MAINE REPORTS

110

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

DECEMBER 5, 1912—JULY 3, 1913

WILLIAM P. THOMPSON

REPORTER.

PORTLAND, MAINE

WILLIAM W. ROBERTS

1913

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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HON. LESLIE C. CORNISH
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HON. WILLIAM P. WHITEHOUSE, CHIEF JUSTICE,
resigned April 8, 1913

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HON. FRED EMERY BEANE, KENNEBEC COUNTY

ATTORNEY GENERAL

SCOTT WILSON

REPORTER OF DECISIONS

WILLIAM P. THOMPSON

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1914

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: SAVAGE, Chief Justice, SPEAR, KING, HALEY, HANSON, PHILBROOK, Associate Justices.

PORTLAND TERM, Fourth Tuesday of June.

SITTING: SAVAGE, C. J., CORNISH, BIRD, HALEY, HANSON, PHILBROOK, A. J.

AUGUSTA TERM, Second Tuesday of December.

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

TABLE OF CASES REPORTED

A.

Adams, Holmes *v*..... 167
American Ex. Co., Conti *v*. 145
——— Agr. Chem. Co. (The *v*. Berry..... 528
Anderson, Rockland City of) *v*..... 272
Appleyard, Edgeley *v*..... 337
Ashland Lumber Co., Howe *v*..... 14
Auburn, (City of) *v*. Paul 192
———, (City of) Lunn *v*. 241
Averill, Carney et al. *v*. 172

B.

Bailey *v*. Merchants' Ins. Co., et als..... 348
B. & A. R. R. Co., Hart *v*. 541
Barrett *v*. L. B. & B. St. Ry., (The) 24
Bath, (City of) *v*. Inh. of Harpswell 391
Bayville Village Cor., (Inh. of) *v*. Boothbay Harbor (Inh. of)..... 46
Bechard, Spiller *v*..... 221
Benner *v*. Payson, et al... 204
Berry, Staples *v*..... 32
——, The American Agr. Chem. Co. *v*..... 528
Best, Colfer *v*..... 465
Biddeford, (City of) Ducharme *v*. 6
Bigelow *v*. M. C. R. R. Co. 105
Blair *v*. L. A. & W. St. Ry. 235
Blaisdell *v*. Inh. of Town of York 500
———, Bliss *v*..... 527
Bliss *v*. Blaisdell..... 527
Blunt *v*. McCoombs..... 211
Boothbay Harbor (Inh. of), Bayville Village Corp. (Inh. of) *v*..... 46
Borden *v*. Sandy R. & R. L. R. R. C..... 327
Bradley, Dow *v*..... 249
Brown, The Linn Woolen Co. *v*. 88
——— *v*. Brown..... 280

C.

Carleton, Tolman *v*..... 57
——— *v*. R. T. & C. St. Ry. 397
Carney, et al. *v*. Averill.. 172
Carr *v*. Piscataquis Woolen Co., et al..... 184
Carter, et als., Petr's., in re 1
Chapin *v*. Little Blue School 415
Cheney *v*. Cheney, et als. 61
City of Eastport, Rich *v*.. 537
Close, Spiller *v*..... 302
Cole, Pierce *v*..... 134
Colfer *v*. Best..... 465
Connors *v*. Connors Bros. et als. 428
Conti *v*. American Exp. Co 145
Cook, Spinney *v*..... 406
Crawford Elec. Co. *v*. Knox Cy. Power Co.....285

D.

Davis, et als., Gardiner *v.*.. 310
——, — —, Trafton *v*... 318
Dirken *v.* G. N. P. Co.... 374
Dow *v.* Bradley..... 249
Ducharme *v.* Biddeford (City of) 6

E.

Eastport (City of), Rich *v.* 537
Edgeley *v.* Appleyard.... 337
English, et als., Libby, et als. *v*..... 449
Est. of Holyoke, Holyoke *v.* 469

F.

Fenderson, Milliken *v*.... 306
Fickett *v.* L. A. & W. St. Ry. 267

G.

Gage *v.* M. C. R. R. Co... 274
Gamrat *v.* Worumbo Mfg. Co. 140
Gardiner *v.* Davis, et als.. 310
Gerber *v.* Seiger..... 52
Gledhill *v.* McCoombs.... 341
Gooding *v.* N. W. Mut. Life Ins. Co..... 69
Great N. P. Co., Dirken *v.* 374
—— —— Haines, et als. *v.* 422

H.

