was entered at said December term, and on the second day of said term the defendant filed a motion to dismiss the action because it was made so returnable, when it should have been made returnable at the August Term of said court, and said action was accordingly dismissed.
2. A writ, dated July 28, 1910, and made returnable to the Supreme Judicial Court for Sagadahoc County on the fourth Tuesday of December, 1910, when it should have been made returnable to the said court at the August term of said court, 1910, was properly dismissed on motion.
3. This action declaring upon the same note was commenced by writ dated June 29, 1911, and entered at the August term, 1911. *Held:* "That the action was barred by the Statute of Limitations."
4. The provisions of Chapter 83, Section 94, of the Revised Statutes, are not applicable to a case like this, when the original writ was made returnable after an intervening term contrary to law.

On exceptions by defendant. Overruled.

On July 28, 1910, an action was commenced on a promissory note. The writ was duly served on the defendant and made returnable at a term of the Supreme Judicial Court to be held at Bath, in the County of Sagadahoc, on the fourth Tuesday of December, 1910, instead of the intervening term of said court held at said Bath on the third Tuesday of August, 1910. The defendant filed a motion on the second day of said December term to dismiss said action, and in accordance with said motion, the Justice presiding dismissed said action. On June 29, 1911, this action for the same cause was commenced and the writ made returnable to the Supreme Judicial Court to be held at Bath, in Sagadahoc County, on the third Tuesday of August, 1911.

Plea, general issue and by brief statement the Statute of Limitations was pleaded. The presiding Justice ordered a nonsuit and the plaintiff excepted to said order.

The case is stated in the opinion.

Samuel Titcomb, and Benedict F. Maher, for plaintiff.

William T. Hall Jr., for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

KING, J. On the 28th of July, 1910, an action was commenced on a promissory note which would otherwise have been barred by the six years limitation on the first day of August following. The writ was made returnable at the term of the Supreme Judicial Court for Sagadahoc County to be held on the fourth Tuesday of December, 1910. It should have been returnable at the August term of said court, 1910. It was entered at said December term and on the second day of the term the defendant filed a motion to dismiss the action because it was made so returnable. On the 6th day of the term, which was the second day of January, 1911, the plaintiff demurred to the motion to dismiss, which demurrer on that day was overruled, and the motion to dismiss sustained. Exceptions to that ruling were filed and allowed, and at the June term of the Law Court, 1911, the exceptions were overruled for want of prosecution. This action declaring upon the same note was commenced by writ dated June 29th, 1911, entered at the August term of said court 1911 and continued to the December term 1911, when and where it was heard upon the defendant's plea of the statute of

limitations and a nonsuit ordered. The case is now before the Law Court on exceptions to that ruling.

The plaintiff's answer to the plea of the statute of limitations was, that the action was authorized by Sec. 94, c. 83, R. S., which is as follows: "When a writ fails of sufficient service or return by unavoidable accident, or default, or negligence of the officer to whom it was delivered or directed, or is abated, or the action is otherwise defeated for any matter of form, or by the death of either party; or if a judgment for the plaintiff is reversed on a writ of error, the plaintiff may commence a new action on the same demand within six months after the abatement or determination of the original suit, or reversal of the judgment; and if he dies and the cause of action survives, his executor or administrator may commence such new action within six months."

The original action was properly dismissed under the motion. *McAlpine* v. *Smith,* 68 Maine, 423 is an authority directly in point in which it is held that a writ returnable after an intervening term is voidable, and may be abated or dismissed on motion. The dismissal of the writ under the motion is therefore equivalent to its abatement. The present action was commenced within six months after the dismissal of the original writ,—in fact it was commenced within six months after the ruling at *nisi prius,* which was on January second, 1911.

The real and only question, therefore, to be determined here is, whether the provisions of Sec. 94, c. 83, are applicable to a case like this, where the original writ is abated because returnable after an intervening term contrary to law. We think that question must be answered in the negative.

It is claimed in behalf of the plaintiff that the original action was abated because of a defect in a "matter of form," and hence the saving proviso of the statute applies. It may not be easy to determine whether the fact that the writ was made returnable contrary to law is a defect in form. Defects in form are amendable, but clearly this writ was not amendable at the time it was dismissed. The term to which it should have been made returnable had passed. Its date could not have been changed because that was not erroneous. It is difficult to point out wherein the writ was defective in matters of form. Perhaps it should be regarded as an unlawful writ, rather than one defective for informalities.

But in our view of the case it is not necessary to determine if the infirmity of the original writ on account of which it was dismissed was a defect in a matter of form. We think it was not a "writ" within the meaning of that word as used in the proviso of the statute. The statute of limitations is founded on a presumption that a debt has been paid or otherwise discharged after the lapse of a certain time during which the creditor has made no attempt to enforce it or revive it. But that presumption does not arise if within the time limited the creditor resorted to legal proceedings to recover the debt; and the saving proviso of the statute now under consideration grew out of this obvious consideration. It was predicated on the fact that the creditor had written the time limited in good faith commenced an action on the debt. Not an action, however, so perfect that it might not be abated or defeated for some defect in matter of form, but at least an action adapted to enforce the cause of action. The proviso was to protect a diligent creditor from losing his cause of action on account of the abatement of his timely and appropriate action because of some matter not affecting its merits, but not to afford the means for a designing creditor to use to extend his cause of action in violation of the statutory limitation.

If a creditor can *carelessly* bring an action returnable after one intervening term and be permitted under this proviso to bring another within six months after the first is abated, it is difficult to understand why he may not *purposely* make the first action returnable after any number of intervening terms, and thereby extend his cause of action at his option. It would therefore seem reasonable that the statute was not intended to apply to a case like the one at bar.

But the meaning and application of the provisions of Sec. 94, c. 83, is plainly disclosed by an examination of the statute as originally enacted. Our general statute of limitations, containing the proviso, was passed in 1821, c. 62. After specifying the limitations for various actions it provides, in section 8, as follows: "That any action of the case or of debt grounded upon any lending or contract, or for arrearages of rent which shall be actually declared upon in a proper writ, returnable according to law, purchased therefor, within the term of six years next after the cause of such action

accrued; shall be deemed and taken to be duly commenced and sued within the meaning of this Act."

By Sec. 11 of the same chapter the proviso was enacted in these words: "That any action which shall be actually declared in as aforesaid, and in which the writ purchased therefor, shall fail of a sufficient service or return by any unavoidable accident or by the default, negligence or defect of any officer to whom such writ shall be duly directed, or when such writ shall be abated, or the action thereby commenced shall be avoided by demurrer or otherwise, for informality of proceedings; then or in any such case, the plaintiffs or plaintiff, or his or her executor or administrator, may commence another action upon the same demand and shall thereby save the limitation thereof, anything in this Act notwithstanding:" Then follows the provision as to the time within which the new action could be commenced, etc.

The framers of the original statute regarded the necessity of defining the term "action" as used in the act, and accordingly it was defined in Sec. 8 to be one "declared upon in a proper writ, *returnable according to law,*" etc. It is of course manifest that the word "action" as used in Sec. 11 has the same meaning as was ascribed to it in Sec. 8. With reference to the words "a proper writ" the court of Massachusetts, in *Woods and others* v. *Houghton,* 1 Gray, 580, 583, said: "We could not have understood 'a proper writ' to mean a writ that could not be abated or defeated for any matter of form, but must have understood it to mean a writ adapted to the cause of action." That construction seems just and reasonable. But the other part of the definition, "returnable according to law," needs no judicial construction, for there can be no doubt as to its meaning. It is definite and explicit. The proviso as originally enacted therefore was not applicable to an action commenced by a writ not made returnable according to law.

The marginal note to said Sec. 8 is: "What shall be deemed the commencement of a suit." Against a similar marginal note in the revision of 1840 is Sec. 17, of Chap. 148, which reads: "The time, when a writ is actually made, with an intention of service, shall be deemed the commencement of a suit in respect to the limitations of this chapter." This is the revised and condensed statement of Sec. 8 of ch. 62, laws of 1821, for we find no intervening

legislation referring to the matter. Later revisions have still further condensed the expression, and in the statutes of 1903 it reads: "A suit is commenced when the writ is actually made with intention of service." Sec. 98, ch. 83. The change in the phraseology in the re-enactment of a statute occasioned by condensation in a general revision does not change the meaning of the statute unless there is an evident legislative intention to work such change. *Martin* v. *Bryant,* 108 Maine, 253, 256. It was necessary that the word "action" as used in the original statute of limitations should be defined. It was explicitly defined in Sec. 8, ch. 62, L. 1821. There is no reason perceivable why the Legislature should have changed or modified that definition. Further there is no legislative act found whereby it was changed or modified. And still further, there is nothing to indicate that the Legislature ever had any intention to change it. It must therefore be held, we think, that its meaning and effect has not been changed by the condensed phraseology of the subsequent revisions.

It is the opinion of the court therefore that the word "writ" as used in Sec. 94, ch. 83, R. S., means at least, a writ made returnable according to law. Since the writ in the original action dated July 28, 1910, was not made returnable according to law, it was ineffectual to save the cause of action from being barred by limitation.

It follows as the conclusion of the court that the statute of limitations pleaded in this case was properly sustained as a bar to the action, and the nonsuit rightly ordered.

Exceptions overruled.

JONAS EDWARDS *vs.* AMERICAN EXPRESS COMPANY.

Androscoggin. Opinion November 11, 1912.

Bill of Lading. Contract. Consignee. Carrier. Destination. Delivery Instructions. Option of Carrier. Transportation. Re-shipping.

The contract in this case which was evidenced by a bill of lading of the standard form employed in shipping livestock, contained the stipulation for the transportation of twenty-eight horses, Big 4 Car 287, from East St. Louis, Illinois, to Detroit, Maine, consigned to Jonas Edwards at Detroit. On the margin of bill of lading, the following was written in pencil: "Consignee's request is that horses be fed and watered and unloaded at Auburn, Maine, besides Buffalo, New York." There was no express requirement that the car containing the horses should go by way of Auburn, Maine, and no provision in the contract requiring the shipment to be made by any particular route.

It is a well settled rule in the law of carriers where a bill of lading contains no stipulation prescribing the particular route by which the shipment of goods shall be made, the carrier has the option to select any one of the ordinary routes of travel which is reasonably safe and expeditious and not excessive in its charges.

On report. Judgment for the plaintiff for $20 with interest from May 12, 1911

This is an action to recover damages for an alleged breach of the defendant's contract with the plaintiff, who resided at Auburn, Maine, to transport twenty-eight horses from East St. Louis, Illinois, to Detroit, Maine. On the margin of the bill of lading, consignee's request that the horses be fed and watered and unloaded at Auburn, Maine, besides Buffalo, New York. The stipulation in the bill of lading was for the transportation of twenty-eight horses, Big 4 Car 287, consigned to Jonas Edwards at Detroit, Maine.

At the conclusion of the evidence, the case was reported to the Law Court for determination. The court, upon so much of the

evidence as is legally admissible to render such judgment as the law and the evidence require.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

White & Carter, for defendant.

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

WHITEHOUSE, C. J. This is an action to recover damages for an alleged breach of the defendant's contract with the plaintiff who resided at Auburn, Maine, to transport 28 horses from East St. Louis, Illinois, to Detroit, Maine.

The contract was evidenced by a bill of lading of the standard form employed in shipping livestock. The following memorandum was written in pencil on the margin, namely: "Consignee's request is that horses be fed and watered and unloaded at Auburn, Maine, besides Buffalo, New York." The stipulation in the bill of lading was for the transportation of 28 horses Big 4 car 287, consigned to Jonas Edwards at Detroit for the sum of $355. There was no express requirement that this car should go by the way of Auburn, Maine, and there was no provision in the contract requiring the shipment to be made by any particular route. The plaintiff complains in his declaration that the horses were transported by a route which did not pass through Auburn and that they were not unloaded, fed and watered at Auburn in accordance with the consignee's request, and he avers that in consequence of the defendant's failure to transport the horses by way of Auburn he was deprived of his lawful right to accept delivery of them at Auburn and to excuse the defendant from the further performance of the contract. It appears that in fact the plaintiff desired and intended to have sixteen of the horses left at Auburn and twelve only actually delivered at Detroit, and he claims to recover as damages $26, for the express paid for re-shipping sixteen horses from Detroit back to Auburn and $35.92 for plaintiff's loss of time and expenses of men besides an overcharge of $20 inadvertently made.

The case comes to the Law Court on report. It is admitted in the agreed statement that the shipment of horses in question left East St. Louis May 9, 1911, at 8.18 P. M. on "Big Four" train

numbered 24, which was a passenger train. On their arrival at Buffalo the horses were unloaded, fed and watered and given five hours rest, according to the request in the memorandum on the bill of lading. They left Buffalo at 5.40 A. M. of May 11, arrived in Boston at 7.50 P. M. of the same day, were shipped from Boston May 11 at ten P. M. on a passenger train running by way of Portland and Augusta to Waterville, arriving at Waterville at four A. M. on May 12, and left Waterville by the first train at 7.15 A. M. of May 12 arriving at their destination at Detroit, Maine, the same morning.

The car containing the horses traveled by passenger trains the entire distance from Buffalo, New York, to Detroit, Maine. There was no train leaving Boston on the night of May 11, after the arrival of the horses there at 7.50 P. M., which ran by the way of Auburn. At Portland the car containing the horses might have been detached from the train on which they left Boston, held at Portland and forwarded to Auburn on the train leaving Portland at seven o'clock the following morning and reaching Auburn at 8.15 A. M. which was the same time the horses reached their destination at Detroit, Maine. May 12, 1911, the plaintiff paid for the services rendered under the contract at Detroit, Maine, $398.25, of which the sum of $23.25 was the advance charge for unloading, feeding and watering the horses at Buffalo.

It is a well settled and familiar rule in the law of carriers that where a bill of lading contains no stipulation prescribing the particular route by which the shipment of goods shall be made, the carrier has the option to select any one of the ordinary routes of travel which is reasonably safe as well as expeditious and not excessive in its charges. *McElveen* v. *So. Ry. Co.*, 109 *Georgia*, 249, 77 Am. St. Rep. 375; *Patten, et als.* v. *Union Pac. Ry.*, 29 Fed. Rep., 591; Elliott on Railroads, Vol. 4, Sec. 1440 and notes.

But it is contended in behalf of the plaintiff in the case at bar that the consignee's request that the horses be unloaded, watered and fed at Auburn became a part of the contract and imposed upon the defendant the obligation to make the shipment of the horses by way of Auburn. It has been seen, however, that all of the twenty-eight horses were consigned to Jonas Edwards at Detroit, Maine, and the defendant had no knowledge of the plaintiff's secret pur-

pose to have sixteen of them unloaded and retained at Auburn until the evening of May 11, when there was a discussion between the plaintiff's agent and the defendant's express agent at Lewiston respecting the rule authorizing the defendant to make a charge of $10 a head for every horse unloaded and kept at Auburn under the conditions then existing, and even then it does not appear that the express agent was requested by the plaintiff or his representative to instruct the conductor of the train, then near Boston, to have the car containing the horses sent through Auburn.

It has been seen that the horses coming by the route through Augusta arrived at their destination at Detroit at the same hour at which they would have arrived at Auburn if the car had been detached from the train at Portland, and sent through Auburn by the seven o'clock train on the morning of the 12th, although Detroit is seventy miles further east than Auburn. In view of this fact, and of the fact that the through rate by express from East St. Louis to Detroit is the same as that to Auburn, it is not denied by the plaintiff that the route through Augusta was an expeditious one and one which the defendant was justified in selecting, unless bound to go through Auburn by force of the plaintiff's request to have the horses watered and fed there. In the absence of information that any of the horses were to be left at Auburn, the defendant was warranted in assuming that the only purpose of his request for watering and feeding was to insure suitable care for the horses and to keep them in proper condition for use or sale. It was known that if the horses were shipped by the Augusta route, proper care would not require them to be fed and watered until they reached their destination at Detroit, and the needless expense of unloading, watering and feeding at Auburn would thus be avoided.

But the plaintiff further contends that in view of the confident claim of the defendant's local agent that the plaintiff would be chargeable with $10 for every horse unloaded and retained at Auburn, he decided on the evening of May 11th, to accept delivery of all the horses at Auburn and relieve the defendant of the further performance of its contract. The express agent denies that any such decision was made known to him on the evening of May 11th, and states that the first knowledge he had of it was on the morning of May 12, after the horses had arrived at Detroit. There is a

sharp conflict of testimony upon this question, and it is sufficient to say that the plaintiff's contention does not seem to the court to be established by a preponderance of the evidence. It is fairly to be inferred from all the evidence that the real object of the plaintiff in having all of the horses consigned to him at Detroit and requesting that they be watered and fed at Auburn, was to hold sixteen of them at Auburn and save the local express rate on the other twelve horses from Auburn to Detroit. But this plan was defeated by the regulation requiring an unloading charge of ten dollars a head.

The conclusion is that there was no breach of contract on the part of the defendant company. But on account of the inadvertent overcharge admitted by the defendant, the certificate must be,

Judgment for the plaintiff for $20, with interest from May 12, 1911.

LUCINDA N. JONES

vs.

THE CO-OPERATIVE ASSOCIATION OF AMERICA.

Androscoggin. Opinion November 9, 1912.

Damages. Due Care. Elevator. Evidence. Exceptions. Immature Operator. Chapter 4 of Public Laws of 1907. Negligence.

1. It is provided by section one of chapter four of the Laws of 1907 that "no person, firm or corporation, shall employ or permit any person under the age of fifteen years to have the care, custody, management or operation of any elevator," under the penalty prescribed in section two.
2. The boy employed to operate and control the defendant's elevator at the time of the plaintiff's injury was fourteen years and five months old.
3. The fact that he was employed by the defendant in violation of law, to operate and control this elevator, was competent but not conclusive evidence of the defendant's negligence with respect to all consequences resulting from a failure of duty on the part of such boy of immature age; and if it is unexplained, and taken in connection with other facts and circumstances, it may be conclusive evidence of such negligence on the part of the defendant.

4. It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator as to all consequences that the statute was intended to prevent.
5. It was incumbent upon the defendant to exercise such thoughtfulness, prudence and discrimination in the selection of elevator boys as the proper discharge of that duty and the situation and circumstances demanded, having regard to the serious consequences likely to flow from a negligent or unskillful operation and management of the elevator.

On exceptions by the plaintiff. Sustained.

This is an action to recover damages for personal injuries to the plaintiff resulting from the alleged negligence of the defendant in the operation and control of the elevator in its store in Lewiston.

It is alleged in the declaration that the defendant negligently and carelessly placed in charge of the elevator to run and operate the same, an inexperienced, incompetent and unsuitable boy of immature years, contrary to law. Plea, general issue.

At the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit upon the defendant's motion, with a stipulation on the part of the defendant that if, for any reason, the order for a nonsuit is overruled, and the case sent back for trial, the question of damages only shall be submitted to the jury. The plaintiff excepted to the order for nonsuit.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

WHITEHOUSE, C. J. This is an action to recover damages for personal injuries to the plaintiff resulting from the alleged negligence of the defendant in the operation and control of the elevator in its store in Lewiston known as the Peck Department Store. The negligence complained of is described in the plaintiff's declaration in substance as follows: The defendant carelessly and negligently placed in charge of the elevator, to run and operate the same, an inexperienced, incompetent and unsuitable boy of immature years, contrary to law, and negligently permitted another of its employees, a boy of immature years, to ride on the elevator without any business or

employment thereon. The boy in charge of the elevator started the same by means of the lever, and ran it, with the plaintiff and the other boy thereon, down to the first floor of the store, and there stopped it for the plaintiff to alight; and while the plaintiff, in the exercise of due care, was attempting to alight by stepping out on to the first floor, the boy in charge of the elevator negligently failed to guard and protect the lever, and left the same unattended and unguarded, and while so left the other boy meddled with the lever and set the same in motion, whereby the elevator was suddenly and without warning started in motion with great force, so that the plaintiff was thereby thrown with great force and violence to the first floor of the store, fracturing the bone of her arm near the shoulder and causing the other injuries of which she complains.

It is provided by section one of chapter 4 of the Laws of 1907 that "No person, firm or corporation shall employ or permit any person under the age of fifteen years to have the care, custody, management or operation of any elevator," under the penalty prescribed in section two.

Peter Hayes, the boy employed to operate and control the defendant's elevator at the time of the plaintiff's injury, was fourteen years and five months old.

The fact that Hayes was employed by the defendant in violation of law, to operate and control this elevator, was competent but not conclusive evidence of the defendant's negligence with respect to all consequences resulting from a failure of duty on the part of such boy of immature age; and if it is unexplained, and taken in connection with other facts and circumstances, it may be conclusive evidence of such negligence on the part of the defendant. As stated by this court in *Larrabee* v. *Sewall,* 66 Maine, 381, "It may be 'strong evidence' that a party is in the wrong when he is doing that which the law forbids him to do." *Neal* v. *Randall,* 98 Maine, 69; *Moore* v. *Maine Central R. R.,* 106 Maine, 297. In *Brown* v. *Whitman,* 209 Mass., 166, the defendant was operating an automobile without a license, and it is said in the opinion, "It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator as to all consequences that the statute was intended to prevent. See also *Berdos* v. *Tremont & Suffolk Mills,* 209 Mass., 489; *Doolan* v. *Pocasset Mfg. Co.,* 200

Mass., 200; *Finnegan* v. *Winslow Skate Mfg. Co.,* 189 Mass., 580; and *Steele* v. *Jaeger Automatic Machine Co.,* 220 Penn., 617.

On the day of the injury in the case at bar, the plaintiff, a lady sixty-seven years of age, accompanied by her daughter, made some purchases at the defendant's store, and after lunching at the restaurant on the fourth floor, took the elevator in charge of the boy Peter Hayes, for the purpose of returning to the first or street floor. At the third floor the elevator was stopped by Hayes and another boy by the name of Lloyd Kritz, who was also in the employment of the defendant, and apparently of about the same age as Hayes, was taken into the elevator. The two boys were "playing and fooling" coming down to the first floor, Kritz making several attempts to seize and control the lever by which the elevator was operated. But Hayes retained control of it until the street floor was reached when the elevator was stopped, and according to the testimony of the plaintiff's daughter, Hayes "opened the door and stepped across away from the lever, or away from his post of duty," leaving the lever unguarded and Kritz within reach of it. The plaintiff's daughter stepped out and just as the plaintiff was in the act of alighting, and before her foot reached the floor, Kritz seized the unguarded lever and started the elevator up with a jerk, throwing the plaintiff heavily to the floor and causing the injuries of which she complains.

At the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit upon the defendant's motion, with a stipulation on the part of the defendant that "if for any reason the order for a nonsuit is overruled, and the case sent back for trial, the question of damages only shall be submitted to the jury."

It was incumbent upon the defendant to exercise such thoughtfulness, prudence and discrimination in the selection of elevator boys as the proper discharge of that duty and the situation and circumstances demanded, having regard to the serious consequences likely to flow from a negligent or unskillful operation and management of the elevator. He was prohibited by statute from employing any boy under fifteen years of age. A boy of more mature years and judgment might have anticipated that it would be necessary to guard the lever of the elevator with vigilance in order to prevent the mischief which might be caused by an intermeddling play-

mate who had shown an eager desire to obtain control of the lever and operate the elevator himself.

There is no suggestion of any want of due care on the part of the plaintiff herself, and under all the circumstances, it is the opinion of the court that the question of the defendant's negligence should have been submitted to the jury, and that there was sufficient evidence to support a verdict in favor of the plaintiff upon that issue.

According to the stipulation of the parties, the certificate must therefore be,

Exceptions sustained; case to stand for trial upon question of damages only.

FLEETWOOD PRIDE, in Equity *vs.* PRIDE LUMBER COMPANY et als.

Aroostook. Opinion November 12, 1912.

Bill in Equity. Claims. Corporations. Collusion. Decree. Directors. Equity. Fraud. Meetings. Notice. Officers. Stockholders. Salaries.

1. The allegations in a bill in equity brought by a minority stockholder against a corporation and a majority of the directors, who are also a majority of the stockholders, that the individual defendants corruptly and collusively conspired to convert the property of the corporation to their own use, in fraud of the corporation and in violation of their duty as directors, that they voted and paid themselves salaries greatly in excess of the value of their services, that, instead of paying the debts of the corporation they converted its funds to their own use, that the plaintiff is a creditor as well as a stockholder, that the individual defendants as majority stockholders control the stockholders' meetings, and manage and control the affairs of the corporation for their own benefit, so that the plaintiff is unable to obtain redress through the corporation, state a case appropriate for equitable relief.
2. In such a case, equity has jurisdiction, and will upon proper proof require the individual defendants to account to the corporation and to restore moneys wrongfully received by them.
3. In a bill in equity, brought according to the course of the common law, by a minority stockholder, who, is also a creditor, to compel directors to restore property and funds of the corporation wrongfully received by them, the court will not ordinarily take jurisdiction to determine the amount of the plaintiff's claim as creditor and order it paid.

4. But in such a case, if it appears that the defendants' breach of trust was wilful, and their conduct collusive and fraudulent, and subversive of the interests of the corporation, the court, if necessary for the protection of the rights of minority stockholders and creditors, and as incidental to the accounting, will not only require the offending directors to account, but will retain jurisdiction of the fund produced thereby, and appoint a receiver to administer it. And in that event, the court has jurisdiction to determine the amount of the plaintiff's claim, and order it to be paid out of the fund, first taking such measures as may be necessary to protect the rights of other creditors.

5. Directors of a corporation have no lawful power to vote salaries to themselves.

6. Directors having valid claims against a corporation cannot prefer themselves to other creditors, if there is not enough to pay all.

7. On appeal from a decree in equity all questions which appear in the record are open.

8. In the absence of statutory power, a court in equity has no jurisdiction to decree the dissolution of a corporation and the distribution of its assets, at the suit of one or more of the stockholders, and the same is true when there is statutory power, if the bill seeks relief only at common law.

In equity. On appeal by defendants. Bill sustained with costs on appeal. Decree in accordance with the opinion.

This is a bill in equity by a minority stockholder in the defendant corporation. The individual defendants, Henderson and Bradstreet, are the other stockholders. The bill alleges that the individual defendants corruptly and collusively conspired to wreck the corporation and convert its property to their own use as individuals in fraud of the corporation and in violation of their duties as directors; that they voted and paid to themselves salaries greatly in excess of the value of their services and have not devoted the funds of the corporation to the payment of debts of the corporation.

All of the defendants filed answers and the plaintiff filed the usual replications. This cause was heard on bill, answers and proof, and a decree filed sustaining the bill, from which decree the defendants appealed.

The case is stated in the opinion.

Hersey & Barnes, for plaintiff.

Butler & Butler, for defendant.

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

SAVAGE, J. The plaintiff is a minority stockholder in the defendant corporation. The individual defendants, Henderson and Bradstreet are the other stockholders. Each of the three owns one-third of the capital stock. All are directors. Henderson is president and Bradstreet is clerk and treasurer. The corporation has ceased to do business as a going concern, and is practically defunct, but is not alleged to be insolvent. The bill alleges that the individual defendants corruptly and collusively conspired to wreck the corporation, and to convert its property to their use as individuals, in fraud of the corporation and in violation of their duty as directors; that they voted and paid themselves salaries greatly in excess of the value of their services; that they have not devoted the funds of the corporation to the payment of debts, but, instead, have converted the funds to their own use; that the plaintiff is a creditor as well as a stockholder; that these defendants as majority stockholders control the stockholders' meetings and manage and control the affairs of the corporation for their own benefit, so that he is unable to obtain any redress through any action on the part of the corporation. These allegations state a case cognizable in equity. If true, the plaintiff as minority stockholder is entitled to pursue this remedy. *Trask* v. *Chase,* 107 Maine, 137.

The prayer of the bill is that the individual defendants and the corporation be restrained from issuing and selling stock of the corporation; from paying Henderson and Bradstreet any salaries, and from expending any funds of the corporation; that Henderson and Bradstreet be ordered to make an accounting; that Henderson and Bradstreet be decreed to be trustees for the corporation in respect of all sums received by them for salaries which they voted to themselves; that they be ordered to restore to the corporation all amounts wrongfully withdrawn by them; that the debts of the corporation be ordered paid; and that a receiver be appointed to receive the property of the corporation, and to make disbursements as may be directed by the court.

The Justice who heard the case below granted a perpetual injunction against the defendant corporation from doing any further business; ordered Henderson and Bradstreet to restore to the treas-

ury of the corporation money withdrawn and paid to themselves in the way of salaries, decreed that the debts of the corporation should be paid; and appointed a receiver. From this decree the defendants appealed. Subsequently the Justice filed another decree containing the same matter as the first, with the addition that the receiver should pay the plaintiff the sum of $13,023.19, the same being the amount found due to him, and that the plaintiff's claim for salary, on one side, and the salaries claimed by Henderson and Bradstreet on the other, should be disallowed. Of the effect of this latter decree we will speak later.

It will be noticed that the plaintiff prays for relief of two entirely distinct kinds, (1) that the individual defendants account to the corporation, and restore moneys wrongfully received by them; (2) that the corporation be ordered to pay him what it owes him. To afford the first remedy, equity clearly has jurisdiction. To afford the latter, equity ordinarily will not take jurisdiction, except as incidental to strictly equitable relief.

I. *The accounting.* The single Justice made no specific finding of facts. But his conclusion necessarily involves certain findings, and such findings, unless clearly wrong, must be regarded as conclusive. The decree shows that he found that Henderson and Bradstreet had received moneys for salaries which they were not entitled to retain. We think the finding was right. Briefly stated, the situation was this. The plaintiff was engaged in the lumbering business, cutting, driving and sawing logs. He owned certain permits and contracts, certain logs that had been cut, certain statutory privileges on streams, a mill, teams, boilers and other things connected with the business. He was in debt. The Pride Lumber Company, a corporation, was organized in March 1908 to take over his business and property, and it did so. Henderson and Bradstreet paid the plaintiff certain money, and each received from him one-third of the entire capital stock. It was understood that the plaintiff was to be the business manager at a salary of $2,000 a year. The plaintiff claims that he worked at that salary for nearly a year. The defendants say it was a shorter time. But in March 1909 Henderson and Bradstreet, who were the majority directors, discharged him, and after that time seem to have conducted the business without any reference to him. He was not consulted,

and if there were any directors' meetings he was not notified and was not present. He claims that either purposely or negligently they allowed certain valuable permit rights to lapse. The last shipment of lumber was made in March, 1910. In October, 1910, the mill burned. Insurance to the amount of $20,000 was received. At that time the insurance money, with a small amount of other money, constituted the sole assets of the corporation, except some accounts which we infer were not very valuable, since they have not been collected, and a small amount of personal property. The corporation owed Bradstreet, the treasurer, on account of advances, $7,000. The only other creditor was the plaintiff, to whom was due something for salary and $2,447 admittedly due on account. Besides this the plaintiff had certain other claims on which something at least was due.

The defendants, Henderson and Bradstreet, then proceeded to administer the money on hand. Bradstreet was paid his $7,000. On January 2, 1911, at a directors' meeting of which the plaintiff, the remaining director, had no notice, and which he did not attend, they voted themselves salaries from April 1, 1908, as follows, Henderson, the president, for doing "all the labor necessary to carry on the business," at the rate of $200 a month; Bradstreet, treasurer, for personally furnishing "all the money to carry on the business, besides attending to other duties of his office," at the rate of $100 a month; Bradstreet also as clerk, $25 a month, and as secretary, $25 a month. Just what Mr. Bradstreet's duties as *secretary* were in addition to those as *clerk* is not stated. The date to which the payment of these salaries was continued does not appear in the printed record, but Mr. Henderson in his testimony says that the payment "practically" used up the $13,000 left of the insurance money after Bradstreet had been paid his $7,000.

The salary payments were unauthorized and unlawful for two reasons. One is that directors have no lawful power to vote salaries to themselves. *Camden Land Co.* v. *Lewis,* 101 Maine, 78, and cases cited. The other is that even if they have valid claims against the corporation which they are managing, directors have no right to prefer themselves to other creditors, if there is not enough to pay all. 10 Cyc., 803. And since it bears upon the propriety of appointing a receiver, we will add that the evidence leads us to

believe that the defendants' breach of trust was wilful, and their payment of salaries to themselves was collusive and fraudulent. The defendants, Henderson and Bradstreet, therefore, should repay the amounts received by them for salaries. But they claim that, if they are compelled to return their salaries, they should be allowed in this proceeding compensation for services actually rendered.

In the second decree filed by the Justice who heard the case, to which reference has already been made, he expressly disallowed the claims of all the parties for salaries. Since there is no dispute that they had all performed services, for which the corporation should pay them, there seems to have been no good reason for disallowing all the claims, except on the ground that in his judgment the amounts of the respective claims would offset one another. And as they were all the parties in interest, the result would be the same whether all claims were allowed, or all disallowed. It is not easy upon the evidence to determine satisfactorily, or even within quite broad limits, how much compensation the several parties were entitled to. But we think the conclusion apparently reached by the sitting Justice is fair and just, and should be adopted by us.

But it is contended that the second decree was unauthorized and void, in that, the first decree having been made and filed, and thus made operative, the Justice then had no jurisdiction to modify or enlarge it. *Parsons* v. *Stevens,* 107 Maine, 65. Let it be granted that this is so. Still, the case is before us on an appeal from the first decree, and on an appeal all questions which appear in the record are open. The case is heard anew upon the record, and such decree is directed as the whole record requires. R. S., chap. 79, section 22; *Trask* v. *Chase,* 107 Maine, 137. Accordingly all questions presented by the record are open for consideration, regardless of the second decree.

II. It is objected that the court has no jurisdiction in equity to determine the amount of the plaintiff's claim in this proceeding, and to order it paid. It is true that it is not the province of equity to collect debts. It may be done under some circumstances, but there must be some equitable consideration to give jurisdiction. In creditors' bills against insolvent corporations, and in bills for the dissolution and winding up of corporations, the court necessarily has the power to determine claims against the corporation in order

that it may decree proper distribution of the proceeds of the sequestered assets. That is a part of its incidental jurisdiction. But this is not a creditors' bill. And although some of the prayers of the bill seem to contemplate a winding up of the affairs of the corporation so far as the payment of debts is concerned, we are here confronted again with a question of equitable power.

It is well settled that a court of equity, in the absence of statutory power, has no jurisdiction over corporations for the purpose of decreeing their dissolution and the distribution of their assets at the suit of one or more of the stockholders. 2 Cook on Corporations, sect. 629; 10 Cyc., 988.

We have a statute in this State which authorizes the court, under some circumstances, to wind up the affairs of a corporation and decree its dissolution, upon a bill in equity brought by a stockholder or creditor. Laws of 1905, Chapter 85, as amended by Laws of 1907, Chapter 137. And this case shows a state of facts which would have supported a bill brought under that statute. But it is manifest, upon examination of the present bill, that neither in allegation nor prayer, is it based upon that statute. It does not fit the statute. It does not ask for relief under the statute. It does not pray in general for a winding up of the affairs of the corporation, nor for its dissolution. The plaintiff therefore in this proceeding must obtain his personal relief upon common law principles, or not at all.

The weight of authority seems to be to the effect that courts of equity will not ordinarily take jurisdiction without statute authority to restrain the operations of corporations, or to wind up their concerns at the suit of a minority stockholder. 5 Thompson on Corporations, section 6842. Mr. Beach in his work on Receivers, at section 421, says:—"The courts of chancery in America . . . have usually, before their jurisdiction was enlarged by statute, declined to sequestrate the property of a corporation by means of a receiver, or to wind up its affairs." . . . "The winding up of the business and affairs of a corporation through a receiver has been said to be, in effect, a dissolution of the company, and, therefore, cannot be done by a court of equity without statutory authority. While the complete winding up of the affairs of corporation cannot be said to amount to its dissolution, yet it is going to an extremity which courts of equity have refused to approach; it destroys the means

afforded the corporation to transact business and virtually annihilates it, and puts the corporation out of existence." The power of the court, even in extreme cases, says the same author, "is not to be extended beyond preserving the assets. The court will take charge of the property until the trouble has been adjusted, when it must lift its hand and retire." To the same effect, see 10 Cyc., 989; also cases cited, Beach on Receivers, sect. 421.

There are indeed some instances found in the books where courts of equity have assumed to wind up the affairs of corporations at the suit of minority stockholders, on some such ground as that the object for which the company was formed is impossible of attainment, and the continuance of operations *must* be ruinous. *Benedict* v. *Columbus Construction Co.,* 49 N. J. Eq., 23.

But without winding up the affairs of the corporation, the court in equity may at the suit of a stockholder or creditor appoint a receiver, where corporate property has been abandoned and is exposed to certain injury or loss, or where the corporation has no officers to care for its property. Beach on Receivers, sect. 421; *Lawrence* v. *Insurance Co.,* 1 Paige, 587; or, where by the acts of the directors the corporate property is exposed to imminent peril. *Thompson* v. *Greeley,* 107 Mo., 557; or, where the directors have been guilty of a breach of trust, and the property is in danger of future injury and waste, unless withdrawn from the reach of danger. *Fougeray* v. *Cord,* 50 N. J. Eq., 185; 4 Thompson on Corporations, sect. 4545. And doubtless there may be other grounds. The case of *Fougeray* v. *Cord,* supra, is in many respects analagous to the case at bar, and the doctrine of that case justifies the appointment of a receiver in this one. The doctrine is founded on the breach of trust and fraud of the managing directors.

In this case we think we are without jurisdiction upon this bill to wind up the affairs of the corporation. Nevertheless, we think we may properly afford complete relief to the plaintiff. The corporation is out of business. It has no assets of importance. Such assets as it has in hand will go but a little way towards satisfying the plaintiff's claim. The court has jurisdiction of the fund which may be restored by these individual defendants, and such moneys as may come into the hands of the receiver. In some cases, particularly in the case of going concerns, the court would order the

fund paid into the treasury for the uses of the corporation. But in this case the corporation has no use for the fund except to pay the plaintiff's claim. And the collusive and fraudulent conduct of the managing directors has been such as to afford sufficient reason for not placing the fund again under their control. Under such circumstances, we think the court has incidental jurisdiction to administer the funds, without remitting the plaintiff to the remedy at law. To do this involves a determination of the amount of the plaintiff's claim. The case shows that the claim was not overestimated by the single Justice.

The decree appealed from will be affirmed with the following modifications. The provision for a perpetual injunction against the corporation will be omitted, as this is appropriate only to the winding up of a corporation. The defendants Henderson and Bradstreet will be ordered respectively to pay the amounts which they have received as salaries to the receiver instead of into the treasury. And as the case does not clearly show the date to which they received monthly salaries, the amount will be determined by the Justice who settles the decree. It will be adjudged that there is due to the plaintiff from the corporation over and above his claim for salary, the sum of $13,023.19, and interest thereon from April 10, 1912, the date of filing the first decree to the date of the final decree. It will be adjudged that the claims of the plaintiff, Henderson and Brandstreet for salaries are all disallowed. The bill will be retained for the purpose of enabling the court to determine if there be other creditors of the corporation, in order that they may be protected. If none, payment of the plaintiff's claim will be ordered out of the funds in the hands of the receiver. If there are other creditors, the fund will be distributed pro rata. If, after payment of claims, funds remain, they will be returned to the corporation.

Bill sustained with costs on appeal.
Decree in accordance with the opinion.

PERLE E. DUNBAR *vs.* HOLLINGSWORTH & WHITNEY COMPANY.

Somerset. Opinion November 12, 1912.

Appliances. Appreciates the danger. Cross Arms. Contributory Negligence. Danger. Due Care. Electric Shock. Failure to Instruct. Motion. Negligence. "Safe place to work rule."