Haines, et als. *v.* G. N. P. Co. 422
Hancock Mut. Fire Ins. Co., Havey *v*..... 492
Harpswell (Inh. of), City of Bath *v*..... 391
Hart *v.* B. & A. R. R. Co. 541
Havey *v.* Hancock Mut. Fire Ins. Co..... 492
Heald *v.* Payson, et als.... 204
Hill *v.* Libby et al..... 150
Hilton, Littlefield *v*..... 495
Hoar, et als., Means *v*.... 409
Holmes *v.* Adams 167
Holt *v.* N. E. Tel. & Tel. Co. 10
Holyoke *v.* Est. of Holyoke 469
Howe *v.* Ashland Lumber Co. 14
Hudson Structural Steel Co. *v.* Smith & Rumery Co. 123
Hutchins *v.* P. B. & R. S. Co. 369

I.

Inh. of Marion, Tuell *v*... 460
Inh. of York, Blaisdell *v*.. 500
—— — —— *v.* Stewart, et als. 523
In re Palmer, Applt..... 441
Intoxicating Liquors, State *v.* 178
——— ———, ——— *v.* 260

J.

Jones, Kelley v..... 360
Jumper *v.* Moore, et al... 159

K.

Kelley *v.* Jones..... 360
Knox Cy. Power Co., Crawford Elec. Co. *v*... 285

L.

Lewiston, B. & B. St. Ry., Barrett *v.* 24

L. A. & W. St. Ry., Blair *v.* 235
——— ———, Fickett *v.* 267
Libby, et al., Proctor *v.*.. 39
——, ——, Hill *v.* 150
——, et als., *v.* English, et als. 449
Linn Woolen Co. (The) *v.* Brown 88
Littlefield *v.* Newport Water Co. 129
Little Blue School, Chapin *v.* 415
Littlefield *v.* Hilton 495
Lothrop *v.* Rockland & Rockport Lime Co..... 296
Lunn *v.* Auburn, City of.. 241

M.

M. C. R. R. Co., Bigelow *v.* 105
———, Woodbury v. 224
———, Sherman *v.*.. 228
———, Gage *v.*..... 274
Manning *v.* Sherman..... 332
Marine Natl. Bank, Trainer *v.* 112
Marion (Inh. of), Tuell *v.* 460
Marston *v.* Tibbetts Mercantile Co. 533
McCoombs, Blunt *v.*..... 211
———, Gledhill *v.*... 341
McGray *v.* Woodbury.... 163
Means *v.* Hoar..... 409
Merchants' Ins. Co., et als, Bailey *v.* 348
Metropolitan Natl. Bank, et als., Bailey *v.*..... 348
Milliken *v.* Fenderson ... 306
Moore, et al., Jumper *v.*.. 159

N.

N. E. Tel. & Tel. Co., Holt *v.* 10
Newport Water Co. (The), Littlefield *v.* 129
N. W. Mut. Life Ins. Co., Gooding *v.* 69

O.

Oliver, Stewart *v.*..... 208

P.

Palmer, Tarbox *v.*..... 436
———, Applt. 441
Paul, Auburn, City of, *v.*. 192
Payson, et als., Heald *v.*.. 204
———, et al., Benner *v.*.. 204
Penobscot Bay & River Steamboat Co., Hutchins *v.* 369
Pierce *v.* Cole..... 134
Piscataquis Woolen Co., et al., Carr *v.*..... 184
Proctor *v.* Libby, et al.... 39

R.

Rich *v.* City of Eastport.. 537
Ritchie, Simpson *v.*..... 299
Rockland, City of, *v.* Anderson 272
——— & Rockport Lime Co., Lothrop *v.*..... 296
———, T. & C. St. Ry., Carleton *v.* 397

S.

Sanford, Whittaker *v.*..... 77
Sandy R. & Rangeley L. R. R. Co., Borden *v.*... 327
Sargent, et als., Bailey *v.*. 348
Seiger *v.* Gerber..... 52
Sherman *v.* M. C. R. R. Co. 228
———, Manning *v.* 332
Simpson *v.* Ritchie..... 299
Smith & Rumery Co., Hudson Structural Steel Co. *v.*..... 123

Spiller *v.* Bechard..... 221
——— *v.* Close..... 302
Spinney *v.* Cook..... 406
Staples *v.* Berry..... 32
———, State *v.*..... 264
State of Maine *v.* Sturgis. 96
—— *v.* Intoxicating Liquors 178
—— of Maine *v.* Intoxicating Liquors 260
——— ——— *v.* Staples 264
Stewart *v.* Oliver..... 208
Stewart, Inh. of York *v.*.. 523
Strong, Inh. of *v.* Strong Water Co. 256
Sturgis, State *v.*..... 96

T.

Tarbox *v.* Palmer, et als.. 436
The American Agr. Chem. Co. *v.* Berry..... 528
Tibbetts Mercantile Co., Marston *v.* 533
Tolman *v.* Carleton 57
Trafton *v.* Davis, et als... 318
Trainer *v.* Marine Natl. Bank 112
Tuell *v.* Inh. of Marion... 460

W.

Whiting, Applt. 232
Whittaker *v.* Sanford.... 77
Woodbury, McGray *v.*... 163
——— *v.* M. C. R. R. Co. 224
Worumbo Mfg. Co., Gamrat *v.* 140

Y.

York, (Inh. of) Blaisdell *v.* 500
——, ——— — *v.* Stewart, et als. 523

TABLE OF MEMORANDA DECISIONS REPORTED

A.

Abbott Bros. Co. *v.* Maine Steamboat Co. 551

B.

Bragdon, Grant *v.*..... 546

C.

Carter *v.* Potter..... 545
———, Osgood *v.* 550
Coy, et al., *v.* Granite State Ins. Co. 551
——— — — *v.* Hamburg-Bremen Fire Ins. Co.... 551
——— — — *v.* The Home Ins. Co. 551

E.

Eastern Trust & Banking Co., Foster *v.*..... 552
Exeter, Inh. of, Smith *v.*.. 553

F.

Feyler, Miller v..... 554
Fletcher-Lahey Co., Michaud *v.* 547
Foster *v.* Eastern Trust & Banking Co. 552

G.

Gammon, et al., *v.* Libby.. 552
Granite State Ins. Co., Coy et al., *v.* 551
Grant *v.* Bragdon 546

H.

Hamburg-Bremen Fire Ins. Co., Coy *v.*..... 551

I.

Inh. of the Town of Exeter, Smith *v.*..... 553

L

L. A. & W. St. Ry., Smith *v.* 547
Libby, Gammon, et al., *v.*. 552

M.

MacNichol Packing Co., Reliable Machine & Dye Works *v.* 548
Maine Steamship Co., Abbott Bros. Co. *v.*..... 551
Michaud *v.* Fletcher-Lahey Co. 547
Miller *v.* Feyler..... 554
Murphy, et al., Tibbetts *v.* 549

N.

Nealley, Applt. 552

O.

O'Brion, Applt. 550
Osgood *v.* Carter..... 550

P.

Penley *v.* Small..... 550
Potter, Carter *v.*..... 545
Putnam, The Springer Lumber Co., *v.*..... 549

R.

Reliable Machine & Dye Works *v.* MacNichol Packing Co. 548

S.

Small, et al., *v.* Sweetser.. 545
——— *v.* Penley..... 550
Smith *v.* L. A. & W. St. Ry. 547
——— *v.* Wallace, et als.. 548
——— *v.* Inh. of Town of Exeter 553
Springer Lumber Co. (The) *v.* Putnam 549
Sweetser, Small *v.*..... 545

T.

The Springer Lumber Co. *v.* Putnam 549
The Home Ins. Co., Coy *v.* 551
Tibbetts *v.* Murphy..... 549

W.

Wallace, et al., Smith *v.*.. 548

TABLE OF CASES CITED

BY THE COURT

A. B. R. Vol. 10, p. 240..... 176
Abbott *v.* Bradstreet, 55 Maine, 530 293
Adams *v.* Hardy, 32 Maine, 339 209
Alabama, etc. Railroad Co. *v.* Roach, 112 Ala., 360..... 543
Aldrich *v.* Gaskill, 10 Cush., 151, 158 499
Allen *v.* M. C. R. R. Co., 79 Maine, 327 183
—— *v.* Archer, 49 Maine, 346 515
17 Am. & Eng. Enc. of Law, p. 649 36
12 —— — —— —— — ——, 886 307
9 —— — —— —— — ——, 42, 50, 78 364
1 —— — —— —— — ——, 878 364
84 Amer. Dec., pp. 130-131..... 510
84 ——— ——, 126..... 511
Anderson *v.* Grant Co., 92 Maine, 430 420
————, Admx. *v.* Wetter, 103 Maine, 257 536
Andover *v.* Co. Commrs., 86 Maine, 185 511
Andrews *v.* Portland, 79 Maine, 484 7
——— *v.* Police Board of Biddeford, 94 Maine, 68..... 9
——— *v.* Andrews, 81 Maine 337 126
——— *v.* Marrett, 58 Maine, 539 210
——— *v.* Co. Commrs., 86 Maine, 185 508
Annan *v.* Baker, 49 N. H., 173. 366
Anthony *v.* Inh. of Adams, 2 Met., 284 462
Arnold *v.* Delano, 4 Cush., 33.. 182
——— *v.* Moyes, 1 Led. (Tenn.) 308 353
Arundale *v.* McCullock, 10 Mass., 71 462
Atchison R. Co. *v.* Johns, 36 Kans. 769 (14 Pac. 237)..... 373
Atlas Shoe Co. *v.* Bechard, 102 Maine, 353 137
Atwood *v.* Chapman, 68 Maine, 36 29
Auburn *v.* Paul, 84 Maine, 212 196
——— *v.* Water Power Co., 90 Maine, 71, 78..... 515
Ayer *v.* Weeks, 65 N. H., 248.. 477
—— *v.* Bangor, 85 Maine, 511 526
Babb *v.* Paper Co., 99 Maine, 298 542
Bacon *v.* McBride, 32 Vt., 585. 169
—— *v.* Steamboat Co., 90 Maine, 46 372
Baker *v.* Vining, 30 Me., 121... 176
—— *v.* Webber, 102 Maine, 414 365
—— *v.* Runnells, 12 Maine, 235 513
Baldwin *v.* Emery, 89 Maine, 497 301
Bangor *v.* Pierce, 106 Maine, 527 196
——— *v.* Brunswick, 27 Maine, 351 478
Bannigan *v.* Woonsocket Rubber Co., 22 R. I., 93..... 283
Bank *v.* Eccleston, 48 Md., 145 352