The defendant was preparing to erect a derrick. Its servants passed a loose guy wire over a highly charged electric wire belonging to another company. In the process, the guy wire wore off the insulation of the electric wire. The plaintiff, a servant of the defendant, was directed to repair the damaged wire by winding tape around the abraded spot. He climbed the pole and put his leg over the cross arm of the pole in such a way that it rested on the guy wire. One end of the guy wire was grounded. In this position, while winding the electric wire he received an electric shock which did him serious injury. In a suit to recover damages therefor, based upon the alleged negligence of the defendant in failing to furnish him a safe place to work, and to instruct him as to the danger, it is *held:*

1. If a workman who is set to work in a dangerous place knows and appreciates the danger, or if by the exercise of reasonable care he would have known and appreciated it, he is held to have assumed the risk of the danger.
2. If a workman who is set to work in a dangerous place knows and appreciates the danger, or if by the exercise of reasonable care he would have done so, the employer is not legally at fault if he fails to instruct him as to the danger.
3. The duty of the master to give his servant warning of danger is not absolute. He is held only to the exercise of reasonable care in this respect.
4. The evidence that the plaintiff both knew and appreciated the danger complained of in this case is so strong and compelling that it must be considered that the verdict of the jury in his favor was the result of misapprehension of the rules of law, or the product of passion or prejudice.

On motion for new trial by defendant. Motion sustained.

This is an action on the case for alleged negligence of the defendant, a master, whereby the plaintiff, a servant, was injured. Plea,

the general issue. The jury rendered a verdict for the plaintiff for $4395.83, and the defendant filed a general motion for a new trial.

Pattangall & Plumstead, W. B. Brown, and Merrill & Merrill, for plaintiff.

Johnson & Perkins, and Butler & Butler, for defendant.

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

SAVAGE, J. Action on the case for alleged negligence of the defendant, a master, whereby the plaintiff, a servant, was injured. The plaintiff recovered a verdict for $4395.83. The case comes here on the defendant's motion for a new trial.

Most of the facts are not in dispute. The defendant was building a pulp mill at Madison. In the process of construction it became expedient to set up a derrick near the pole line of the Madison Electric Works. Two of the wires on this pole line were high voltage wires carrying 2200 volts of electricity. For the purpose of staying the derrick mast when erected, the defendant's servants were pulling a guy wire over and diagonally across the electric wires, within a few inches of an electric light pole, and across the cross arm. One end of the guy wire was intended to be attached to the mast, and the other to a "dead man" in the ground on the other side of the pole line. When completed, the guy wire would be above the electric wires and clear them. But while being pulled over, the guy wire was in contact with the electric wires, and wore off the insulation, so that the guy wire touched the metal of one of the electric wires. The men who were handling the guy wire received electric shocks. One of the men caused the guy wire to be lifted from the bare electric wire and moved a few inches to where the insulation remained intact. There it was found the next morning. One end, at least, of the guy wire was on the ground. On the following morning the plaintiff was directed to fix the damaged wire. He undertook to do so. The necessary repairs consisted in winding tape around the abraded spot on the wire. He put on his climbers and climbed the pole. He put his right leg over the cross arm, in such a way that it rested on the guy wire. His left foot rested on the cross arm brace. He then reached out with his left hand to wind the wire. Being in contact with the "grounded guy wire, it

was only necessary for him to touch the electric wire, when his body would complete the circuit, and the electricity would escape from the electric wire and pass through him and the guy wire to the ground. And that was what undoubtedly did happen. One witness, indeed, testified that he saw one workman pick up the guy wire on the ground that morning, and drop it as if shocked. This would indicate that the guy wire was then in contact with the bare spot in the electric wire. But this is contradicted by all the other evidence in the case. That occurrence doubtless took place the day before when they were pulling the guy over the wire, as was described by another witness. While the plaintiff was passing the tape around the wire, he received an electric shock. He says he does not know just how it happened. He says the guy wire was resting, not on the bare spot, but on the insulated portion of the electric wire. If so, the electric current did not pass from the electric wire to the guy wire through a direct contact of the two wires. The guy wire itself was not charged before the plaintiff began work. It could be charged only by being connected with an uninsulated part of the live electric wire. The plaintiff received no shock when he put his leg on the guy wire. There was no way for him to get a shock until, with his leg over the grounded guy, he touched a live wire with some other part of his body. His physician testified that he had two burns, one on the thumb and first finger of his left hand, and the other on the back side of his right leg, a little above the knee. His position as we have described it perfectly accounts for these burns. As a result of the injury, the plaintiff's thumb and finger on the left hand were amputated.

The plaintiff in his writ charges the defendant with negligence in two particulars, namely, a failure to furnish him with a reasonably safe and suitable place to work, and a failure either to inform him that the guy was charged with electricity, and that its condition was therefore dangerous, or to shut off the current. The defendant denies negligence on its own part, and contends that the plaintiff was guilty of contributory negligence.

It will be noticed that the theory of the writ is that the guy wire was charged with electricity, and that the plaintiff received his injury through coming in contact with it. But that we think is clearly a misconception. There is no evidence that the guy wire was in

contact with any uninsulated portion of the electric wire. As already stated, the plaintiff himself asserts that it was resting on an insulated portion. There was no way for it to become charged, until the plaintiff's body completed the circuit with the electric wire. We have already stated our conviction that while the plaintiff's leg was in contact with the guy wire lying over the cross-arm, his hand came in contact with the electric wire, and thus completed the circuit. But the misconception in the writ is amendable, and we do not deem it material, after verdict.

So far as the "safe place to work" rule is concerned, it need only be said that it is not applicable to the situation in this case. That danger was lurking in the charged electric wires is true. Yet the place, to one who knew and appreciated the danger, and used the degree of care which was requisite to the situation, that is to say, due care under the existing circumstances, was "safe," as the word is used in the master-and-servant rule. Besides, but for the guy wire, the witnesses all agree that the plaintiff's work was not dangerous. The pole which the plaintiff climbed was dry. Dry wood is practically a non-conductor of electricity. The plaintiff might have rested upon the cross-arm or upon the pole, and touched the live wire without harm, unless he was in contact with some conductor. The guy wire was a conductor. It was the presence of the guy wire which created the danger. But work has to be done at times in dangerous places. If the workman knows and appreciates the danger, or if by the exercise of reasonable care, he would have known and appreciated it, he is held to have assumed the risk of danger. *Caven* v. *Granite Co.*, 99 Maine, 285. And this rule has especial force in a case where the dangerous risk lies in the voluntary movements of the workman himself, movements which he can control and for which he is responsible. When the place to work is itself dangerous, the master is absolved from liability, if the workman knew and appreciated the danger, or should have done so. And this leads to a consideration of the other alleged ground of negligence, the failure to instruct the plaintiff as to the danger.

If the servant knows and appreciates the danger, instruction is not necessary. If the servant does not know and appreciate the danger, and would not have known it by the exercise of due care,

as, if the danger is not obvious, and the servant is inexperienced, it is the duty of the master to give him suitable warning of the danger. But in this respect the duty is not absolute. As in the case of furnishing safe and suitable appliances, or a safe place to work, the master is bound to use due care. He is held to no more. Negligence, or want of due care, is the basis of the action. If he used due care, he does all that the law requires. *Cowett* v. *American Woolen Company*, 97 Maine, 543. The care of the master must be equal to the emergency, and must be determined by the conduct of ordinarily prudent men, under like circumstances. *Snowdale* v. *United Box, Board and Paper Co.*, 100 Maine, 300. But this need not be considered further, for we think that the case clearly shows that the plaintiff knew and appreciated the danger, and hence that instructions were not necessary. He was a mature and intelligent mechanic. In this age of the world, it is not unreasonable to impute to intelligent men some knowledge that contact with wires carrying a voltage of 2200 volts is, or is likely to be, dangerous. For such a man to say otherwise is unbelieveable. Besides, the plaintiff, though not an electrician, was in charge of a carpenter's crew in which were two electricians, and for many months all the electrical work done in the construction of the mill, both in placing and repairing wires, was done by his electricians, under his supervision and direction, so that the necessity of so placing wires as to avoid connecting, or "short circuiting," must have been somewhat familiar to him. Further, if the testimony of one of the plaintiff's own witnesses as to statements made by the plaintiff at the time he received the order to fix the wire is true, and it is corroborated, there can be no doubt that he appreciated the danger. The plaintiff indeed denies having made the statements, and it is true that the witness afterwards shaded off his testimony down to a contradiction of himself. His shading off creates a painful impression as it is read; and in view of the signed statement made by him on the day of the accident, when the matter was fresh in his memory, we are led to think that the entire shading off might be disregarded without doing violence to the truth. But we do not rest our conclusion on this feature. The incident is merely a feature, that is all. There was, besides, the uncontradicted testimony of two apparently reputable witnesses called by the defendant

of statements made at different times by the plaintiff, when inquired of, as to why he did not shut off the current by pulling certain plugs before he attempted to do the work. If he made these statements, the conclusion is almost irresistible that he appreciated the danger, for the statement is that he said he did. One of these witnesses says that he said he knew it was foolish to go up on the pole without drawing the plugs. That he made the statements we must believe, at least until the testimony is contradicted. His explanation of his neglect to shut off the current was, not that he did not know that the current was on, not that he did not know how to shut it off, not that he did not know it would be dangerous to let it stay on, but to use his words, "I would have got the devil if I had shut off the juice."

It is the opinion of the court that the evidence that the plaintiff both knew and appreciated the danger is so strong and compelling that it must be considered that the verdict of the jury, which is in effect to the contrary, was the result of misapprehension of the rules of law, or the product of passion or prejudice.

Motion for a new trial sustained.

ESTELLA A. BEAN *vs.* CITY OF PORTLAND.

CHARLES A. BEAN *vs.* SAME.

Cumberland. Opinion November 1, 1912.

Acceptance. Accident. Building street. Damages. Due care. Laying out. Municipal Officers. Negligence. Notice. Liability. Travelers.

In two actions brought by husband and wife for injuries sustained in an accident which occurred on the evening of April 22, 1909, on Dartmouth Street in the Deering District of the City of Portland.

1. That the place where the accident happened was a highway within the meaning of R. S., Chap. 23, sec. 76. The street had been laid out and accepted by the municipal officers several years before, and the portion on which the accident occurred had been built and maintained at least six years prior thereto.
2. That the wife was in the exercise of due care and was in no way responsible for the accident.
3. That whether or not the Boston and Maine Railroad is secondarily liable is not involved in this suit. The city is primarily liable.
4. That while it may be a matter of doubt whether the written notice given to the city within fourteen days after the accident, stating that the wife had received "various bodily injuries . . . namely various severe injuries to various portions of my body, including my spine," was sufficiently specific to include an injury to the ribs, yet as the evidence of injury to the ribs was admitted without objection the point is raised too late. The notice was sufficient to recover for the injuries therein alleged and if the defendant wished to defeat recovery for other and distinct injuries, not specified therein, but covered by the same accident, it should have objected to proof of them when offered.
5. That there is no legal foundation for the suit brought by the husband to recover for loss of his wife's services and the expenses connected with her recovery. He was not present at the time of the accident and his claim is not within the purview of the Statute.

On report. In the action brought by Estella A. Bean. Judgment for plaintiff for $1400. In action brought by Charles A. Bean. Judgment for defendant.

These two actions were brought by husband and wife to recover for injuries sustained in an accident which occurred on the evening of April 22, 1909, on Dartmouth Street in the Deering District of the City of Portland, and were tried together. Plea general issue. The case of Estella A. Bean against the City of Portland was submitted to jury on question of damages and a verdict returned in favor of plaintiff for $1400. The case was then reported to the Law Court upon the following stipulation; namely,

Upon so much of the foregoing evidence as is legally admissible the Law Court is to render such judgment as the legal rights of the parties may require. If the Law Court is of the opinion that the plaintiff, Estella A. Bean, is entitled to recover upon the foregoing evidence, then judgment is to be rendered in her behalf for the sum of Twelve Hundred and Fifty Dollars ($1250) as found by the jury; and if the Law Court is of the opinion that the fourteen days' notice given to the city is sufficient to embrace the injury to her ribs, then judgment is to be rendered in her favor against the city for the further sum of One Hundred and Fifty Dollars ($150), as found by the jury, making a total sum of Fourteen Hundred Dollars ($1400).

The evidence reported in the case of Estella A. Bean may be considered by the Law Court in determining the entire case of Charles A. Bean against the City of Portland.

The case is stated in the opinion.

Foster & Foster, and Eben Winthrop Freeman, for plaintiff.

Richard E. Harvey, and Emery G. Wilson, for defendant.

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

CORNISH, J. These two actions were brought by husband and wife to recover for injuries sustained in an accident which occurred on the evening of April 22, 1909, on Dartmouth Street in the Deering District of the City of Portland, and were tried together. By the terms of the stipulation under which they are reported to the Law Court, this court is to pass upon the question of liability in the first instance, and in the case of the wife the further question of recoverable damages, the amount of actual damages in both cases having been fixed by findings of the jury.

1. We will consider first the action brought by the wife.

The evidence is voluminous, covering over three hundred printed pages, and yet the essential facts are not seriously in controversy. The city relies upon three points in defence; first, that the place where the accident happened was not a highway, as contemplated by R. S., Chap. 23, sec. 76; second, contributory negligence; third, that the liability, if any, rests upon the Boston and Maine Railroad and not upon the City of Portland. None of these has sufficient merit to defeat the action.

The evidence is overwhelming as to the liability of the city for the maintenance and protection of the street at the place where the accident happened.

As long ago as 1902 the joint standing committee on new streets laid out Dartmouth Street sixty feet wide and running in a general westerly direction from Forest Avenue on the East, 1278 ft. to Deering Avenue on the West. The location was duly filed in the office of the City Clerk, and was duly accepted, and the street "accepted, allowed and established as a street or public way for the use of the city of Portland" by the Mayor and Aldermen on November 3, 1902. The street itself was not built at that time and the same proceedings for laying out and acceptance were repeated in November, 1903. The proposed street crossed the tracks of the Worcester division of the Boston and Maine Railroad at a distance of about 270 ft. from Forest Avenue and in 1904 the municipal officers of Portland petitioned the Railroad Commissioners of the State for permission to cross these tracks at grade. After due notice and hearing this permission was granted, the street within the railroad location to be constructed at the expense of the city but to be maintained at the expense of the Railroad Company.

In June, 1905, the municipal officers ordered that the street be opened to public travel. A similar order was passed in February, 1907, and on March 18, 1907, the Commissioner of Public Works was authorized and directed to construct a crossing over the railroad tracks.

These orders were not complied with to their full extent but the city constructed that portion of the street between Forest Avenue and the East line of the railroad location at some time prior to 1903 and has since maintained and improved the same. A fine roadway

was constructed, a sidewalk built on the South side and private houses have been erected. But the city neglected to place any railing or barrier at the end of this constructed portion where it meets the railroad location. At that point the bank falls off rather abruptly, a distance of from two to four feet, toward the tracks and no barrier or guard was erected at the end of the traveled way. This lack of railing was the cause of the accident. The plaintiff drove into Dartmouth Street from Forest Avenue between nine and ten o'clock on a dark and misty evening and ignorant of the situation drove straight on over the embankment and sustained the injuries alleged.

We are unable to perceive on what ground it can be claimed that the city was not responsible for the place where the accident happened. It is true that the pitfall was on the location of the Railroad Company but it was the duty of the city to erect a railing or barrier to protect travelers from that pitfall. The liability of the city did not end with the constructed portion of the way. Its duty was to use due care in protecting the travelers on that way terminating as it did, from perils beyond. With equal force might it be claimed that if through want of railing on the side of a traveled road, a traveler is precipitated on to the adjoining land of a private individual no recovery can be had. It is not the title to the precise place where the party falls that fixes the liability, but the proximate cause of the fall. The first point in defence cannot be sustained.

Nor is there any force in the contention that the plaintiff was not in the exercise of due care. She was a comparative stranger in the city, her home being in Livermore Falls. She was visiting her daughter who was ill and who lived on Noyes Street, another street that leads from Forest Avenue toward the West. With the nurse she had gone to Portland for medicine for the daughter and this accident occurred on her return. Several streets lead toward the West from Forest Avenue and the plaintiff admits that she first intended to take William Street but having passed that she turned off as she supposed into Noyes Street. It proved to be Dartmouth Street. But that error can hardly be called a negligent act on her part and the proximate cause of the accident. She had a right to presume that all these streets were equally safe and convenient for travel. On the East side of Forest Avenue opposite the entrance

of Dartmouth Street was an incandescent light which revealed the entrance into this street and impliedly invited travel. The plaintiff accepted the invitation and was driving in a careful manner with a kind and well broken horse when suddenly she was precipitated over the unguarded embankment. All the duties that the law cast upon her were fully met, and the accident can in no way be attributed to any want of due care on her part.

The third point raised in defence, namely the liability of the Boston and Maine Railroad is not involved here. The city is primarily liable and whether the city has or has not a remedy over against the Railroad Company can in no way affect that liability.

It is, therefore, the opinion of the Court that the action of Mrs. Bean is clearly maintainable. The next question is that of recoverable damages.

The jury have assessed her total damages at fourteen hundred dollars, one hundred and fifty of which was for injury to her ribs, and the defendant contends that the statutory notice given to the city was not sufficiently broad in its scope to include this injury. This notice described the nature of her injuries in these words; "various bodily injuries . . . namely various severe injuries to various portions of my body, including my spine."

It is unnecessary to decide whether under this notice evidence of injury to the ribs was strictly admissible, had objection been made, because this evidence was introduced without any objection on the part of the defendant. The only objection made to the notice itself was on the ground that it was not served within the required fourteen days, and this was overruled. The notice, as a notice, was sufficient to recover for the injuries therein alleged, and if the defendant wished to defeat recovery for other and distinct injuries, not specified therein, but covered by the same accident, it was bound to object to proof of them when offered. *Beverage* v. *Rockport,* 106 Maine, 223. This was not done and therefore the damages assessed for injury to the ribs must be included and the verdict for the full amount of $1400 must be allowed to stand.

2. There is no legal foundation for the suit brought by the husband to recover for loss of his wife's services and the expenses connected with her injuries and recovery, and in fact this claim is not urged by counsel in argument. Charles A. Bean was not present at

the time of the accident, and he neither "received any bodily injury" nor "suffered damage in his property," which are the statutory prerequisites for the maintenance of this form of action, R. S., Chap. 23, sec. 76. *Frazer* v. *Lewiston,* 76 Maine, 531.

The entries must therefore be as follows: In the action brought by Estella A. Bean, judgment for plaintiff for $1400.

In the action brought by Charles A. Bean, judgment for defendant.

So ordered.

INHABITANTS OF SANDY RIVER PLANTATION

vs.

WESTON LEWIS AND JOSIAH S. MAXCEY.

Franklin. Opinion November 13, 1912.

Assessors. Assessment. Clerk of Plantation. Constitution. Debt. Defects. Exceptions. Forfeiture. Jurisdiction. Meeting. Qualification. Revised Statutes, Chapter 4, Section 27. Record. Tax. Laws of 1910, Chapter 193, Section 6.

1. This is an action of debt, to recover taxes assessed against the property of the defendants in the year 1910 by the assessors of Sandy River Plantation, in which assessment is included the Forestry District tax for that year.

2. This is an action at law to recover the tax, and not a proceeding seeking to enforce a forfeiture for its non-payment, and that an action for the recovery of a tax assessed will not be defeated by any mere irregularity, but only by such omission or defects as go to the jurisdiction of the assessors, or deprive the defendant of some substantial right, or by some omission of an essential prerequisite to the bringing of the action.

3. It is objected that there is no evidence of the legal election or qualification of the assessors of said plantation for the year 1910, because the book of record, which purported to show their election, had been mutilated and pages upon which the record of the annual meeting for 1910 had been attempted to be made, had been cut out, and the record introduced as the record of that meeting was made in February, 1911.

4. The fact that it was not made until February, 1911, did not affect its validity. The clerk could make the record of the meeting at any time during the year following his election.

5. It is objected that the record fails to show a legal qualification of the assessors. The record states that J. L. Clark was chosen first assessor by ballot, and duly qualified. The record states the same as to the other two assessors, except it states that S. H. Learned was chosen second assessor and C. S. Marden third assessor. The only act that either of them could do, and should do, to qualify them as assessors was to take the oath of office, and the record says they duly qualified.

6. The words of the record, showing that they each, naming them, duly qualified, is at least prima facie evidence that they were sworn as required by law, and nothing appearing in the case to overcome that presumption, that they were authorized to perform the duties of assessors.

On exceptions by defendant. Overruled.

This is an action of debt, to recover taxes assessed against the property of the defendants in the year 1910, by the assessors of Sandy River Plantation, in which assessment is included the Forestry District tax for that year. Plea, general issue with brief statement, namely:

1. That said assessors were not legally elected or legally qualified as such.

2. Said tax is illegal in whole or in part.

3. Said assessors had no legal right or lawful authority to assess said tax and commit the same prior to the first day of July, 1910.

4. Said assessors have included in said assessment a Forestry District tax which they had no right to include in said assessment.

5. Said Forestry District tax is unconstitutional and illegal.

6. That payment of said tax was never legally demanded.

At the conclusion of the testimony, the presiding Justice directed a verdict for the plaintiff for the amount of the tax sued for and interest thereon from date of demand, May 30, 1910, and the defendants excepted to the directing of said verdict.

The case is stated in the opinion.

Elmer E. Richards, for plaintiff.

Frank W. Butler, for defendants.

SITTING: WHITEHOUSE, C. J., CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HALEY, J. This is an action of debt, to recover taxes assessed against the property of the defendants in the year 1910 by the assessors of Sandy River Plantation, in which assessment is

included the Forestry District tax for that year. At the close of the testimony the presiding Justice directed a verdict for the plaintiff, for the amount of the tax sued for, and interest thereon from the date of demand, May 30, 1910, and the defendants bring the case to this court upon exceptions to the directing of the verdict as aforesaid.

In considering the exceptions it should be remembered that this is an action at law to recover the tax, and not a proceeding seeking to enforce a forfeiture for its non-payment, and that an action for the recovery of a tax assessed will not be defeated by any mere irregularity, but only by such omission or defects as go to the jurisdiction of the assessors, or deprive the defendant of some substantial right, or by some omission of an essential prerequisite to the bringing of the action. *Greenville* v. *Blair,* 104 *Maine,* 444; *Rockland* v. *Ulmer,* 87 Maine, 357.

1. It is objected that there is no evidence of the legal election or qualification of the assessors of said plantation for the year 1910, because the book of records, which purported to show their election, had been mutilated and pages upon which the record of the annual meeting for 1910 had been attempted to be made, had been cut out, and the record introduced as the record of that meeting was made in February, 1911.

There is no evidence that the pages cut from the record book was the record of the annual meeting. The legitimate inference is that the writing upon the leaves cut from the book was done by a daughter of the clerk, in an attempt to make the record for the clerk to sign, but he never signed, or attested it as the record. It was found to be contrary to the facts, or wrong in some particulars, and then the record that was introduced in evidence was made as the record of the annual meeting of 1910, and the clerk testified at the trial that it was the record of that meeting, made according to the facts, and it was properly attested by him. The fact that it was not made until February, 1911, did not affect its validity. The clerk could make the record of the meeting at any time during the year following his election.

2. It is objected that the records of the plantation do not show before whom the alleged assessors qualified, as required by chapter 4, section 27, Revised Statutes. It was held in *Hale et al* v. *Cush-*

ing, 2 Maine, 218, that the statute requiring such a certificate to be returned and filed, was directory, and that case has been cited with approval, although the same point was not directly involved, in *Purrington* v. *Dunning,* 11 Maine, 176; *Chapman* v. *Inhabitants of Limerick,* 56 Maine, 390, and *Farnsworth Co.* v. *Rand,* 65 Maine, 19, and is decisive of that objection.

3. It is objected that the record fails to show a legal qualification of the assessors. The record states that J. L. Clark was chosen first assessor by ballot, and duly qualified. The record states the same as to the other two assessors, except it states that S. H. Learned was chosen second assessor, and C. S. Marden third assessor. The only act that either of them could do, and should do, to qualify them as assessors was to take the oath of office, and the record says they duly qualified.

In *Edwardson* v. *Garnhart,* 56 Mo., 81, the court held, "That a recital in a referee's report that he had been duly qualified is at least prima facie evidence that he has been sworn as the statutes require." In *Hale* v. *Seltzer,* 25 La. Ann., 320, it was held: "The word qualify in its legal use means to take an oath to discharge the duties of an office." In *People* v. *McKenney,* 52 N. Y., 374, it was held: "That to qualify for an office, means to take an oath of office." *In State* v. *Neibling,* 6 Ohio State, 40, the court said "Qualified in courts imports nothing more than that the person elected has complied with the requirements of the statutes by giving bonds and taking the oath of office." In *State* v. *Abbott,* 55 Kan., 154, it was said of the word qualified: "It means to take such steps as the statute requires before a person elected or appointed to an office is allowed to enter on discharge of its duties." And in *People* v. *Palen,* 75 Hun., 289, the court held, in the language of the Century Dictionary, that the word "qualify" means to make oath to any fact; to take the oath of office before entering upon its duties.

We think the words of the record, showing that they each, naming them, duly qualified, is at least prima facie evidence that they were sworn, as required by law, and nothing appearing in the case to overcome that presumption, that they were authorized to perform the duties of assessors.

4. It is objected that the assessors had no authority to commit the taxes prior to June 1, 1910, and the evidence shows that they

were committed April 21, 1910. Section 90, chapter 86, Laws of 1905, reads: "In July of each year said assessors shall commit the same with a warrant in the usual form to the collector of taxes." The law contemplates that when the taxes are committed, all things have been done by the assessors to complete the assessment, the date of the commitment to the collector has nothing to do with the validity of the assessment, and to rule that, by committing the taxes to the collector before the date named in the statute, rendered the assessment void, would be to hold that an act of the assessors that had nothing to do with the assessment, done after the assessment had been completed, would render the assessment void. The assessment was made as of April 1, 1910, and whether the assessors completed their duties in April or July would not affect the validity of the assessment, and the direction in the statute to commit the tax to the collector in July of each year was directory.

5. The next objection is that the Forestry District tax is unconstitutional, because it places a burden on all real property within the limits of the district, in addition to all other property taxes assessed throughout the State, and the case of *Dyar* v. *Farmington Village Corporation,* 70 Maine, 515, is cited as sustaining that position. In that case the Legislature authorized the Farmington Village Corporation, by a two-thirds vote of the voters of said corporation, to raise, by loan or taxation, $35,000 to aid in building a railroad, and the act was held unconstitutional, because it was unconstitutional to impose local taxes for public purposes, and it was held that a railroad was for public purposes. The doctrine of that case cannot be questioned, but it recognizes the doctrine contended for by the plaintiff in this case, that taxation for local purposes by assessments upon property benefitted, and in proportion to the benefits conferred upon it, are valid. The forestry tax was not a tax for public purposes, but for the special benefit of the forest lands within the district. Section 6, chapter 193, of the Laws of 1911, provide that, "the taxes assessed by authority of this act shall be held by the State Treasurer as a fund to be used to protect from fire the forests situated upon and within the district hereby created, and to pay expenses incidental thereto, and for no other purpose." "The forests," as said in the preamble to the act, "are

one of the chief sources of wealth of the state, and the protection of such forests from destruction by fire is of the greatest importance; to this end it is the paramount duty of the legislature to have funds provided without delay for such protection." With that end in mind the Legislature created the Forestry District, and authorized this tax, provided for fire wardens, deputy fire wardens, and watches to be kept of the forests, and authorized the summoning and paying of help for the extinguishment of fires in the district, and provided that the tax should be used for that purpose and for no other purpose. It was a tax for a local purpose, and, as far as the case shows, was assessed according to the maxim that, "he who receives the advantage ought to sustain the burden." Land within this district had special benefits that no other forest land in the State had, and it ought to bear the burdens caused by the receipt of those special benefits.

It is objected that the assessors had no authority to assess or collect any part of the forestry district tax, because, by the act creating the district, it is made the duty of the state assessors to assess the tax and the State Treasurer to collect it. By chapter 193 of the Laws of 1905, an administrative district was established and incorporated, known as the Maine Forestry District, its purpose and object being the protection from fire of the forests within that district. The act creating the district specified the lots and plantations included in the district, and fixed the rate of taxation for all land in the district, which was to be in addition to the general tax upon all property within the State, and it is admitted that the property upon which the forestry tax was assessed was within that district and owned by the defendants, and no question is raised but that the state assessors performed their duty in assessing the property, as required by law. But it is urged that the only proceedings by which the tax properly assessed could be collected was by a forfeiture of the land taxed, as provided by section 5. Section 4 of said act provides that the treasurer shall cause lists of the assessments of said lands to be advertised for three weeks in papers specified, and section 5 provides that if the tax is not paid within the time limited, the land shall be held forfeited to the State, and vests therein free of any claim by any former owner, and defendants claim that the tax can be collected in no way except

that provided by section 5. But section 65, chapter 10, R. S., provides: "In addition to other provisions for the collection of taxes legally assessed, the mayor and treasurer of any city, the selectmen of any town, and the assessors of any plantation, to which a tax is due, may, in writing, direct an action to be commenced in the name of such city, or the inhabitants of such town or plantation, against the party liable."

As stated above, it is not questioned but that the tax was legally assessed and due; but it is claimed that it was not due the plantation within the meaning of section 65, chapter 10, R. S. This section was construed by the court in *Rockland* v. *Ulmer,* 84 Maine, 503, in which it was held that the State and county tax which, at the time of the assessment, the collector was bound to pay when collected, direct to the county and State, was due the municipality within the meaning of that statute.

If the general State, and county tax, which do not belong to the municipality, are due the municipality, within the meaning of the statute, why are not the taxes of the fire district due the municipality? It was held in the above case that, "The municipality was the agency through which said State and county taxes were assessed and collected. Viewing the municipality in the light of an agent or trustee of the public, all the taxes to be assessed and collected through its agency, may be said to be 'due' to it as such agent or trustee. The right of action against the delinquent inhabitant, or property owner, was given to the municipality to enable it to perform its duties as such agents or trustees. We think the State and county taxes assessed upon the municipality, are within the preview of the statute granting this relief."

If the municipality could act as the agent of the State in collecting the State tax, why could it not act as the agent of the State in collecting the fire district tax? The last named tax was included in the treasurer's warrant to the assessors of the plaintiff town, and thereby the tax, by the doctrine of *Rockland* v. *Ulmer,* supra, was committed to the plantation to collect for the benefit of the fire district, to be paid direct to the State.

The objections above considered are all that are urged in behalf of the exceptions. We do not consider them of sufficient weight to sustain the exceptions, and the mandate should be,

Exceptions overruled.

JEANETTE L. STURTEVANT

vs.

WESTERN UNION TELEGRAPH COMPANY.

Somerset. Opinion November 13, 1912.

Acceptance of an Offer. Damages. Dispatch. Duty of Defendant. Instructions. Message. Negligence. Telegraph Company.

1. In an action on the case to recover damages for negligence of defendant in not seasonably delivering a telegraph message received by it from the plaintiff, at Skowhegan, Maine, to be delivered to Mr. Kaler at South Portland, Maine, it is held that telegrams are sent because the sender desires the contents communicated to the addressee at once; that this method is employed instead of the mail because of its dispatch.
2. That its importance was apparent upon its face, and when the defendant accepted it and the money to forward it, in law it undertook to forward and deliver it at once. That was the consideration for which it accepted the plaintiff's money.
3. That even if the defendant used the effort to reach Mr. Kaler that it claims to have used, it was negligent and failed to perform the duty that it owed to the plaintiff.
4. There is nothing in the case which excuses the defendant from its negligence after the message was received at the Portland office, and for that negligence, the plaintiff is entitled to recover such damages as she sustained by reason thereof.

On report. Judgment for the plaintiff for forty cents.

This is an action on the case to recover damages for the alleged negligence of the defendant in not seasonably delivering a message received by it from the plaintiff. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court upon the following stipulation, namely;

The parties agreeing thereto, this case is reported to the Law Court upon so much of the foregoing testimony as is legally admissible; the Law Court to decide all questions of law and fact involved,

and if the Law Court finds for the plaintiff and that the plaintiff is entitled to more than nominal damages, the court shall assess damages in the sum of two hundred and seventy-five dollars.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

Symonds, Snow, Cook & Hutchinson, and Payson & Virgin, for defendant.

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

HALEY, J. This is an action on the case to recover damages for the alleged negligence of the defendant in not seasonably delivering a telegraph message received by it from the plaintiff, and is before this court on report.

In the fall of 1908 the plaintiff taught a part of the fall term of the South Portland high school, substituting for Mrs. Chase, and finished the school year as a teacher in the grade schools of that city. On Monday, August 23, 1909, she received a letter from Mr. James Otis Kaler, superintendent of the South Portland schools, directed to her which read as follows:

"Do you want Mrs. Chase's position for High School? She resigned yesterday, and if I can find you, and you want the position; you can have it; but I must succeed in getting word from you very soon. I am sending this same letter to several places where there seems a possibility of its reaching you. James Otis Kaler."

This letter was written and mailed at South Portland August 21, 1909, and was received by the plaintiff Monday, August 23d, at about 10.30 A. M., at her home in Skowhegan. At about noon of the day the letter was received the plaintiff tried to reach Mr. Kaler by telephone, to accept the position offered, but did not succeed in reaching him. At 1.30 P. M. the same day she delivered to the defendant, at it's office in Skowhegan, a telegram, to be forwarded to Mr. Kaler, and paid the defendant the regular charge of twenty-five cents, and also fifteen cents additional to have the message delivered to Mr. Kaler at South Portland, she having been notified that the defendant had no office at South Portland, and that the charge for delivering it in that city would be fifteen cents. The message read as follows:

"Aug. 23, 1909. To Mr. James Otis Kaler, Ocean Street, South Portland, Maine. Will accept Mrs. Chase's position. Please write me at once. J. L. Sturtevant."

During the summer months Mr. Kaler lived at Cape Elizabeth, five or six miles from his home in South Portland. At his summer home he had no telephone, but had one at his home in South Portland. Prior to August 23d, Mr. Kaler had instructed the defendant to telephone all his messages, and not to send a messenger with them, and after telephoning to his home in South Portland enough to satisfy themselves that he was not there, to mail his messages to him.

The plaintiff claims that there is no legal evidence to show the defendant used the effort to reach Mr. Kaler that it claims to have made. It is not necessary to pass upon that question, as we think if the defendant did all that it claims to have done, it was negligent and failed to perform the duty that it owed to the plaintiff. Telegrams are sent because the sender desires the contents communicated to the addressee at once. That method is employed instead of the mail because of its dispatch. The message showed that it was the acceptance of an offer. Its importance was apparent upon its face, and when the defendant accepted it, and the money to forward it, in law it undertook to forward and deliver it at once. That was the consideration for which it accepted the plaintiff's money. Of course it had a reasonable time in which to deliver it, which was to be determined from the nature of the business of transmitting messages by electricity. The defendant was not obliged to deliver the message to Mr. Kaler at Cape Elizabeth, five or six miles from the place named for delivery in the message, but when it was received at its Portland office at two minutes past two P. M. it knew Mr. Kaler was not living in South Portland. He had so informed them, and they knew when they had tried unsuccessfully at 2.17 P. M. to reach him at South Portland, by telephone, that he was not at his home in South Portland, and must have known from his instructions to them that he was at Cape Elizabeth. Mr. Kaler's instructions to the defendant to mail his messages did not change or modify the contract between the plaintiff and the defendant. He might not be able to hold the defendant liable for not delivering to him a message within a reasonable time by reason of his instructions

to the defendant, but the plaintiff was not a party to that arrangement, and had the right to insist that the defendant perform the contract made with her. It was the duty of the defendant, when it failed to get Mr. Kaler at his home in South Portland, if it did not intend to send the message to him at Cape Elizabeth without further charges, to have at once notified the plaintiff by telephone or telegraph of that fact, and of the additional expense of sending the message to Cape Elizabeth, that she might, if she desired, have had it forwarded to that place. But the defendant saw fit to retain the message the rest of that day and the following night, and then send it to Mr. Kaler by mail.

There is nothing in the case which excuses the defendant from its negligence after the message was received at the Portland office, and for that negligence the plaintiff is entitled to recover such damages as she sustained by reason thereof.

Mrs. Chase was elected teacher of the South Portland high school June 15, 1909, to serve during such portion of the ensuing year as should be the pleasure of the board. She resigned her position about the middle of August, 1909. It appears that Mr. Kaler was the superintendent of schools of South Portland, and on August 21st he notified Dr. Brown, as a member of the school committee and chairman of the high school committee, that Mrs. Chase had resigned, and they immediately began their efforts to find a substitute, and it was agreed that if either of them succeeded in getting a teacher that would be satisfactory, he should be engaged and the other notified. Mr. Kaler wrote to the plaintiff with the knowledge of Dr. Brown, and letters were written to other teachers. On the same day, August 21st, Ralph E. Sawyer applied to Dr. Brown for the position. Dr. Brown talked with the other members of the committee, and engaged Mr. Sawyer to fill the vacancy, and early Monday morning he informed Mr. Kaler that he had engaged Mr. Sawyer for the position, and Mr. Kaler ratified the engagement. Mr. Sawyer taught the school the balance of the year. As Mr. Sawyer was engaged before noon on Monday, August 23d, to fill the vacancy caused by the resignation of Mrs. Chase, the neglect of the defendant to deliver the message sent by the plaintiff accepting the position, did not cause her to lose the position, because her message was not given to the defendant to be forwarded until 1.30 P.

M., more than an hour and a half after the position had been filled, and the defendant's neglect was not the cause of her not obtaining the position. The only damages claimed or proved, are that she was prevented from accepting the position made vacant by Mrs. Chase, and the forty cents paid the defendant for transmission and delivery of the message.

Judgment for plaintiff for forty cents.

THE BUFFALO FERTILIZER COMPANY

vs.

THE AROOSTOOK MUTUAL FIRE INSURANCE COMPANY.

Aroostook. Opinion November 13, 1912.

Application. Assumpsit. Assignment. Consent. Contract. Conveyance. Deed. Mortgage. Policy of Insurance. R. S., Chap. 49, Sect. 1. Security. Title. R. S., Chap. 92, Sect. 1.

Assumpsit upon a fire insurance policy issued to the plaintiff by the defendant Company on the 22d day of December, 1909, for one thousand dollars, on a certain building occupied by the assured as a fertilizer house, in Houlton, Maine, and which was destroyed by fire on the 23d day of February, 1910.

The defendant contends that, at the time of the fire which destroyed said building, the plaintiff had no insurable interest covered by the policy in the property destroyed and that on the 23d day of December, 1909, the plaintiff in violation of the terms of the policy, delivered to the International Agricultural Corporation a warranty deed of the building described in the policy, which deed was dated September 20, 1909.

The plaintiff in answer contends that the warranty deed given to the International Company, though absolute on its face, was in fact a conveyance for the security of money advanced to pay debts of the plaintiff; by the International Company.

In support of these propositions, the plaintiff introduced four written agreements executed by and between the plaintiff and the International Company prior to the conveyance of the premises insured designed to effect a transfer of all the plaintiff's property to the International Company. The policy in suit was never assigned or transferred to said company nor

was any assent in writing or otherwise ever given by the defendant to any sale or conveyance of the property.

Held: That a most critical analysis of the written instruments above described upon which the plaintiff relies, will fail to disclose any of the elements or characteristics of a mortgage.

There is nothing in any of the agreements purporting to be a defeasance.

No one of them contains any provisions which could defeat the force or operation of the plaintiff's deed.

According to the express stipulation in the policy, it was avoided by the sale of the property without the consent of the defendant.

On report. Judgment for defendant.