Banks *v.* Parsons, 86 Maine, 514 366
Banton *v.* Herrick, 101 Maine, 134 363
Barbier *v.* Connolly, 113 U. S., 27 .....386, 387
Baring *v.* Calais, 11 Maine, 463 478
Barnes *v.* McLellan, 3 P. N. W. (Pa.) 6723 Am. D., 62..... 126
Barnum *v.* Gilman, 27 Min., 466 206
Barrett *v.* L. A. & W. St. Ry., 104 Maine, 479 331
Bartlett *v.* Harmon, 107 Maine, 451 364
——— *v.* McIntire, 108 Maine, 163 .....451, 452
Bartley *v.* Boston, etc. Ry., 198 Mass., 163 467
Bates *v.* Kempton, 7 Gray, 382.. 346
Bath Savings Institution *v.* Fogg, 101 Maine, 188..... 38
Beale *v.* Swasey, 106 Maine, 35 220
Bean *v.* Greene, 12 Maine, 422. 293
—— *v.* Hyde Park, 143 Mass., 295 .....517, 521
Bearce *v.* Fossett, 34 Maine, 575 515
Bennett *v.* Bennett, 93 Maine, 241 220
——— *v.* Davis, 90 Maine, 102 428
Berman *v.* The Fraternities H. & A. Assn., 107 Maine, 368.. 12
Berry *v.* Somerset Ry., 89 Maine 552 413
Bessey *v.* Unity, 65 Maine, 342. 516
Bibber *v.* Carville, 101 Maine, 59 127
Bigelow *v.* M. C. R. R. Co., 109 Maine; 85 Atl., 396..... 325
Bishop *v.* White, 68 Maine, 104, 107 74
——— Crim. Proced., sec. 1309. 99
——— *v.* Webber, 139 Mass., 411 109
2 Bl. Comm., 446..... 267
Blackburn *v.* Crawfords, 3 Wall, at p. 192 476
Blacken *v.* Milner, 104 Fed. 522 531
Blackwood *v.* Brown, 34 Mich., 4 283
Blanchard *v.* Ferdinand, 132 Mass., 389 413
———— *v.* Ayer, 148 Mass., 174 521
Bliss *v.* Junkins, 106 Maine, 128 .....506, 511
Blood, et al. *v.* Nashua and Lowell Railway Co., 2 Gray, 137 464
Blumenthal *v.* B. & M. R. R., 97 Maine, 255, 261, 262..... 467
Bolin, In re, 136 N. Y., 177, 32 N. E., 626..... 38
Boothbay *v.* Ack. Railroad Co., 51 Maine, 318 17
Borneman *v.* Sidlinger, 15 Maine, 429 .....343, 346
Boston Elec. Co. *v.* Cambridge, 163 Mass., 64..... 521
Boswell *v.* Greene, 31 Conn., 74 217
Bowen *v.* Mfg. Co., 105 Maine, 31, 34 467
Boyden *v.* Hill, 198 Mass. 447.. 127
Bragdon *v.* Harmon, 89 Maine 29 535
Braley *v.* Powers, 92 Maine, 203 137
Bresnahan *v.* Soap Co., 108 Maine, 124 514
Brewer Brick Co. *v.* Brewer, 62 Maine, 62 50
Brooks *v.* Libby, 89 Maine, 151, 152-3 468
Brown *v.* Lyford, 103 Maine, 362 177
——— *v.* Lawton, 87 Maine, 83. 252
——— *v.* Crafts, 98 Maine, 40.. 343
——— *v.* Duckey, 106 Maine, 102 364
——— *v.* Chadburn, 31 Maine, 9 465
——— *v.* Watson, 47 Maine, 161 465
——— *v.* Witham, 51 Maine, 29. 516
Brownbridge *v.* People, 38 Mich., p. 753 99
Burgess *v.* Robinson, 95 Maine, 120 365
Burleigh *v.* White, 70 Maine, 130 354

Burlington *v.* Swanville, 64 Maine, 78 489
Burnham *v.* Austin, 105 Maine, 196 12
Burns *v.* Burns, 132 Mich., 441, 93 N. W., 1077..... 38
—— *v.* Scott, 117 U. S., 582.. 301
Butterfield *v.* Forester, 11 East., 61 271
Byne *v.* Byne, 1 Rich. (S. C.), 438 283
Cain *v.* Rockwell, 132 Mass., 194 536
Campbell *v.* Eveleth, 83 Maine, 50, 54 467
———— *v.* Railroad Co., 24 Am. & Eng. R. Cas., 427; 4 Atl., 489 542
Cape Elizabeth *v.* Co. Commrs., 64 Maine, 456..... 502
Carrigan *v.* Stillwell, 99 Maine, 434 247
Carter *v.* National Bank, 71 Maine 357
—— *v.* Rockford & I. Ry. Co. (Wisc. 1911), 132 N. W., 598 405
Case *v.* Owen, 139 Ind., 22, 38 N. E., 395 36
—— on Hoffman, 100 Wis., 314 510
—— — ————, 100 Wis., 357 511
Cathaway *v.* Bowles, 136 Mass., 54 171
Cawley *v.* Leonard, 28 N. J. Eq., 467 352
Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa, 234.. 290
Central Trust Co. *v.* Western N. C. R. Co., 89 Fed. Rep., 24 291
Chamberlain *v.* Eckert, 2 Biss., 124 283
———— *v.* Walker, 92 Mass., (10 A. 429) 301
Chamberlayne Modern Law of Ev., Vol. 2, Sec. 1652, 1656, et seq. 339
Chambers *v.* Prince, 75 Fed. Rep., 176 477
Chance *v.* St. Louis, I. M. & S. R. Co., 10 Mo. App., 351..... 403
Chapin *v.* Worcester, 124 Maine, 464 196
—— *v.* Maine Central Railroad Co., 97 Maine, 151..... 502
Chapman *v.* McIlraith, 77 Mo., 38, 46 Am Rep., 1..... 343
———— *v.* Forsyth, 2 How., 202 530
———— *v.* Nobleboro, 76 Maine, 427 535
Chase *v.* Bates, 81 Maine, 182.. 5
—— *v.* McLellan, 49 Maine, 375 252
—— *v.* Springvale Mills Co., 75 Maine, 156 339
—— *v.* Chase, 66 N. H., 588.. 477
Maine, 156 339
—— *v.* Cochrane, 102 Maine, 431 .....502, 517
—— *v.* Kenniston, 76 Maine, 209 535
Christ's Church *v.* Woodward, 26 Maine, 172 516
Cincinnati, etc. Ry. Co. *v.* Long, 112 Ind., 166, 177..... 543
Clapp *v.* LaGrill, 103 Tenn., 164, 52 S. W., 134 336
Clark *v.* Kansas City, 176 U. S., 114, 20 Sup. Ct. Rep., 284.... 386
—— *v.* Russell, 116 Mass., 455.. 521
—— *v.* Tremont, 83 Maine, 426 539
Clarke *v.* Eastern Advertising Co., 106 Maine, 59, 61..... 74
Clifford *v.* Denver, etc. R. R. Co., 188 N. Y., 349, 354, 357.. 234
Cobb *v.* Stevens, 14 Maine, 472.. 128
Coburn *v.* Whitely, 8 Met., 272.. 413
Colbath *v.* B. & A. R. R. Co., 105 Maine, 379 147
Collier Bankruptcy, p. 326..... 532
Collins *v.* Toledo, etc. R. R. Co., 80 Mich., 390, 45 N. W., 178.. 403
Commonwealth *v.* McLane, 4 Gray, 427 197