This is an action of assumpsit upon a fire insurance policy issued to the plaintiff by the defendant company on the 22d day of December, 1909, for the sum of one thousand dollars, on a certain building occupied by the assured as a fertilizer house in Houlton, Maine. At the conclusion of the evidence, the case was reported to the Law Court for determination; the Law Court to render such final judgment upon said evidence as the legal rights of the parties may require.

The case is stated in the opinion.

Shaw & Shaw, and White & Case, for plaintiff.

G. H. Smith, and Madigan & Madigan, for defendant.

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

WHITEHOUSE, C. J. This is an action of assumpsit upon a fire insurance policy issued to the plaintiff by the defendant company on the 22nd day of December, 1909, for the sum of $1,000, on a certain building occupied by the assured as a fertilizer house in Houlton, Maine.

It is provided by sec. 1 of Chap. 49 of the R. S. that "A contract of insurance—life excepted—is an agreement by which one party for a consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party had an interest."

To entitle the plaintiff to recover in this action, it was therefore incumbent upon him to establish both an insurable interest in the

building destroyed and a valid subsisting contract of insurance at the time of its destruction.

The application for the policy declared upon contains a warranty that the plaintiff is the sole owner of the property to be insured and the policy itself contains the established provision of the standard policy that "this policy shall be void" if the property "shall be sold without the assent of the company in writing or in print."

The property was destroyed by fire on the 23rd of February, 1910, and it is contended by the defendant, first, that the plaintiff at that time had no insurable interest covered by this policy in the property destroyed, and, secondly, that on the 23rd day of December, 1909, the day following the issuance of this policy, the plaintiff, in violation of its terms, delivered to the International Agricultural Corporation a warranty deed of the building described in the policy.

But it is contended by the plaintiff that the warranty deed given to the International company, though absolute on its face, was in fact a conveyance for the security of money advanced to pay the debts of the plaintiff by the International company, and that the "ownership of the property, in law and in equity, was the same at the time of the fire as on the date of the policy."

In support of these propositions, the plaintiff introduces four written agreements executed by and between the plaintiff and the International company, prior to the conveyance of the premises insured, designed to effect a transfer of all the properties of the plaintiff to the International company.

In the first of these indentures dated July 10, 1909, the plaintiff agreed to sell and convey to the International company certain properties and plants including the building covered by the policy in suit, and the International company agreed to pay therefor in its capital stock at par, the full market value of the properties to be determined by appraisers. It was further agreed that upon receipt of the conveyance of the property, the International should deliver to the plaintiff its capital stock equal to eighty per cent of the estimated value of the plaintiff's assets; that this stock should be held in the plaintiff's treasury and if the value fixed by the appraisers should be less than eighty per cent of the estimated value, the requisite number of shares of stock should be returned to the International company; and on the other hand if the appraisal exceeded

80% of the estimated value enough additional shares of stock should be issued to the plaintiff to supply the deficiency.

In pursuance of this agreement, the plaintiff executed the deed above mentioned of the premises in question. The deed was dated September 20, 1909, but it was not delivered and recorded until December 23, 1909, the next day after the policy in suit was issued.

Subsequently, an agreement was made between the International company and a syndicate composed of the larger owners of the plaintiff company, and still later another agreement between this syndicate and the International company and a further agreement between the plaintiff and the International, all for the ultimate purpose of aiding the plaintiff in adjusting its liabilities in accordance with the terms of the agreement of July 10. By the terms of the three later agreements, the members of the syndicate were to accept the International stock at par for all of the plaintiff's debts paid by them, this stock to be deducted from the amount which the International had stipulated to pay the plaintiff; and for all of the plaintiff's debts paid by the International company, a corresponding amount was to be retained by that company. But it was expressly stipulated that the certificates of stock to be issued in payment for the property to be acquired from the plaintiff under the agreement of July 10, should not be delivered to the plaintiff, but should be delivered to the Bankers' Trust Company to be held against a certificate to be issued to the representative of the plaintiff. Otherwise the agreement of July 10 was to "remain in full force and effect."

The policy in suit was never assigned or transferred to the International company, and no assent, in writing or otherwise, was ever given by the defendant to any sale or conveyance of the property. But on December 23, 1909, the day the deed from the plaintiff to the International company was recorded, six other policies covering the same property originally issued to the plaintiff were assigned by the plaintiff to the International company, and the assignments assented to by the respective companies that issued them.

From this summarized statement of the stipulations in the several agreements and brief review of the transactions material to the questions raised in this case, it is evident that the facts disclosed, considered with reference to the settled rules of law in this State,

not only fail to support the plaintiff's propositions but clearly justify the contentions of the defendant; first, that at the time of the fire the plaintiff had no insurable interest in the property described in the policy, and second, that the policy was invalidated by the act of the plaintiff in selling and conveying the property to the International company without the assent of the defendant, in contravention of a clause in the policy which expressly declares that it shall be void if the property is sold without such assent.

It is not in controversy that the warranty deed of December 23, 1909, unconditional in its terms, was effectual to transfer from the plaintiff to the International company, an absolute title to the property in question, unless the operation of it was controlled by force of the agreements and transactions above described. The plaintiff claims that "the writings and agreements between the plaintiff and the International company, including the deed relied upon by the defendant, all taken and construed together, amount to a conditional sale only, or at most a conveyance for the security of a debt neither of which constitutes an alienation."

As defined in section 1 of Chap. 92, R. S., mortgages "include those made in the usual form, in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with an instrument of defeasance executed at the same time or as part of the same transaction." But the most critical analysis of the written instruments above described, upon which the plaintiff relies, will fail to disclose any of the elements or characteristics of a mortgage. In the first place, it does not appear that the deed was given to the International as security for any liabilities assumed for the plaintiff, and secondly, there is nothing in any of these agreements purporting to be a defeasance. No one of them contains any provision which could possibly have the effect to defeat the force or operation of the plaintiff's deed. No contingency is suggested in which the title to these premises would revert to the plaintiff. It has been seen that by virtue of one of the agreements, the stock of the International company which was to be issued to the plaintiff in payment for its assets, was to be held by the Bankers' Trust Company until the plaintiff's indebtedness had been liquidated, and it had been determined whether this stock should be delivered to the syndicate above mentioned or to the International company. Thus the International had ample security in the stock held by the

Trust Company for all the advances made by it. It did not hold these premises as security; by virtue of the deed of December 23, it held the absolute legal title. See *Tomlison* v. *Ins. Co.*, 47 Maine, 432.

The remote and contingent interest which the plaintiff had in the stock of the International company held by the Bankers' Trust Company was not covered by the terms of the policy in suit. R. S., Chap. 49, sections 24 and 31; *Bailey* v. *Ins. Co.*, 56 Maine, 474; *Balow* v. *Ins. Co.*, 77 Mich., 540.

The second ground of defense, that the plaintiff sold the premises without the assent of the defendant, is equally conclusive against the plaintiff's right to recover on the policy in suit. No further discussion of the evidence is required to prove that on December 23, 1909, in pursuance of prior written stipulations the plaintiff sold and conveyed the premises in question to the International company under an agreement to accept in payment the stock of the International company at par as above more fully stated. The premises were then "sold" within the meaning of that term as used in the policy. A complete alienation of the plaintiff's entire interest, legal and equitable, in that specific piece of property was thereby effected. It has been noticed that all of the other insurance policies covering this property were assigned by the plaintiff to the International company, December 23, 1909. While this fact cannot modify the legal effect of written agreements it has much significance upon the question of the plaintiff's understanding at the time in regard to the nature and purpose of the entire transaction. It is obvious that these other policies would not have been assigned to the International company unless it was understood that the property had been "sold" within the meaning of the policy. It is fairly to be inferred from the testimony of the plaintiff's witnesses that the failure to have the policy in suit assigned to the International company after the conveyance of December 23 was an inadvertent omission.

According to the express stipulation in the policy it was avoided by a sale of the property without the consent of the defendant. *Lyford* v. *Insurance Co.*, 99 Maine, 273; *Brown* v. *Ins. Co.*, 156 Mass., 587; *Boston Bank* v. *Ins. Co.*, 201 Mass., 350. And the certificate must be,

Judgment for the defendant.

LAKE AUBURN CRYSTAL ICE COMPANY AND FRANKLIN COMPANY, In Equity,

vs.

THE CITY OF LEWISTON.

Androscoggin. Opinion November 14, 1912.

Agreed statement of facts. Bill in Equity. Declaration of Rights. Floatable stream. Ice. Injunction. Lease. Private Rights. Private Property. Title. Private and Special Laws of 1911.

Under the agreed statement of facts five questions arise:

1. Is the Androscoggin River at the point in question a floatable and non-tidal stream?
2. If so, were the complainants riparian proprietors?
3. Did the City of Lewiston acquire, by virtue of its Harrisburg lease, any title to the ice forming upon the river in front of the complainants' shore?
4. Is the title to the ice in a floatable stream in the riparian owner or in the public?
5. Is the ice upon a floatable stream formed over and above the land belonging in fee to the owner, property within the meaning of Section of the Declaration of Rights which provides: "Private property shall not be taken for public uses without just compensation nor unless the public exigencies require it."
6. Was it the intention of the city to cut and harvest ice upon the river, upon the ice field alleged to be covered by complainants' title, to the extent of enabling the complainants to maintain their bill and be entitled to the relief prayed for.

Held; that under the rules laid down in *Wilson and Son et al* v. *Harry Harrisburg and Nathan Goldberg,* 107 Maine, 207, there can be no doubt that the plaintiffs are entitled to the relief prayed for and can maintain their bill.

Report upon an agreed statement of facts. Bill sustained with costs. Permanent injunction to issue.

This is a bill in equity in which the plaintiffs seek an injunction restraining the defendants from carrying into effect its alleged threats and purposes to enter upon the shores of said river adjacent to the premises owned by said Harrisburg and upon the bed of the river and to erect thereon and over and upon the bed of said river certain ice slips or runs and other structures and to cut, harvest and remove from said river the ice crop thereon, as set forth, and from doing any and all acts and things in furtherance of said threats and purposes and from interfering with the property and rights of the complainants and for a restraining order pending a hearing. Heard upon bill, answers and proof. At the conclusion of the evidence, the case reported to the Law Court upon an agreed statement of facts.

The case is stated in the opinion.

White & Carter, and Newell & Skelton, for plaintiffs.

Frank A. Morey, for defendant.

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

SPEAR, J. This case is reported upon an agreed statement of facts and involves the constitutionality of Chapter 92 of the Private and Special Laws of 1911. Under the agreed statement five questions arise.

1. Is the Androscoggin river at the point in question a floatable and non-tidal stream?

2. If so, were the complainants riparian proprietors?

3. Did the city of Lewiston acquire, by virtue of its Harrisburg lease, any title to the ice forming upon the river in front of the complainant's shore?

4. Is the title to the ice in a floatable stream in the riparian owner, or in the public?

5. Is ice upon a floatable stream formed over and above the land, belonging in fee to the owner, property within the meaning of Section of the Declaration of Rights; which provides: "Private property shall not be taken for public uses without just compensation nor unless the public exigencies require it."

6. Was it the intention of the city to cut and harvest ice upon the river upon the ice field alleged to be covered by the complain-

ants' title, to the extent of enabling the complainants' to maintain their bill and be entitled to the relief prayed for?

Every one of these questions, except the 6th is so thoroughly analyzed and fully settled in favor of the complainants in the comprehensive and exhaustive opinion in *Wilson and Son* v. *Harrisburg,* 107 Maine, 207, a case involving the identical premises in controversy, that a further review of the authorities applicable to the issues here raised would be a work of superrogation. Nor can there be any doubt, upon the evidence, under these rules of interpretation, that the plaintiffs are entitled to the relief prayed, and can maintain their bill.

But the defendants contend that they are authorized by special act of the Legislature to enter upon the ice field described in the plaintiffs' bill for the purposes of cutting ice for the benefit of the city. But an examination of the special act invoked, discloses a fatal omission in its phraseology, when regarded as a statute calculated to confer the right of eminent domain. It does not provide for the payment of any compensation whatever by the city for the taking of the ice, itself, formed upon the water over the bed of the river, the title of which is in the plaintiffs. Yet the one requirement to be found in the Constitution touching the right of eminent domain is that the property taken must be paid for. The constitutionality of municipal ownership under the special act of 1911, has not been considered.

Bill sustained with costs.
Permanent injunction to issue.

L. AUSTIN GRAY *vs.* JOHN B. DAY.

Washington. Opinion November 14, 1912

Acknowledgment. Brief statement. Conditional promise. Correspondence. Counter brief statement. Interpretation. Limitations. Statutes. Waiver. Writing.

Action on promissory note. The defence is the Statute of Limitations, by brief statement. The plaintiff filed a counter brief statement alleging that defendant had waived, in writing, the Statute of Limitations. The writ was dated December 16, 1911. The note sued is as follows:

"Wesley, Me., Mar. 8, 1905. $72.00. Five months after date, I promise to pay to the order of L. Austin Gray seventy-two dollars, interest at six per cent. Value received." (Endorsed on the back) "Aug. 5, 1905. Received $1.80, interest on the within." "Oct. 3, 1905. Received $20.00, on the within." The two following letters from the defendant to plaintiff's attorney constitute the evidence relied upon by plaintiff to establish the promise in writing to pay the note and also the waiver of the Statute of Limitations:

Waterville, Me., 9-21, 1911. Mr. H. H. Gray, Millbridge, Me. Dear Sir; Yours of the 19th inst. at hand. Regarding same would say, I have had no thought of letting this note run out to avoid paying it, and had it run over that time I would feel just as much obliged to pay it. I know Austin has been very patient and I thank him for it. I am sorry to say that at the present time I don't see how I can pay anything on this note, but I will give a new note which would amount to the same thing you mentioned. Will you let me know if that will do, and we can fix it up any time in that way. Awaiting your reply, I am, yours truly, John B. Day. P. S. I have a new pung for which I paid $55.00 and if he, Austin, would like that as payment I would deliver it to him for $45.00. This is a spring pung, upholstered with green plush. It has never had the thills in it. If he is interested in it, he can see it at Heman Dodge's in Westley.

Waterville, Me., 10-11, 1911. Mr. Gray, Dear Sir; Yours of the 30 ult. at hand some time ago. I have been thinking it over, and am sorry to say that it is impossible for me to pay 10 per cent. interest. 6 per cent. is all I can possibly pay. I will pay that, and do it as soon as I can. Yours truly, John B. Day.

Held: 1. That the letters do not contain such an acknowledgment and promise in writing as to remove the bar of the Statute.

2. That they do not prove a waiver which operated as an estoppel upon the right of the defendant to invoke the Statute.

On report. Judgment for defendant.

This is an action of assumpsit on a promissory note dated March 8, 1905, upon the back of which were two indorsements of payments, one dated August 5, 1905, and the other dated October 3, 1905.

The defendant plead the general issue with a brief statement of Statute of Limitations. The plaintiff filed a counter brief statement alleging a waiver of the Statute and an acknowledgment and promise in writing to pay.

At the conclusion of the evidence the case was reported to the Law Court.

The case is stated in the opinion.

H. H. Gray, for plaintiff.

Warren C. Philbrook, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

SPEAR, J. This is an action on a promissory note, and comes up on report. The plea was the general issue and the statute of limitations. A counter brief statement was filed alleging waiver of the statute and acknowledgment and promise in writing to pay. The case is made up entirely of correspondence between plaintiff's attorney and the defendant, together with the exhibits representing the original and renewal notes. The chronological order of the evidence is as follows:

1. Exhibit A., defendant's promissory note and endorsements of the following tenor: Wesley, Me., Mar. 8, 1905. $72.00. Five months after date I promise to pay to the order of L. Austin Gray, Seventy-two Dollars, interest at six per cent. Value received. John B. Day. (Endorsed on the back) Aug. 5, 1905, received $1.80 interest on the within. Oct. 3, 1905, received $20.00 on the within.

2. Exhibit D., a letter from the plaintiff's attorney to the defendant as follows: Milbridge, Me., September 19, 1911. John B. Day,

Esq., Waterville, Me. Dear Sir:—L. A. Gray has sent me a note against you upon which is due $72.85. This note will soon be barred by statute unless you make a payment, or action is commenced. If you will send me a payment at once so as to keep the note good we will then arrange to make it convenient for you to pay the balance, otherwise I shall have to commence action. Yours very truy, H. H. Gray.

3. Exhibit B., a letter from the defendant to the plaintiff's attorney which reads: Waterville, Me., 9-21, 1911. Mr. H. H. Gray, Millbridge, Me. Dear Sir: Yours of the 19th inst. at hand. Regarding same would say, I have had no thought of letting this note run out to avoid paying it, and had it run over that time I would feel just as much obliged to pay it. I know Austin has been very patient and I thank him for it. I am sorry to say that at the present time I don't see how I can pay anything on this note, but I will give a new note which would amount to the same thing you mentioned. Will you let me know if that will do, and we can fix it up any time in that way. Awaiting your reply, I am yours truly, John B. Day. P. S. I have a new pung for which I paid $55.00 and if he, Austin, would like that as payment I would deliver it to him for $45.00. This is a spring pung, upholstered with green plush. It has never had the thills in it. If he is interested in it, he can see it at Heman Dodge's in Westley.

4. Exhibit E., a letter from plaintiff's attorney in reply to the defendant's letter, exhibit B. Milbridge, Me., September 30, '11. John B. Day, Esq., Waterville, Me. Dear Sir: I have written Austin who says he has a spring pung and does not care for yours. He says he will renew the note for a year at 10 per cent. if you will pay my charges which will be small. I enclose note for you to sign if you desire to do this and if you will return this to me with $2.00 for my services it will extend the matter another year. Please sign at the right where I have made pencil cross and have a witness sign at the left. Please return this at once if you desire to do this. When new note is received I will send you the old one. Yours truly, H. H. Gray.

5. Exhibit C., a letter of the defendant to the plaintiff's attorney in reply to exhibit E. Waterville, Me., 10-11, 1911. Mr. Gray, Dear Sir: Yours of the 30 ult. at hand some time ago. I have been

thinking it over, and am sorry to say that it is impossible for me to pay 10 per cent. interest. 6 per cent. is all I can possibly pay. I will pay that, and do it as soon as I can. Yours truly, John B. Day.

6. Exhibit F., the last letter of the plaintiff's attorney to the defendant. Milbridge, Me., November 2, 1911. John B. Day, Esq. Waterville, Me. Dear Sir:—I forwarded your letter to Austin and he makes three propositions: First, you give a note payable one-half in six months and the balance in one year at 6 per cent. interest. Second, he will take a note at 6 per cent. for one year secured or with a good signer. Third, he will take your individual note one year at 10 per cent. and in either case you to pay my small charge of $2.00. Please let me hear from you at once in regard to the matter. Yours truly, H. H. Gray.

7. Defendant's Exhibit A., the renewal note. Waterville, Me., Sept. 30, 1911. One year after date I promise to pay to the order of L. Austin Gray, Seventy-two dollars and eighty-five cents with interest at ten per cent. per annum until paid. Value received.

To Exhibit F. the defendant made no reply, whereupon suit was brought upon the original note, the plaintiff relying upon the correspondence above exhibited as an acknowledgment or promise sufficient to relieve the note from the statute of limitations. Upon these exhibits are raised two questions. First, do they, as claimed by the plaintiff, contain such an acknowledgment and promise in writing, as to remove the bar of the statute? Second, do they prove a waiver which operated as an estoppel upon the right of the defendant to invoke the statute? It is the opinion of the court that both questions must be decided in the negative.

The principles of law raised in these two questions are so interwoven that it becomes quite necessary to consider them together inasmuch as the language which is claimed to prove a waiver may at the same time be interpreted to convey a promise or acknowledgment, or a conditional promise. The case must be determined according to the language of our statute which is of long standing, and, by frequent construction from an early date down through its history, would seem to be well understood. The statute reads as follows: "In actions of debt or on the case founded on any contract 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." R. S., Chap. 83, Sec. 100. That this statute should be construed strictly in favor of the bar which it was intended to create and not liberally in favor of a promise, acknowledgment or waiver, is quite clearly established. In *Perley* v. *Little,* 3 Maine, 97, it is said by Chief Justice Mellen in discussing this statute that "Doubts, uncertainties and equivocal expressions, are not by construction, to be converted into promises or acknowledgments." *Warren* v. *Walker,* 23 Maine, 453, decided in 1844 is also in point. To the same effect is *Johnston* v. *Hussey,* 89 Maine, 488, in which Chief Justice Emery said: "After much and varying judicial exposition, statutes of limitations are now almost universally held to be statutes of repose, to be interpreted and applied to effect that purpose. Any act or declaration imposed to defeat or postpone that effect is to be closely scrutinized." *Johnston* v. *Hussey,* 92 Maine, 92, also approves of this rule of interpretation.

Another rule of law of important bearing upon the decision of this case starts in *Perley* v. *Little,* 3 Greenlief, supra, and continues down through the cases, namely, that a promise, acknowledgment or waiver whether express or conditional is to be determined upon an examination of the whole writing; in the language of *Perley* v. *Little* "the plain and fair meaning of the party making use of the expression should be sought for, and then permitted to have its legitimate influence, and nothing further, in the decision of the question."

Our first inquiry, then, upon the written evidence before us may be directed to the determination of whether the alleged promise was express or conditional. In *Perley* v. *Little,* supra, it was held that, even though a part of the writing taken by itself would amount to an express promise or acknowledgment, and take the case out of the statute, yet it might be so modified by other parts as to completely nullify the express promise, or convert it into a conditional one. Under this interpretation we are unable to discover how plaintiff's Exhibit B., the letter of the defendant, can be construed to be more than a conditional promise. The language of the defendant is: "I am sorry to say that at the present time I don't see how I can pay anything on this note, but I will give a new note which will amount to the same thing you mentioned." The thing men-

tioned in plaintiff's Exhibit D was a payment at once so as to keep the note good. The first sentence above quoted is clearly not such a promise as to take the case out of the statute; but the second sentence "I will give a new note which would amount to the same thing you mentioned" might be sufficient under the rule laid down in *Peavy* v. *Brown,* 22 Maine, 100. But the letter does not stop here. It makes the promise upon a condition in this language: "Will you let me know, *if that will do,* and we can fix it up any time that way. Awaiting your reply, I am," etc. This by a fair interpretation of the language clearly means that the defendant would give a new note, if the plaintiff would consent to take it, and expressly asks, "will you let me know" whether you will take it. To summarize the language of this letter, it fairly says: "I will give a new note if you will take it. Let me know." This was clearly a conditional promise, and in order for the plaintiff to invoke a conditional promise to remove the bar of the statute it is incumbent upon him to show that he has performed the condition. In *Porter* v. *Hill,* 4 Maine, 41, the headnote, which fairly states the case, is as follows: "To take a demand out of the operation of the statute of limitations there must be either an absolute promise to pay the debt,—or a conditional promise, accompanied by proof of performance of the condition." In *Deshon* v. *Eaton,* 4 Maine, 413, it is also said: "The result of the most approved modern decisions, as to what declarations or admissions will take a case out of the operation of the statute of limitations is, that there must be an admission of present indebtedness, or a promise to pay, absolute or conditional; and if conditional, it must appear that the conditions, upon which the promise was to attach, has happened. The authorities upon this point were reviewed and considered in *Perley* v. *Little,* 3 Greenlief, 97; and more recent cases in the supreme court of the United States and of Massachusetts, fully warrant the deduction just stated." To the same effect is *Lombard* v. *Pease,* 14 Maine, 349. Expressly in point is *McLellan* v. *Albee, et al,* 17 Maine, 184, in which the court held: "The language proved to have been used by the defendant, Albee, may be equivalent to a conditional promise to pay, but the other party did not accede to the conditions annexed. It is contended, that though not for that reason effectual as a promise, an admission of present indebtedness

may be inferred from it." But the court held: quoting *Rutlege* v. *Ramsey,* 3 Nev. & Peng., 319, "That although this was an acknowledgment of the debt, yet as it contained merely a promise to pay in a particular manner, no general promise to pay could be implied from it, and that it was not sufficient to take the case out of the statute." But it was contended that, though the language, being conditional, was not effectual as a promise, an admission of present indebtedness might be inferred from it. But the court held otherwise, saying: "An acknowledgment of present indebtedness being only evidence from which a promise may be implied, an unconditional promise cannot be implied from testimony exhibiting the condition attached to it; so that any implied promise would be liable to the objection, when it was conditional as the express one." Here it should be observed that the promise, in the case at bar, was to pay in a particular manner—by a new note—and comes squarely within the above rule of law. The leading case, perhaps, upon this point is *Mattocks* v. *Chadwick,* 71 Maine, 313, in which Justice Walton, after citing the phraseology of many promises that had been judicially interpreted, uses this language: "When a new promise is relied on to take the debt out of the statute of limitations, and the new promise is a conditional one, the plaintiff cannot recover unless he proves performance of the condition. Proof of the promise only is not sufficient." In that case the defendant said "I would say now as I said before, and also told Mr. Ward, that when I was able I should most certainly pay the demand; but I am not now, nor have I been, in a condition to settle it." But the court held: "Such a promise is not sufficient to take a case out of the operation of the statute of limitations, without proof of the defendant's ability to pay."

Under this state of law and fact it was entirely competent for the plaintiff to do one of three things: Accept the conditional promise; exact an express promise in writing; or bring suit before the statute of limitations expired. He did neither. It would seem, rather that he preferred to hazard the chance of ten per cent. interest on a new note, including interest and charges on the original, until paid, to the certainty of the defendant's offer, as shown by the letter of September 30, marked Exhibit E. This the defendant declined

to do, as shown by Exhibit C., his letter of October 11th, and this refusal would clearly seem to be inconsistent with an express promise to pay the original note and interest. Even after receiving the letter of October 11th the plaintiff declined to accept the defendant's condition, and again suggested an entirely new proposition, including costs, to which the defendant made no reply. From the evidence disclosed in this correspondence, it is the opinion of the court that neither an express promise to pay nor an acknowledgment of the debt in writing can be properly inferred.

But upon the second question the plaintiff contends that, even if this be true, the correspondence shows a waiver on the part of the defendant to invoke the statute of limitations, on account of which the plaintiff deferred bringing suit, as he otherwise would have done, and consequently the defendant should now be estopped to invoke the statute. But we are unable to discover anything whatever in the evidence that warranted the plaintiff in delaying his action, as the correspondence rather shows that he delayed it in the hope, with the defendant's apparent willingness to give a new note, that he would be able to obtain a note bearing ten per cent. interest instead of the note which the defendant seemed willing to give. The only note which the plaintiff ever sent to the defendant, Exhibit A., written "with interest at 10 per cent. per annum until paid" seems to establish this conclusion. Had he sent a note to the defendant bearing interest at 6 per cent. and had the defendant declined to sign and return this note, a different conclusion might be arrived at. This we do not undertake to decide.

But let us see more specifically upon what evidence the plaintiff claims estoppel. He says it is because the defendant promised to give a new note, reliance upon which induced him to rest easy in the belief that the defendant would do as he had agreed. Concede that the defendant did promise to give a new note which, it may be admitted, would legally imply interest at the rate of 6 per cent., then did he ever refuse? We do not so interpret the defendant's letters. On the other hand, it conclusively appears from the plaintiff's letters, through his attorney, that he declined to take the new note which the defendant expressed a willingness to give.

At this juncture we are met with the anomalous attitude of the plaintiff, of having refused to accept a new note, which he might

have had, and then, of invoking the rule of estoppel because he had declined to take it. The evidence shows not only that there was no waiver but a willingness on the part of the defendant to keep his promise to the letter.

Judgment for the defendant.

J. H. DONNELL *vs.* CANADIAN PACIFIC RAILWAY COMPANY.

Aroostook. Opinion November 14, 1912.

Agents. Arrangements for Storage. Common Carriers. Conversion. Demand. Detainer. Dominion. Trover.

An action of trover for the conversion of certain personal property which was destroyed by fire in the freight-house at Presque Isle, belonging to the defendant. The plaintiff for several years prior to the fire June 7, 1909, had an arrangement with the defendant that the bulk of his freight coming in car load lots over the defendant's road should be set apart in a portion of its freight-house and kept separate from goods of other shippers and to allow the plaintiff and his servants at any time to remove them. The plaintiff, and his agents and servants, had, previous to the fire, been furnished with a key to the freight-house whenever called for for the purpose of storing and removing goods from the storehouse. Upon the day of the fire, the plaintiff's agent went to the agent of the defendant for the key, but the agent refused to deliver to him the key, and the plaintiff did not succeed in getting the key until the burning of the freight-house was imminent.

Held: 1. That while the defendant's agent did not refuse to deliver the goods, nor claim title to them, under the circumstances he exercised a dominion over them in refusing the key.

2. Upon the plaintiff's demand emphasized by the immediate presence of dangerous conditions, almost any hesitancy or delay to give him, the quickest possible possession of his goods was wrongful.

3. When a person exercises a dominion over personal property inconsistent with the possession of the owner, in consequence of which the property is lost or destroyed, the exercise of such dominion constitutes a conversion.

On report. Judgment for plaintiff for twenty-six hundred dollars and interest from date of the writ.

This is an action of trover for the conversion of personal property consisting of various kinds of merchandise of the alleged value

of twenty-six hundred dollars. Plea general issue.

At the conclusion of the evidence the case was reported to the Law Court for determination upon so much of the evidence as is legally admissible.

Hersey & Barnes, and Shaw & Shaw, for plaintiff.

E. C. Ryder, for defendant.

SITTING: WHITEHOUSE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, JJ.

SPEAR, J. This case, coming up on report, imposes jury powers upon the court. It is the opinion of the court that the following facts may be found upon a preponderance of evidence. This is an action of trover for the conversion of personal property consisting of various kinds of merchandise of the alleged value of $2600, the amount of which is not in dispute. The plaintiff was a large dealer in groceries, provisions and feed in the village of Presque Isle and had been so engaged for at least seven years. The defendant is a railroad corporation having a station, freight-house and place of business at Presque Isle.

The defendant company and the Bangor & Aroostook Railroad Company are competing roads as common carriers of freight at Presque Isle. Prior to the 7th day of June, 1909 for several years the plaintiff had an agreement with the defendant that the bulk of his freight coming in car load lots should come over the defendant road, and that in consideration for this business the defendant should set apart a portion of its freight-house for the storage of his goods and keep them separate from the goods of other shippers, and allow the plaintiff and his servants at any time to remove them, for the storage of which no charge was to be made. This arrangement was admitted by the defendant's agent, and had existed for some years prior to the date of the fire. As a necessary result, the defendant, his agents and employees had been furnished with a key whenever called for for the purpose of storing, and removing, goods from the storehouse. Previous to the day of the fire neither the plaintiff nor anyone of his employees had ever been refused the use of the key, upon request, to give them access to the building.

On the afternoon of June 7, 1909, a fire started in the western part of the village of Presque Isle about one-half mile from the

freight and storehouse of the defendant, which rapidly developed, threatened, and finally consumed a large part of, the village, including the freight-house in question. At this time the goods alleged to have been converted, together with five barrels of sugar which were removed, were in the storehouse without insurance. When the plaintiff became alarmed at the progress of the fire he took his team with three servants and proceeded to the storehouse. Immediately upon arriving he sent one of his men, Mr. McKenney, who had long been a clerk in his store and well known to the defendant's agent as his clerk, to obtain the key to the storehouse to enable him to unlock it and remove his goods to a place of safety. This was from three-quarters of an hour to an hour before the fire was communicated to the freight-house. The defendant's agent, although he said in his testimony "I presumed he wanted the key for the purpose of removing his goods" refused to deliver the key. He also says that he gave Mr. McKenney no reasons whatever for refusing him the key. McKenney returned without the key, and the plaintiff himself then proceeded to the station, found the defendant's agent and requested the key. As to what occurred between the plaintiff and the defendant's agent with reference to what seems to have been a fatal delay in not turning over the key to the plaintiff, there appears to be a material conflict in the testimony, which must be solved in the light of the circumstances and probabilities, because it is not controverted that the plaintiff, had he been given the key when he first approached the agent, would have been able to save all his goods. Therefore, the loss of the time between the request for the key and receiving it was responsible for the burning of the goods. The defendant contends that this loss of time was due to the voluntary concession of the plaintiff based upon the conclusion that the storehouse was not in danger. The plaintiff, however, contends that he was unable to obtain the key until the burning of the warehouse was imminent. In corroboration of the plaintiff's contention it should be observed that the defendant's agent admits that the first time the plaintiff made demand on him for the key he refused to deliver it "except on condition that he would become responsible for any goods lost outside of his own."

We are of the opinion that the plaintiff's contention must be sustained. The conditions connected with the res gestae of the

situation are of paramount importance in determining the value of the evidence found in the conflicting testimony touching this question of delay. The plaintiff had uninsured over three thousand dollars' worth of merchandise in the storehouse, a conflagration was raging in the village, he had become alarmed to the extent of coming with his team and three men to the storehouse for the purpose of removing his goods; he had immediately upon arriving sent one of his employees to obtain the key to enable him to open the storehouse; the employee returned without the key. He, himself, then at once proceeded to the railroad station for the same purpose. It is not controverted that he promptly demanded the key. It is equally true that the storehouse was on fire before he reached it with the key. That under these circumstances he dallied away three-quarters of an hour and then after obtaining the key waited fifteen minutes, according to the agent's testimony, before he proceeded to the storehouse, with the fire so near that the storehouse was actually burning before he arrived with the key, was inconsistent with the probable action of any sane and interested man. We, therefore, think that the plaintiff's testimony, corroborated by the probabilities, sustains the burden of proof in favor of his contention as to the cause of the delay. Upon this conclusion of fact, did the refusal of the defendant to deliver the key to the plaintiff constitute a conversion?

Again the cirmumstances under which the plaintiff was acting constitute an important element in determining, not only the facts, but his legal rights upon the question of conversion. Under ordinary conditions we should gravely doubt if the acts of the defendant's agent could be regarded as tantamount to a conversion. The right to possession of goods in the hands of a bailee may depend, however, so intimately upon immediate surrender that a delay of a few minutes, even, may result in the difference between salvage and partial or total loss. And the typical illustration of this rule would occur in case of fire. It is the opinion of the court that it did occur in the case at bar. While the defendant's agent did not refuse to deliver the goods, nor claim title in them, nevertheless, under the circumstances he exercised a dominion over them in refusing the key, more disastrous to the plaintiff than an ordinary delay for a month to allow him to enter the storehouse. Upon the

plaintiff's demand, emphasized by the immediate presence of dangerous conditions, it would seem that almost any hesitancy or delay to give him the quickest possible possession of his goods, was wrongful. And, as we understand the law, a wrongful detention upon proper demand will support an action of trover. In *Fifield* v. *Me. Central R. R. Co.,* 62 Maine, 77, it is said: "To constitute it there must have been either a wrongful taking, or wrongful detainer, or an illegal using, or a misusing, or an illegal assumption of ownership." In *Fernald* v. *Chase,* 37 Maine, 289, it is said: "To make out a conversion, there must be proof of a wrongful possession, or of the exercise of a dominion over it, in exclusion or defiance of the owner's rights, or of an unauthorized and injurious use, or of a wrongful detention after demand." To the same effect is *Fuller* v. *Tabor,* 39 Maine, 519. Cooley on Torts, 524, says: "Any distinct act of dominion wrongfully exerted over one's property in defiance of his right or inconsistent with it is a conversion. . . . It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it either his own or another person's use." We think the rule is too well established to require further citation that when one person exercises a dominion over personal property inconsistent with the possession of the owner, in consequence of which the property is lost or destroyed, the exercise of such dominion constitutes a conversion.

Nor in the case at bar can the intention with which the defendant's agent withheld the key become material. 28 Am. Enc. Sec. Edition, 681, and cases cited. 38 Cyc., 2029. See also *England* v. *Bulkley,* 25 Ill., 224.

In accordance with the terms of the report the entry must be,

Judgment for the plaintiff for Twenty-six hundred dollars and interest from the date of the writ.

BARNEY SILVER, in rep., *vs.* VINCENT G. MOORE.

Penobscot. Opinion November 15, 1912.

Abandonment. Agent. Breach of Contract. Cash sale. Contract of sale. Delivery. Replevin. Tender.

The plaintiff agreed with defendant's agent for the purchase of two cows from defendant for the sum of eighty-three dollars. He paid sixty dollars down and took one cow away with him. A few days later the parties had a conversation as to the balance due and the defendant refused to carry out the contract.

The plaintiff accordingly went to the defendant's premises with an officer and tendered the defendant the balance of the purchase price which the latter refused to accept. The plaintiff then took the cow upon a replevin writ. The money tendered was not brought into court.

Held: 1. That in the absence of any agreement to the contrary as to the terms of payment, the law presumes a cash sale, that is a sale conditioned on payment concurrent with delivery.

2. That the balance of the purchase price not having been paid, the title to the second cow had not passed to the plaintiff.

3. That the tender of the balance due before suit brought, does not remove the difficulty because the tender was not kept good by bringing the money into court.

4. That as the plaintiff had neither the title nor the right of possession, this form of action cannot be maintained.

On exceptions by plaintiff. Overruled.

This is an action of replevin by vendee against the vendor to recover possession of a cow. Plea, general issue with brief statement alleging title to defendant.

The case is stated in the opinion.

Thompson & Blanchard, for plaintiff.

Mayo & Snare, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

CORNISH, J. Action of replevin brought by vendee against vendor to recover possession of one cow. Plea general issue with a brief statement alleging title in defendant.

The transaction was as follows: The plaintiff accosted the defendant in relation to the purchase of cows, and the defendant turned the plaintiff over to his father as his agent. Together the plaintiff and the agent went to the defendant's barn and looked over the herd of six cows, and the agent gave the plaintiff the price of each. Finally, the plaintiff selected two and asked the price for both. The agent named ninety dollars, and the plaintiff offered eighty. After some haggling the agent said: "If you want them for eighty-three dollars you can have them." The plaintiff accepted the offer and paid sixty dollars down, for which a receipt was given in these words: "Received from Barney Silver sixty dollars on account for cows." The plaintiff took one cow away and left the other, the agent agreeing to keep her a few days until the plaintiff could send for her. Two days later the parties met and the following conversation took place according to the testimony of the plaintiff: "Vincent Moore says, 'Barney I owe you ten dollars,' and I says, to Mr. Moore, 'Perhaps you are mistaken, I owe you twenty-three dollars after I got him;' he says, 'You called the other one you took at fifty dollars and this one twenty-three dollars;' and I says, 'You don't know which one is worth fifty dollars and thirty-three dollars, perhaps this one is worth thirty-three dollars and the other fifty dollars.' He says, 'You can't have them anyway.'"

Soon after this the plaintiff went to the defendant's premises with an officer and tendered the defendant twenty-three dollars, the balance of the purchase price, which the latter refused to accept. The plaintiff then took the cow upon this replevin writ. The money tendered was not brought into court.

Upon this state of facts, the presiding Justice ordered a nonsuit, and we think the ruling was correct. The plaintiff did not have such title or right of possession as justified the suit.

There was no completed sale of the second cow. The only inference to be drawn from the evidence is that both parties intended this to be a cash sale. There was no mention of credit, and in the absence of an agreement or understanding between the

parties as to terms of payment, the law presumes a sale to be a cash sale, that is, a sale conditioned on payment concurrent with delivery. *Merrill v. Stanwood,* 52 Maine, 65; *Merrill Furniture Co.* v. *Hill,* 87 Maine, 17; *Berlaiwsky* v. *Rosenthal,* 104 Maine, 62. The defendant had delivered one cow and had received part payment for both. It is not to be presumed that he intended to deliver the other to the plaintiff until he received full pay therefor. This is not an action for breach of contract of sale, where the Statute of Frauds might be involved. If it were, the partial payment and the acceptance and receipt of a part of the goods would satisfy the Statute. A contract of sale, and a sale, are quite distinct although much confusion has arisen because the distinction has not been clearly kept in mind. The first is an agreement to transfer, the second is a transfer of title. The basis of an action for breach of contract of sale is that the title has not passed, and the seller has not done what he agreed to do. The basis of the present action is that the title to the whole has passed. As between the parties, the law holds the question of sale to be largely one of intention, to be gathered from all the circumstances of the case, and applying that test here it is apparent that the parties did not intend that title should vest in the vendee before the agreed price was fully paid. The relations of the parties, the conversation at the time the bargain was struck, the partial payment, the terms of the receipt given, and especially the statement of the plaintiff at the second interview, "I owe you twenty-three dollars after I get him," meaning the second cow, all negative the contention that the parties intended the title to pass until payment was completed. If the title had already passed, the plaintiff owed the twenty-three dollars even before he got the remaining cow.

Nor does the tender of the balance due, made by the plaintiff before suit brought, remove the difficulty, because the tender was not kept good by bringing the money into court. Before the plaintiff could get title to the cows he was obliged to fully pay for them, as it was a cash sale. Tender is not payment; it is merely an offer to pay. "Where the debt remains after the tender, a tender of money to be available to the party tendering, must be kept good, otherwise it is abandoned." 38 Cyc., p. 158. And when the party to whom the payment is due refuses to accept it, the tendering party

must place the amount in custodia legis so that it can be had upon request, otherwise he cannot maintain his action. *McPheters* v. *Kimball,* 99 Maine, 505.

The plaintiff claims that the defendant waived the tender by refusing to accept the proffered sum, citing several authorities as sustaining the proposition, viz., *Mattocks* v. *Young,* 66 Maine, 459; *Duffy* v. *Patten,* 74 Maine, 396; and *Lowe* v. *Harwood,* 139 Mass., 133; but the distinction between those cases and that at bar is clear. In the cited cases, the action was brought on a breach of contract, which provided for a preliminary tender. The court held that the party's announcement in advance that he would not receive the tender if made and his refusal to perform the contract avoided the necessity of making a tender which would have been an idle and useless ceremony. But that is not this case. Here the tender was made, but was ineffective.

The plaintiff's right of action must rest on his title to the property, and his title is based on his payment therefor. The defendant's refusal to accept the balance of the purchase price might render him liable for breach of contract to sell and deliver, but it could not be regarded as a substitute for the payment itself so as to transfer the title to the property bargained for. In other words, a refusal to sell cannot be construed to be a sale, nor can a refusal to accept the purchase price be regarded as its acceptance.

Exceptions overruled.

LEWIS PIERCE, Admr. de bonis non with the will annexed. Petr.
In Equity.

Cumberland. Opinion November 15, 1912.

Bequest. Construction. Executor. Home for Indigent Seamen. Income. Investment. Public Charitable Bequest. Trustee. Will.

The fifth clause of the will of Joseph How, late of Portland, deceased, reads as follows: "I request and direct, that after the decease of my said wife, mother and brother, my said estate, real and personal, shall be appropriated to the founding of a home for indigent seamen, and I authorize and empower my executor to invest the said property and the income thereof, and to use and employ the same in such manner as will do the most good to the class of indigent seamen."

Held: 1. That the bequest is in terms a good public charitable bequest.

2. That although the balance remaining after the support of life tenants for forty years amounts to only $1,500, the original purpose of the testator ought not to be thwarted because of the smallness of the available fund.

3. That the purpose is definite in its objects, is lawful and is to be regulated by a trustee to be appointed by the Probate Court, the original trustee having died.

4. That the trustee so appointed is to invest the residuum of the estate for the benefit of indigent seamen, that he can do this directly or turn over the income to some worthy society or association organized for that purpose, like the Portland Marine Society.

5. That the exact details must be left to the sitting Justice who is to determine to whom the income is to be paid and through what channel the kindly gift can be made most effective.

Bill in equity. Bill sustained. Decree in accordance with the opinion.

This is a bill in equity by Lewis Pierce, administrator de bonis non with the will annexed, of the estate of Joseph How, asking the court to construe the fifth clause in the will of Joseph How. Answers by the heirs at law filed admitting the allegations in the

bill. At the conclusion of the hearing before a single Justice, the case was reported to the Law Court for determination upon bill and answer.

The case is stated in the opinion.

Lewis Pierce, for complainant.

George C. Wheeler, for defendant.

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

CORNISH, J. The fifth clause of the will of Joseph How, which the court is asked by these proceedings to construe, reads as follows:

"I request and direct, that after the decease of my said wife, mother and brother, my said estate, real and personal, shall be appropriated to the founding of a home for indigent seamen, and I authorize and empower my executor to invest the said property and the income thereof, and to use and employ the same in such manner as will do the most good to the class of indigent seamen."

This will was probated July 24, 1870, and the executor named therein having resigned, the plaintiff was appointed administrator de bonis non with will annexed June 15, 1875. All the parties named as having a life interest have died and the question as to the legal disposition of the property under clause five is raised by the heirs at law, who claim that the balance now remaining should be distributed among them as intestate estate.

It should be observed that the proceedings in this case are not strictly in accordance with the established practice; but inasmuch as all parties in interest are before the court, we will proceed to the merits of the controversy.

The heirs at law contend that the attempted trust in the clause under consideration has failed, both for indefiniteness and because the amount available, about $1,500, is so small as to render it impossible to carry out the provisions of the trust even if one were created.

We cannot so view the matter. The bequest is in terms a good public charitable bequest. *Going* v. *Emery,* 16 Pick., 107; *Tappan* v. *Deblois,* 45 Maine, 122; *Preachers' Aid Society* v. *Rich,* 45 Maine, 522; *Howard* v. *Amer. Peace Society,* 49 Maine, 288. In

Holmes v. *Coates,* 159 Mass., 226, the bequest was very similar to the one under discussion, viz., "for the benefit of disabled soldiers and seamen who served in the Union Army in the late war of the Rebellion in the United States, their widows and orphans;" and the court held that it was a valid public charitable bequest and should be executed in such a manner as to carry out the intention of the testator. The same principle applies to the case at bar. The testator's intention was plain. He wished to establish a trust for the benefit of indigent seamen. In the first part of section five he provides for the founding of a home for such objects of charity; in the second, he authorizes and empowers his executor to invest the property and the income thereof and "to use and employ it in such a manner as will do the most good to the class of indigent seamen." The two are in a sense inconsistent, if the intention in the first clause was to use the funds in constructing a building, because in that case there would be nothing left to invest under the second clause. But the general purpose is apparent; it was to have the property so used "as would do the most good to the class of indigent seamen." If enough remained so that a seaman's home could be established and maintained, the executor was authorized to so use it. If not, then the property should be invested and the income used for the same general purpose.

The balance actually available, after the support of the life tenants for forty years, proves to be only $1,500, but the fact that it is no larger does not annul this express provision of the will. To hold that because of its smallness, this sum should be distributed among heirs who were never contemplated by the testator, or diverted to any other purpose, would be a violation of the testator's clearly expressed wish. *Allen* v. *Nasson Institute,* 107 Maine, 120. The purpose is not indefinite. True, no particular place is mentioned, where a home should be established, nor where the objects of his bounty should receive their assistance. But none need be. If the charity is definite in its objects, is lawful, and is to be regulated by a trustee appointed for the purpose, it is sufficient. The executor was made trustee by the will, and he having resigned, it is now incumbent upon the Probate Court to appoint a trustee for this property, as no valid trust is allowed to fail for want of a trustee.

The trustee so appointed is to invest the residuum of the estate,

and employ the income for the benefit of indigent seamen. He can do this directly, or he can turn over the income to some worthy society or association organized for that purpose. It is common knowledge that in the City of Portland, where the testator lived and died, a corporation known as the Portland Marine Society was incorporated more than a century ago for this same general purpose and is still in active operation. It might be deemed wise to turn over the income of this trust fund, as it accrues, to that society. But the exact details must be left to the sitting Justice who is to determine to whom the income shall be paid and through what channel the kindly gift can be made most effective. *Holmes* v. *Coates,* supra.

Decree in accordance with this opinion.

INHABITANTS OF ROCKPORT *vs.* CITY OF ROCKLAND.

SAME *vs.* SAME.

Knox. Opinion November 23, 1912.

Acquired Settlement. Collateral Attack. Derivative Settlement. Error. Instructions. Intention of Marriage. Paupers. Record. Residence. Rebuttable Presumption. Supplies. Settlement.

Barter had a derivative settlement in Isle Au Haut. The plaintiff contended that he acquired a settlement in Rockland by having his home there for five successive years, between 1889 and January 7, 1899, without receiving supplies as a pauper, directly or indirectly.

The defendant contended that Barter moved from Rockland to Stonington in 1892 and made his home there for two years, subsequently returning to Rockland where his intentions of marriage were filed October 10, 1894. That he again went to Stonington in November, 1894, and from there went to Rockport in the summer of 1895 and made his home there till his marriage December 27, 1898.

The plaintiff introduced without objection the record from the City Clerk's office of Rockland showing Barter's intentions of marriage dated October 10, 1894, in which his residence was stated to be Rockland. Also the record of his marriage on December 27, 1898, in which his residence was stated to be Rockland.

Held:

1. Assuming that the recital of Barter's residence in the record of his marriage was properly admitted as tending to show that his residence at the time was in Rockland, it was only presumptive evidence of that fact and not conclusive.
2. Its admissibility was on the ground that the law requires that a record of a marriage shall be made containing the names and residences of the contracting parties and there is a presumption that the recital is true. But it is a rebuttable presumption.
3. The record having been admitted, it was proper for the other party to show facts and circumstances which would have a tendency to rebut the presumption arriving from the recital in the record.

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

The above actions are to recover for pauper supplies furnished by plaintiff town to George L. Barter and his family and were tried together. The jury returned a verdict for the plaintiff in both cases; in docket number 684 for $76.54, and in docket number 686 for $34.63. In the course of the trial, the defendant excepted to the admission and exclusion of certain evidence and to parts of the charge to the jury. The motion for new trial was not considered by the court, but the exceptions were sustained. The case is stated in the opinion.

L. M. Staples, for plaintiff.

E. K. Gould, for defendant.

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

KING, J. These actions are to recover for pauper supplies. They were tried together, and the sole controversy involved was concerning the pauper settlement of George L. Barter. The verdicts were for the plaintiff and the cases are before this court on defendant's exceptions and a motion for a new trial.

The question raised by the first exception may be thus briefly stated: Barter had a derivative settlement in Isle Au Haut. The plaintiff contended that he acquired a settlement in Rockland by having his home there for five successive years, between 1889 and

January 7, 1899, without receiving supplies as a pauper directly or indirectly.

The defendant contended that Barter moved from Rockland to Stonington in 1892 and made his home there for two years, subsequently returning to Rockland where his intentions of marriage were filed October 10, 1894. That he went back to Stonington in November, 1894, and remained there till the summer of 1895 when he went to the plaintiff town and made his home there till his marriage on December 27, 1898.

The plaintiff introduced without objection the record from the city clerk's office of Rockland showing Barter's intentions of marriage dated October 10, 1894, in which his residence was stated to be Rockland. Also the record of his marriage on December 27, 1898, under the same intentions, in which his residence was stated to be Rockland. Chester D. Walker, the Justice who performed the marriage ceremony, called by the defense, testified that he inserted in his return to the city clerk of the marriage the residence of Barter as Rockland taking it from the certificate of the publication in 1894, and that Barter was not consulted about it, and did not know that the return had been so made.

Referring to the record of the marriage the presiding Justice in his charge to the jury said:

"The marriage was returned by the justice performing the ceremony to the city clerk, to be recorded as required by law, and that certificate stated that the residence of the groom was in Rockland. The plaintiff relies upon that fact. Mr. Walker, the justice who performed the ceremony, has been upon the stand and he has testified that he took the residence from the license that was issued. You are to consider the fact of the license, the fact of the marriage; and we must, Gentlemen, place reliance upon records. Records cannot be collaterally attacked. It would hardly be fair that a record that is required by law to be made for the purpose of perpetuating the facts therein stated for future generations should be open to attack in court when they are not directly involved, open to what is known as collateral attacks. If they can attack the record of a marriage, they can attack the record of the deed of your place, and it is only by proceedings directly involved that such records can

be attacked. If wrong, they can, of course, be corrected, but it must be by direct proceedings. You will bear in mind the marriage and the publication."

We think the learned Justice erred in the instructions quoted, and that this exception must be sustained. Assuming that the recital of Barter's residence in the record of his marriage was properly admitted as tending to show that his residence at that time was in Rockland, it was only presumptive evidence of that fact and not conclusive. Its admissibility was on the ground that, since the law requires that a record of a marriage shall be made containing among other recitals the names and residences of the contracting parties, there is a presumption that the recitals are true. But it is a rebuttable presumption. The recitals may not be true. And the record having been admitted it was proper for the other party to show facts and circumstances which would have a tendency to rebut the presumption arising from the recital in the record. *Ward* v. *Oxford,* 25 Mass., 476. See also *Shutesbury* v. *Hadley,* 133 Mass., 242, where a copy of the record of a marriage was held properly admitted in a proper case as prima facie evidence only of the person's residence as therein recited at the time of the marriage.

Nor can it be reasonably contended that the error was harmless to the defendant. Under the instructions the jury may have concluded that they should regard the records introduced as *conclusive* proof that Barter's residence was in Rockland in October, 1894, and in December, 1898. Such a conclusion would very materially strengthen the plaintiff's contention, and quite as materially weaken that of the defendant.

It is unnecessary to consider the motion as in the opinion of the court the entry must be,

Exceptions sustained.

GEORGE E. ALLEN

vs.

GEORGIANNA ALDEN AND WILLIAM G. ALDEN.

Knox. Opinion December 2, 1912.

Assignment. Breach of Contract. Conveyance. Consideration. Damages. Equitable Assignment. Mortgage. Tender.

An action to recover damages for a breach of a contract for the conveyance to the plaintiff of certain real estate situate in Rockland and known as the Hiram G. Berry Block and the assignment to him of two mortgages of $5,000 each on the Kimball Block adjoining. The first mortgage was held by the Rockland Savings Bank, and the second mortgage by the defendant Georgianna Alden. The consideration of the sale was $29,000, of which $500 was paid at the time of the execution of the contract. There was inserted in said contract this provision:

'In the event of my being unable to get an assignment of said mortgage to said Rockland Savings Bank so as to assign it to said Allen as aforesaid, then this agreement shall be void and said $500 shall be returned to said Allen.

The defendants seasonably applied to the said Savings Bank to secure the purchase and legal assignment of the first mortgage on the Kimball Block, but the bank refused to part with its mortgage and Georgianna Alden never sought to exercise her legal right as second mortgagee to pay the prior mortgage. The $28,500 was seasonably tendered by plaintiff and the defendants seasonably tendered a return of the $500.

Held: 1. That the agreement contemplates only a voluntary legal assignment of the mortgage obtained from the Savings Bank by purchase.

2. That a junior mortgagee of property who redeems a prior mortgage is entitled to be subrogated to the rights of the first mortgagee so as to hold the first mortgage as quasi assignee for the purpose of obtaining reimbursement for the amount paid by him to protect his interests as second mortgagee in the event of the redemption of his own mortgage.

3. The mere fact that one has a right to redeem a mortgage does not enable him to compel an assignment of it to himself.

4. The second mortgagee had the right to pay and take up the bank mortgage and that the practical result would be an equitable assignment of the mortgage.

On report. Judgment for defendant.

This is an action to recover damages for the breach of a contract for the conveyance to the plaintiff of certain real estate situate in Rockland, known as the Hiram G. Berry Block, and the assignment to him of two mortgages of $5,000 each on the Kimball Block adjoining. The first mortgage was held by the Rockland Savings Bank, and the second by the defendant Georgiannna Alden. The consideration of the sale was $29,000, of which $500 was paid at the time of the execution of the contract. The contract contained this provision: "In the event of my being unable to get an assignment of said mortgage to said Rockland Savings Bank so as to assign it to said Allen as aforesaid, then this agreement shall be void and said $500 returned to said Allen." At the conclusion of the evidence, the case was reported to the Law Court for its determination.

The case is stated in the opinion.

Reuel Robinson, Heath & Andrews, and Alan L. Bird, for plaintiff.

A. S. Littlefield, for defendant.

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

WHITEHOUSE, C. J. This is an action to recover damages for the breach of a contract for the conveyance to the plaintiff of certain real estate in Rockland known as the Hiram G. Berry Block, and the assignment to him of two $5,000 mortgages on the Kimball Block adjoining, the first mortgage being held by the Rockland Savings Bank and the second by the defendant Georgianna Alden. The consideration of the sale was $29,000 of which the sum of $500 was paid at the time of the execution of the contract.

The provision in the contract directly involved in the decision of the question presented is found in the following clause:

"In the event of my being unable to get an assignment of said mortgage to said Rockland Savings Bank so as to assign it to said Allen as aforesaid . . . . then this agreement shall be void and said $500 shall be returned to said Allen."

The defendants seasonably applied to the Rockland Savings Bank to secure the purchase and legal assignment of the first mortgage on the Kimball Block, but the bank refused to sell or part with its mortgage, and the defendant, Georgianna Alden, never sought to exercise her legal right, as second mortgagee, to pay the prior mortgage, and thereby obtain an equitable assignment of it.

The plaintiff made seasonable tender of $28,500 as the balance of the purchase price, and the defendants made seasonable tender of the return of the $500 received at the date of the contract.

One of the counsel for the plaintiff who drew the contract states in his testimony that before the contract was made, and while they were discussing the possibility that the Savings Bank might not be willing to make an assignment of its mortgage to the defendant, he advised them in that event "he could not compel them to make a regular assignment of the mortgage, but that being a junior mortgagee, holding a second mortgage, he would have a right to pay the first mortgage to the bank, take it up, and by so doing he would be subrogated to the rights of the bank, and that in legal effect would be, so far as he was concerned, an assignment of the mortgage." It is a fair inference from all of his testimony that the first or "tentative" draft of the contract was not entirely satisfactory, and that the defendant, Mr. Alden, wished to have a clause inserted expressly declaring the contract void in the event that the defendants were unable to obtain an assignment from the Savings Bank of the first mortgage on the Kimball Block, and that a second draft was made in the form in which the contract now appears, with the clause in question duly inserted. It does not appear, however, to have been expressly stated by the plaintiff, or any one acting in his behalf, either before or after the contract was signed that the plaintiff would be willing to accept the fact of the payment of the Savings Bank mortgage as a satisfactory performance of the contract; and it is admitted that after the signing of the contract there was never any conversation whatever between the parties in relation to the Savings Bank mortgage.

The case comes to the Law Court on report.

It is admitted that if the agreement contemplates only a voluntary legal assignment of the mortgage obtained from the Savings Bank, by purchase, the defendants are entitled to judgment. But

it is contended that the plaintiff or his assigns would have been compelled to accept an assignment of the second mortgage upon proof that the defendants had paid the first mortgage, even if not accompanied by a legal assignment of it from the Savings Bank, and that such assignment of the second mortgage by the defendants, after payment of the first mortgage, would have operated as a legal performance of the contract for the sale to the plaintiff.

It is undoubtedly well settled law that a junior mortgagee of property who redeems a prior mortgage is entitled by operation of law to be subrogated to the rights of the first mortgagee so as to hold the first mortgage as quasi assignee for the purpose of obtaining reimbursement for the amount paid by him to protect his interests as second mortgagee in the event of the redemption of his own mortgage. *Frisbee* v. *Frisbee,* 86 Maine, 444. And in case the redeeming party occupies the position of surety for the mortgage debt, he may be entitled to have a written assignment of the mortgage. *Lumsden* v. *Mann,* 96 Maine, 357; *Ellsworth* v. *Lockwood,* 42 N. Y., 89. But in the last named case, it was held that the plaintiff was not in the position of a surety, and was not entitled to an assignment. In the opinion, the court said: "Upon the whole, I do not think it can be said to be the law of this state that the right to redeem a mortgage, that is, the right to compel the holder of it to accept or receive payment of it, after it is due and payable, carries with it the right, upon such redemption, to an assignment of the mortgage unless the redeeming party has the position of surety." In Jones on Mortgages, sec. 792, the author says: "A mortgagee cannot be compelled in equity to assign his mortgage, on receiving payment, in order that subsequent parties in interest may adjust their rights. He is entitled to be paid, or to proceed to foreclosure, without being obliged to investigate titles arising after his own. He may release his interest on receiving payment and leave after-claimants to the preferences which their respective titles give them when his mortgage is discharged."

"The mere fact that one has a right to redeem a mortgage does not enable him to compel an assignment of it to himself. There may be some equitable reason for it, as that the redeeming party is in the position of a surety and is entitled to be subrogated to the position of the holder of the mortgage" . . . . "It has been

erroneously assumed in some cases that the right to compel an assignment of a prior mortgage and the debt, flows from the right of redemption."

But it is unnecessary to determine whether under the circumstances of this case the junior mortgagee could have compelled an assignment of the prior mortgage or not, and reference has only been made to the state of the law upon this subject for the purpose of suggesting that it strengthens the probability that a voluntary assignment from the Savings Bank, and no other, must have been contemplated by the parties when the clause in question was inserted in the contract. They were advised by counsel before the final draft of the contract was made, that they could not compel the bank to "make a regular assignment," but that the second mortgagee had the right to pay and "take up" the bank mortgage, and that the practical result would be an equitable assignment of the mortgage. But the defendants were evidently unwilling to be placed under obligation to raise $5,000 to pay the first mortgage or to exhaust legal remedies in the effort to obtain a written assignment. In order to avoid all such burdens and vexations, they insisted upon having the clause in question inserted in the contract. If only an equitable assignment resulting by operation of law from the payment of the prior mortgage had been in contemplation, the insertion of this clause in the contract was wholly superfluous. They all knew that such an equitable assignment could be obtained. There was no uncertainty in relation to that. But there was an uncertainty in regard to the attitude of the prior mortgagee. The bank might be unwilling to make an assignment of the mortgage. This was obviously the contingency against which the defendants wished to provide, and it is the opinion of the court that the "assignment" mentioned in that clause of the contract under consideration must be held to signify a voluntary legal assignment and no other.

Judgment for the defendants.

DAVID J. WILBUR

vs.

FORGIONE AND ROMANO COMPANY AND TYSON CONSTRUCTION COMPANY, Trustee.

Cumberland. Opinion December 4, 1912.

Accident. Agents. Contractors. Contract. Due. Duties. Care. Employer. Express Direction. General Employment. Interference. Liability. Management. Master. Negligence. Servant.

In July, 1911, the Tyson Construction Company were the general contractors in erecting an addition to the store of Porteous, Mitchell & Braun Company on Congress Street in the City of Portland and in extending the rear of the store to Free Street. The work of making the necessary excavation was sublet to the defendant. The shoring of the adjacent buildings was sublet to the Isaac Blair Company and the plaintiff was one of the Blair Company employees.

On the day of the accident, the plaintiff, in the course of his employment, was working upon a ladder at a height of about twenty-eight feet from the ground, the bottom of the ladder resting in the excavation on the Free Street lot and the top against the wall or chimney of an adjoining house. A team consisting of a pair of horses and a dump cart, loaded with rock on its way out from the excavation, came in contact with this ladder, throwing the plaintiff to the ground. This team was owned by the Cash Fuel Company, and with its driver, Marston, had been let by the Cash Fuel Company to the defendant to assist in the removal of rock. It was one of several employed in the same work, one being owned by the defendant, two by the Cash Fuel Company, and the others by various other persons or concerns.

Held:

1. That the proximate cause of the accident was the manner in which the team was driven and not a projecting rock in the bottom of the excavation.
2. That the driver, Marston, in the particular act which caused the injury, was the servant of his employer and original master, the Cash Fuel Company, and not of the defendant to whom the team had been furnished.

3. That in the absence of any contract to the contrary or of any interference on the part of the person to whom the team had been let, the driver in the ordinary handling of the team remains the servant of his original master who was responsible for his selection and retention.
4. That this principle of law applies not only to persons carrying on a general livery or teaming business but to those who are engaged in a different occupation yet occasionally or in a single instance let their teams with drivers to another for the performance of certain work.

This is an action on the case in which the plaintiff seeks to recover damages for personal injuries which were occasioned by being thrown from a ladder upon which he was standing and working in the course of his employment. While so employed, a team consisting of a pair of horses and a dump cart loaded with rocks came in contact with the ladder upon which plaintiff was standing throwing him to the ground, a distance of twenty-eight feet, causing the injuries complained of. This team was owned by the Cash Fuel Company, and, at the time of accident, with its driver was let to the defendant. At the conclusion of the evidence, the case was reported to the Law Court for determination upon so much of the evidence as is legally admissible on the question of liability only. If, in the judgment of the Law Court, there is sufficient evidence to establish the liability of the defendant, the case is to stand for the assessment of damages by a commission of three to be appointed by the Court.

The case is stated in the opinion.

Simonds, Snow, and Cook & Hutchinson, for plaintiff.

Arthur Chapman, Foster & Foster, Eaton, and Keene & Gardner, for Trustee.

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

CORNISH, J. On report, with the stipulation that if in the opinion of the Law Court, there is sufficient evidence to establish the liability of the defendant the case is to be remanded for assessment of damages by a commission of three to be appointed by the Court.

The conceded facts are these. In July, 1911, the Tyson Construction Company were the general contractors in erecting an addition to the store of Porteous, Mitchell and Braun Company on Congress Street in the City of Portland and in extending the rear of the store to Free Street. The work of making the necessary excavation was sublet to the defendant. The shoring of the adjacent buildings was sublet to the Isaac Blair Company and the plaintiff was one of the Blair Company employes.

On the day of the accident, the plaintiff, in the course of his employment, was working upon a ladder at a height of about twenty-eight feet from the ground, the bottom of the ladder resting in the excavation on the Free Street lot and the top against the wall or chimney of an adjoining house. A team consisting of a pair of horses and a dump cart, loaded with rock, on its way out from the excavation, came in contact with this ladder throwing the plaintiff to the ground. This team was owned by the Cash Fuel Company, and with its driver, Marston, had been let by the Cash Fuel Company to the defendant to assist in the removal of rock. It was one of several employed in the same work, one being owned by the defendant, two by the Cash Fuel Company, and the others by various other persons or concerns.

The Cash Fuel Company was engaged in the sale of coal and wood, but as there was little for its teams to do at that season, it entered into an agreement with the defendant whereby the defendant was to pay it the sum of five dollars per day for the use of each team and driver as long as the defendant saw fit to employ them. The general manager of the Cash Fuel Company, a witness for the plaintiff, on being asked what arrangement he made with the defendant replied, "To hire two teams to him with dump carts, two horses and a man; he was to pay for the use of them $5 a day." On being asked what instructions he gave the drivers, he replied that he told them to report to Forgione and to tell him whose teams they were, and where they came from, but he had nothing to say as to what the teams should do after arrival. It was a typical case of letting a team with driver for special work. The Fuel Company selected, hired and paid the drivers for its teams and with that the defendant had nothing to do. If the defendant was not satisfied with a driver it could doubtless have sent back the team and driver but could not have substituted a driver of its own selection.

This being the state of facts, the plaintiff rests his contention upon one of two propositions. First that the defendant was negligent in ordering the team in question to be loaded and driven in such close proximity to the ladder as to cause the accident; or second, that Marston, the driver of the team was at the time in the performance of the defendant's business as its servant and his negligence was in law the defendant's negligence.

The first step to be taken in the solution of this problem is to ascertain what was the proximate cause of the accident. That is a question of fact. It is undisputed that this team had been loading with rocks in the rear of the Free Street excavation, with the horses' heads pointed toward Congress Street. On the way out it passed the ladder on which the plaintiff stood. The plaintiff claimed that the rear end of the cart was at an elevation of two or three feet while being loaded, the rear wheels being trigged. That when the cart was full, the trig was removed and the driver started on his way; that as he was nearly abreast the ladder the left forward wheel struck a solid projecting rock about the size of a Derby hat causing the pole and the yoke to swerve toward the left and strike the ladder. The burden was upon the plaintiff to establish this claim by a preponderance of the evidence. This we think he failed to do, but on the contrary the fair conclusion to be reached from all the evidence in the case, is that no projecting rock caused the accident, but when the cart was full, the driver in leaping upon the seat and gathering up the reins in some way, pulled on the wrong rein, turned the horses toward the left and thereby came in contact with the ladder. It would be profitless to discuss in detail the evidence leading to this conclusion. It is sufficient to state the conclusion itself. The direct and immediate cause therefore was the manner in which the team was handled by the driver and not a condition of the ground in the excavated cellar.

It is not necessary to decide in this action whether under all the circumstances of the case, the kind of work that was going on and the rough place in which it was necessarily performed, the driver was or not in the exercise of due care, but assuming that his act was a negligent one, was the defendant legally responsible for that act? That depends upon whether the driver was, at the moment

of the injury to the plaintiff, and in the particular work he was then engaged upon, the servant of the defendant, the general contractor, or of the Cash Fuel Company, his immediate employer.

Under the long line of decisions both in this country and England the Court is of the opinion that he was not at the time the servant of the defendant.

It is true that a person, admittedly in the general employment of one person may be loaned or hired to another in such a way as to become the servant of the other for the time being and in a particular transaction, with all the legal consequences of the new relation. *Wyman* v. *Berry,* 106 Maine, 43. But, as was stated by Chief Justice Holmes in *Driscoll* v. *Towle,* 181 Mass., 416, "The mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign—as the master sometimes was called in the old books."

We must therefore determine whether in the particular act which caused the injury in this case namely the handling of the team, the driver was the servant of his original master, the Cash Fuel Company, or of the person to whom the team had been furnished, namely the defendant, the general contractor.

The authorities give but one answer to this question. They hold that in the absence of a special contract to the contrary, or of interference he remains the servant of his original master. The reason for this is apparent. Take the case at bar. The Cash Fuel Company hired whom it pleased to care for, manage and drive its teams. It paid them and discharged them. With their selection, payment and discharge the defendant had nothing whatever to do and it was no part of the duty of the defendant to determine upon the fitness or unfitness of such drivers. It took the teams as manned and furnished, while the responsibility for the proper handling of the teams in the absence of any contract to the contrary or of any express direction of the defendant, still remained upon the owner of the team. It is doubtless true that if the defendant in the case at bar had given directions to Marston to drive against the plaintiffs ladder and he had obeyed, the defendant would have been liable. In such

case the defendant would have assumed to interfere with the general employment of the driver and must therefore be responsible for the result of his own acts. But so long as the directions given by the defendant pertained to the general progress of the work, as the places from which the rock was to be taken and those to which it was to be carried and dumped, leaving the management of the team in doing that work still in the hands of the driver, that driver remained the servant of the party who hired and paid him for that particular kind of labor, presumably with the knowledge of his experience and skill. That was the situation here. It was the usual contract of hiring a team with driver, with no special limitations. So far as the evidence shows the defendant in a general way sent the teams to different parts of the excavation for their loads and gave orders as to the places where the loads should be dumped, but the evidence fails to prove that the defendant controlled or directed the driver in the management and handling of the team at any point in the work. While driving out of the excavation the driver remained the servant of the Cash Fuel Company, and that Company was responsible for his acts the same as on Congress Street on its way to or from the dumping ground.

In the absence of express contract, the law leaves the responsibility for the acts of the servant upon the person who was responsible for his selection and retention. "The health and safety of the horses, and the protection of the whole team by careful management, are of so much importance to the owner, that in the absence of an express contract, he will not be presumed to have given up their management to the hirer when he has sent his own servant for the special purpose of retaining this management," is the language of Chief Justice Knowlton in *Shepard* v. *Jacobs,* 204 Mass., 110.

Stress is laid upon the fact that the driver obeyed the orders of the defendant's foreman as to where the team should be loaded and the signals or directions of the defendant's employes as to when the team should be started, but that is not sufficient to show there has been a change of masters so far as the handling of the team is concerned. The order did not apply to the handling of the team, and the signals were more in the nature of information than of orders, and obedience to them showed coöperation in one extensive

work rather than subordination to another employer. *Standard Oil Co.* v. *Anderson,* 212 U. S., 215-226. The authorities are abundant; only a few need be referred to.

In *Jones* v. *Corporation of Liverpool,* L. R., 14, 2. B. Div., 890, the defendant contracted with one D. to supply by the day a driver and horse to drive and draw a watering cart belonging to the defendant. The defendant's inspector gave general direction as to what streets should be watered. In an action to recover damages for injuries sustained by a third person through negligent conduct of the driver while in charge of the team, it was held that the hirer was not liable. This decision follows the leading English cases of *Laugher* v. *Pointer,* 5 Barn & Cr., 560; *Smith* v. *Lawrence,* 2 Man. & Ry., 1, and *Quarman* v. *Burnett,* 6 Mees. & W., 497.

In *Higham* v. *Waterman Co.,* 32 R. I., 578, a truckman let his truck and driver to haul lumber at a certain price per hour; held that the driver continued to be the servant of the truckman in all matters pertaining to the performance of the contract unless by special arrangement he was placed directly under the control of the hirer or by the hirer's interference he makes the driver his servant as to the particular matter with which he interferes.

In *Morris* v. *Trudo,* 83 Vt., 44, the Superintendent of Streets of the City of Vergennes hired of the defendant a double team with driver. By the terms of the contract the driver was to do with the team whatever work he was set to do by the superintendent, whether moving stones, or using a scraper, or handling gravel. In the hauling of the gravel the superintendent directed where it should be taken from, where it should be unloaded and how it should be placed. The plaintiff was assisting the driver to unload, when the horses either started suddenly or were started by the driver, and the plaintiff, who was at the rear end of the wagon body, was thrown to the ground and injured. Suit was brought against the original employer and the court in the course of the opinion said:

"The precise question is whether or not, though the team and driver had been temporarily hired out by the defendant, the driver in the specific detail of managing or handling the team, remained the servant of the defendant of whom the team was hired. . . . One to whom the servant of another is temporarily lent or hired,

has for the time being the responsibility of a master in so far, and only in so far as he may exercise the authority of a master. The testimony tends to show that in respect to the driving of the team the defendant committed nothing to the city or its superintendent. . . . The doctrine of *respondeat superior* fastens liability upon the defendant, since the negligent wrong doing inhered in a thing in respect to which the relation of master and servant between him and the driver had never been suspended. . . . If the contract had been such that Lavelley (the superintendent) might have put a driver of his own choosing in charge of the team, and have put the driver furnished at some other work, the defendant would be held to have relinquished the right of a master and to have been freed from responsibilities as such in all respects. Such a contract, however, the evidence does not show."

This language applies with equal force to the case at bar, the facts being essentially similar.

The Supreme Court of Massachusetts has affirmed and reaffirmed the same doctrine in the following cases among others:

In *Huff* v. *Ford,* 126 Mass., 24, where a horse and wagon were let by the day by a contractor to the city of Boston to be used in the work of paving a street; in *Reagan* v. *Casey,* 160 Mass., 374, where the owner let a double team and driver to the City of Boston for work upon a sewer extension, under the general supervision of the foreman who had the right to direct where the teams should back up for their load and the place where they should be unloaded; In *Driscoll* v. *Towle,* 181 Mass., 416, where the team with driver was let to an Electric Lighting Company to be employed in general construction work; in *Shepard* v. *Jacobs,* 204 Mass., 110, which involved the letting of an automobile with chauffeur; and in *Hussey* v. *Franey,* 205 Mass., 413, involving the letting of a hack with driver.

It is unnecessary to multiply the citation of authorities which are numerous and uniform.

The very recent case of *Ireland* v. *Clark,* 109 Maine, 239, 83, At Rep., 667, involved the question between the servant and master, and the rights of no third person were affected. But the principle now at issue was there under discussion and many of the cases above referred to were cited with approval. That case is an authority in point. See also *Ames* v. *Jordan,* 71 Maine, 540.

The plaintiff seeks to escape the force of these decisions by distinguishing between livery stable keepers, truckmen and persons carrying on a general livery or teaming business and who, he claims, are therefore in a sense common carriers, and those persons or corporations who, like the Cash Fuel Company, are engaged in a different occupation but in a single instance, or even occasionally, let their teams with drivers for the performance of certain work. This distinction, however, is not made in the cases and we are unable to perceive the logical line of cleavage. In every case, no matter what the general business of the owner may be, the rights and liabilities of the parties depend upon the contract under which the teams are let. This and this alone is the test, and whether one of the parties makes the contract as a part of his regular occupation, or outside it and in a special instance, should make no difference. The question is, who was the master at the particular time and in the particular transaction, the owner or the contractor, not whether the owner is accustomed to make these contracts. Otherwise two teams might be working side by side, and under the same general arrangement between the parties, and the contractor be held liable for the negligent acts of one driver in the handling of his team and not for those of the other under precisely the same circumstances. It would not seem that liability could shift on such artificial grounds. It rests upon contract and not upon occupation.

Our conclusion, therefore, is that the injury in question was caused by the driver in the management of his team and that in that phase of his work he was not the servant of the defendant.

The entry must therefore be,

Judgment for defendant.

ELIZABETH M. RODICK *vs.* MAINE CENTRAL RAILROAD COMPANY.

Hancock. Opinion December 4, 1912.

Admissibility. Barrier. Common Carrier. Control. Damages. Due Care. Discretion. Exceptions. Ice. Inanimate Objects. Invitation. Negligence. Passenger. Photographs. Private Property. Public. Public Highway. Safe Place. Snow.

On the evening of February 8, 1911, the plaintiff, a passenger on a steamboat of the defendant company, landed at its wharf in Bar Harbor, and while passing along and upon the wharf on her way to take a public conveyance, slipped upon ice, fell and was seriously injured. She obtained a verdict of four thousand eight hundred and thirty dollars.

Held:

1. That upon the sharp issue of fact submitted to the jury as to the precise spot where the plaintiff fell, whether within or without that portion of the wharf set apart for passenger travel the evidence was conflicting, and the finding of the jury was not so manifestly against the weight of evidence as to be disturbed.
2. That the plaintiff's injury was due to a condition of the wharf for which the defendant was legally responsible, and that liability might arise even though the plaintiff had taken a few steps beyond the sidewalk in order to reach a waiting team. The defendant had control of the entire wharf and permitted the teams to drive upon this portion to meet passengers, and therefore impliedly invited the passengers to meet the teams.
3. That there is no evidence of want of due care on the part of the plaintiff.
4. That the damages are not excessive. The plaintiff was employed as a clerk in the Bar Harbor Post Office at a salary of $1400 per year. Her earning power has been materially reduced. The injury was serious and probably permanent. The expenses have been necessarily large, and the suffering was severe.
5. Photographs of the locus were admitted, which had been taken several months after the accident, and which represented the plaintiff as standing in the exact spot where she claims to have fallen.

The admissibility of a photograph is a preliminary question addressed to the discretion of the presiding Justice and depends upon whether it is sufficiently verified, is fairly representative of the object portrayed and may be useful to the jury.

6. Photographs, however, should represent simply the conditions existing at the time, and when they go further and represent persons in various assumed positions, they may be more properly excluded than admitted because they have passed beyond their legitimate function and tend to unduly emphasize the claims of one party or the other.
7. It would have been a wiser use of discretion in this case to have excluded the photographs, but their admission was not such an abuse of discretionary power as to warrant sustaining the exceptions.
8. That the refusal of the presiding Justice to specifically instruct the jury that at the time of the injury the relation of common carrier and passenger did not exist, constituted no error, as he had already clearly and comprehensively charged the jury as to the exact legal relations existing between them, and to have given the requested instruction at that time would have misled rather than have aided the jury in their comprehension of the legal obligations of the parties.

On motion and exceptions by defendant. Overruled.