——— *v.* Emery, 11 Cush., 411 198
Com. *v.* Cluley, 56 Pa. St., 270. 206
Commonwealth *v.* Crotty, et als., 10 Allen, 403 263
Com. *v.* Farnum, 114 Mass., 267, 271 267
—— *v.* Churchill, 5 Mass., 174 282
Commonwealth *v.* Coombs, 2 Mass., 492 462
Com. *v.* Trefethen, 157 Mass., 180 479
Conant's Appeal, 102 Maine, 477, 481 .....508, 511, 513
Conway *v.* L. & A. Horse R. R. Co., 87 Maine, 283..... 401
——— *v.* — — — ——— — —
—- 90 Maine, 199..... 402
Cook *v.* Basley, 123 Mass., 396 255
Cooley's Cons't. Limitations, 7th ed., 11 387
——— ——— ———, 890 387
Corinth *v.* Lincoln, 34 Maine, 310 478
Cote *v.* Biddeford, 96 Maine, 491 9
Cottle, Aplt., 5 Pick., 482..... 511
Cowett *v.* Woolen Co., 97 Maine, 543 382
Crawford *v.* Dunbar, 52 Cal., 36 206
——— *v.* Burke, 195 U. S., 176 531
Cressey *v.* Parks, 76 Maine, 532 365
Crippen *v.* Dexter, 13 Gray, 330 472
Cronan *v.* Cotting, 104 Mass., 245 531
Crosby *v.* Spear, 98 Me., 544.... 176
——— *v.* Miller, Vaughn & Co., 25 R. I., 172 531
Crossman *v.* Universal Rubber Co., 127 N. Y., 34, 39..... 283
Cumberland & Oxford Canal Co. *v.* Portland, 62 Maine, 504 463
Curran *v.* Clayton, 86 Maine, 42 454
Cushman *v.* Smith, 34 Maine, 247 17
23 Cyc. 484..... 36
22 —— 1441..... 75
—— Vol. 12, p. 779..... 99
—— 34, 921-922..... 126
9 —— 396..... 127
5 —— 640, 641..... 169
14 —— 20..... 170
14 —— 21..... 170
34 —— 408, 411..... 177
34 —— 167..... 177
35 —— p. 493..... 182
—— Vol. 37, p. 725..... 202
32 —— 280..... 218
19 —— 460..... 307
—— Vol. 29, pp. 477-8..... 336
18 —— L. & P. 289..... 357
13 —— of L. P. 463-466..... 364
6 —— page 610..... 373
4 —— Law & Procedure, 820.. 536
Cypher *v.* Huntington, etc. Co., 149 Pa. St., 359..... 542
Cyr *v.* Dufour, 62 Maine, 20... 513
Danby *v.* Dawes 81 Maine, 30.. 5
Danvers *v.* Co. Commrs., 2 Met., 185 510
Dartmouth College *v.* Woodward, 17 U. S., 4 Wheat, 629 387
Davis *v.* Judge, 46 Vt., 655..... 42
——— *v.* Mann, 10 M. & W., 545 271
——— *v.* Skinner, 58 Wis., 638.. 301
Day *v.* Boston & Maine R. R., 96 Maine, 207 382
Daynes *v.* Quinn, 204 Mass., 306, 309 467
D. L. & W. R. R. Co. *v.* Trautwein, 52 N. J. L., 169, 19 At., 178 402
Deane *v.* Inh. of Randolph, 132 Mass., 475 ..... 462, 463
Deer Isle *v.* Winterport, 87 Maine, 37 479
Delaware, L. & W. R. Co. *v.* Board of Public Utilities Commission, New Jersey Supreme Court, 84 Atl. Rep., 704 386

Dendy *v.* Nicholl, 4 C. B. N. S., 376 93
Devine *v.* Brooklyn H. R. Co., 34 App. Div. (N. Y.) 248.... 271
Dicey on Parties to Actions, page 178 301
Dickens *v.* Barber, 9 Mass., 225 233
Dickey *v.* Linscott, 20 Maine, 455 421
Dillon's Munc. Corp., 4th Ed., Sec., 675 364
Dimes *v.* Grand Junc. Canal, 3 H. L. C., 759..... 509
Doherty *v.* O'Callaghan, 157 Mass., 90 476
Dolliver *v.* Park, 136 Mass., 499 7
Donaldson *v.* New York, N. H. & H. R. R., 188 Mass., 484... 382
Donnell *v.* Co. Commrs., 87 Maine, 225 426
Doss *v.* Railroad Co., 59 Mo., 27 373
Dougherty *v.* Moore, 71 Md., 248; 18 Atl., 35..... 38
Downer *v.* Garland, 21 Vt., 362 283
Drapeau *v.* Paper Co., 96 Maine, 299, 304 467
Dresser *v.* Kronberg 108 Maine, 423 251
Drew *v.* Hagerty, 81 Maine, 231 38
Dubtin *v.* Chadbourne 16 Mass., 433 472
Dudley *v.* Kennedy, 63 Maine, 465 465
Dumpors case, 4 Coke, 119, 1 Smith Lead. Cas. & note..... 92
Duncan *v.* Missouri, 152 U. S., 337, 377 .....386, 389
Dunlap, Applt., 100 Maine, 397 443
Dunn *v.* Snell, 74 Maine, 22.... 428
Durgan *v.* Curran, 106 Maine, 509 454
Dyer *v.* Farmington Village Corporation, 70 Maine 515..... 50
—— *v.* Scalmanini, 69 Cal., 637 283
Eacott, Applt., 95 Maine, 522.. 443
Eastern Trust & Banking Co. *v.* Cunningham, 103 Maine, 455. 137
Edwards *v.* Lord, 49 Maine, 279 293
Elliott *v.* Kansas City, 198 Mo., 593 234
——— *v.* Sawyer, 107 Maine, 195 542
Emery *v.* Fowler, 39 Maine, 326 338
Emilie Wilson *v.* Boise City, 20 Idaho, 133, 117 Pac., 115, 36 L. R. A. (N. S.) 1162..... 18
Ency. Plead and Pract. Vol. 19, p. 476 99
24 Ency of Law, page 618..... 127
Endlick on the Interpretation of Statutes Sec. 352..... 202
Ennis *v.* Smith, 14 How, 400... 487
Esrey *v.* So. Pac. Co., 88 Cal., 399 373
Essex *v.* Day, 52 Conn., 483.... 126
Excelsior Co. *v.* Railroad Co., 93 Maine, 70 271
Ex parte Martini (Fla.) 2 So., 689, 690 100
—— —— Gordon, 1 Black, 303. 102
—— —— Clendenning, 22 Okl., 108, 97 Pac., 650, 19 L. R. A. (N. S.) 1041 102
—— —— Hinckley, 8 Maine, 149 511
Farmington Village Corporation *v.* Farmington Water Co., 93 Maine, 192 259
Farrar *v.* Eastman, 5 Maine, 345 518
Farris *v.* Hayes, 9 Ore., 81, 87.. 283
Fayette *v.* Chesterville, 77 Maine 28, 33, ... 233
——— *v.* Livermore, 62 Maine, 229 396
Felton *v.* Girardy, 104 Fed., 127 130 467
Field *v.* Schieffelin, 7 Johns, Ch. 150 357
Fifield *v.* Maine Central R. R. Co., 62 Maine, 77 60
Findlay *v.* Keim, 62 Penn. St., 112, 117, 118 283