This is an action on the case to recover damages for personal injuries received by the plaintiff. The plaintiff was a passenger on one of the defendant company's steamboats, which landed at defendant's wharf at Bar Harbor, and in passing on and along said wharf, on her way to take a public conveyance, slipped upon ice and fell sustaining the injuries complained of. The jury returned a verdict for the plaintiff for $4,830.00. The defendant filed exceptions to the admission of two photographs of the locus, and to the refusal of the presiding Justice to charge the jury that at the time of the injury the relation of common carriers and passengers did not exist between the plaintiff and defendant in this case, and filed a general motion for a new trial.

The case is stated in the opinion.

Deasy & Lyman, for plaintiff.

Hale & Hamlin, and Forrest Goodwin, for defendant.

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

CORNISH, J. On the evening of February 8, 1911, the plaintiff, a passenger on a steamboat of the defendant company, landed at

its wharf in Bar Harbor, and while passing along and upon the wharf on her way to take a public conveyance, slipped upon ice, fell and was seriously injured. She obtained a verdict of four thousand eight hundred and thirty dollars and the defendant has brought the case to this court on motion and exceptions.

Motion.

The wharf of the defendant company corresponded to the station grounds of a railroad for the arrival and departure of passengers. It covered considerable space, a portion being used for the passenger station, a portion for the freight station and the rest for passengers on foot or for conveyances which were permitted to drive upon the wharf. The usual course of passenger travel from an incoming steamer, was up the slip beneath an awning, toward the passenger station, and then around the corner of the station and along a walk twelve feet wide running beside the station and a railing or guard on the outer side. This walk led off the wharf to the public highway, and outside this railing, carriages, public and private, were allowed to drive upon the wharf to bring and carry away passengers. A space of about four or five feet in width, slightly raised, next the rail formed a buffer against which the rear wheels of the carriages rested. At the end of the railing near the corner of the station was an electric light pole. At various places there were openings in the railing to enable passengers to pass through and reach their carriage. Between the end of the railing at the electric light pole near the northwest corner of the passenger station, across to the freight station was no guard or railing to prevent a passenger going directly to a team, and teams were permitted to wait at that portion of the wharf. In the summer a barrier in the form of a chain was stretched across from the light pole to one of the posts supporting the awning, to prevent such travel, but this was not used in the winter.

The plaintiff on the evening in question had reached a point near the light pole when she suddenly slipped on ice and fell. The sharp issue of fact submitted to the jury in the charge was the precise spot where she fell, the case apparently having been tried upon the theory that if she was injured upon the passenger walk or within that portion of the wharf set apart for passenger travel the defend-

ant company would be liable, while if she was injured at a point a few feet outside where she may have gone to take a team, the company would be free from liability. A large number of witnesses on both sides testified as to the exact spot where she fell and where she was found after the fall, and upon the issue submitted the jury must have found that the plaintiff's contention was correct. The evidence is conflicting but we cannot say after carefully studying and comparing it, that the finding on this point is so manifestly wrong as to be set aside. Were the question before the court without the verdict of a jury, we might conclude that the plaintiff, when she reached the pole instead of turning to the left and following the sidewalk, took a step or two to the right to reach her team. But we are not prepared to say that even then the company would be free from blame. It knew the situation. It permitted teams to drive upon that portion of the wharf and wait for passengers and it might naturally expect that these passengers would be obliged to take a few steps beyond the sidewalk to reach the waiting teams. No rail or chain at that point suggested a barrier. No sign warned passengers not to proceed to the teams. On the contrary, the situation was such as to imply an invitation. It was the defendant's private property, devoted to the use of the public, and it was bound in law to use due care toward passengers upon it. *Keefe* v. *B. & A. R. R. Co.*, 142 Mass., 251.

The plaintiff's fall was due to a condition for which the defendant was responsible. A heavy snow had fallen on the preceding day. A portion of it had been removed from the wharf, and the sidewalk had been scraped. But the evidence leads to the conclusion that ice had been allowed to remain at points both on the walk and just outside it, and no attempt was made to remove or sand it until after the accident.

Upon this branch of the case, the want of due care on the part of the defendant, the verdict should not be disturbed.

Nor are we able to discover any want of due care on the part of the plaintiff. Her conduct was that of the ordinarily prudent woman under similar circumstances. She was walking along in the usual way, as were the other passengers from the same steamer, and it was not incumbent upon her to keep her eyes fastened on the

surface of the wharf to discover ice. Had she looked she would have discovered nothing because the ice was concealed by a slight covering of snow, which made it still more treacherous.

The motion cannot be sustained.

Exceptions.

1. The first exception lies to the admission of two photographs of the locus, introduced by the plaintiff against the defendant's objection. These were taken in the Fall after the accident; and their admissibility is challenged because the plaintiff appears in the photograph as standing in the place in which she claims to have fallen, that spot being as we have already said, a sharply controverted point.

This question of the admissibility of photographs in evidence has been several times considered by this court and the rule of practice in this State has been firmly established. Their admission or rejection lies largely within the discretion of the presiding Justice and the exercise of that discretion, unless the court finds the facts such as to show an abuse of discretion, is not the subject of exception.

"Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed and whether it may be useful to the jury, are preliminary questions addressed to him and his determination thereon is not open to exceptions." *Jameson* v. *Weld,* 93 Maine, 345. In the application of this rule a wide latitude is left to the presiding Justice and we find that no exceptions were sustained by the Law Court to the admission of photographs in *State* v. *Hersom,* 90 Maine, 273, and *Jameson* v. *Weld,* 93 Maine, 345; nor to their exclusion in *Stone* v. *Street Railway,* 99 Maine, 243, and *Babb* v. *Paper Co.,* 99 Maine, 298.

The same rule prevails in Massachusetts. *Blair* v. *Pelham,* 118 Mass., 420; *Verran* v. *Baird,* 150 Mass., 141; *Casey* v. *Hubbardston,* 172 Mass., 106; *Field* v. *Goudy,* 199 Mass., 568; *Everson* v. *Casualty Co. of America,* 208 Mass., 214.

Photographs, however, should show simply the conditions existing at the time. They should aid the jury in better applying the oral evidence to the particular location. In a case like the one under consideration, they should represent inanimate not animate

objects, and when they go further than this and represent the parties in various claimed positions they may more properly be excluded than admitted on the ground that they have passed beyond their legitimate function and tend to emphasize unduly the claims or the evidence of one party or the other. It was on this ground that the photographs were excluded in *Babb* v. *Paper Co.*, supra, where the court say: "To be admissible, photographs should simply show conditions existing at the time in question. But photographs taken to show more than this, with men in various assumed positions, and things in various assumed situations, in order to illustrate the claims and contentions of the parties should not be admitted. An examination of the excluded photographs shows that they fall within the latter class. They would serve merely to illustrate certain theories of the defendant as to how the accident happened. They were properly excluded as a matter of law."

So in *Stone* v. *Street Railway,* 99 Maine, 243, the photograph showed a man in the position on the car in which some of the witnesses said the plaintiff was at the time of the accident; and it was held to have been properly excluded.

In the case at bar therefore it would have been a wiser use of discretion to have excluded the photographs, but we do not think their admission in connection with all the facts in the case was such an abuse of discretionary power as to warrant the sustaining of exceptions. It may have been error but not such exceptionable error as would justify the ordering of a new trial.

We are aware that in other jurisdictions there is a conflict of evidence on the admissibility of photographs showing persons or parties in certain assumed positions.

In *Fore* v. *State,* 75 Miss., 727 (23 So. Rep. 710), their admission was held exceptionable error, as being in the nature of tableaux vivants, while in *Shaw* v. *State,* 83 Ga., 92, (9 S. E. 768); *State* v. *O'Reilley,* 126 Mo., 597, (29 S. W. 577); *State* v. *Kelley,* 46 S. C., 55, (24 S. E. 60); *Harrison* v. *Green,* 157 Mich., 690, (122 N. W. 204) and *Bowling Green Gaslight Co.* v. *Dean,* (Ky. 1911) (134 S. W. 1115), their admission is approved.

After carefully considering all these cases we adhere to and reaffirm the rule already established in this State and Massachusetts.

2. The second exception lies to the refusal of the presiding Justice to charge the jury that at the time of the alleged injury the relation of common carriers and passengers did not exist between the plaintiff and the defendant in this case.

The request was properly refused. The presiding Justice had already clearly and comprehensively charged the jury as to the exact legal relations existing between the parties at the time of the accident, giving in substance, if not in words, the rule laid down by this court in the recent case of *Maxfield* v. *Railroad Co.*, 100 Maine, 79, that it was the duty of the Railroad Company "to exercise all ordinary care to maintain the platform in question in such a reasonably safe and suitable condition that passengers who were themselves in the exercise of ordinary care could walk over it in safety." To have given the requested instruction would have misled rather than have assisted the jury in their comprehension of the legal obligations of the parties.

Damages.

The plaintiff had been employed as a clerk in the Bar Harbor Post Office for a period of fourteen years and was so employed at a salary of $1,400 at the time of the accident. Her earning power has been reduced. The injury to the ankle, foot and leg was a serious one with the strong probability, if not the absolute certainty, of being permanent. The expenses have necessarily been large. The suffering as described by the physicians as well as by the plaintiff was severe.

After careful consideration of the entire case we are unable to say that the damages are excessive.

Motion and exceptions overruled.

CORA WILLIAMS, EX. *vs.* MAYNARD S. WILLIAMS.

Knox. Opinion December 4, 1912.

Burden of Proof. Checks. Dividend. Explanations. Experts. Error. Exceptions. Forgery. Genuineness of Signature. Handwriting. Microscope in jury room. Payment. Settlement. Standard of Handwriting. Signature. Writing.

This is an action of trover brought by Cora Williams, Executrix of the last will and testament of Warren G. Williams, to recover from the defendant the sum of $18,750, with interest. The testator, Warren G. Williams, Maynard S. Williams, the defendant, and Mrs. Mary J. Forhock were the children of Timothy Williams, and as his heirs at law were the owners in common of a lime quarry in Rockland, which in March, 1900, was sold and conveyed to the Rockland-Rockport Lime Company for the sum of $56,250, one-third of which belonged to each of the above named heirs. The entire purchase price of $56,250 was paid to Maynard S. Williams, and by him deposited with Kidder, Peabody & Co., of Boston, with the consent of his brother and sister. Warren G. Williams died in 1910, testate, and this suit is brought by his wife, the executrix, who claims that the defendant never paid over to her husband the portion that was due him.

The defendant claims that he paid the testator in full, one-half $9,375 on September 10, 1901, and the remaining half, $9,375, on April 18, 1903.

In support of his contentions, he presents two receipts purporting to be signed by Warren G. Williams bearing the above dates and for the above amounts.

The plaintiff claims that the above two receipts are forgeries.

The dividends on the amounts so deposited the defendant paid to his brother and sister in checks, but he claims to have paid to his brother his $18,750 in money at the two times mentioned in the receipts, at his brother's request.

Held:

1. That a careful study of the entire testimony fails to find the explanation satisfactory or convincing; on the contrary, it lacks the elements of credibility.
2. That the transactions, as related by the defendant, are possible, but seem hardly probable. They are so at variance with the usual course of business transactions as to be well nigh inherently incredible.
3. An inspection of these two receipts themselves, without comparison with any other standard, arouses suspicion. The two blank forms used used are identical, the same paper, the same printing. The written por-

tions of the body are as nearly identical as the human hand could make them. The ink is apparently the same, the handwriting the same. In fact the two receipts are so similar in form and substance that it seems impossible that one was written on September 10, 1901, and the other on April 18, 1903.

4. The signatures "Warren G. Williams" are practically identical. Their appearance would indicate strongly that they were prepared at one sitting.

On motion and exceptions by plaintiff. Sustained.

This is an action of trover by the executrix of the last will and testament of Warren G. Williams to recover from the defendant the sum of $18,750, with interest. Warren G. Williams, Maynard S. Williams and Mrs. Mary J. Frohock were the children of Timothy Williams, and as his heirs at law were the owners of a certain lime quarry in Rockland, which, in March, 1900, was sold and conveyed to the Rockland-Rockport Lime Company for the sum of $56,250, one-third of which belonged to each of the three heirs. The entire amount of the $56,250 was paid to defendant and deposited in his name with Kidder, Peabody & Co., with the consent of his brother and sister. The defence is payment evidenced by two receipts purporting to have been signed by Warren G. Williams, but which the plaintiff claimed were forgeries. Plea, general issue with brief statement of statute of limitations. The jury returned a verdict for the defendant. The plaintiff filed a general motion for a new trial and exceptions. The case is fully stated in the opinion.

A. S. Littlefield, for plaintiff.

L. M. Staples, for defendant.

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

CORNISH, J. This is an action of trover brought by the executrix of the last will and testament of Warren G. Williams to recover from the defendant the sum of $18,750 with interest. A verdict having been rendered for the defendant the case is before the Law Court on motion and exceptions by the plaintiff.

The following facts are practically conceded.

The testator, Warren G. Williams, the defendant Maynard S. Williams and Mrs. Mary J. Frohock were the children of Timothy

Williams and as his heirs at law were the owners in common of a certain lime quarry in Rockland which in March 1900 was conveyed to the Rockland-Rockport Lime Company for the sum of $56,250, one-third of which belonged to each of the three heirs.

The entire purchase price was paid to the defendant who was the active agent in making the sale, and on March 19, 1900, was deposited by him in his own name with Kidder, Peabody & Co. of Boston, with the full consent of his brother and sister.

Warren G. Williams died testate in 1910, and this suit is brought by his wife, the executrix, who claims that the defendant never paid over to her husband the portion that was due him, and seeks to recover the same with interest, while the defendant claims that he paid the testator in full, one-half, $9,375, on September 10, 1901, and the remaining one-half, $9,375, on April 18, 1903. In support of his contention he presents two receipts purporting to be signed by Warren G. Williams, bearing those dates and for those amounts. The plaintiff replies that these receipts are forgeries. Here is the issue.

Motion.

The $18,750 belonging to Warren G. Williams, having been admittedly received by the defendant the burden rested upon him to prove its payment to the owner.

His story is this, that he deposited the entire $56,250 with Kidder, Peabody & Co. in his own name by agreement with his brother and sister, and received interest thereon at rates varying from 2 to 4%, the dividends being paid to him semi-annually and then checks were sent by him to his brother and sister for their respective shares; that the first half of the principal, $9,375, was paid by him to his brother on September 10, 1901, at his sister's home in Rockland, and in her presence, and was paid in money at Warren's request because, to use his own words; "he said he wanted it in cash, bills or money, and not checks or bonds or anything of that nature," and the first receipt was given at that time.

His explanation of having so large an amount of bills on hand is that he had drawn about twelve thousand dollars in cash in November, 1900, from Kidder, Peabody & Co., and had drawn it partly with the idea of meeting this claim;

That subsequently Warren requested payment of the remaining $9,375, and again they met at Mrs. Frohock's house, on April 18, 1903, and again at Warren's request he paid him the full amount in bills of large denomination and Warren put them in his pocket and went away. He accounts for the possession of so large an amount of cash on the second occasion by saying that he had purchased twelve thousand dollars worth of bonds of Kidder, Peabody & Co. in January, 1903, and had turned over eight or nine or ten thousand of them to his sister for which she had paid him in bills and it was these same bills that he had kept on hand until April 18th, 1903, when he made this final payment to his brother and took the second receipt;

That after that second payment Warren never mentioned the quarry matter to him nor informed him of what he had done with the money nor how he had invested it.

The sister corroborates the defendant in a large part of his testimony especially as to the cash payments made to Warren in her home, and this with the two receipts, the genuineness of which is seriously denied, makes up the defendant's explanation.

After a careful study of the entire testimony we fail to find this explanation satisfactory or convincing; on the contrary it lacks the elements of credibility.

The transactions, as related by the defendant, are possible but they seem hardly probable. They are so at variance with the usual course of business as to be well night inherently incredible. The drawing of twelve thousand dollars in cash from the bankers in November, 1900, and keeping it on hand in order to pay Warren the $9,375, ten months later, in September, 1901, and that too, when, as the plaintiff testifies on cross-examination, Warren did not ask for the payment until two months before it was made, or about July, 1901, overtaxes one's credulity. The idea of keeping that large amount of money in idle bills for so long a time to meet a claim that had not as yet been made lacks reasonableness.

Then too, every other payment during all the progress of this business had been made by the defendant in checks. He apparently knew their value as receipts, and when the rent of the quarry had been received by the defendant prior to the sale, he had remitted to the plaintiff and his sister checks for their share. According to his

own statement after the sale and before the payment of the first half of the principal, that is from March, 1900, to September, 1901, he had used checks with which to pay the plaintiff his share of the earned dividends and between the payment of the first half and of the second, that is between September 10, 1901, and April 18, 1903, he continued to pay the plaintiff his dividends on that remaining half in checks. They lived in the same city and only a mile and a half apart, but these business transactions between them were conducted in the usual way. The defendant paid by check and Warren apparently received the checks without objection.

Yet when it came to the payment of nine thousand three hundred and seventy-five dollars on two occasions, making a total of eighteen thousand seven hundred and fifty it was counted out in bills. From the standpoint of both the man who made the payment and the man who received it, checks would seem to have been not only the natural but the necessary form of payment.

The second payment is in the same category. The cash which he used in this payment he says he obtained from his sister as the price of certain bonds that he sold her; that she paid him in cash at her house, that he does not know where she obtained the bills but that he took them and placed them in his safety deposit box at the Rockland Trust Company and kept them there until he made the second payment in April, 1903. This involves two cash payments of nine thousand dollars or more; the one from the sister to the defendant and the other from the defendant to Warren, and that too although he had not asked his sister to pay him in cash, a most unnatural transaction.

It may be that the defendant attempted to connect his alleged payments with two checks drawn by him on Kidder, Peabody & Co., the first on November 6, 1900, for $12,418.56, and the second on January 19, 1903, for $12,403.50, the only two large amounts drawn from that account prior to April, 1903, but the first of these shows that it was drawn to the order of J. R. Frohock, and has no connection with Warren. It may have been in part payment of Mrs. Frohock's share, while the second appears in the account merely as a draft. Outside of these two withdrawals, the other withdrawals from Kidder, Peabody & Co., excluding a purchase and sale of some United States bonds that appear on both sides of

the account and do not affect it, aggregate only $4,184.89, between the time of first deposit and the alleged final settlement.

The question naturally arises therefore, from what source did the defendant obtain his money to make the payments.

Again, these two receipts represent only the principal. What of the accrued interest? The defendant says he paid it as it accrued, but on April 18, 1903, there must have been interest due from January 1, 1903, and that did not enter into the settlement. Would it not have done so, if a final settlement was then made. We have simply two naked receipts each for exactly one-half the principal. All these suggestions arise so naturally from the circumstances and probabilities that they cannot be ignored in attempting to reach the truth.

It is further in evidence that Warren was a day laborer all his life, industrious and frugal. There was never any outward sign of his having received what to him would have been a fortune. His dealings with the traders disclose a man of very moderate means. He had about seven thousand dollars in bonds that apparently came from some other portion of his father's estate, but there is no evidence of any investment or deposit or use of the large amount in controversy which the defendant says he paid him. All this is significant.

On the other hand however, it should be said that Warren was married in 1903 to the plaintiff and that there is no evidence of any demand being made upon the defendant for payment until after Warren's decease in 1910. The relations of the two brothers apparently continued friendly.

This brings us to the two receipts, the genuineness of which is in dispute.

The plaintiff attacks them as forgeries, not free hand imitations but tracings from some genuine original.

An inspection of these two receipts themselves, without comparison with any other standards arouses suspicion. The two blank forms used are identical, the same paper, the same printing. The written portions of the body are as nearly identical as the human hand could make them, with the exception of one or two words. The ink is apparently the same, the handwriting the same. In fact the two receipts are so similar in form and substance that it seems

impossible that one was written on September 10, 1901, and the other on April 18, 1903. Their appearance would indicate strongly that they were prepared at one sitting.

When we come to the signatures, "Warren G. Williams" these too are practically identical. It must of course be remembered in this connection that Warren could not read, and could write nothing except his name. He had learned to do this in a mechanical way, so that an unusual similarity in his signatures might be expected. But the similarity here is more marked than even that. There is some variety in the signatures introduced as standards of comparison especially when superimposed, but these two, when one is superimposed upon the other, correspond in practically every detail, a correspondence not to be expected when they were written more than a year and a half apart. Moreover the experts for the plaintiff testified that the ink on the two receipts was identical in color and analysis, that it was of practically the same age and when compared with the same kind of ink in signatures nearly ten years old and admittedly genuine, the latter had a dark, thoroughly rusted, burnished red appearance as they should have at that age, with an elimination of black or blue, while the ink on these two disputed receipts was of "a fairly bright methylene blue color, with no rusty appearance, only a dullness, the blue still prominent."

In other words if these receipts had actually been written at their purported dates in 1901 and 1903, the ink should have the appearance of ink of that age, while in fact it had the appearance of being recently used.

This expert evidence is corroborated by the positive testimony of the Judge of Probate and the Register of Probate who noted the freshness of the ink when these receipts were first presented in the Probate Court and the change from a blue black to a darker color, with a loss of the fresh appearance and a taking on of a dullness, within a comparatively short time, changes that could not have taken place, between the two inspections had the receipts actually been written about ten years before.

It is true that the defence presented two experts, the same number offered by the plaintiff, who testified that in their opinion the signatures to the receipts were genuine, but their attention seems to have been directed more to the question of forgery by imitation

than by tracing; so that the very similarities which would indicate genuineness from the former standpoint might tend to prove forgery from the latter. Nor did they make any analysis or test of the ink, or attempt to controvert the convincing testimony of the plaintiff's witnesses on that point.

Without going into further detail it is sufficient to say that it is our opinion from the testimony, the exhibits, the circumstances and the probabilities that the verdict in this case was so clearly wrong as to indicate bias or prejudice on the part of the jury, or failure to appreciate the facts, and for that reason it cannot be allowed to stand.

Exceptions.

These should be briefly considered because the same questions may arise if this case is tried again.

1. The exclusion of the testimony of Herbert L. Ulmer tending to show that Warren G. Williams borrowed small sums from him during the past ten years. We think this testimony was legally admissible as having some tendency to show the financial condition of Warren, its weight being for the jury. But inasmuch as other witnesses, such as traders, were permitted to show the manner in which Warren carried small accounts at their stores and paid in installments, which was evidence tending to prove the same general condition, we do not think the exclusion of Ulmer's evidence constituted prejudicial error.

2. The exclusion of the testimony of Merritt A. Johnson, an attorney, who was employed by Warren after these alleged payments, and was asked what he did by virtue of that employment. It is not contended that anything done was brought to the attention or knowledge of the defendant. It would be at the most a self serving act and the evidence was properly excluded.

Johnson was further interrogated as to a trip with Warren to the Pan American Exposition in October, 1901, immediately after the first alleged payment, and stated that the trip was under consideration for two or three weeks but Warren did not decide to go until the day before they started. Being asked, "What was the reason that it was not earlier decided" and "had you delayed your going for any reason on account of Mr. Williams," the answers were excluded.

We think there is no error here. The evidence sought so necessarily involved either the opinion of the witness or some declaration of Warren that it was properly excluded.

3. The exclusion of expert testimony offered by the plaintiff to prove to the Court that certain exhibits offered by the defendant as standards of the handwriting of Warren were not themselves genuine.

Whatever the rule may be in other jurisdictions the general rule adopted in this State is that when the genuineness of handwriting is in question it may be proved by comparison with other handwriting of the party sought to be charged, admitted or proved to be genuine; that such writing is admissible as a standard for the purpose of comparison whether relevant to the issue or not; that before it can be admitted as a standard it must be proved or admitted to be genuine, that the question of its admissibility as a standard is to be determined by the presiding Justice, and exceptions to its admission will not be sustained unless it clearly appears that there was some error in law or that the evidence was admitted without proper proof of the qualifications requisite for its competency. *State* v. *Thompson,* 80 Maine, 194.

The Massachusetts court has adopted the same rule as in this State, that exceptions will not lie to the findings of the presiding Justice unless his decision is founded upon error in law or upon evidence which is as a matter of law insufficient to justify the findings. *Nunes* v. *Perry,* 113 Mass., 276, *Costello* v. *Crowell,* 139 Mass., 590, cited in *State* v. *Thompson,* supra.

In other words the genuineness of the standard is a preliminary question of fact to be determined by the presiding Justice and its admissibility as a standard is a matter within his discretion. This does not mean, however, an arbitrary exercise of power, which is sometimes termed an abuse of discretion. To illustrate: "Whether a witness called as an expert possesses the necessary qualifications to enable him to testify is a preliminary question to be decided by the court. That decision must be final and conclusive unless it is made clearly to appear from the evidence that it was not justified or that it was based upon some error in law." *Marston* v. *Dingley,* 88 Maine, 546. So in cases of handwriting, "proper proof" of the qualifications requisite for the competency of the standard must be

adduced to the court. Great consideration must necessarily be given to the decision of the presiding Justice, but the question remains, what is "proper proof" or "evidence sufficient in law" and "when can it be made to appear that "the ruling was not justified by the state of the evidence as presented to the Judge at the time," all of which tests have been recognized by the courts of Massachusetts and Maine?

The general rule is that "it may be proved by any person who has acquired a knowledge of the handwriting by having seen the party write, or from having carried on a correspondence with him, or, as decided in Hammond's case, 2 Maine, 32, from having seen handwriting acknowledged or proved to be his." *State* v. *Thomson,* supra.

Applying these principles to the precise point at issue, we find the situation to be this: Several specimens of Warren's signature were introduced by both plaintiff and defendant, which were admitted to be true and were therefore accepted as standards. The defendant offered certain other specimens, to the admission of which the plaintiff objected on the ground that they were not genuine. Thereupon, the court put this question to the defendant:

"Q. The question is, examine those papers, Nos. 13 to 27, the signatures of Warren G. Williams, and state whether in your opinion, it is his genuine handwriting."

"A. I should say they were."

"The Court. I will admit them. Whether they are or not we will see afterwards."

Some discussion followed between court and counsel as to withdrawing these exhibits, but they were not withdrawn. The plaintiff then offered an expert in handwriting to state whether in his opinion the party who wrote the admitted standards, wrote the signatures on these exhibits No. 13 to 27, and whether he had any way of demonstrating the grounds of his belief. This evidence was excluded and exceptions reserved.

So that, the presiding Justice while deciding that the question of the genuineness of the offered standards was a matter for his determination alone, heard the opinion of the defendant himself, but declined to hear expert evidence to the contrary.

It is the opinion of the court that this evidence should have been received. While mere expert evidence may not be sufficient alone to establish the genuineness of a standard, under the decision in *Commonwealth* v. *Tucker,* 189 Mass., 457-472, yet it does not follow that it should not be heard by the presiding Justice when offered to attack the genuineness, *Costello* v. *Crowell,* 133 Mass., 352, especially when the only evidence of that genuineness is the opinion of the defendant himself, uncorroborated, the party who is claiming under the alleged forged receipts.

The source being somewhat open to suspicion, we think the other side should be allowed to offer any competent evidence, including expert, to meet the claim, and that "the ruling was not justified by the state of the evidence as presented to the Judge at the time."

This exception should be sustained.

4. Refusal of the presiding Justice to allow the jury to make examination with the microscope, used by one of the experts, who testified as to the results of his examination.

This is largely a matter of discretion with the presiding Justice, and while it is customary to permit the jury to use such an aid in the investigation of the facts, we are not prepared to say that the refusal to do so in this case was reversible error.

5. The court after explaining the statute which prevents the defendant from testifying unless the plaintiff, as a representative party had testified, used this language. "Therefore in law the defendant became a competent witness and his testimony is entitled to as much weight as you find it entitled to, and you should not detract from it on account of his being an adverse party to the estate because the plaintiff has waived that rule." This may not have accurately expressed the meaning of the court, but as it stands it practically says to the jury that they are to make no allowance for the fact that the defendant is an interested party with interests adverse to the plaintiff. It was an incorrect statement of the rule by which the defendant's evidence was to be weighed, and its effect may have been harmful.

It is unnecessary to consider the other exceptions, many of which are of minor importance.

The conclusion of the court is that the entry should be,

Motion and exceptions sustained.

L'UNION MUSICALE

vs.

OVIDE CHEVALIER AND FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Androscoggin. Opinion December 5, 1912.

Alterations. Architect. Bond. Contract. Contractor. Damages. Foundation. Negligence. Notice. Plan. Specifications. Supervision. Surrender of Contract. Waiver.

This is an action to recover damages for the alleged breach of a bond given by the defendant, Chevalier, as principal, and the Fidelity & Deposit Company of Maryland as surety, to secure the faithful performance of a contract with the plaintiff for the erection of a brick building at the corner of Cook and Second Streets in Auburn to be used as a club house. The contractor was to provide all the materials and perform all the labor required to construct the building according to the terms of the contract and all of the drawings, specifications and stipulations which were made a part of the contract, for the agreed price of $29,500. This contract bears date May 23, 1910, and the bond in suit, signed by the contractor, Chevalier, and the surety company is dated July 5, 1910. Work on the building was begun two or three weeks after the date of the contract and was continued under the supervision of architect Desjardines until August 15th, when as the defendant claim, a heavy fall of rain undermined the stone foundation at one corner of the building and caused two of the partially constructed walls near that corner to settle and crack. The plaintiff contends that the settling and cracking of the walls was due to the failure of the contractor to lay the foundation and protect the work, according to the plans and specifications, and that it was known to the contractor that the foundation at that point was settling before the rainfall. On the 23rd day of August, the architect notified the contractor to tear down these "brick walls and stone foundations and rebuild them according to contract and specifications."

And on the 27th day of the same month, the plaintiff caused due notice to be given to the Surety Company of the contractor's failure to perform his contract.

After the contractor had received from the architect the notification of August 23rd, and this had been reinforced by a like notice from the plaintiff demanding that he tear down the brick walls and stone foundations in question and rebuild them according to the contract he accepted the inevitable result and surrendered the contract. He had manifestly become convinced prior to August 15th that the building could not be erected in a workmanlike manner, according to the plans and specifications, for the contract price of $29,500; but after the discovery of the defective foundations and the demand by the owner for a rebuilding of the walls, he realized that compliance with this demand and a full performance of his contract would involve a heavy loss to him.

The surety company thereupon formally waived the privilege to assume the contract.

The situation which then confronted the plaintiff was not free from practical difficulty. It had paid the contractor $6,000 and become liable to pay valid lien claims for $1,286 more. As a result of the contractor's failure to perform his work according to the contract, the foundations were not sufficiently substantial and secure to sustain a building of the height called for by the original plan. After expending all of its cash on hand upon Chevalier's rejected work, it was not practicable to raise sufficient funds to tear down his work, and, commencing anew, construct the building according to the original plan. The society, therefore, adopted the only course remaining. It procured the services of another architect, redrafted and altered the plans and proceeded to erect a building one story lower and otherwise materially different from that originally planned. Chevalier's foundation and walls as strengthened and repaired, were deemed sufficient to support a building erected according to the modified plan, and they were accordingly allowed to stand and were utilized in the building finally erected. Thus the amount of the damage caused by the contractor's failure to perform his contract according to the specifications, for which the defendant would be legally responsible, was reduced to the lowest practicable figure.

The plaintiff claims to recover only the damage resulting from the contractor's breach of the contract before it was surrendered. It had paid him for the labor and materials furnished according to the certificate of the architect, but subsequently discovered outstanding lien claims on the property to the amount of $1,286.17 which it was compelled to pay. The plaintiff was damaged to that extent by reason of Chevalier's failure to furnish the labor and materials according to the contract.

The amount actually expended by the plaintiff in repairing and strengthening the foundation and walls, is also a legitimate element of damage. The items of labor for these repairs are not definitely separated by the testimony from the other work on the building; but upon the estimates made by the contractor himself and other witnesses, it is considered by the Court that the sum of $300 would be a reasonable allowance for this item.

On report. Judgment for the plaintiff for $1,586.17, with interest from the date of the writ.

This is an action to recover damages for the alleged breach of a bond given by the defendant, Chevalier, as principal, and the Fidelity and Deposit Company of Maryland, as Surety, to secure the faithful performance of a contract with the plaintiff, for the erection of a brick building at the corner of Cook and Second Streets in Auburn, Maine, to be used as a club house. Plea, the general issue with brief statement as follows: And for brief statement of special matter of defense to be used under the general issue above pleaded that it claims oyer of that certain writ obligatory mentioned in plaintiff's declaration. Upon the conclusion of the evidence, the case was reported to the Law Court upon so much of the evidence as is legally admissible, the Law Court to render such final judgment therein as the law and the admissible evidence require. It is agreed by the parties that in case the Law Court finds there is any breach of defendants' bond, the Law Court should assess the damages.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

J. G. Chabot, and George C. Wing, for defendants.

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

WHITEHOUSE, C. J. This is an action to recover damages for the alleged breach of a bond given by the defendant, Chevalier, as principal, and the Fidelity & Deposit Company of Maryland as surety, to secure the faithful performance of a contract with the plaintiff for the erection of a brick building at the corner of Cook and Second Streets in Auburn to be used as a club house. The contractor was to provide all the materials and perform all the labor required to construct the building according to the terms of the contract and of all the drawings, specifications and stipulations which were made a part of the contract, for the agreed price of $29,500. This contract bears date May 23, 1910, and the bond in suit, signed by the contractor, Chevalier, and the surety company

is dated July 5, 1910. Work on the building was begun two or three weeks after the date of the contract and was continued under the supervision of architect Desjardines until August 15th, when as the defendants claim a heavy fall of rain undermined the stone foundation at one corner of the building and caused two of the partially constructed walls near that corner to settle and crack. The plaintiff contends that the settling and cracking of the walls were due to the failure of the contractor to lay the foundation and protect the work, according to the plans and specifications, and that it was known to the contractor that the foundation at that point was settling before the rainfall. On the 23rd day of August the architect notified the contractor to tear down these "brick walls and stone foundations and rebuild them according to contract and specifications." On the same day, the plaintiff by its attorneys caused the following notice to be delivered to the Surety Company:

"In accordance with the terms of the bond furnished to the L'Union Musicale of Auburn, Me. (a corporation), for the faithful performance of the contract for their building by the contractor, Ovide Chevalier, we hereby notify you that, through the neglect of the said Ovide Chevalier to properly protect his work, rain caused a damage (Monday the 15th) of Twelve to Fifteen Hundred Dollars."

And on the 27th day of the same month, the plaintiff caused a second notice to be given to the Surety Company, as follows:

"You are hereby notified that the L'Union Musicale to whom Ovide Chevalier gave a bond as principal and yourself as surety hereby notify you of the following defects and failure to perform the contract on the part of Chevalier that has come to their notice, to wit:

"The depth of their block at the corner of Cook and Second Streets in Auburn at a point six feet West from the Northeast corner of the wall, that the depth is three feet and two inches and also at a point twenty-five feet from the same corner the depth is three feet and three inches; at a point twenty feet East from the Northwest corner the depth is four feet and six inches and ten feet South of the Northeast corner the depth is three feet and four inches and at the Southeast corner the depth is four feet.

"You are hereby notified to at once cause said foundations to be put in according to the contract and pay the damages occasioned by the defective work."

It is not in controversy that according to the specifications in the contract relating to the "height of stone work" the foundations in the sections comprising the corner where the walls settled and cracked were to be six feet in height, "the top of the wall being figured one foot from present grade." The third paragraph of the contract provides that "no alterations shall be made in the work except upon written order of the architect." In the stipulations in regard to "general conditions" is the following provision:

"And the contractor is to amend and make good at his own cost any defects, injuries, shrinkage, settlements or other faults in his work arising from defective or improper materials and workmanship which may appear within one year after the completion of the building, is to clear away from time to time the dirt and rubbish resulting from his operations and cover and protect his work and materials from all damage during the progress of the building, and deliver the whole in a clean and perfect condition."

It appears from the evidence that the statements made by the plaintiff in the notification to the Surety Company of August 27th, respecting the depth of the stone foundations were entirely correct and that instead of being six feet in depth as required by the specifications, the foundation actually laid by the contractor varied from three feet two inches to four feet six inches; and it is admitted by the contractor that no written order was ever given by the architect authorizing such a change to be made in the depth of the foundation.

It is also satisfactorily shown by the testimony that the contractor, who was required by the terms of the contract to protect his work against all damage during the building, negligently allowed the ditch which should have carried off the water, to become obstructed so that at the time of the heavy rain the water flowed into the cellar and undermined the wall which at this point was built upon the sand. It appears, however, that the foundation had setttled and the wall cracked somewhat before the rain and that the cracks had been "jointed" by the contractor; and that after the rain the foundations settled still more and the cracks in the walls were reopened.

On the 12th day of September, the architect Desjardines, in the discharge of his duty under the provisions of the contract, signed a certificate stating that the contractor, Chevalier, had "refused and neglected to supply a sufficiency of properly skilled workmen or of materials of the proper quality, and has failed to prosecute the work . . . . with diligence and has failed in the performance of the agreements contained in such contract." He further certified that such neglect, refusal and failure on the part of the contractor were sufficient cause for the plaintiff "to terminate the employment of the contractor under said contract, and is also sufficient ground for the said Union to enter upon the premises and take possession for the purpose of completing the work . . . . and to employ any other person or persons to finish the work and to provide the materials therefor."

The next day, September 13th, the plaintiff gave the contractor a written notice that this certificate had been received from the architect, and that at the expiration of three days from the service of that notice upon Chevalier, the owner would be at liberty to terminate the employment of the contractor and employ any other person or persons to finish the work, in pursuance of the provisions of the contract.

After the contractor had received from the architect the notification of August 23rd, and this had been reinforced by a like notice from the plaintiff demanding that he tear down the brick walls and stone foundations in question and rebuild them according to the contract, he accepted the inevitable result and surrendered the contract. He had manifestly become convinced prior to August 15th that the building could not be erected in a workmanlike manner, according to the plans and specifications, for the contract price of $29,500; but after the discovery of the defective foundations and the demand by the owner for a rebuilding of the walls, he realized that compliance with this demand and a full performance of the contract would involve a heavy loss to him.

The Surety Company thereupon formally waived the privilege to assume the contract.

The situation which then confronted the plaintiff was not free from practical difficulty. It had paid the contractor $6,000 and become liable to pay valid lien claims for $1,286 more. As a result

of the contractor's failure to perform his work according to the contract, the foundations were not sufficiently substantial and secure to sustain a building of the height called for by the original plan. After expending all of its cash on hand upon Chevalier's rejected work, it was not practicable to raise sufficient funds to tear down his work, and, commencing anew, construct the building according to the original plan. The society therefore adopted the only course remaining. It procured the services of another architect, redrafted and altered the plans and proceeded to erect a building one story lower and otherwise materially different from that originally planned. Chevalier's foundation and walls, as strengthened and repaired, were deemed sufficient to support a building erected according to the modified plan, and they were accordingly allowed to stand and were utilized in the building finally erected. Thus the amount of the damage caused by the contractor's failure to perform his contract according to the specifications, for which the defendants would be legally responsible, was reduced to the lowest practicable figure.

The plaintiff claims to recover only the damages resulting from the contractor's breach of the contract before it was surrendered. It had paid him for the labor and materials furnished according to the certificates of the architect, but subsequently discovered outstanding lien claims on the property to the amount of $1,286.17 which it was compelled to pay. The plaintiff was damaged to that extent by reason of Chevalier's failure to furnish the labor and materials according to the contract.

The amount actually expended by the plaintiff in repairing and strengthening the foundation and walls, is also a legitimate element of damage. The items of labor for these repairs are not definitely separated by the testimony from the other work on the building; but upon the estimates made by the contractor himself and other witnesses, it is considered by the court that the sum of $300 would be a reasonable allowance for this item. The certificate must accordingly be,

Judgment for the plaintiff for $1,586.17, with interest from the date of the writ.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

FRANK R. MERRITT *vs.* JAMES S. WYMAN.

Washington County. Decided June 17, 1912. This is an action on the case to recover damages alleged to have been caused by the negligence of the defendant in operating his automobile. No questions of law are involved. The sole question of fact, the alleged negligence of the defendant, was found by the jury in favor of the plaintiff, and although the court might have reached a different conclusion, as the jurors were the judges of the fact and heard the witnesses, the court cannot say the evidence warrants our disturbing the verdict. Motion overruled. *A. D. McFaul, J. F. Lynch,* for plaintiff, and *J. W. Sawyer, H. H. Gray,* for defendant.

GILMAN P. SMITH, In Equity

vs.

SCHOODOC POND PACKING CO. et als.

Washington County. Decided June 17, 1912. The evidence shows that in the spring of 1907 the plaintiff, Gilman P. Smith, and George B. Boynton and Joseph A. Coffin, entered into negotia-

tions with the object of engaging in the canning business at Columbia Falls. Mr. Coffin was under guardianship, but attended to business with the knowledge and consent of his guardian, who, as far as this case is concerned, ratified his doings. It was proposed to take over the business and property of the Schoodoc Pond Packing Company, which company was organized under the laws of Maine in 1902, and in 1907 it owned a canning factory and some stock suitable to use in the canning business. On May 27, 1907, the shareholders of the Schoodoc Pond Packing Company were James H. Bailey, Edward B. Curtis, George D. Perry, Joseph A. Coffin and George B. Boynton, all of whom were officers of the company. On that day Gilman P. Smith, George B. Boynton and Joseph A. Coffin, with George D. Perry, attempted to hold a meeting of the stockholders of the Packing Company. Mr. Perry was not present at that meeting. The presumption is that E. H. Leighton represented him by proxy. At that meeting Mr. Smith, Mr. Boynton and Mr. Leighton were elected directors. All the interest that the case shows Mr. Leighton had in the negotiations was that he had a proxy for one share of stock owned by George D. Perry. They voted to amend, revise and repeal the old by-laws, and to adopt new ones. At a meeting held immediately afterwards the directors elected Mr. Smith, President; Mr. Coffin, Vice-President, and Mr. Boynton, Clerk and Treasurer; and Mr. Smith, Mr. Coffin and Mr. Boynton at once begun the business of packing blueberries in the Schoodoc Pond Packing Company's factory, which they leased of the guardian of Mr. Coffin for the sum of $500. They carried on the business in the name of the Schoodoc Pond Packing Company, and when the business season was closed there was a profit of $3834.31 in the hands of Mr. Boynton, who was chosen Treasurer at the meeting of May 27, 1907, and he deducted one-third for his share of the profits and paid the balance to Mr. Coffin, who claimed it as the Treasurer of the Schoodoc Pond Packing Company and denied the plaintiff's right to any part thereof.

The bill asks the court to decree that, by the acts of the parties, they were a corporation de facto under the name of the Schoodoc Pond Packing Company, and that a receiver of the company be appointed to wind up the affairs of the corporation, and that the corporation be dissolved; that, if the acts of the parties did not

constitute them a corporation, the court will decree that they were a partnership, and that a receiver be appointed to wind up the affairs of the partnership. A decree should be entered dismissing the bill as to the Schoodoc Pond Packing Company and E. H. Leighton, they having no interest in the fund, and sustaining the bill against Josephine B. Coffin, administrator of the estate of Joseph A. Coffin, and George B. Boynton. The question of attorneys fees and costs to be settled by the Justice allowing the receiver's account. Bill sustained. Decree according to rescript. *A. E. Rogers,* for plaintiff. *A. D. McFaul,* for defendant.

GEORGE W. WHITLEY *vs.* J. R. BEAN.

Penobscot County. Decided June 17, 1912. This is an action of trover to recover one-half of the value of apples and potatoes harvested by the defendant's order and taken away from the farm of Warren A. Cummings in Dixmont. The defendant claimed title by a mortgage bill of sale given him by said Cummings. The verdict was for the plaintiff in the sum of $201.75, and the case is before this court on a motion for a new trial. Motion sustained. New trial granted. *H. L. Mitchell, George E. Thompson,* for plaintiff. *George H. Morse, Terence B. Towle,* for defendant.

FRANKLIN LAWRY *vs.* WELDON E. RAMSEY.

Penobscot County. Decided June 19, 1912. An action of trespass to recover damages for assault and battery. The jury found for defendant. A careful examination of evidence, which was con-

flicting, does not, in the opinion of the court warrant disturbance of the verdict. Motion for new trial denied. *L. B. Waldron, B. W. Blanchard,* for plaintiff. *P. H. Gillin,* for defendant.

ESTABROOKS SHIRT MANUFACTURING CO. *vs.* H. HOLTON WOOD.

Waldo County. Decided June 19, 1912. This is an action on the case to recover damages for injury to personal property by reason of the alleged negligence of defendant. The goods injured were upon the third floor of a building leased by plaintiff of defendant and the injury was caused by the bursting of a pipe which was part of a sprinkler system installed upon the fourth or attic floor of the building. The claim, as the case was tried, is that defendant so negligently attended to the heating of the building that the pipe was frozen in consequence of such neglect. The plaintiff's case, we think, wholly fails to show negligence, while the evidence produced by the defendant indicates the exercise on the part of defendant of at least ordinary care in the premises. And, moreover, the evidence of defendant indicates quite strongly the probability that the lack of heat upon the fourth floor was due to the negligent act of a person or persons for whose acts defendant was not responsible. Motion sustained. New trial granted. *Arthur Ritchie,* for plaintiff. *Dunton & Morse,* for defendant.

ELIZABETH B. BLISS *vs.* SAMUEL W. JUDKINS et als.

York County. Decided July 17, 1912. This proceeding, though somewhat irregular in both form and substance, appears to have been brought under Equity Rule XXXIX, which provides for an application to the discretion of the court for a re-hearing in an

Equity cause. In the petition, the court is asked to review and modify its opinion and decision announced December 22, 1910, in *Bliss* v. *Judkins,* 107 Maine, 425. Bill dismissed with costs. *Chauncey W. Hackett, Arthur Sewall, J. O. Bradbury,* for plaintiff. *Cleaves, Waterhouse & Emery,* for defendants.

STATE OF MAINE *vs.* CHARLES F. BRANN.

Kennebec County. Decided August 23, 1912. This is a search and seizure process, issued under section 49, chapter 29, R. S., upon which the respondent was found guilty in the lower court and took the case, by appeal, to the Superior Court for Kennebec County, in which court he filed a demurrer to the complaint and warrant. The demurrer was overruled, and the respondent brings the case to this court upon exceptions to the overruling of the demurrer. Exceptions sustained. Demurrer sustained. *Joseph Williamson,* County Attorney, for State. W. H. Fisher, for defendant.

GEORGE BALLARD *vs.* ISAAC THIBODEAU.

Aroostook County. Decided September 16, 1912. This is an action on the case for false representations in the sale of a horse. The plaintiff alleges in his writ that the defendant represented that the horse was a good horse in every way and capable of doing any kind of work and that the horse was sound. He further alleges that the horse which he received from the defendant was not all right in every way but at the time of the sale and delivery of him, the horse was sick and disordered and showed his disordered condition before the plaintiff reached his home and that the horse died within one month from the time he received him.

The jury rendered a verdict for the plaintiff for $68, and the case comes to the law court on motion to set aside the verdict as against the law and the evidence. Motion overruled. *William P. Allen,* for plaintiff. *W. R. Lumbert, Hersey & Barnes,* for defendant.

GEORGE H. HAYES et al., Executors, *vs.* LEO D. LAMOND.

Washington County. Decided September 16, 1912. The plaintiffs were executors of the estate of William O. Grady comprising assets of the value of $98,190. It is provided by the statute that the executors may be allowed "a commission not exceeding five per cent on the amount of personal assets that come into their hands, and in cases where legal counsel is necessary, a reasonable sum for professional aid."

The plaintiffs employed the defendant who is an attorney, at law, to render them professional and other assistance in the settlement of the estate. It appears from the uncontradicted testimony that outside of two trips to Boston and New York, made by the plaintiffs with the defendant, the expenses of which were paid out of the estate, the only actual service rendered by the plaintiffs personally was to sign checks, and that the defendant, in addition to legal services "kept the books and did everything else pertaining to the settlement of the estate." For all of these services, legal and clerical, the plaintiffs paid the defendant the sum of $5000.

But upon presentation to the probate court of the second account of the executors, objection to the allowance thereof was made by the heirs and legatees interested in the estate, and thereupon a written agreement was entered into by the parties interested to submit the account to a referee who should "determine what should constitute proper charges and the amount thereof in said account."

It was determined by the referee after notice and hearing that a commission of four per cent of the amount of the personal assets in the aggregate would be allowed to the executors for their services, and the further sum of $2830.70 for services and expenses

of the defendant employed by them to render professional aid in the settlement of the estate. It appears that the Judge of Probate refused to allow to the plaintiffs the sum of $5000 for professional aid in the settlement of the estate and the plaintiffs bring this action against the defendant to recover the difference between the $5000 actually paid by them for all the services rendered by him and the sum of $2830.70 allowed to the plaintiffs by the referee for professional aid.

The plaintiffs appear to have paid the defendant this sum of $5000 voluntarily and without mistake of law or fact. This sum covered not only the reasonable compensation which they were authorized to pay for legal assistance but also included compensation for all other services rendered by the defendant in the settlement of the estate and in keeping the accounts which the plaintiffs were themselves competent to perform without legal assistance. It is in evidence and uncontradicted that one or both of the plaintiffs expressed the opinion at the time that the defendant's claim was not exorbitant, and it was paid by them after they had been informed that the Judge of Probate had stated in substance that he should not feel warranted in allowing such a sum for legal services. It is accordingly the opinion of the court that the certificate must be, judgment for the defendant. *J. H. McFaul,* for plaintiffs. *St. Clair & J. H. Gray,* for defendant.

ANNA C. MASTERMAN *vs.* PORTLAND RAILROAD COMPANY.

Androscoggin County. Decided September 16, 1912. This case comes up on motion for a new trial, and exceptions. The exceptions are waived. The only point relied upon under the motion is that the verdict for the plaintiff was excessive.

The plaintiff was a passenger upon one of the defendant's cars when it collided with another car. She was thrown violently upon the street pavement and received very serious injuries. The evidence would warrant a jury in finding that she sustained a fracture of the

skull. She was unconscious, or only partly conscious, for four or five days, hovering between life and death. The extent of her recovery at the time of the trial was somewhat in dispute. The future consequences of the injury are in some respects problematical.

Disregarding, as the jury should have done, and as the court must do, all such consequences as are merely possible, of which no more can be predicted than that they may follow, and considering only such damages as the jury were warranted in finding that the plaintiff had sustained up to the time of the trial, and such other damages as the jury might believe, with reasonable certainty, would be sustained in the future, the court is of opinion that the verdict is not so manifestly excessive as to require a new trial. Motion and exceptions overruled. *McGillicuddy & Morey,* for plaintiff. *Libby, Robinson & Ives,* for defendant.

FRANCES GARCELON *vs.* ALICE E. MOUNTFORD.

Androscoggin County. Decided September 28, 1912. This is a writ of entry to recover possession of the northerly half of a triangular shaped piece of land situated on the east side of the Androscoggin river in the city of Lewiston. Both the plaintiff and the defendant claim title by deed to the tract described in the writ. At the close of the testimony the presiding Justice directed a verdict for the plaintiff, and the defendant brings the case forward upon exceptions to that ruling.

The plaintiff claims title by virtue of a warranty deed given by G. Henry Jordan and Deborah G. Jordan, dated December 20, 1873, and recorded December 21, 1873, to George W. Jordan, who died in 1905, leaving a will under which will the plaintiff claims to hold the premises described in the writ. Exceptions sustained. *Newell & Skelton,* for plaintiff. *McGillicuddy & Morey,* for defendant.

FREDERICK W. DAMON *vs.* UNITED PHOTO MATERIALS CO.

Androscoggin County. Decided September 28, 1912. This is an action of debt on a foreign judgment. After the entry of the writ the defendant suggested its bankruptcy, and it was entered upon the docket and the case continued. At a subsequent term of the court the plaintiff placed the case upon the trial list, and the defendant, having pleaded that it had been adjudicated a bankrupt and no discharge granted or refused, moved for a continuance as a matter of right. The bankruptcy of the defendant was admitted and it was also admitted that one term's notice, in writing, had been given by the plaintiff to the defendant, as required by section 68, chapter 84, R. S. The presiding Justice overruled the motion for a continuance, ordered judgment for the plaintiff and that execution be perpetually stayed. The defendant filed exceptions, which were duly allowed. At the next term after the above proceedings were had the defendant obtained its discharge in bankruptcy, and by agreement of parties that fact was stated in the bill of exceptions by way of amendment, and became a part of the record in the case now before the court. Exceptions overruled. *Benjamin G. Ward,* for plaintiff. *George C. & H. L. Webber,* for defendant.

FLORENT SANFACON *vs.* FRED PARENT.

Aroostook County. Decided September 28, 1912. This is an action of assumpsit to recover the value of two carloads of potatoes claimed to have been sold by the plaintiff to the defendant. The only issue in the case was one of fact. The plaintiff claimed he sold the potatoes to the defendant, the defendant claimed the plaintiff sold them to one Ward. The testimony was conflicting, and different parts of it strongly corroborated each of the parties. The jury, who saw and heard the parties, by their verdict found the plaintiff's contention was true. They were better qualified to judge

of the truthfulness of the witnesses than this court, and a careful reading of the testimony fails to satisfy us that there was not sufficient evidence if the jury believed it, to justify the verdict. *Cameron* v. *Street Railway,* 103 Maine, 482. Motion overruled. *Peter C. Keegan,* for plaintiff. *L. V. Thibodeau, A. S. Crawford, Jr.,* for defendant.

LILLIE M. ROGERS *vs.* CHARLES R. FOOTE.

Sagadahoc County. Decided October 7, 1912. This was an action for assault and battery in which the plaintiff recovered a verdict of $385.25. The case is before the Law Court on motion only, as the single exception reserved was not urged in argument.

The jury have found by their verdict that the defendant committed an assault upon the plaintiff by kicking her twice in the side while she was scrubbing a floor in the house of a neighbor for whom she was at work. This the defendant denied but there is ample evidence to support the verdict. If the assault was made, it was without justification or even provocation, so far as the record shows. Motion and exceptions overruled. *E. C. Plummer,* for plaintiff. *F. L. Staples,* for defendant.

WILLIAM HUGHES *vs.* ANN HUGHES AND THOMAS HUGHES.

Androscoggin County. Decided October 9, 1912. In this "action against his mother and brother for money had and received," the plaintiff seeks to recover the sum of $1800 alleged to have been taken by the defendants from the plaintiffs old coat hanging in the cellar under his mother's house, on the first day of July, 1909, and to have been converted by them to their own use and benefit.

The case has been before the trial court three times and twice before the Law Court. At the first trial, the jury disagreed; at the second trial, the plaintiff recovered a verdict for the amount claimed which was set aside by the Law Court as against the evidence. At the third trial, after the introduction of the plaintiff's evidence, the presiding Justice ordered a nonsuit, and the case came to the Law Court a second time on exceptions to this ruling. Exceptions overruled. *Newell & Skelton,* for plaintiff. *McGillicuddy & Morey,* for defendants.

LEONARD GRIFFITH *vs.* WILLIAM C. BROWN.

MARY E. GRIFFITH *vs.* SAME.

Aroostook County. Decided October 17, 1912. These two actions, brought by husband and wife, arose from an automobile accident that occurred in the town of Limestone on August 22nd, 1909. The cases have been tried twice and are before the Law Court for the second time. At the first trial the plaintiffs obtained verdicts which on motion by the defendant, were set aside by the Law Court. At the second trial, the plaintiffs again prevailed and again the cases are before this court on defendant's motion. It is unnecessary to restate at length the reasons that before seemed convincing to the court. The present record simply confirms the conclusion then reached. The entry should therefore be, motions sustained. *W. B. Hall, Powers & Guild,* for plaintiff. *Hersey & Barnes, W. R. Lumbert,* for defendant.

ANDREW VIOLETTE et al. *vs.* SAMUEL B. LISTER.

Aroostook County. Decided October 17, 1912. This is an action of tort to recover damages for the loss of certain property alleged

to have been caused by the defendant's negligence in allowing sparks to escape from a stationary engine. The defendant was engaged in drilling a well for the plaintiffs and had set his machine and engine near the plaintiff's buildings. Escaping sparks caused the fire.

The evidence is conflicting as to whether a screen or arrester was on the smoke stack at the time the fire occurred, and also as to the degree of care taken by the defendant in the prosecution of his work. The jury, who had an opportunity to see and hear the witnesses, sustained the plaintiffs' contentions of fact and rendered a verdict in their favor. A critical reading of the evidence does not convince the court that the verdict was manifestly wrong. The entry must therefore be, motion overruled. *Peter C. Keegan, Powers & Archibald,* for plaintiffs. *O. L. Keyes,* for defendant.

PERLEY H. HOWARD *vs.* DIRIGO MUTUAL FIRE INS. CO.

Androscoggin County. Decided October 18, 1912. This is an action on an insurance contract by which the plaintiff seeks to recover the full amount of the indemnity specified in his policy and comes up on motion by the defendant. The defendant resists the claim upon the ground that the evidence shows that the fire was incendiary and that the jury should have so found. No questions of law are raised. The evidence is conflicting and undoubtedly raises suspicions against the plaintiff. But the force and effect of suspicious circumstances in connection with the origin of a fire are matters for the consideration of the jury. Their conclusions should not be disturbed unless they are so clearly erroneous as to require the intervention of the court. In this case, a careful examination of the testimony does not disclose such error or bias as to require such intervention. Motion overruled. *White & Carter,* for plaintiff. *Newell & Skelton,* for defendant.

EMERSON H. DOUGHTY *vs.* JOHN W. SULLIVAN.

Cumberland County. Decided October 24, 1912. This is an action for damages for an assault and battery. The jury returned a verdict of $800 for the plaintiff, and the case is before this court on a general motion by the defendant for a new trial.

About eight o'clock in the evening of November 21st, 1910, the plaintiff, acting as a "Sturgis Deputy," went into the premises numbered 95 Center Street, Portland. In the rear room he found intoxicating liquors being sold. The man behind the bar escaped, and the two customers went out. "There was something said and I don't recall what was said. Anyway, I said something like this, I says, 'You get out of here,' and he started out of the door." (Meaning the defendant) . . . . "I followed him right around, followed the side of the building out to the gate. I was four or five feet behind him. He stepped into the gate and immediately turned and came back, and when he got right in abreast of me he drawed with his right hand and struck me on the right jaw here, and before I could gather myself there was at least half a dozen pounced on me from the back which kept me going for three or four minutes, perhaps five minutes, and all at once they left."

The weight and credibility of the testimony is always for the jury to determine, and when, as in this case, they have reached a verdict on an issue of fact where the testimony was in direct conflict and could not be reconciled, that verdict should not be disturbed unless it is manifestly the result of bias or prejudice. Motion overruled. *F. W. Hinckley,* for plaintiff. *Foster & Foster,* for defendant.

MARY E. SHALLOW *vs.* MOSES ROUX.

York County. Decided November 12, 1912. This is an action of trover for $155 in currency in which the jury returned a verdict for the plaintiff for $151.47. It is now before this court on three motions for a new trial—one being a general motion that the verdict

is against the weight of the evidence, and the other two being special motions founded upon alleged newly discovered evidence.

The parties were the only witnesses at the trial, except that the plaintiff called a witness in rebuttal whose testimony was of no material consequence.

The burden was on the plaintiff to establish the truth of her charge against the defendant by a fair preponderance of all the evidence. That charge really was that he stole the $155 from her clothing while making a business call upon her at her room. Her testimony is very unsatisfactory, to say the least. The story that she told is unreasonable in so many particulars that it seems quite incredible. Motion sustained. New trial granted. *George A. Goodwin,* for plaintiff. *Allen & Willard,* for defendant.

LEE K. REED *vs.* ABRAM LIBBY.

Penobscot County. Decided November 13, 1912. This is an action of assumpsit in which the plaintiff seeks to recover from the defendant $265 claimed to be due him as commission for the sale of a tract of wild land. The defendant being the owner of a tract of land known as Mile Square 11, in the town of Chester, about October 11th, orally authorized the plaintiff to sell the land for him. The selling price was to be not less than $4 per acre, making the price of the whole tract $2560. If the plaintiff sold it for that price he was to be paid $25 for his services; but the plaintiff was not limited to that price. He was authorized to sell it for as much more as he could, and all he obtained over $2560 he was to have in addition to the $25 to be paid him as commission as aforesaid. The plaintiff showed the lot to the Esty Brothers, but December first Esty Brothers concluded not to purchase and so informed the plaintiff, and afterwards the defendant sold the lot to Mr. Hershey for $2800. The jury rendered a verdict for the plaintiff for $265, and the defendant filed a general motion for a new trial. Motion sustained. New trial granted. *George W. Thombs,* for plaintiff. *Martin & Cook,* for defendant.

HENRY KENNARD *vs.* REUBEN HATHAWAY.

Aroostook County. Decided November 27, 1912. This is an action of replevin in which the plaintiff claimed the right of possession of a horse by virtue of a mortgage. The horse replevied was owned and mortgaged by the defendant, as security for notes given in part payment for a horse sold and delivered to the defendant by the plaintiff. The defendant claimed that the plaintiff fraudulently misrepresented the horse purchased by him and returned the horse to the plaintiff, thereby undertaking to rescind the trade. If the defendant had a right to rescind the trade, then it is evident that he was entitled to retain the possession of the horse he had mortgaged to the plaintiff. Whether he was justified in his act of recision depends entirely upon the issue of whether, in fact, such false and fraudulent misrepresentation were made by the plaintiff, as to the character and qualities of the horse, and such reliance was placed upon them by the defendant, as warranted him in returning the horse and cancelling the contract of sale. Verdict for the defendant. Motion for new trial by plaintiff. Motion overruled. *William P. Allen,* for plaintiff. *O. L. Keyes,* for defendant.

MARK DYER *vs.* WILLIAM A. COLLINS.

Cumberland County. Decided December 2, 1912. This is an action of trespass on the case to recover for injuries alleged to have been sustained by the plaintiff by the negligence of the defendant, in negligently and wilfully deserting him on the fishing grounds in the darkness of the night. And by reason of such desertion he was left alone in his dory and was compelled to face a rough and choppy sea without food or water for about eight hours before he reached the United States Government Light-Ship off Cape Elizabeth Shore. The jury returned a verdict for the plaintiff for $25.00 and the defendant filed a general motion for a new trial and

excepted to a refusal by the presiding Justice to give requested instructions. Motion and exceptions overruled. *Frederick W. Hinckley,* for plaintiff. *Benjamin Thompson and Frederick J. Laughlin,* for defendant.

FRANCES S. SAYLES *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland County. Decided December 2, 1912. This is an action on the case to recover for personal injuries received by falling on the steps of one of the defendant's cars from which she was alighting on the fourth day of September, 1909. The jury returned a verdict for the plaintiff for $3500 and the defendant filed a general motion for a new trial. Motion sustained; verdict set aside; new trial granted. *Edwin Stone and Ford White,* for plaintiff. *N. & H. B. Cleaves, Stephen C. Perry and White & Carter,* for defendant.

THOMAS H. SULLIVAN, Adm.

vs.

ROCKLAND, THOMASTON AND CAMDEN STEEL RAILWAY.

Knox County. Decided December 4, 1912. This is an action to recover damages for personal injuries resulting in the death of Sortir Theodos, plaintiff's intestate. Sortir was one of a crew of men who, on the 23d day of December, 1910, under charge of William Walker, foreman, went to work for defendant discharging a cargo of coal in defendants' cars at the wharf at Glencove, in town of Rockport, Me. The evidence shows that the accident

which caused the death of plaintiff's intestate, was due to, or contributed to, by a fellow servant. At the conclusion of the plaintiff's testimony, the presiding Justice ordered a nonsuit and the plaintiff excepted to said order. Exceptions overruled. *Philip Howard,* for plaintiff. *A. S. Littlefield and Alan L. Bird,* for defendant.

NEWELL E. AVERY *vs.* ALBERT J. AVERY.

Lincoln County. Decided December 6, 1912. This is an action of assumpsit on a promissory note for $29.25 dated November 7, 1905. The jury rendered a verdict for the plaintiff for $39.72, and the defendant filed a general motion for a new trial. Motion sustained; verdict set aside. There was no legal consideration for the note on which the verdict was rendered. *R. S. Partridge,* for plaintiff. *W. M. Hilton,* for defendant.

HELEN COUGHLIN, Pro Ami *vs.* EDWARD J. BRADBURY.

JOHN P. COUGHLIN *vs.* SAME.

York County. Decided December 18, 1912. These are actions against the defendant for alleged negligence in compounding a physician's prescription, calling for five grains of phenacetin and five grains of sugar of milk, to be put up in the form of five powders, containing one grain each of the phenacetin and sugar of milk. A verdict was rendered in each case in favor of the plaintiff. Except upon the question of damages the two cases stand upon precisely the same testimony. In fact the second case is a matter of expenses only, depending upon the result of the first.

The defendant, who filled the prescription was not a registered druggist, but this fact is immaterial. If negligent, whether registered or not, he would be liable, and vice versa, provided there was no contributory negligence on the part of those administering the drug. The facts are these:

About a year before the use of the drug upon which the case arose, the plaintiff, John Coughlin, procured a prescription from Dr. Cochrane, for the compound above described. It had been refilled three or four times, and administered two or three times before to the little girl, Helen, four years old. When one of these last obtained powders was given to her it made her quite seriously ill, from the effects of which she suffered some weeks. The first action is brought to recover for this illness, alleged to have been caused by the defendant's negligence. Was the defendant negligent? There is only one ground upon which the defendant can be charged with negligence, and that is, a failure to properly mix the ingredients of which the compound was made so as to distribute the phenacetin throughout the mixture so that subtantially one grain was contained in each powder.

It is not in controversy that the defendant pursued the usual course in filling this kind of a prescription. He weighed out five grains of each of the required ingredients, placed them in a mortar, stirred them with a pestle, "from a minute and a half to two minutes," dumped the mixture upon a prepared paper, graded it up as nearly as possible, divided it into five equal parts, and then placed them into separate papers and folded them for use, properly marking the box in which they were contained. The evidence shows that this was the appropriate and usual method of filling this kind of a prescription.

Unfortunately only one of these powders was analyzed, and the inference to be drawn from this analysis is rather against the supposition of due care. The powder analyzed should have contained one grain of phenacetin, whereas it did contain but six-tenths of a grain, or one-tenth more than half. The surplus, consequently, must have gone into one or have been distributed in all the other powders. The other powders may also have been so unevenly mixed, as to have enabled some one powder to have contained a very much larger proportion of the medicinal elements than was

intended, and therefore have become an overdose for a child but four years of age.

It was incumbent upon the defendant either to so thoroughly mix the ingredients that each powder would contain substantially the quantity it was intended to have, or to compound each powder separately by weight, which was perfectly practicable to do.

But the defendant contends that the plaintiff's mother, who administered the powder, was negligent in giving a child so young so powerful a drug, without first consulting a physician to discover if her physical condition, beside the malady for which the medicine was given, was in other respects healthy. It appears, however, that a powder, compounded from this same prescription, and presumed to be precisely like it had previously been given to this little girl two or three times with perfect success. If this powder, when properly compounded, had several times been used with benefit, then the mother, we think, had a right to presume that a use of it again for a similar trouble, and it was similar, would effect a like result. She could not, therefore, be charged with negligence, even if her course was not in harmony with the highest degree of prudence. She was required to exercise only that caution which an ordinarily careful person would have done under like circumstances. We think her act comes within the rule. Motion in each case overruled. *Robert B. Seidel,* for plaintiffs. *Frank L. Palmer and James O. Bradbury,* for defendant.

OAKLEY C. CURTIS et als., Petr's., *vs.* LESLIE C. CORNISH et als.

Cumberland County. Decided December 18, 1912. Upon the authority of *Curtis* v. *Cornish,* 109 Maine, 84, Atlantic Reporter, 799, the entry must be Exceptions sustained. *E. W. Freeman,* for Oakley C. Curtis et als, Petr's. *Fred V. Matthews,* for et als.

FRED C. ROBERTSON *vs.* BURKE & WARREN.

Lincoln County. Decided December 18, 1912. This case involves a written contract between the plaintiff and defendants for sawing lumber in a portable mill which the plaintiff had bought of the defendants. He was to saw and pile the lumber at a given price per thousand in regard to which there is no dispute. There are but two material issues in the case. (1) Was the quantity of lumber sawed to be determined by the mill scale, or by the returns received by the defendants, from those to whom they might sell and ship the lumber. (2) If the mill scale was to govern, then was the lumber properly surveyed and marked. The written contract is silent as to how the quantity of lumber sawed should be determined. The jury found in favor of the plaintiff in both issues and returned a verdict for the plaintiff and the defendant filed a general motion for a new trial. Motion overruled. *C. L. Macurda and A. S. Littlefield,* for plaintiff. *Cleaves, Waterhouse & Emery,* for defendant.

STAPLES PIANO & MUSIC COMPANY *vs.* HARRY PLUMMER.

Cumberland County. Decided December 18, 1912. This was an action of assumpsit, tried in the Superior Court of Cumberland County by the Judge without the intervention of a jury, subject to exceptions. The plaintiff's declaration contains two counts; one upon assumpsit for the value of a piano, the other upon assumpsit for the sale and delivery of the same piano.

At the close of the plaintiff's evidence, the Judge upon the testimony granted a nonsuit. To this ruling exceptions were taken and allowed. The case comes up on the evidence. The defense was that the piano which the plaintiff carried to the defendant's house in the evening did not correspond either in make or quality with the piano which the defendant had agreed to purchase. The plaintiff's own evidence shows conclusively that the defendant refused

to accept the piano, and although he permitted it to remain in his house, compelled the piano to be locked, which was done by Charles Staples, one of the plaintiff's agents. Whatever may be the plaintiff's rights upon a contract of sale, it is evident from the testimony that the contract of sale, if one was made, was not consummated by an acceptance by the plaintiff. Exceptions overruled. *E. A. Turner,* for plaintiff. *H. H. Gray, Benjamin Thompson and F. J. Laughlin,* for defendant.

STATE OF MAINE in scire facias *vs.* HENRY T. TALBERTH et als.

Kennebec County. Decided December 19, 1912. Scire Facias upon a recognizance given by the defendants under a sentence for illegal keeping of intoxicating liquors imposed upon the defendant Talberth by the Superior Court for Kennebec County at the January term, 1911. The sentence was in the following form: "Fine of $100 and costs taxed at $40, and thirty days in jail unless bail is given to keep out of business, etc." At the same term the other defendants Murray and Rosen appeared and became "sureties in $500 conditioned that said Henry Talberth shall violate none of the provisions of the prohibitory liquor laws in the State of Maine for the term of two years from this date."

The defendants contend that the procedure in taking this recognizance was unauthorized, and the recognizance itself void.

Precisely the same question has been decided by this court in the case of *State* v. *Sturgis* et als., very recently announced. In that case a sentence was imposed similar to that in the case at bar, and in an action of scire facias judgment was ordered for the defendants.

It was there held that "When the court has pronounced the sentence of the law against one convicted of a criminal offence, it then has no power (unless so authorized by statute) to make any order, the effect of which would be to indefinitely suspend the execution of that sentence, or to nullify it, upon the happening of a contin-

gency or the performance of some condition by the defendant at his option, that any such order is void, and any bond or recognizance given in pursuance of such order is void."

The opinion in that case thoroughly discusses the question at issue, and is decisive of the case at bar. Judgment for the defendants. *Joseph Williamson,* County Attorney, for plaintiff. *F. W. Clair,* for defendants.

FRANK W. CARLETON *vs.* HERBERT E. FLETCHER et als.

County of Sagadahoc. Decided December 20, 1912. The plaintiff brought this action against the defendants to recover damages alleged to have been directly caused by their willful and malicious conduct as judges of the horse races in September, 1911, in suspending the plaintiff's horse, Baron Sidnut, from competing over any track of the National Trotting Association, and also the consequential damages resulting from such suspension. The jury returned a verdict in favor of the plaintiff for $708.15.

The case comes to the Law Court solely on a motion to set aside the verdict as against the evidence. No exceptions were taken to the admission or exclusion of evidence, or to any instructions given to the jury by the presiding Justice.

In the 2.20 race three horses were entered, viz., Katherine Kohl, Baron Sidnut and Roanbird. The plaintiff was the owner of Sidnut and F. H. Wiggin, superintendent of the horse department of the society, was the owner of Roanbird. A. E. Russell was the driver of Sidnut, and Robert Waite the driver of Roanbird. In the fourth heat, according to the testimony for the plaintiff, Katharine Kohl had the pole with Sidnut next and Roanbird outside. As they went down the turn, Waite driving Roanbird touched her with the whip and swung up against Sidnut's wheel and onto his legs, causing him to break and run. Thereupon, Waite pulled away, and Russell got Sidnut back to his stride and finished second. But the defendants, as judges of the race, set Baron Sidnut back for "foul

driving and interfering" on the part of Russell, his driver. Russell appeared before the judges and attempted to explain the incident according to the facts, as claimed by him, when he was knocked down by Waite, in the presence of the judges, and beaten and bruised until he was unconscious.

For this flagrant violation of the rule, the judges not only failed to impose upon Waite the penalty prescribed by the association or even to administer a reprimand; but rendered their decision as above stated.

It appeared that in this heat the plaintiff's horse, Baron Sidnut, cast the larger part of one of his shoes, but owing to the fact that his driver had been temporarily disabled by the assault committed upon him by Waite, the loss of the shoe was not discovered for ten or fifteen minutes after the heat. Prompt inquiry and search were then made for a blacksmith, but when one was found only five minutes remained before the fifth heat was to be started. The judges thereupon required the plaintiff to have his horse shod in that time, or race him without being shod. The blacksmith declared that it was impossible to put on a shoe in five minutes, but the judges ordered the fifth heat to go on without Baron Sidnut; and the plaintiff claimed that the heat was started and raced after sunset, in violation of the rules, Waite being allowed to drive Roanbird without censure for the past or warning for the future.

The next day the plaintiff "protested this action of the judges in terms which reflected upon their good faith." Thereupon, by order of the judges, the plaintiff's horse, Baron Sidnut, and his driver, A. E. Russell, "were suspended for sixty days for foul driving in the fourth heat."

But after learning that they had no authority to suspend the plaintiff's horse for foul driving, the judges informed the plaintiff that if he would withdraw his protest they would withdraw the suspension of his horse and driver. The plaintiff declined to accept this proposition, and ten days later, on the plaintiff's application, Baron Sidnut, and his driver, A. E. Russell, were temporarily reinstated by the President of the National Trotting Association, and December 14th following, this action was confirmed by the board of review.

The plaintiff also calls attention to the fact that F. H. Wiggin, the owner of Roanbird, by virtue of his position as superintendent

of the horse department, appointed the defendants judges of the races, and then bought pools on his own horse for the 2.20 trot the night before the race.

It is claimed in behalf of the plaintiff that these facts and circumstances are clearly established by the evidence. It is contended that in setting back Baron Sidnut for "foul driving," in ignoring the violent assault committed upon the driver, in refusing to give the plaintiff an opportunity to have his horse shod for the fifth heat, and in ordering the heat to be raced that evening with Sidnut left out, the defendants were acting in pursuance of a preconceived purpose to favor Roanbird to the disadvantage of Sidnut and the detriment of the plaintiff; and it is further contended that in suspending the plaintiff's horse and driver for sixty days for foul driving, the defendants not only acted illegally, but willfully and maliciously in order to punish the plaintiff for presuming to file a protest against their action.

The defendants deny all of the material allegations against them, and insist that in all respects they acted in good faith according to their best judgment. As might be expected, there was a conflict of testimony in regard to facts and circumstances connected with the 2.20 race in question. It was not in controversy that with respect to those performing quasi judicial duties, like the defendants, the legal rule of judicial immunity is limited by the principle of good faith and honest purpose. But the evidence to prove that they acted willfully and maliciously and in a vindictive spirit should be clear and cinvincing. Upon a careful examination of the printed testimony, the liability of the defendants does not appear to be entirely free from doubt. But the jury had the advantage of hearing the witnesses and observing their manner and bearing on both direct and cross examination. It was a question which they were peculiarly qualified to determine, and their decision does not appear to be so manifestly wrong as to require the interposition of the Law Court to set it aside.

The plaintiff was subjected to substantial damages in the expenditure of time and money required to obtain a reinstatement of his horse. According to the plaintiff's evidence, this item alone was at least fifty dollars. But the plaintiff was entitled to recover punitive or exemplary damages in addition to the actual damages sustained.

If the jury awarded the entire balance of the verdict above fifty dollars as exemplary damages, it cannot be deemed excessive. It is therefore unnecessary to consider the question of the probable winnings of the plaintiff's horse in subsequent races. Motion for new trial overruled. *A. J. Dunton & Morey,* for plaintiff. *Pattangall & Plumstead,* for defendants.

THE OSCAR HOLWAY COMPANY *vs.* EDWARD G. BAILEY.

Androscoggin County. Decided December 20, 1912. In this action, the plaintiff sought to recover the value of a carload of cotton-seed meal alleged to have been sold to the defendant, a retail dealer at Silver's Mills in the town of Dexter, Maine. The jury returned a verdict for the defendant, and the case comes to this court on a verdict to set it aside as against the evidence.

The plaintiff's contention is that in July, 1910, it sold to the defendant four carloads of cottonseed meal, viz: two carloads on July 7, one for October shipment, and one for December shipment, and two carloads on July 9 both for November shipment; and it is claimed that the payments made by the defendant were for one of the carloads sold July 7 for October shipment and for one of those sold July 9 for November shipment. A third carload was forwarded to the defendant January 16, 1911, and immediately after the invoice of the third shipment was received by the defendant, he wrote a letter to the plaintiff, stating that he had purchased only two carloads of cotton-seed meal and having already received those he refused to accept the third shipment. The plaintiff replied, reviewing the negotiations between them, and insisting that the defendant had purchased four carloads and that there was one more due him besides the one then on the track at Silver's Mills. Motion for new trial overruled. *M. S. Holway,* for plaintiff. *Charles W. Hayes, John A. Morrill,* for defendant.

GEORGE M. MANSELL

vs.

LEWISTON, AUGUSTA & WATERVILLE ST. RY.

Kennebec County. Decided December 20, 1912. This case comes up on motion. It is an action for damages for personal injuries received by the plaintiff by the over-turning of his cab, which came in contact with a rail of the defendant's road at the Western Avenue Junction in the city of Augusta. No question is raised as to the amount of the verdict. The accident occurred in the traveled part of the way.

Upon the evidence, the jury would be authorized to find that, at the point of accident, the defendant in clearing the snow from its roadbed, had left a depression or trench, occupied by the track, which made a diagonal slope to the rails, from the level of the snow in the road, eight inches in length and six or seven inches in depth; that is, it formed a triangle with a hypothenuse of eight inches and a perpendicular of six or seven inches.

It was the duty of the defendant, by its charter, to so construct and maintain its railroad that so much of the highway, as might be occupied thereby, should be safe and convenient for travelers,—the same duty imposed upon towns with respect to maintaining the highways and keeping them in repair.

The first question, therefore, is, was the condition complained of a defect? This was a fact for the consideration of the jury. Unless their verdict was clearly wrong, it cannot be disturbed.

We are unable to avoid the conclusion that this trench or channel cut through the snow in the traveled part of the highway, sufficient to cause the overturn of a cab, or other vehicle upon runners, whatever its depth and shape, could be regarded as other than a defect, provided the vehicle was being driven with due care. It is a case in which the accident itself speaks. The fact that the cab overturned in the traveled part of the street, is very strong evidence that such street was unsafe and inconvenient for travelers. Upon this element of the case the verdict cannot be set aside.