First Natl. Bank of Baltimore *v.* Jaggers, 100 Am. Dec. 53.. 535
Fisher *v.* Shaw, 42 Maine, 32, 39 252
Fleming *v.* Courtenay, 98 Maine, 401 .....253, 535
——— *v.* ——— 95 Maine, 128 535
Flewelling *v.* Horse Railroad, 89 Maine, 594 271
Foot *v.* Stiles, 57 N. Y., 399, 408 510
Foren *v.* Rodick, 90 Maine, 276. 335
Fossett *v.* Bearce, 29 Maine, 523 514
Foster *v.* Hall, 12 Pick., 89, 98.. 233
Fournier *v.* Mfg. Co., 108 Maine, 357 382
Frankel *v.* Ins. Co., 158 Ind., 304 75
Freeman on Judgments, Secs. 144, 145 510
Friend *v.* Co. Commrs., 53 Maine, 387 511
Frye *v.* Bath Gas & Electric Co., 94 Maine, 16 .....382, 383
Fuller *v.* Smith, 107 Maine, 161. 420
Furnam *v.* Upry, 106 N. Y., 579 126
Gale *v.* Morris, 30 N. J. E., 285 126
Gamsby *v.* Ray, 52 N. H., 513.. 282
Gardner *v.* Telephone Co., 170 Mass., 156 384
Garland *v.* Hewes, 101 Maine, 549 309
——— *v.* Garland, 75 Maine, 97 365
Garrett *v.* Turner, Pennsylvania Supreme Court, 84 Atl. Rep., 354 386
Gaudet *v.* Stansfield, 182 Mass., 451, 454 467
Gay *v.* Minot, 3 Cush., 352..... 511
—— *v.* Bradstreet, 49 Maine, 580 513
George *v.* School Dist., 6 Met., 497 520
German, etc. *v.* Western etc. Co., 137 Cal., 598 126
Getchell *v.* Wells, 55 Maine, 433 533
Gilman *v* Gilman, 52 Maine, at p. 175 473
——— *v.* ———, 52 Maine, 165 488
——— *v.* Nantucket Bank, 5 Mass., 97 535
Gilmore *v.* Georgia Railroad & Banking Co., 83 Ga., 482..... 283
Glass *v.* Hazen Confectionery Co., 211 Mass., 99..... 382
Glendon *v.* Hovey, 98 Maine, 139 414
Glover *v.* Patten, 165 U. S., 394 .....475, 476
Goff *v.* Rehoboth, 12 Met., 26.. 517
Golder *v.* Golder, 95 Maine, 259 345
Gooch *v.* Bryant, 13 Maine, 386 536
Goodlett *v.* Louisville Railroad, 122 U. S., 391, 411..... 543
Gorham *v.* Canton, 5 Maine, 266 478
Goulding *v.* Horbury, 85 Maine, 227 .....345, 347
Grace *v.* United etc. Society, 203 Mass., 355, 364 467
Graffam *v.* Ray, 91 Maine, 234.. 171
Grant *v.* Albee, 89 Maine, 299.. 60
Green *v.* Crapo, 181 Mass., 55, 62 234
——— on Ev., 16 ed., Sec. 163... 339
——— *v.* Alden, 92 Maine, 177.. 365
Greene *v.* Walker, 63 Maine, 311 366
——— *v.* Lunt, 58 Maine, 518. 366
1 Greenleaf on Evidence, Sect. 55 139
2 ——— — ——— —— 269 139
Gregory *v.* Crapo, 78 Maine, 190 472
Grider *v.* Appersen Co., 32 Ark., 332 283
Griffin *v.* Levee Commissioners, 71 Miss., 767 283
——— *v.* Creppin, 60 Maine, 270 366
——— *v.* Pinkham, 60 Maine 123 535
Grow *v.* Grow, 24 Pick., 261.... 343
Gulf Red Cedar Co. *v.* Walker, 132 Ala., 533, 31 So., 374..... 19
Gulf, Colorado and Santa Fe Ry. *v.* Ellis, 165 U. S., 150... 383
Guptill *v.* Richardson, 62 Maine, 257, 265 264
Gurdy, Appellant, 101 Maine, 73 4, 5