It accordingly remains to be seen if the plaintiff was in the exercise of due care. The jury was clearly warranted in finding

for the plaintiff upon this issue. In fact, there is no evidence that contravenes this conclusion, nor does the defendant raise the question in its brief. It is true, the plaintiff had frequently been past the locus, but upon the day of the accident quite an amount of snow had fallen which obscured the real condition, and, in addition to this, the plaintiff was obliged to turn from the most traveled part of the way to avoid collision with an approaching coal team. Plea, general issue. The jury rendered a verdict for the plaintiff for $585.00 and the defendant filed a motion for new trial. Motion overruled. *B. F. Maher,* for plaintiff. *Heath & Andrews,* for defendant.

SARAH S. WOODWARD *vs.* CHARLES J. DAIN et al., Trustees.

Sagadahoc County. Decided January 20, 1913. This case in equity is before this court on an appeal from the final decree of the sitting Justice.

In the third paragraph of his will Charles F. Rideout, late of Bath, Maine, provided as follows:

"I do hereby expressly declare and direct that, in case my sister Sarah S. Woodward at any time falls into distress or is actually in need of financial assistance, my Executors shall furnish and provide for her out of my residuary estate such sum or sums as may be actually necessary for her support."

By a decree of the Supreme Judicial Court of this State, dated August 18, 1909, it was decreed that "out of said residuary estate the trustees shall forthwith provide the said Sarah S. Woodward such sum or sums as may be actually necessary for her support in accordance with the provisions of the third paragraph of said will."

In this bill in equity now before the court Mrs. Woodward complains that under the decree referred to the trustees have fixed upon the sum of three dollars and a half per week to be paid to her, which sum she claims is inadequate for her actual necessary support, and she asks that the trustees may be ordered to pay her a

larger sum per week, and also to pay certain bills which she has contracted for her necessary support and which she is unable to pay.

The sitting Justice, hearing the same, ruled in substance and effect that the provisions of the third paragraph of the will of Mr. Rideout created a trust in the residuary estate for the necessary support of Mrs. Woodward as therein specified, which trust was superior to the interest of the life tenant in said residuary estate; and that although the testator vested in the trustees the discretion to determine the amount of the payments to be made to Mrs. Woodward, yet, where is appears that the trustees have not properly exercised that discretion, either from lack of good faith or because of a misconception of the legal scope of the trust and of their duties thereunder, the court has jurisdiction to interfere.

And he found as a fact that the trustees had "in some respects misconceived their duties," and that they had failed to furnish and provide for Mrs. Woodward such sums as were reasonably adequate for her actual necessary support. Whereupon, he ordered, adjudged and decreed as follows:

1. That the trustees shall pay to the complainant out of the residuary estate of Charles F. Rideout, monthly, from and after the date of this decree not less than twenty dollars a month, which sum is adjudged to be actually necessary for her support, and shall from time to time pay such further sum as her actual necessities shall require.

2. That the trustees shall forthwith pay to the complainant out of said residuary estate the sum of thirty dollars for medical expenses already incurred.

3. That the residuary estate shall bear the costs and expenses of this proceeding to this extent: The trustees shall pay to the complainant's solicitor the taxable costs, together with a solicitor's fee of forty dollars and charge the same in their account.

Held:

1. The sitting Justice correctly construed the provisions of the third paragraph of the will of Charles F. Rideout as creating a trust in the residuary estate for the actual necessary support of the complainant, which was superior to the interest of the life tenant therein.

2. His ruling was appropriate and correct, that when trustees, who are vested with the exercise of a discretion, fail to properly exercise that discretion either from lack of good faith or because of a misunderstanding of the scope of the trust and their powers and duties therein, a court of equity has jurisdiction to interfere and give directions to the end that the trust may be properly carried out.

3. The decision of the sitting Justice, as to matters of fact, will not be reversed unless it clearly appears that such decision is erroneous. It does not so appear in this case; on the other hand, his findings of fact appear to be fully supported by the evidence, and his conclusion and judgment just and reasonable. Decree below affirmed with costs. *George W. Heselton,* for plaintiff. *E C. Plummer,* for defendant.

MARY WELCH *vs.* JAMES H. MCGLINCHY.

Cumberland County. Decided February 26, 1913. This cause comes up on a motion for a new trial. The action is to recover damages sustained by reason of alleged misrepresentations made by the defendant during the negotiations for the purchase by the plaintiff of certain real estate.

One Ellen McGlinchy, a cousin of the defendant, employed him to sell the real estate for her. He undoubtedly supposed at that time that she was the sole owner of the property. But it subsequently appeared that she had title to but one undivided sixth of it, as an heir of her mother.

Acting as agent of his cousin, the defendant sold the property to the plaintiff and she received a warranty deed thereof executed by Ellen McGlinchy. The plaintiff claimed that the defendant stated to her in the negotiations that Ellen McGlinchy was the sole owner of the property—that she was "the only one that owned the property, and that there was no other heirs about it." The

jury returned a verdict for plaintiff and defendant filed a motion for a new trial. Motion overruled. *D. A. Meaher and W. G. Chapman,* for plaintiff. *John T. Fagan and Connellan & Connellan,* for defendant.

JAMES W. POTTLE et al. *vs.* LIVERPOOL & LONDON & GLOBE INS. CO.

Washington County. Decided February 28, 1913. Action of assumpsit to recover $1250 fire insurance on a stock of general merchandise belonging to the assured and contained in their one and one-half story frame store situated at the Four Corners, so called, in North Perry, Maine.

This case was originally tried in 1911, the chief grounds of defence being (1) that the fire originated by the voluntary act, design and procurement of the plaintiffs, (2) that their proof of loss was false and fraudulent, (3) that they did not use reasonable exertions to save and protect the property after the fire started, and (4) that they falsely and fraudulently understated the amount and value of the property that was saved. That trial resulted in a verdict for the plaintiffs, which upon motion was set aside by this court because "the proof of loss was so clearly false and fraudulent that the plaintiffs' right of recovery was thereby forfeited." *Pottle* v. *Ins. Co.,* 108 Maine, 401, 405.

The case has again been tried, with the same issues involved, resulting on a verdict of $1390 for the plaintiffs, and it is again before this court on defendants' motion that this verdict be set aside as being unwarranted by the evidence. Plea, the general issue, with brief statement. The jury rendered a verdict for the plaintiffs for $1390. The defendant filed a general motion for a new trial. Motion sustained. Verdict set aside. *Ashley St. Clair, W. R. Pattangall and R. J. McGarrigle,* for plaintiffs. *C. B. & E. C. Donworth,* for defendants.

TERESA GRANIERE MARCHIONNE *vs.* MAINE FELDSPAR COMPANY.

Androscoggin County. Decided March 12, 1913. Action brought under the provisions of Chapter 258, Public Laws of 1909, by a widow to recover damages for the instantaneous death of her husband while in the defendant's employ and alleged to have been caused by its negligence. Verdict for $2400. The case comes before the Law Court upon an exception to the refusal of a requested instruction, and upon a general motion for a new trial. *Held:*

1. By the express provisions of section 4 of chapter 258, Public Laws of 1909 the damages recoverable for the death of a person "shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable."

2. It was error to omit to instruct the jury in this case that the damages were to be assessed in accordance with the rule expressly prescribed in the statute under which the action was brought, and to instruct them that the damages were to be assessed upon the principle of compensation to the plaintiff for the pecuniary loss resulting to her on account of the death of her husband.

3. Although erroneous instructions are usually, and more appropriately, presented by a bill of exceptions, yet the law of the case may be examined upon a general motion that the verdict be set aside, and if it appears that a manifest error in law has occurred, and it does not appear that no injustice has resulted to either party, the verdict may and should be set aside as against the law.

4. It cannot be said in this case that no injustice has resulted to either party because of the erroneous instructions as to the rule for the assessment of damages. Assessed by the true rule they might have been more or less than those actually assessed by the jury. In the opinion of the court therefore, the verdict ought to be set aside that this error of law may be corrected.

5. Since the damages are to be assessed with reference to the degree of the culpability of the defendant and the evidence on that issue must be again presented, we deem it inexpedient to consider the exception, or other questions raised under the motion. Verdict set aside. *A. L. Kavanaugh,* for plaintiff. *Oakes, Pulsifer & Ludden,* for defendant.

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ABANDONMENT.

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Adams v. *Hodgkins,* 361.

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In a suit to recover the contract price, held that Algire in negotiating the sale to dealers was the agent of the defendant and not of the plaintiff, and that his faults and material representations to the purchasers respecting the physical construction of the cultivators afford no defense to the suit, even though Algire may have been for other purposes the plaintiff's agent.
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See COMPLAINT AND WARRANT. MOTION IN ARREST OF JUDGMENT. RECORD. EXCEPTIONS. WILLS. JURISDICTION. FRAUD.

1. Upon the imposition of sentence, the taking of an appeal and filing an appeal bond, the jurisdiction of the magistrate is at an end and he has no further jurisdiction of the case, unless the appellant withdraws his appeal as, and in the manner authorized by Revised Statutes, Chap. 133, Section 19. *State* v. *Houlehan*, 281.

2. When a motion is made by an appellant under R. S., Ch. 133, Sec. 19, to withdraw his appeal, the powers of the magistrate are those only which are confined to that Section of the Statute.
State v. *Houlehan,* 281.

3. A record is a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and terminating with the judgment, and only the records of magistrates which are made in the course of judicial duty are of force. *State* v. *Houlehan,* 281.

4. The question of the jurisdiction and authority of the Judge of Probate to appoint a sole trustee under this will in which four were named as trustees by the testator, but none qualified, is not one specially raised by the reasons assigned for the appeal and hence is not now before the court.
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See LOGS AND LOGGING.

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1. Section 9 of the Bankruptcy Act of 1898, which provides that a bankrupt shall be exempt from arrest upon civil process should be construed to mean exemption from arrest made after bankruptcy petition is filed and does not apply to an arrest on civil process, properly made before the filing of the petition. *Turgeon* v. *Bean,* 189.

2. It is not in controversy that the demand was made on the plaintiff for payment of the tax on February 24, 1909, and that he was arrested on March 8, following. *Fenlason* v. *Shedd,* et al, 326.

3. The phrase "for twelve days after demand" in the common meaning of the language, gives the taxpayer twelve full days after the day of demand in which to pay the tax or point out property.
Fenlason v. *Shedd,* et al, 326.

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Fenlason v. *Shedd,* et al, 326.

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1. A person not an innkeeper or warehouseman, nor in the business of storing goods, who permits the property of another to remain on his premises under an agreement that storage is to be paid, but without any agreement for a lien, has no lien for the storage at common law.
Lewis v. *Gray,* 128.

2. That a ruling that the defendant was entitled to a lien for the storage of certain hay if there was an understanding or agreement between the parties that the storage was to be paid for was erroneous and that the defendant had no such lien at common law. *Lewis* v. *Gray,* 124.

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1. An action on a poor debtor's bond, given under Revised Statutes, chapter 114, section 49, on a breach occurring after filing a petititon in bankruptcy is not barred by the debtor's discharge.
Rice, et al, v. *Murphy,* et als, 101.

2. Bankruptcy Act, July 1, 1898, c. 541, sec. 9, which provides that a bankrupt shall be exempt from civil arrest, should be construed to exempt from arrest made after a bankruptcy petition is filed, and not to apply to an arrest on civil process properly made before filing of the petition.
Turgeon v. *Bean,* 189.

BANKS AND BANKING.

See SPECIAL DEPOSITS. SAVINGS BANKS.

1. Bank deposits are either general or special, being special where the bank merely assumes custody of the funds without authority to use them and where the depositor is entitled to a return of the identical money, in which case the relation is that of bailor and bailee and not creditor and debtor. *Fogg* in Eq. v. *Tyler,* 109.

2. A contract for a special deposit in a bank need not be in any particular form, it being governed like other contracts by mutual intention and understanding of the parties. *Fogg* v. *Tyler,* 109.

3. Under Revised Statutes, Chapter 48, Section 45, which provides that after decree of sequestration in a proceeding to wind up a Savings bank, commissioners shall be appointed to receive and pass upon claims, and that the Court may extend the time for hearing claims as justice may require, the Court may reappoint commissioners and extend the time within which claims may be presented and determined.
Nutter, et al, *Receivers* v. *Saco Savings Bank,* 124.

4. Revised Statutes, Chapter 48, Section 47, which provides that claims not presented to the commissioners in the proceeding to wind up a savings bank within the time fixed by the Court shall be forever barred, does not prevent allowance of a claim presented within an extension of time for presenting claims. *Nutter,* et al, v. *Saco Savings Bank,* 124.

5. The report of commissioners to receive claims in a proceeding under Revised Statutes, Chapter 48, Section 44, Et. Seq., to wind up a savings bank, like the report of a master in chancery, or a verdict should not be set aside unless clearly erroneous.
Nutter, et al, v. *Saco Savings Bank,* 124.

BILLS AND NOTES.

See PRESUMPTIONS. INDORSER. ESTOPPEL.

1. In the absence of agreement to the contrary, the parties to a note are presumed to be liable on it according to the legal effect of the instrument. *Canney* v. *Corey,* et al, 232.

2. Defendant, an indorser of a note, who induced plaintiff to indorse by deceiving her into believing that by indorsing below his name, she would become merely a surety for him is estopped to deny that he assumed the relation of principal to plaintiff. *Canney* v. *Corey,* et al, 232.

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1. In an action for breach of contract of marriage, if seduction is alleged, it may be shown in aggravation of damages, on the ground that the damages resulting to the plaintiff by reason of the breach of the marriage contract, cannot be justly estimated without taking into consideration that increased humiliation and keener sense of shame and disgrace on account of the seduction which the breach of contract of marriage subjects her to. *Hickey* v. *Kimball,* 433.

2. In an action for breach of promise of marriage, when seduction under promise of marriage is proved, evidence that defendant participated in an abortion performed on plaintiff was admissible to show guilt of seduction. *Hickey* v. *Kimball,* 433.

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See COMMISSIONS. REAL ESTATE. BANKS. CONTRACTS.

1. To entitle a real estate broker to a commission for procuring a prospective purchaser, he must produce a customer willing and prepared to purchase and pay for the property at the price and on the terms given by the principal to the broker. *Miller* v. *Haddock,* 98.

2. Payment for corporate shares to a stock brokerage firm does not give the buyer priority as to his claim for return of the money on receivership proceedings against the firm before the stock could be secured by the firm,

though the firm's balance in the fund in which the payment was deposited never fell below the amount of the payment; the transaction being an ordinary stock sales contract and involving no fiduciary relation between the parties. *Fogg* v. *Tyler,* 221.

3. In an action for a real estate broker's commission, it was proper to refuse to instruct that the fact that payments were not made by the purchaser would not bar plaintiff's right to recover if a sale had been made where it was admitted that payments were not made and the question as to whether a sale had been made was fully covered by the instructions given. *Fogg* v. *Tyler,* 221.

4. In an action by a real estate broker for compensation for services, held, under evidence a question for the jury whether defendant promised to pay him for services rendered. *Thompson* v. *Soule,* 286.

5. In an action for compensation for assisting in finding a purchaser for land, it was proper to instruct the jury that they should make the plaintiff whole as near as they could. *Thompson* v. *Soule,* 286.

6. Under a real estate broker's contract, giving him power to contract to convey, he was authorized to insert in a contract of sale provision for forfeiture on breach of the contract by either party.
Stevens v. *Odlin,* 417.

BURDEN OF PROOF.

See USE AND OCCUPATION. ASSUMPSIT.

1. The burden of proof was on the plaintiff to show an express contract by defendant to pay her a fixed sum for use and occupation of land to which she had no title. *Pennington* v. *Gartley,* 270.

2. In an action by an executrix for money due, the testator from the sale of certain property and admitted to have been received by defendant as testator's agent, the burden was on the defendant to prove payment.
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1. It is a well settled rule of carriers where a bill of lading contains no stipulation prescribing the particular route by which the shipment of goods shall be made, the carrier has the option to select any one of the ordinary routes of travel which is reasonably safe and expeditious and not excessive in its charges. *Edwards* v. *American Express Co.*, 444.

2. That the defendant employed a boy under fifteen years of age to run an elevator, in violation of Laws of 1907, Chapter 4, was competent evidence of defendants' negligence as to all consequences of failure of duty on the part of such boy. *Jones* v. *Co-Operative Association*, 448.

3. It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator as to all consequences that the statute was intended to prevent.
Jones v. *Co-Operative Ass.*, 449.

COMPLAINT AND WARRANT.

See APPEAL. SENTENCE.

CONSTITUTIONAL LAW.

See TAXATION. COURTS. PROHIBITION. WATERS. MILLS.

1. Public Laws of 1911, chapter 52, which provides for the change of the boundaries of the northern district of Aroostook County and for the removal of the registry office to Fort Kent, or Van Buren, as designated by the qualified electors of the district, is not invalid as a delegation of legislative power. *Fournier* v. *County Commissioners*, 48.

2. That the method of levying the tax cannot be assailed, which requires that "all taxes upon real or personal estate, assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof," is fully met. No property escapes, no locality escapes, and the rate is uniform. There is no discrimination.
Sawyer v. *Gilmore*, 169.

3. Under Constitution of Maine, article 6, section 6, which prohibits the Justice of the Supreme Judicial Court from holding other office excepting that of justice of the peace, Public Laws, 1911, chapter 122, section 12, which created a tribunal composed of Justices of the Supreme Judicial Court or Superior Court, or both, to inquire into complaints against corrupt practices, is unconstitutional.

Curtis, et als, v. *Cornish,* et als, 384.

4. The act of 1905, chapter 399, is not unconstitutional, but within the powers reserved to the Legislature of amendment, alteration or repeal of acts of incorporation.

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See BANKS AND BANKING. BROKERS. INSURANCE. EVIDENCE. SALES. AGENCY. CARRIERS.

1. Under a contract for advertising, payment held due when advertiser rendered impossible of performance a condition on which payment depended.

Brackett v. *Knowlton,* 43.

2. In a suit to avoid a contract for the purchase of a life annuity by plaintiff's decedent, the burden of proof was on the plaintiff to show that decedent was mentally incapable of contracting.

Richardson v. *Travelers Ins. Co.,* 117.

3. On the issue of mental capacity to contract, mere intellectual feebleness must be distinguished from unsoundness of mind.

Richardson v. *Travelers Ins. Co.,* 117.

4. When contracts, not offered in evidence were the best evidence of their contents, testimony as to their contents received without objection must be considered on appeal.

Doylestown Agr. Co. v. *Brackett, Shaw & Lunt Co.,* 300.

5. Under a contract for the sale of agricultural implements by the manufacturer to a wholesaler providing that as a condition a salesman should use his best endeavors to make sales for the wholesaler, the salesman was the agent of the wholesaler and not of the manufacturer, though the salesman was in the manufacturer's employment and was paid by the latter and though the salesman, without authority, assumed to sign for and represent the manufacturer.

Doylestown Agr. Co. v. *Brackett, Shaw & Lunt Co.,* 301.

6. A salesman's representations that cultivators were like a particular make with which the purchasers were familiar, and that the parts of the two kinds were interchangeable, constituted a material representation.
Doylestown Agr. Co. v. *Brackett, Shaw & Lunt Co.*, 301.

7. When a railroad construction contract bases the contractor's compensation on wages paid by him plus a percentage thereon, he cannot treat the railway company's refusal to continue to pay unreasonably high wages as a breach of the contract.
Murray Bros. Co. v. *Aroostook Valley Railway Co.*, 350.

8. Evidence held insufficient to show that a railroad contractor was wrongfully discharged before completing the work under a supplemental contract. *Murray Bros. Co.* v. *Aroostook Valley Railway Co.*, 350.

9. A contract to convey executed by a real estate broker, under authority from the vendor, is as valid as if the contract was signed by the vendor himself. *Stevens* v. *Odlin*, 417.

10. When a building contractor failed to comply with the specifications of the contract and subsequently abandoned it, the owners necessary expenditures in repairing and strengthening the part of the building constructed were recoverable from the contractor.
L'Union Musicale v. *Ovide Chevalier & Fidelity Co.*, 548.

11. One incapacitated by age, or impairment of mental faculties, may be capable of forming a rational judgment as to a particular transaction.
Richardson v. *Travelers' Ins. Co.*, 117.

12. A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss, not exceeding an agreed sum.
Getchell v. *Fire Ins. Co.*, 247.

13. When a bill of lading evidencing the carrier's contract contained no express requirement that the car containing the horses should go by any particular route, the carrier had the option to select any one of the ordinary routes of travel which was reasonably safe and expeditious and not excessive in its charges. *Edwards* v. *Express Co.*, 444.

CORPORATIONS.

See CONTRACTS. EQUITY.

1. On dissolution of a corporation, the stock of which was equally owned by plaintiff and defendant and to which they had assigned theatre leases

with the agreement that on dissolution the lease should be retransferred to the parties assigning them, held, properly awarded to the plaintiff a lease on a particular theatre which he had assigned, but which had been purchased and terminated by a corporation controlled by defendant.
Proctor, et al, v. *Keith,* et al, 147.

2. No officer of a corporation can fix or increase his own salary. That power is vested in the directors as a board.
Chabot & Richard Co. v. *Chabot,* 403.

3. The defendant, as treasurer of the plaintiff corporation, had no power to employ counsel in litigation in which he and other individuals were the only interested parties, at the expense of the corporation, and to pay them out of the corporate funds, even though the corporation was a necessary, but only a nominal party to the result.
Chabot & Richard Co. v. *Chabot,* 403.

4. Directors leaving valid claim against a corporation cannot prefer themselves to other creditors, if there is not enough to pay all.
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See EVIDENCE. ANIMALS.

1. Evidence of a custom is inadmissible, in the absence of proof of its common prevalence in the community and of the adverse party's knowledge thereof. *Ireland* v. *Clark,* 239.

DAMAGES.

See BREACH OF CONTRACT.

1. The plaintiff in an action of breach of contract of marriage cannot recover damages for seduction itself, because she was a participant in the wrong. *Hickey* v. *Kimball,* 433.

2. Owner who had paid contractor according to architect's certificate is entitled to recover outstanding lien claims on the property for labor and materials which he was required to pay.
L'Union Musicale v. *Chevalier,* 548.

3. When a woman earning $1400 a year was injured in her foot and ankle as the result of which her earning capacity was reduced and her injuries were probably permanent and caused her suffering and large expense, a verdict of $4830 was not excessive.

Rodick v. *Maine Central R. R. Co.*, 530.

DECEIT.

See FRAUD.

1. In an action of deceit brought against a real estate agent to recover back a forfeiture of three hundred and fifty dollars alleged to have been paid under the terms of a written contract, because of false and fraudulent representations made by the agent at the time of payment, the jury having rendered a verdict, the court held that the representations were not false and actionable but in accordance with the facts.

Stevens v. *Odlin*, 417.

DECLARATIONS.

See HOMICIDE.

DEEDS.

See USE AND OCCUPATION. NOVATION. ASSUMPSIT.

The destruction of a deed once delivered cannot destroy the title which had been conveyed. *Pennington* v. *Gartley*, 270.

An easement created by deed or grant, whatever may be the rule as to one acquired by prescription, may be extinguished among other modes, by abandonment, so called, or non-user and adverse possession for twenty years. *Adams* v. *Hodgkins*, 361.

DEMURRER.

See INTOXICATING LIQUORS.

In a process for Search and Seizure of intoxicating liquors, where neither the complaint nor the warrant contains any express allegation nor any allegation from which by necessary inference or intendment it appears that said dwelling house therein described, or any part of it, is used as an inn or shop, or for purposes of traffic, nor any allegation by the magistrate before whom the complaint was made that he was satisfied by evidence presented to him, that intoxicating liquor was kept in said dwelling house, or its appurtenances intended for illegal sale, demurrer will be sustained. *State* v. *Soucie,* 251.

EASEMENTS.

See ABANDONMENT. DEED. NON-USER. TITLE. WAY.

1. An easement created by deed or grant, whatever may be the rule as to one acquired by prescription, may be extinguished among other modes, by abandonment, so called, or non-user and adverse possession for twenty years. *Adams* v. *Hodgkins,* 361.

2. When the owner of the servient estate alleges its loss by abandonment, he assumes the burden of proof. *Adams* v. *Hodgkins,* 361.

3. When an easement is spoken of as lost by abandonment, it is intended that the circumstances are such that a release can be presumed. *Adams* v. *Hodgkins,* 361.

4. It is the general rule that an easement or way created by deed or grant is not lost by mere non-user without proof of intention to abandon, and adverse possession by the owner of the servient estate. *Adams* v. *Hodgkins,* 361.

ELEVATOR.

It is provided by section 1 of chapter 4 of the Public Laws of 1907 that no person, firm or corporation shall employ or permit any person under the age of fifteen years to have the care, custody, managment or operation of any elevator. *Jones* v. *Co-Operative Ass.,* 448.

ESTOPPEL.

See LIENS. CONTRACTS. WAIVER. BILLS AND NOTES. INDORSER.

1. A building contractor is not estopped to claim priority for a lien over a subsequent mortgage, even if the contract did not exist when the original negotiations for the mortgage were had, and even if the contractor did not disclose the contract to the mortgagee's officers when they understood when they lent the money and took the mortgage that the contractor was constructing a building under contract.

Saucier v. *Maine Supply Co.*, 342.

2. Defendant, an indorser of a note, who induced plaintiff to indorse by deceiving her into believing that by indorsing below his name she would become merely a surety for him is estopped to deny that he assumed the relation of principal to plaintiff. *Canney* v. *Corey*, et al, 323.

EVIDENCE.

See CUSTOMS AND USAGES. PAUPERS. TRUSTS

1. Evidence of a custom is inadmissible in the absence of proof of its common prevalence in the community and of the adverse party's knowledge thereof. *Ireland* v. *Clark*, 239.

2. Marriage record held not conclusive evidence of parties' then residence, but may be rebutted by evidence. *Rockport* v. *Rockland*, 512.

3. When in an action by an executrix against the testator's agent for money received defendant claimed to have paid the testator large sums, testimony that testator had borrowed small sums of the witness should have been admitted as tending to show the testator's financial condition.

Williams, Ex., v. *Williams*, 537.

4. The genuineness of handwriting may be proved by comparison with other handwriting admitted or proved to be genuine.

Williams, Ex., v. *Williams*, 537.

5. A writing need not be relevant to the other issues of the case to be admissible as a standard for comparison in proof of handwriting.

Williams, Ex., v. *Williams*, 537.

6. The admissibility of a writing as a standard of comparison in proof of handwriting is a preliminary question addressed to the sound, but not arbitrary, discretion of the trial court.
Williams, Ex., v. *Williams*, 537.

7. The genuineness of a standard of comparison in proof of handwriting may be proved by any person who has knowledge of the party's handwriting from having seen him write, or from having corresponded with him, or from having seen handwriting acknowledged or proved to be his.
Williams, Ex., v. *Williams*, 537.

8. The admissibility of a photograph is a preliminary question addressed to the discretion of the presiding Justice and depends upon whether it is sufficiently verified, is fairly representative of the object portrayed and may be useful to the jury. *Rodick* v. *Maine Central R. R. Co.*, 530.

9. Photographs, however, should represent simply the conditions existing at the time, and when they go further and represent persons in various assumed positions, they may be more properly excluded than admitted, because they have passed beyond their legitimate function and tend to merely emphasize the claims of one party or the other.
Rodick v. *Maine Central R. R. Co.*, 530.

10. When the issue was whether a transaction in which the plaintiff delivered certain moneys to the defendant to be used in paying for land, constituted a resulting trust, or was a gift or advancement from mother to daughter, and the plaintiff, the mother, on cross-examination was asked whether the amount of money was not about what the defendant's interest in her property would be, if she were dead, the answer was properly excluded as immaterial. It had no legitimate tendency to prove a gift.
Tuttle v. *Merrow*, 347.

EXCEPTIONS.

See REVIEW. APPEAL. INTOXICATING LIQUORS. MOTION TO DISMISS. MANDAMUS.

1. Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law. *State* v. *Houlehan*, 281.

2. A bill of exceptions must set forth enough to enable the court to determine that the point raised is material and that the ruling excepted to is both erroneous and prejudicial.
Doylestown Agr. Co. v. *Brackett, Shaw & Lunt Co.*, 301.

3. A report of evidence used on a motion for a new trial may be referred to to explain a bill of exceptions, but not to add to it.
Doylestown Agr. Co. v. *Brackett, Shaw & Lunt Co.,* 301.

4. When the plaintiff fails to prove any one essential element of his case, exceptions lie to a refusal to direct a verdict for the defendant.
Berry v. *Atlantic Railway,* 330.

5. Exceptions do not lie to discretionary rulings.
Curtis, et als, v. *Cornish,* et als, 384.

6. Where an inferior tribunal is attempted to be created in violation of the constitution, and it has no jurisdiction of the proceedings before it, and defendant then had objected to its juriscidtion and there is no other adequate remedy available he is entitled to a writ of prohibition as a matter of right. The denial of it as a matter of law is error to which exceptions lie. *Curtis,* et als, v. *Cornish,* et als, 384.

7. The findings of fact made by the court hearing the case without a jury on such as necessarily formed the basis of the court's conclusion as conclusive, if there is any evidence to support them and exceptions do not lie.
Chabot & Richard Co. v. *Chabot,* 403.

8. Upon exceptions to an order for the issuing of a peremptory writ of madamus, the court cannot direct a modification of the decree. It can only sustain or overrule the exceptions. *White* v. *Manter,* 408.

9. Exceptions to a refusal to instruct cannot be sustained unless the requested instructions are correct in their entirety.
York v. *Parker,* 414.

10. A requested instruction based upon the assumption that the municipal officers may lay out a private way for an owner of cultivated land over his own land is faulty, for the reason that municipal officers have no such authority. *York* v. *Parker* 414.

EXECUTOR AND ADMINISTRATOR.

See ADMINISTRATOR.

1. Under Revised Statutes, Chapter 66, Par. 54, relating to the appointment of commissioners to determine claims alleged to be exorbitant, unjust or illegal, the claimant has not the option of either further maintaining a

pending suit or submitting his claim to the commissioners, but must do the latter, and the report of the commissioners is final saving the right of appeal. *Shurtleff* v. *Redlon*, 62.

2. Under R. S., Ch. 66, Sec. 54, a claim is committed when service of notice of application filed in Probate Court by executor or administrator is made upon the claimant. *Shurtleff* v. *Redlon*, 62.

EQUITY.

See CORPORATIONS.

1. The decision of a single Justice upon matters of fact in an equity case will not be revised, unless clearly erroneous.
Bangor & Aroostook Railroad Co. v. *Belonie Dubay*, 29.

2. To sustain a bill in equity, to reform a contract, the plaintiff must show that the contract executed does not express the terms to which the parties actually agreed and which were intended to be expressed, and that the mistake was mutual. The proof must be full, clear and decisive and beyond reasonable doubt or uncertainty, but it is not necessary that the testimony be free from contradiction.
Brunswick & Topsham Water District v. *Inh. of Topsham*, 334.

3. While equity will take jurisdiction on bill by minority stockholders to compel the majority stockholders to account for money wrongfully received by them, ordinarily it will not take jurisdiction to compel the corporation to pay plaintiff what it owes him, except as incidental to strictly equitable relief. *Pride* v. *Pride Lumber Co.*, 452.

4. In the absence of statutory power, a court in equity has no jurisdiction to decree the disolution of a corporation and the distribution of its assets at a suit of one or more of the stockholders, and same is true when there is statutory power, if bill seeks relief only at common law.
Pride v. *Pride Lumber Co.*, 452.

5. A testamentary bequest of funds to be appropriated to the founding of a home for indigent seamen in such manner as would do the most good to the class of indigent seamen is not invalid for indefiniteness.
Pierce, Pet'r, 509.

6. That this bequest in terms is a good public charitable bequest.
Pierce, Pet'r, 509.

7. "Cy pres" is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. It is applied only to valid charitable gifts.
Lynch, Trustee, v. *S. Congregational Parish,* 32.

FRAUD.

See DECEIT.

1. That the representations made by the defendant as to the signing of the original contract of sale by the owner were not false and actionable in accordance with the facts. *Stevens* v. *Odlin,* 417.

fraudulent conveyance see paper manuscript 1.

FRAUDS, STATUTE OF

See CONTRACTS. TITLE.

1. A vendor's oral agreement to remove existing incumbrances is generally good, but a general agreement to make good a title, if the deed delivered does not have that effect, is within the statute of frauds.
Ladd v. *Holman,* 46.

GUARANTY.

See CONSIDERATION. BURDEN OF PROOF.

1. The undertaking of a guarantor is his own separate and independent contract, distinct from that of the principal debtor.
International Harvester Co. v. *Fleming,* 104.

2. When the guaranty is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor, there is not, or need not be, any other consideration than that moving between the creditor and the original debtor under the principal contract.

International Harvester Co. v. Fleming, 104.

3. In an action against a defendant guarantor on a note, held that the burden was on the defendant to show bad faith on the part of the plaintiff sufficient to release the defendant from liability or that there was a failure of consideration for the guaranty.

International Harvester Co. v. *Fleming,* 104.

4. The plaintiff appointed in writing one Berry, its agent for the sale on commission of its fertilizers. Berry by the same writing agreed to make at a time stated full settlement in cash for all sales made by him. On the back of the writing was written a guaranty, which was signed by the defendant, by which they guaranteed "the faithful preformance by Berry of all and singular the obligations of the within agreement on his part to be kept so long as the agency shall be continued." The contract of agency itself provided that it should "not be in force until accepted by the Home Office, "which was in New York. No sufficient notice of acceptance of the contract, or guaranty, was given until eleven months after the date of the guaranty, and ten or eleven months after Berry received the fertilizer which he sold, and several months after he had received and appropriated to his own use the proceeds of the sales.

Agricultural Chemical Co. v. *Ellsworth,* et als, 195.

5. That the guaranty was a continuing one.

Agricultural Chemical Co. v. *Ellsworth,* et als, 195.

6. That in the case of such a continuing guaranty, for debts to be created and uncertain in their amount, the guarantor is not liable unless the guaranty is accepted, and notice of the acceptance is given to the guarantor within a reasonable time.

Agricultural Chemical Co. v. *Ellsworth,* et als, 195.

7. That in this case the notice of acceptance was not given to the guarantors within a reasonable time.

Agricultural Chemical Co. v. *Ellsworth,* et als, 195.

8. That the facts in the case do not bring it within the exceptions to the general rule requiring notice of acceptance of a continuing guaranty, namely, that the consideration of the guaranty was a valuable one, moving directly or indirectly to the guarantor from the creditor, or that the guaranty was made at the request of the creditor or that it was contemporaneous with the contract guaranteed.

Agricultural Chemical Co. v. *Ellsworth,* et als, 195.

HIGHWAYS.

See WAYS. OFFICERS. CERTIORARI. TRESPASS. NEGLIGENCE.

1. Where upon petition to the county commissioners for alteration of an alleged existing highway, the return of the commissioners contains no express adjudication that the alleged highway is a highway, and shows the alteration by them of a town road, their record will be held void for want of jurisdiction. *Ford* v. *Erskine,* et als, 164.

2. "Location" of a highway and "alteration" of a highway do not amount to the same thing. Ford *v. Erskine,* et als, 164.

3. A county commissioner is not liabile individually for trespass committed in the construction of a road across private lands under void proceedings, so far as he acted in an official capacity.
Ford v. *Erskine,* et als, 164.

4. The selectmen of a town and a contractor employed by them in constructing a road, who made it as an alteration of an existing highway by county commissioners, who were without jurisdiction, are liable in trespass. *Ford* v. *Erskine, et als,* 164.

5. Under Revised Statutes, chapter 104, sections 14, 15, on denial of a petition for certiorari, it is improper to affirm the record sought to be quashed; issurance of a writ being essential to any judgment affirming, modifying or quashing the record. *Ford* v. *Erskine,* et als, 164.

6. When the record of certiorari proceedings fails wholly to show the grounds alleged therein for attack upon the record sought to be affected and the grounds for the denial of the writ, the petitioner is not estopped from collaterally attacking the record for want of jurisdiction.
Ford v. *Erskine,* et als, 164.

7. Statutory laying out of a town way does not justify private individuals in building a road upon the way unless they act as highway surveyors or road commissioners, or under some other authority from the town.
Harris v. *Larrabee,* et al, 373.

8. Private individuals, who built a road over a town way laid out by proper proceedings, are not liable for punitive damages on account of their trespass. *Harris* v. *Larrabee,* et al, 373.

9. The place where the accident occurred was a highway within the meaning of R. S., Chap. 23, Section 6, as the street had been laid out and accepted by the municipal officers and a portion of it, on which the accident occurred, had been built and maintained at least six years prior thereto. *Bean* v. *City of Portland,* 467.

10. One of the essentials required by R. S., Chap. 23, section 76, to be shown by the plaintiff in order to maintain an action for damages for injuries received by reason of any defect or want of repair of a highway or town way against the county or town required by law to keep the way in repair is that the commissioners of such county, or the municipal officers, or road commissioners of such town, or any person authorized by any road commissioner of such town to act as substitute for either of them had twenty-four hours' actual notice of the defect or want of repair before the accident. *Radcliffe* v. *Lewiston,* 368.

HOMICIDE.

See APPEAL. EVIDENCE. DECLARATIONS. HEARSAY. MALICE.

1. The respondent, at the October term of the Supreme Judicial Court for the County of Oxford was found guilty of the murder of his wife, Rosina Albanes on May 11, 1911. He filed a motion for a new trial, which was denied by the presiding Justice and an appeal was taken.
State of Maine v. *Albanes,* alias *Joe Bill,* 199.

2. That the single question before the court on this branch of the case is whether in view of all the testimony the jury were warranted in believing beyond a reasonable doubt and therefore finding that the defendant was guilty of the crime charged against him. *State* v. *Albanes,* 199.

3. A careful study of the occurrences which were either uncontroverted or which, from the evidence the jury were warranted in believing, took place justified and demanded the verdict rendered.
State v. *Albanes,* 199.

4. There was ample evidence both of implied and of express malice.
State v. *Albanes,* 199.

5. The evidence of John Zacolli, as to certain conversation he had with deceased on the day before the shooting offered to show what she had to say about Joe Bill's manner, was merely hearsay, and was properly excluded. *State* v. *Albanes,* 199.

6. The question of relevency or irrelevancy on the ground of remoteness in time is a preliminary question to be determined by the presiding Justice in his discretion, and his ruling will not be disturbed unless the discretion has been grossly abused. *State* v. *Albanes,* 199.

INDICTMENT.

See RECORDS.

1. An indictment duly found, returned and filed becomes a part of the records of the court. *State* v. *Ireland,* et al, 158.

2. At common law and independent of any Statute, courts have an inherent power to preserve and protect their own records and to substitute copies for lost records. *State* v. *Ireland,* et al, 158.

3. Copy of a lost or mislaid indictment may be substituted by order of the trial court as soon as the loss is discovered and before the case is submitted to the jury, but omission to do so before conviction is not fatal; the substitution being properly made upon satisfactory evidence at the forthcoming *nisi prius* term. *State* v. *Ireland,* et al., 158.

INDORSER.

See BILLS AND NOTES.

Defendant, an indorser of a note, who induced plaintiff to indorse by deceiving her into believing that by indorsing below his name, she would become merely a surety for him is estopped to deny that he assumed the relation of principal to plaintiff. *Cannev* v. *Corey,* et al, 323.

INSOLVENT ESTATES.

1. Under Revised Statutes, chapter 66, section 54, relating to the appointment of commissioners to determine claims alleged to be exorbitant, unjust, or illegal, the claimant has not the option of either further maintaining a pending suit or submitting his claim to the commissioners, but must do the latter, and the report of the commissioners is final saving the right of appeal. *Shurtleff* v. *Redlon,* 62.

2. The word "maintained," as used in section 54, chapter 66, Revised Statutes, means to prosecute to a conclusion an action already begun. *Shurtleff* v. *Redlon,* 62.

3. Under Revised Statutes, chapter 66, section 54, a claim is committed when service of notice of the application filed in the Probate Court by the executor or administrator is made upon the claimant.
Shurtleff v. *Redlon*, 63.

INSTRUCTIONS.

See PRESUMPTIONS COLLISION. CONTRACT.

1. In an action for collision between plaintiff's motor boat and defendant's steamer, the defendant contended that plaintiff's boat was not equipped and managed in accordance with the requirements of regulations established by the Federal Government and that a failure to comply with these provisions of law was per se contributory negligence. The presiding Justice instructed the jury that it is incumbent upon the plaintiff to show that lack of these statutory requirements not only did not contribute towards the injury, but he must go a step further and prove that it could not have contributed to the injury. Held, that notwithstanding the exceptionable error in the charge, under the statement of facts in the exceptions, it became harmless error. *Prince* v. *Eastern S. S. Co.*, 396.

2. The following instruction to the jury on the question of damages were held to be correct: "You are to make the plaintiff whole as near as you can. I don't know how you will figure it. It appears that the plaintiff did more or less work. It seems impossible for him to state what he did, but in arriving at the amount which he is entitled to, if entitled to anything, you will consider the value of the property and the effort he made, according to the evidence, and determine what would be a fair, a reasonable price for the services performed." *Thompson* v. *Soule*, 286.

INSURANCE.

See FALSE REPRESENTATIONS. ESTOPPEL. WAIVER. CONTRACT.

1. A policy of insurance is a contract founded on a proposal on one side and an acceptance on the other; and does not become operative as a contract until the application is accepted.
Carleton v. *Patrons' Androscoggin Fire Ins. Co.*, 79.

2. A fire policy on a building and furniture therein is void in its entirety if void on account of prior insurance on the building.
Carleton v. *Patrons' Androscoggin Fire Ins. Co.*, 79.

3. A fire policy was invalidated by insured procuring other insurance without the knowledge of the insurer in violation of a stipulation in the policy.
Carleton v. *Patrons' Androscoggin Fire Ins. Co.*, 79.

4. The insurer was not estopped from relying on the invalidity of the policy because of other insurance by the mere fact that insured expressed to the soliciting agent at the time of the application an intention to obtain other insurance and that the agent said that if the insured was not satisfied with the size of the policy, he could get other insurance.
Carleton v. *Patrons' Androscoggin Fire Ins. Co.*, 79.

5. A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss, not exceeding an agreed sum.
Getchell v. *Fire Ins. Co.*, 274.

6. The pliantiff had a contract with the owner of the property insured for a tenancy to continue during the owner's life, a specific term, and his rights are superior to the rights of an ordinary tenant's at will.
Getchell v. *Fire Ins. Co.*, 274.

7. If the relation between the insured and the property insured was such that injury to it will be a direct and actual loss to him, he had an insurable interest in the property insured. *Getchell* v. *Insurance Co.*, 274.

8. Under Revised Statutes, Chapter 49, section 93, which makes knowledge of an insurance agent knowledge of his principal, a soliciting free insurance agent's knowledge that the premises were unoccupied through the application for a policy thereon, stated that they were occupied by a tenant, was knowledge by the insurer defeating its right to avoid the policy on the ground of material misrepresentations.
Guptill v. *Pine Tree State Insurance Co.*, 323.

9. Renewal of a fire insurance policy constitutes a new contract.
Guptill v. *Pine Tree State Insurance Co.*, 323.

10. The act of a soliciting fire insurance agent in filling out blanks in an application for a policy, after it has been signed by applicant, is the act of insurer. *Guptill* v. *Pine Tree State Insurance Co.*, 323.

11. A clause in a fire policy, that if the insured's premises become vacant for more than thirty days, without insurer's consent, the insurance shall be forfeited, does not apply to a case where the premises were unoccupied when the policy issued. *Guptill* v. *Pine Tree State Insurance Co.*, 323.

12. Under Revised Statutes, Chap. 49, Section 1, a person cannot recover on a contract of insurance without proving both an insurable interest and a valid subsisting contract of insurance.
Buffalo Fertilizer Co. v. *Aroostook Mutual Fire Ins. Co.*, 483.

13. Insurer held not liable for loss of insured property when insured had transferred its interest by an instrument conveying the legal title and not a mere mortgage, within Revised Statutes, Chap. 91, section 1, and because such sale was without the consent of the insurer.
Buffalo Fertilizer Co. v. *Aroostook Fire Ins. Co.*, 483.

INTOXICATING LIQUORS.

See DEMURRER.

In a process for Search and Seizure of intoxicating liquors, where neither the complaint nor the warrant contains any express allegation nor any allegation from which by necessary inference or intendment it appears that said dwelling house therein described, or any part of it, is used as an inn or shop, or for purposes of traffic, nor any allegation by the magistrate before whom the complaint was made that he was satisfied by evidence presented to him, that intoxicating liquor was kept in said dwelling house, or its appurtenances intended for illegal sale, demurrer will be sustained. *State* v. *Soucie*, 251.

JURIES.

See EXCEPTIONS.

In actions brought on notes and defended on the ground of forgery by a third person, jurors who had tried a similar action wherein identical facts were involved were disqualified. *McDonough* v. *Blossom*, 141.

JURISDICTION.

See APPEAL. INTOXICATING LIQUORS.

Upon the imposition of sentence, the taking of an appeal and filing an appeal bond, the jurisdiction of a magistrate or judge of a Municipal Court is

at an end, and he has no further jurisdiction of the case, unless the appellant withdraws his appeal as, and in the manner authorized by Revised Statutes, chapter 133, section 19. *State* v. *Houlehan*, 281.

The question of the jurisdiction and authority of the Judge of Probate to appoint a sole trustee under this will in which four were named as trustees by the testator, but none qualified, is not one specially raised by the reasons assigned for the appeal and hence is not now before the court. *Burpee* v. *Burpee*, 379.

LIBEL AND SLANDER.

See CONSTRUCTION.

1. Whether a newspaper article is libelous is to be determined from an examination not of a clipping, but of the entire article. *Macurda* v. *Lewiston Journal*, 53.

2. When a newspaper article is claimed to be libelous as charging the commissioners of a public offense, the charge cannot be enlarged by innuendo. *Macurda* v. *Lewiston Journal*, 53.

3. Newspaper articles concerning the plaintiff and relied on by him as being libelous cannot be deemed to be malicious when the evidence showed that the plaintiff was unknown to the writer. *Macurda* v. *Lewiston Journal*, 53.

LIENS.

See BILL IN EQUITY. CONTRACTS. WAIVER. ESTOPPEL. MORTGAGE. BAILMENT.

1. A mechanic's lien for labor and materials furnished under a contract takes precedence over a mortgage given subsequently to making of a contract, though the labor and materials, or some of them, may not be actually furnished until after the mortgage is given. *Saucier* v. *Maine Supply Co.*, 342.

LIFE ESTATES.

See DEED. LIFE TENANT. WILLS.

1. A life tenant's warranty deed in fee conveys a life estate only. *Hooper* v. *Leavitt*, 70.

2. Possession and occupancy by a life tenant's grantee in fee held not adverse to the remainderman, until the life tenant's death.
Hooper v. *Leavitt*, 70.

3. In an action to recover land, evidence held insufficient to show adverse possession by plaintiff against the remainderman.
Hooper v. *Leavitt*, 70.

LIMITATIONS OF ACTIONS.

See STATUTE OF LIMITATIONS. ESTOPPEL. WAIVER.

1. Letters that do not contain such an acknowledgment and promise in writing as to remove the bar of the Statute. *Gray* v. *Day*, 493.

LOGS AND LOGGING.

See SCALING. ARBITRATION. LUMBER.

1. Where parties mutually agreed upon a surveyor to scale logs and that his finding should be final and binding as a basis of payment, his scale was binding between them in the absence of fraud or mathematical mistake. *Hutchings* v. *Merrill*, 313.

2. Arbitrators are immune from private action for damages for judgments rendered while acting within their jurisdiction in the due course of the administration of justice. *Hutchings* v. *Merrill*, 313.

3. One selected to scale logs who was an experienced and competent scaler, and who performed his duty fairly and honestly, though negligently, could not be held liable in an action by the purchasers of the logs, for discrepancy between the amount which he scaled and the amount of logs delivered, as permitting such an action would destroy the independence of arbitration. *Hutchings* v. *Merrill*, 313.

MANDAMUS.

See CORPORATIONS. STOCKHOLDERS. EXCEPTIONS.

1. Under chapter 47, section 20, of the Revised Statutes, the right of a stockholder to inspect the corporate records and the list of stockholders is absolute and unlimited. *White*, Petr., v. *Manter*, 408.

2. The purpose of the desired inspection is immaterial.
White, Petr., v. *Manter,* 408.

3. The right to take copies and minutes from the records is limited to such parts as concern the stockholders' interests. *White* v. *Manter,* 408.

4. A petition for mandamus by a stockholder to compel the officers of a corporation to permit him to inspect the corporate records is not faulty for the reason that it fails to allege the purpose for which inspection is desired. *White* v. *Manter,* 408.

MASTER AND SERVANT.

See EVIDENCE. NONSUIT. EXCEPTIONS.

1. Master held not liable to a servant injured by defects in the staging, in the construction of which he had worked.
Veano v. *Crafts & Stacey,* 40.

2. When a master furnishes to servants, employed in constructing a building, sufficient materials of a suitable character with which to build a staging, and the servants undertake to build it for themselves, the master is not liable to a servant who is injured by reason of a defect in its construction. *Veano* v. *Crafts & Stacey,* 40.

3. The "safe place to work" doctrine is inapplicable to an action against an electric company for injury to an employee while insulating an abraded wire, when there was no danger not incident to that line of work, excepting a guy wire, the presence and situation of which were apparent to him. *Dunbar* v. *Hollingsworth & Whitney Co.,* 461.

4. An employe assumes the risk of such damages as are known to him, or would be known to him by the use of reasonable care for his own safety.
Dunbar v. *Hollingsworth & Whitney Co.,* 461.

5. An employer's duty to warn against dangers is limited to such as are not known to the employe, and would not be known by the use of ordinary care and such duty is not absolute.
Dunbar v. *Hollingsworth & Whitney Co.,* 461.

6. That in the absence of any contract to the contrary, or of any interference on the part of the person to whom the team had been let, the driver in the ordinary handling of the team remains the servant of his original master who was responsible for his selection and retention.
Wilbur v. *Construction Company,* 521.

7. This principle of law applies not only to persons carrying on a general livery or teaming business, but to those who are engaged in a different occupation, yet occasionally, or in a single instance, let their teams with drivers to another for the performance of certain work.
Wilbur v. *Construction Company*, 521.

MORTGAGES.

See REPLEVIN. LIENS.

1. The right of a mortgagee of personal property to take possession after default is so well established as to need no citation of authorities.
Cate v. *Merrill*, et al, 424.

2. A junior mortgagee of property who redeems a prior mortgage is entitled to be subrogated to the rights of the first mortgagee so as to hold the first mortgage as quasi assignee for the purpose of obtaining reimbursement for the amount paid by him to protect his interests as second mortgagee in the event of the redemption of his own mortgage.
Allen v. *Alden*, et al, 516.

3. The mere fact that one has a right to redeem a mortgage does not enable him to compel an assignment of it to himself.
Allen v. *Alden*, et al, 516.

4. A mechanic's lien for labor and materials furnished under a contract takes precedence over a mortgage given subsequently to making of a contract, though the labor and materials, or some of them, may not be actually furnished until after the mortgage is given.
Saucier v. *Me. Supply Co.*, 342.

MOTION TO DISMISS.

See MASTER AND SERVANT. NONSUIT. DEMURRER. PLEADING. WRIT.

1. A motion to dismiss is properly denied, whatever be the merits or demerits of the action itself, when on the face of the writ appear neither defects nor defenses, and it will not be assumed that the court at *nisi prius* went beyond the scope of the motion, and attempted to, decide questions which the motion did not properly raise.
Shurtleff v. *Redlon*, EXTX., 62.

2. A motion to dismiss lies only to some defect which can be seen on inspection of the writ alone. It does not lie, where to support or resist it, proof is necessary dehors the writ.

Hubbard v. *Limerick Water Co.*, 248.

3. Like a demurrer, a motion in arrest of judgment is addressed only to the record and can introduce no facts not appearing therein.

State v. *Houlehan*, 281.

4. A writ dated July 28, 1910, and made returnable to the Supreme Judicial Court for Sagadahoc County on the fourth Tuesday of December, 1910, when it should have been made returnable to the said court at the August term of said court, 1910, was properly dismissed on motion.

Densmore v. *Hall*, 438.

NAVIGABLE WATERS.

1. Rule for determining boundaries of flats as between adjoining upland owners stated. *Portsmouth Harbor Land & Hotel Co.* v. *Swift*, 17.

2. Since the base line of a particular lot should run along the upland and not over the flats, it would be improper to draw the line from a point not apart of the upland, but a small rocky point usually surrounded by water and located several hundred feet from the upland.

Portsmouth Harbor Land & Hotel Co. v. *Swift*, 17.

NAVIGATION.

See EXCEPTIONS.

The United States Statutes and the rules and regulations of navigation are to be interpreted in accordance with the decisions of the Federal Courts.

Prince v. *Eastern Steamship Co.*, 395.

NEGLIGENCE.

See ANIMALS. MASTER AND SERVANT.

1. It was actionable negligence for defendants to leave unguarded a hole cut by them in the ice on a lake across which plaintiff's team was driven in hauling logs for defendants. *Ireland*, et al, v. *Clark*, et al, 239.

2. In an action for death of a horse hired by defendants from plaintiffs and drowned in a hole cut in ice on a lake used as a public highway, whether plaintiffs were guilty of contributory negligence under the evidence, a jury question. *Ireland,* et al, v. *Clark,* et al, 239.

3. In an action against a board of water commissioners for an injury caused by negligent blasting, the point that under Private and Special Laws of 1895, Chap. 243, under authority of which defendant was operating the water system, the defendant is not liable for negligence alleged, but that the city is expressly made liable when not raised at the trial cannot be considered by the Law Court.
Coan, et al, v. *Auburn Water Commrs.,* 311.

4. When, in a suit against an electric railway company, it is shown that an electric car was derailed and the plaintiff, a passenger, was injured in consequence of the derailment, that is sufficient evidence *prima facie* of the defendant's negligence. The burden of explanation then falls upon the defendant. *Berry* v. *Atlantic Railway,* 320.

5. In an action against a city for injury to a pedestrian, evidence held to warrant a finding that the sidewalk on which the accident occurred was defective. *Radcliffe* v. *City of Lewiston,* 368.

6. In an action against a city for injury to a traveler on a street, the city waived insufficiency of the notice of the accident as to injuries not specified therein by failing to object to proof of those injuries.
Bean v. *City of Portland,* 467.

7. On a telegraph company's neglect to deliver a telegram, or to notify the sender that delivery could not be made without extra expense, he is entitled to recover such damages as were sustained through such negligence. *Sturtevant* v. *Western Union Telegraph Co.,* 479.

8. Even if the defendant used the effort to reach Kaler, to whom the telegram was directed, that it claims to have used, it was negligent and failed to perform the duty that it owed to the plaintiff.
Sturtevant v. *Western Union Telegraph Co.,* 479.

9. A finding on conflicting evidence that plaintiff fell on a part of defendants' wharf set apart for passenger travel is not so manifestly wrong as to require it to be set aside.
Rodick v. *Maine Central R. R. Co.,* 530.

10. The plaintiff's injury was due to a condition of the wharf for which the defendant was legally responsible. The defendant had control of the entire wharf and permitted teams to drive upon this portion to meet passengers and therefore impliedly invited the passengers to meet the
Rodick v. *Maine Central R. R. Co.,* 530.

NEW TRIAL.

See EXCEPTIONS. MOTION. INSURANCE.

1. Points not made at the trial are not open to the party at the hearing before the Law Court. It is the well settled rule that points not made at the trial are considered as waived.
Coan, et al, v. *Auburn Water Co.,* 311.

2. It is true that there are exceptions to this rule and that the court sometimes will, of its own motion, consider and determine issues upon points not suggested by either party in the furtherance of justice.
Coan, et al, v. *Auburn Water Com.,* 311.

3. A verdict on conflicting evidence will not be disturbed by the Supreme Judicial Court on motion for a new trial.
Guptill v. *Pine Tree State Ins. Co.,* 323.

4. A motion for a new trial on the ground of excessive damages will not be granted when the Court finds in the verdict, viewed in the light of the evidence, no indication of bias, prejudice or improper motive on the part of the jury. *Guptill* v. *Pine Tree State Ins. Co.,* 323.

NONSUIT.

See MASTER AND SERVANT.

1. A nonsuit is properly ordered, when there is no evidence to support a finding which is essential to the plaintiff's right to recover.
Veano v. *Crafts,* et al, 40.

NOVATION.

See BURDEN OF PROOF. ASSUMPSIT. USE AND OCCUPATION.

1. The doctrine of novation cannot apply to an action for use and occupation of land to which the plaintiff had no title, since novation implies a substitution of a debtor, of a creditor and a new contract.
Pennington v. *Gartley.* 270.

PAUPERS.

See EVIDENCE. PRESUMPTIONS.

1. Assuming that the recital of Barter's residence in the record of his marriage was properly admitted as tending to show that his residence at the time was in Rockland, it was only presumptive evidence of the fact and not exclusive. *Rockport* v. *Rockland,* 512.

2. Its admissibility was on the ground that the law requires that a record of a marriage shall be made containing the names and residences of the contracting parties, and there is a presumption that the recital is true. But it is a rebuttable presumption. *Rockport* v. *Rockland,* 512.

3. The record having been admitted, it was proper for the other party to show facts and circumstances which would have a tendency to rebut such presumption. *Rockport* v. *Rockland,* 512.

PLEADING.

One of the defendants pleaded the general issue with a brief statement denying plaintiff's title and claiming title in himself. Under this plea, the only issue was the title of the plaintiff. *Cate* v. *Merrill,* 425.

PRESUMPTIONS.

See ADVERSE POSSESSION. INSURANCE. COLLISION. PAUPERS.

1. In an action for collision, plaintiff's violation of navigation rules is presumed to have contributed to the disaster, but the presumption is rebuttable by him, though it is not rebutted so long as the proof is doubtful. *Prince* v. *Eastern Steamship Co.,* 395.

2. The law requires that a record of marriage shall contain the names and residences of the contracting parties and carries with it a presumption that the recital is true. But it is a rebuttable presumption. *Rockport* v. *Rockland,* 513.

PROBATE COURTS.

See COURTS. ADMINISTRATOR.

1. There must be fixed places and stated times for holding the sessions of the court at which all matters requiring public notice may be made returnable and all hearings may be held. *Newell* v. *DeLorme,* 422.

2. The Judge of Probate cannot, in the interim between the terms, perform any judicial act, except such as are authorized by Statute to be performed in vacation. *Newell* v. *DeLorme,* 422.

PROHIBITION.

See INJUNCTION. MANDAMUS. SCIRE FACIAS.

PROPERTY.

See WATER AND WATER COURSES. MOTION TO DISMISS.

1. Ice on a floatable stream formed over land, belonging to a riparian owner, is "property" within section 21 of the Declaration of Rights, which provides that private property shall not be taken for public use without just compensation. *Lake Auburn Crystal Ice Co.* v. *Lewiston,* 489.

2. The plaintiff as a lower mill owner had the right to the natural flow of the river, which right is regarded and protected as property. *Hubbard* v. *Limerick Water & Elec. Co.,* 248.

REAL ACTION.

See LIFE ESTATES. VENDOR AND PURCHASER.

In an action to recover land from the grantee under a recorded conveyance, the burden is on the plaintiff to show that such grantee took with actual notice of the existence of the plaintiff's prior unrecorded deed. *Hooper* v. *Leavitt,* 70.

RECORDS.

See INDICTMENTS.

At common law and independent of any Statute, courts have an inherent power to preserve and protect their own records and to substitute copies for lost records. *State* v. *Ireland,* et al, 158.

REFORMATION OF INSTRUMENTS.

See EQUITY. BILL IN EQUITY.

1. To warrant reformation of a contract for mistake, plaintiff must fully, clearly and decisively establish a mutual mistake, but the proof need not be uncontradicted.
Brunswick & Topsham Water District v. *Inh. of Topsham,* 334.

REPLEVIN.

See MORTGAGE. PLEADING. TENDER. SALE.

1. The default of the mortgagor being established, the right of the plaintiff to maintain replevin is clear. *Cate* v. *Merrill,* 424.

2. Under a plea of the general issue in replevin, with a brief statement denying plaintiff's title and claiming title in defendants, the only issue is as to the plaintiff's title. *Cate* v. *Merrill,* 424.

3. The plaintiff purchased two cows from defendant for the sum of eighty-three dollars. He paid sixty dollars and took one of the cows away with him. A few days later, the plaintiff went for the other cow and tendered defendant the balance, which was refused, and plaintiff replevied the cow. The court held that in the absence of any agreement to the contrary, or to the terms of pyament, the law presumes a cash sale conditioned on payment concurrent with delivery. *Silver* v. *Moore,* 505.

4. That the balance of the purchase price not having been paid, the title to second cow did not pass to plaintiff. *Silver* v. *Moore,* 505.

RESULTING TRUST.

See TRUSTS. EVIDENCE.

To establish a resulting trust by parol evidence, the proof must be full, clear and convincing. But the rule may be satisfied, though there be only one witness against one, or one against several. The circumstances, the conditions and probabilities speak as well as the witnesses.

Tuttle v. *Merrow*, 347.

REVIEW.

See EXCEPTIONS. LACHES. JUDGMENT.

1. A petitioner's right to a writ of review is not defeated on the ground of laches in failing to procure the signature and allowance of a bill of exceptions before the trial judge died, where he had five days left within which to present the bill under an allowance of time.

McDonough v. *Blossom*, 141.

2. A judgment of the Law Court, dismissing exceptions brought from the Superior Court for want of prosecution, not being on the merits, cannot be urged as res adjudicata. *McDonough* v. *Blossom*, 141.

3. A petitioner being prevented without his own fault from taking cases from the Superior to the Law Court on exceptions, through the death of the Judge of the Superior Court before exceptions were allowed, is entitled to present them by petition for review.

McDonough v. *Blossom*, 141.

4. To entitle one to a writ of review, he must show that justice has not been done; that the consequent injustice was through fraud, accident, mistake or misfortune, and that a further hearing will be just and equitable. *McDonough* v. *Blossom*, 142.

5. Where one asks for review of two actions, he should present a petition in each action, but, when the same facts apply to both cases, a single petition may be discontinued as to one of the causes without prejudice and a writ of review issued on the other. *McDonough* v. *Blossom*, 142.

SALARIES.

Directors of a corporation have no lawful power to vote salaries to themselves. *Fleetwood Pride* v. *Pride Lumber Co.*, 452.

SALES.

See CONTRACTS. EVIDENCE. REPLEVIN.

1. Misrepresentations by a seller of physical characteristics of the goods sold, the buyer having no opportunity to know the true facts, are material, and the other essential elements of actionable misrepresentation being established, entitle the buyer to rescind or recoup in damages. *Doylestown Agr. Co.* v. *Brackett, Shaw & Lunt Co.*, 301.

2. Mere expression of a saleman's opinion cannot be regarded as a material representation concerning the quality of goods sold. *Doylestown Agr. Co.* v. *Brackett, Shaw & Lunt Co.*, 301.

3. That in the absence of any agreement to the contrary as to the terms of payment, the law presumes a cash sale conditioned on payment concurrent with delivery. *Silver* v. *Moore*, 505.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS. SHOP AND DWELLING HOUSE. COMPLAINT.

1. In a process for search and seizure of intoxicating liquors, where neither the complaint nor the warrant contains any express allegation nor any allegation from which by necessary inference or intendment it appears that said dwelling house therein described, or any part of it, is used as an inn or shop, or for purposes of traffic, nor any allegation by the magistrate before whom the complaint was made that he was satisfied by evidence presented to him, that intoxicating liquors was kept in said dwelling house, or its appurtenances intended for illegal sale, demurrer will be sustained. *State* v. *Soucie*, 251.

STREET RAILWAYS.

See NEGLIGENCE. PARENT AND CHILD.

1. In an action to recover for the death of a child struck by a street car, evidence held to show negligence on the part of the motorman.
Grant v. *Bangor Railway & Electric Co.*, 133.

2. In an action for the death of a child about five years old, evidence held not to show want of due care on the part of the child.
Grant v. *Bangor Railway & Electric Co.*, 133.

3. However young a child may be, the negligence imputable to the parent or custodian from the mere presence of the unattended child in the place of danger is only prima facie and not conclusive.
Grant v. *Bangor Railway & Electric Co.*, 133.

4. The facts and circumstances in explanation of a child's presence unattended in a place of danger are always to be considered. No hard and fast rules as to the case of children can be laid down and the financial condition of the family and the other cares devolving upon the parents are not to be ignored.
Grant v. *Bangor Railway & Electric Co.*, 133.

5. When a mother was obliged to go to a nearby market for something for supper and left her five year old child with a nine year old daughter on the sidewalk, telling the latter to watch the child, which she promised to do, and the young child was struck by a street car during her absence, held, that the mother was not guilty of contributory negligence.
Grant v. *Bangor Railway & Electric Co.*, 133.

6. Under Revised Statutes, Chapter 51, Section 75, held, to empower the Board of Railroad Commissioners to order reconstruction of a town bridge by an Electric Railroad Company, with provision for partial reimbursement by the town. *Bangor Railway & Electric Co.* v. *Orono*, 292.

TAXATION.

See COMMERCE. ARREST. CONSTITUTIONAL LAW.

1. A corporation established to maintain and apply a fund toward the support of a minister held not a charitable institution within a taxation exemption statute.
Inhabitants of Gorham v. *Trustees of the Ministerial Fund in the First Parish in Gorham*, 22.

2. Under Revised Statutes, 1903, Chapter 9, Section 13, Clause IX, providing that personalty held by religious societies shall be assessed in the town where the societies usually hold their meetings, a ministerial fund is taxable. *Gorham* v. *Ministerial Fund*, 22.

3. That taxation may be equal within the requirement of Const. art. 9, sec. 8, it is not necessary that the benefits arising therefrom be enjoyed by all the people in equal degree, nor that each person should participate in each particular benefit. *Sawyer* v. *Gilmore*, 169.

4. Inequality of tax assessment vitiates it, but inequality of distribution of the proceeds does not, if the purpose be the public welfare. *Sawyer* v. *Gilmore*, 169.

5. The particular method of distributing the proceeds of taxation rests in the wise discretion of Legislature. *Sawyer* v. *Gilmore*, 169.

6. The executive and the judicial departments of the State can exercise only the powers conferred by the Constitution, and such as are necessarily implied therefrom, while the powers of the Legislature, broadly speaking, are absolute, except as limited by the Constitution. *Sawyer* v. *Gilmore*, 169.

7. A legislative act should be held constitutional, unless the Constitution positively invalidates it. *Sawyer* v. *Gilmore*, 169.

8. Const. art. 8, which provides that the Legislature shall require the several towns to make suitable provision at their own expense for the support of public schools, is mandatory and not prohibitory; there being no remedy on the Legislature neglecting or refusing to legislate. *Sawyer* v. *Gilmore*, 169.

9. The word "suitable" within Const. art. 8, which requires the Legislature to require towns to make suitable provision for common schools at their own expense, is an elastic term depending upon the necessities of changing times, and subject to the Legislature's discretion to determine what is suitable. *Sawyer* v. *Gilmore*, 169.

10. Toothpicks stored by a manufacturer thereof in a storehouse preparatory to shipment in the general course of business are not taxable under Revised Statutes, chap. 9, section 13, par. 1, as amended by Public Laws of 1909, chap. 4, as personalty employed in trade, or in mechanic arts. *Peru* v. *Estate of Charles Forster*, 226.

11. Logs and lumber used at a mill for manufacture of boxes for the manufacturer's use in shipping explosives, are taxable as personalty "employed in the mechanic arts," within Revised Statutes, Chap 9, section 13, par. 1, in the town where the mill is located.
Boothbay v. *DuPont Powder Co.*, 236.

12. The record of the election of assessors of a plantation at an annual meeting in 1910 was not invalidated because the record was not made until February, 1911.
Inhabitants of Sandy River Plantation v. *Lewis*, 472.

13. It is immaterial that the records of a plantation do not show before whom assessors qualified as required by R. S., Chap. 4, section 27, that Statute being merely directory.
Inhab. of Sandy River Pl. v. *Lewis*, 472.

14. Recovery of a tax will not be defeated by mere irregularity, but only by defects going to the jurisdiction of the assessors, and depriving defendant of some substantial right.
Inhab. of Sandy River Pl. v. *Lewis*, 472.

TELEGRAPH COMPANY.

See CONTRACTS. NEGLIGENCE.

1. A telegraph company has a reasonable time in which to deliver a telegram with proper regard to the nature of the telegraph business.
Sturtevant v. *Western Union Telegraph Co.*, 479.

2. On a telegraph company's neglect to deliver a telegram or to notify the sender that delivery could not be made without extra expense, he is entitled to recover such damages as were sustained through such negligence. *Sturtevant* v. *Western Union Telegraph Co.*, 479.

TITLE.

See DEED. CONTRACTS. ASSUMPSIT. TROVER.

1. The destruction of a deed once delivered cannot destroy the title which had been conveyed. *Pennington* v. *Gartley*, 270.

2. In order to maintain her action of trover, it was incumbent upon the plaintiff to prove that she had title to the property or was entitled to the immediate possession of it. *Lawdry* v. *Mandelstam*, 376.

TRESPASS.

See HIGHWAYS.

1. While it may be that one who, having mere knowledge of a contemplated trespass allows the use of his personal property in effecting the same may be not liable for the trespass, one who directs his employee to aid in the doing of a specific act which proves to be a trespass is liable. *Ford* v. *Erskine*, et als, 164.

2. It clearly appears that the defendants did the acts complained of without authority of any vote of the town, or directions of the selectmen, highway surveyor or road commissioners. They acted as private individuals, without permission of the plaintiff or legal justification and are liable therefor in this action of trespass. *Harris* v. *Larrabee*, et al, 373.

TROVER.

See CONTRACT. DEMAND. POSSESSION. TITLE.

1. In order to maintain her action of trover, it was incumbent upon the plaintiff to prove that she had title to the property or was entitled to the immediate possession of it. *Lawdry* v. *Mandelstam*, 376.

2. That while the defendant's agent refused to deliver to the plaintiff a key to the warehouse where plaintiff's goods were stored, until it was too late to remove them, before the fire spread to the building, constitutes actionable conversion. *Donnell* v. *Canadian Pac. Ry. Co.*, 500.

TRUSTEE PROCESS.

See EXECUTORY CONTRACTS. EVIDENCE. CORPORATE OFFICERS.

1. One is not chargeable as trustee for the price of bonds on his breach of an executory contract to buy them.
Pettengill, Andrews & Co. v. *Rangeley Light & Power Co.* and Trustee, 87.

2. On trustee process, evidence held insufficient to show that the alleged trustee was indebted to the principal defendant.
Pettengill, Andrews & Co. v. *Rangeley Light & Power Co.*, 87.

3. The treasurer of a corporation cannot be charged under trustee process for its property in his official custody.
Pettengill, Andrews & Co. v. *Rangeley Light & Power Co.*, 87.

TRUSTS.

See EXCEPTIONS. GIFTS. PLEADINGS. WILLS. EQUITY.

1. To establish a resulting trust by parol evidence, the proof must be full, clear and convincing. But the rule may be satisfied, though there be only one witness against one or one against several. The circumstances, conditions and probabilities speak as well as the witnesses.
Tuttle v. *Merrow*, 347.

2. When the issue was whether a transaction in which the plaintiff delivered certain moneys to the defendant to be used in paying for land constituted a resulting trust or was gift, or advancement from mother to daughter, and the mother, on cross-examination, was asked whether the amount of money was not about what the defendant's interest in her property would be, the answer was properly excluded as immaterial. It had no legitimate tendency to prove a gift. *Tuttle* v. *Merrow*, 347.

3. The will of J. P. P. provides that Robert W. and Esther A. during their life, or during the life of the survivor, may designate any needy relative of J. P. P. testator as heirs to the trust fund to such an amount as they deem advisable. This is construed as vesting in Robert W. and Esther A. a discretion as to whether or not any of the relatives of J. P. P. should inherit from the trust fund. *Dunn* v. *Morse*, 254.

4. It was a personal privilege or confidence given to them and they not having designated in their lifetime any such needy relatives, it is to be presumed that it was their judgment that it was not advisable that the relatives should have any part of the trust estate and that the personal privilege of confidence cannot be exercised by the court.
Dunn v. *Morse*, 254.

5. That the residue of the trust fund, after the death of Robert and Esther and their widow or widower, if any, should be paid over to an institution, or institutions, for the relief of suffering humanity.
Dunn v. *Morse*, 254.

6. A person accepting a trust is bound to execute the trust and to carry out the intention of the testator. *Dunn* v. *Morse*, 254.

7. R. W. and E. A. having accepted the trust, the power of selecting the institution, or institutions, becomes imperative and must be executed, and not having been executed in their lifetime, the court will not allow the trust to fail for lack of a trustee. *Dunn* v. *Morse*, 254.

USE AND OCCUPATION.

See ASSUMPSIT. DEED. TITLE. RENT.

1. The plaintiff cannot recover for use and occupation of real estate to which she had no title. *Pennington* v. *Gartley*, 270.

2. The doctrine of novation cannot apply to an action for use and occupation of land to which the plaintiff had no legal title, when neither defendant nor lessee of the land was indebted to plaintiff, she being a stranger to the transaction, since novation implies a substitution of a debtor, of a creditor and a new contract. *Pennington* v. *Gartley*, 270.

WAIVER.

See ASSUMPSIT. MASTER AND SERVANT. INSURANCE.

1. In an action against a city for injury to a traveler on a street, the city waived insufficiency of the notice of the accident as to injuries not specified therein by failing to object to proof of those injuries.
Bean v. *City of Portland*, 467.

2. Points not made at the trial are not open to the party at the hearing before the Law Court. It is the well settled rule that points not made at the trial are considered as waived.
Coan, et al, v. *Auburn Water Co.*, 311.

3. When an agent of an insurance company knew the buildings insured were unoccupied when the application was made, held that the defendant company waived that requirement and that the policy was not invalidated.
Guptill, et al, v. *Pine Tree State Fire Ins. Co.*, 323.

WATER AND WATERCOURSES.

See MOTION TO DISMISS. PLEADING. EQUITY.

1. The plaintiff, as lower mill owner, had the right to the natural flow of the river, which right is regarded and protected as property.
Hubbard v. *Water & Electric Co.*, 248.

2. Before the defendant had a right to take and detain the waters of the river, it was incumbent upon him to take the water in the same maner as it would be required to take other property.
Hubbard v. *Water & Electric Co.*, 248.

3. The Legislature used the term "sufficient water" in the sense of sufficient water having due regard to the rights of others having property rights affected, and not merely the natural flow of the river.
Milo Electric Light & Power Co. v. *Sebec Dam Company*, 427.

4. The title to ice on a floatable stream is in the riparian owner, and not, in the public. *Lake Auburn Crystal Ice Co.* v. *Lewiston*, 489.

WAYS.

See EASEMENT. ABANDONMENT. DEED.

1. A right of way, whether acquired by grant of prescription, is not extinguished by the habitual use by its owner of another way, instead of it, unless there is intentional abandonement of the former way.
Adams v. *Hodgkins*, 361.

2. Whether a way laid out by municipal officers is a town way or a statutory private way is a question of law to be determined by the records of the laying out. And the court in this case having ruled that the town "did lay out a town way," a requested instruction respecting the character of a statutory private way and the rights of parties therein related to an immaterial issue and was properly refused. *York* v. *Parker*, 414.

WILLS.

See DEEDS, DESCENT AND DISTRIBUTION. TRUSTS, EXECUTORS AND ADMINISTRATORS.

1. "Cy Pres" is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into

effect in a particular mode which cannot be followed the words shall be so construed as to give effect to the general intention. It is applied only to valid charitable gifts. *Lynch* v. *South Congregational Parish*, 32.

2. In an action to construe a will the burden is on heirs claiming a lapsed legacy to show that the legacy lapsed.
Lynch v. *South Congregational Parish*, 32.

3. In construing a will, the testator's intention collected from the whole instrument and considered with reference to all the surrounding circumstances, his family, the nature, amount and situation of his property and his avowed and manifest purpose should govern.
Frederick Danforth, Ex. in Eq., v. *Charles F. Reed*, et als, 93.

4. A testamentary remainder will not be construed to be contingent if, consistently with testator's intention, it may be deemed vested.
Danforth, Ex., v. *Reed*, et als, 93.

5. The will of J. P. P. provided that Robert W. and Esther A., during their life, or during the life of the survivor, may designate any needy relative of J. P. P. testator as heirs to the trust fund to such an amount as they deem advisable. This is construed as vesting in Robert W. and Esther A. a discretion as to whether or not nay of the relatives of J. P. P. should inherit from the trust fund. *Dunn* v. *Morse*, 254.

8. It was a personal privilege or confidence given to them and they not having designated in their lifetime any such needy relatives it is to be presumed that it was their judgment that it was not advisable that the relatives should have any part of the trust estate and that the personal privilege of confidence cannot be exercised by the court.
Dunn v. *Morse*, 254.

7. In construing a will, testator's intention should be ascertained, if possible, from the will itself. *Dunn* v. *Morse*, 254.

8. A person accepting a testamentary trust must execute it by carrying out testator's intention as expressed by the language creating the trust.
Dunn v. *Morse*, 254.

9. Where a will directed the executors to designate an "institution or institutions for the relief of suffering humanity" to receive trust funds on termination of the trust, but executors neglected to perform that duty, the courts will designate such beneficiaries. *Dunn* v. *Morse*, 254.

10. A will gave one-third of the residuary estate, in trust, to pay the income to R. and H. during B.'s lifetime, the principal to be transferred to the legal heirs of R. and H., or either of their said heirs to take the same share as said R. and H. would have taken if living. B. and R. are living, but H. died intestate. *Held;* that the income of H.'s share in the income passes to her legal representatives and not to her heirs.
Morse v. *Ballou,* 264.

11. Generally a devise or bequest to a testator's children gives a vested interest, unless a contrary intention is shown by the will.
Morse v. *Ballou,* 264.

12. On bequest of income to several persons by name, to be divided among them equally the legatees take as tenants in common nad not as joint tenants, and on death of a legatee before termination of the trust, the income must be paid to the legal representative of the estate of the deceased legatee. *Morse* v. *Ballou,* 264.

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WRITS.

See ATTACHMENTS. INJUNCTION. MANDAMUS. PROHIBITION. SCIRE FACIAS.

1. Prohibition is an extraordinary writ, which should be issued with great caution and only to prevent a lower court from exercising a power with which it has not been vested and not to control its proceedings nor to correct errors in the ordinary exercise of its unquestioned jurisdiction, and does not lie if there is another adequate remedy available by appeal, certiorari or writ of error. *Curtis,* et als, v. *Cornish,* et als, 384.

2. A writ dated July 28, 1910, and made returnable to the Supreme Judicial Court for Sagadahoc County on the fourth Tuesday of December, 1910, when it should have been made returnable to the said court at the August term of said court, 1910, was properly dismissed on motion.
Densmore v. *Hall,* 438.

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See WRITS. CONSTITUTIONAL LAW.

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