Haines, Atty. Gen'l *v.* Crosby, 94 Maine, 212 295
Haley *v.* Palmer, 107 Maine, 311 .....437, 444
Hall *v.* Perry, 87 Maine, 569, 577 233
—— *v.* Thayer, 105 Mass., 219.. 511
Hamilton *v.* Railroad Co., 64 Texas, 251 (53 Am. Rep. 756) 373
———— *v.* Phippsburg, 55 Maine, 193 516
Handyside *v.* Powers, 145 Mass., 123 336
Hane *v.* Germania Life Ins. Co., 197 Pa. St., 276, 47 At., 200... 343
Hanscom *v.* Marston, 82 Maine, 288 358
Hardman *v.* Cabot, 69 W. Va., 664, 9 Am. & Eng. Ann. Cases, 1030 294
Harlow *v.* Pike, 3 Maine, 438... 426
Hathaway *v.* Evans, 108 Mass., 267 42
———— *v.* Tinkham, 148 Mass., 85 308
Hathorn *v.* King, 8 Mass., 370.. 233
Hatton *v.* Robinson, 14 Pick., 416, 422 233
Haven *v.* Snow, 14 Pick., 28.... 535
Hawes *v.* Williams, 92 Maine, 492 171
Hayes *v.* Missouri, 120 U. S., 68 386
—— *v.* Rich, 101 Maine, 314.. 535
Hayford *v.* Wentworth, 97 Maine, 347 59
———— *v.* Co. Commrs., 78 Maine, 156 426
Hayman *v.* Pond, 7 Met., 328.. 530
Hayward *v.* School Dist., 2 Cush., 419 521
Hazelton *v.* Portsmouth, K. & Y. St. Ry., 71 N. H., 589..... 403
Hefferman *v.* Fall River Iron Works Co., 197 Mass., 28, 31-2 468
Hennequin *v.* Clews, 111 U. S., 676 530
Herberts *v.* Rowles, 30 Md., 278 352
Higgin *v.* Wilmington City Railway Co., 1 Marvel (Del.) 353 271
Hill *v.* Stevenson, 63 Maine, 364 343
—— *v.* Mowry, 6 Gray, 552.... 366
Hinckley *v.* Fowler, 15 Maine, 289 301
Hing *v.* Crowley, 113 U. S., 703 386
Hodge *v.* Hodge, 90 Maine, 505 354
Holcomb *v.* Palmer, 106 Maine, 17 .....437, 444
Holden *v.* Hardy, 169 U. S., 366, 392 .....386, 388
Holder *v.* Massachusetts Horticultural Society, 211 Mass., 370 382
Holway *v.* Ames, 100 Maine, 208 220
Hornblower v. Banton, 103 Maine, 375 363
Hotchkiss *v.* Coal & Iron Co., 108 Maine, 34 41 137
Hovey *v.* Hobson, 55 Maine, 256 138
Howe *v.* Cambridge, 114 Mass., 388 196
——— *v.* Ward, 4 Maine, 202... 218
Hughes *v.* Decker, 38 Maine, 153 170
———— on Evidence, at p. 312.. 474
Hulien *v.* Railway, 107 Wis., 122, 125 543
Hull *v.* Hull, 78 Maine, 114, 117-8 467
Hume *v.* Power Co., 106 Maine, 78 381
——— *v.* U. S. 118 Fed., 689.... 518
Hunter *v.* Heath, 76 Maine, 219 448
Hurley *v.* Farnsworth, 107 Maine, 306 447
Hurtado *v.* California, 110 U. S. 516 388
Hyde Park *v.* Wiggin, 157 Mass., 94 514
Ipswich *v.* Co. Commrs., 10 Pick., 519 512
Inh. of Cape Elizabeth *v.* Co. Commrs., 64 Maine, 456..... 462

In re Bolin, 136 N. Y., 177, 32 N. E., 626 38
— — Webb, 89 Wis., 354..... 102
— — Strickler, 51 Kan. 700, 33 Pac., 620 103
— — Maloney, A. B. R., 502.. 176
— — Corliss, 11 R. I., 638..... 206
— — Catharine Roberts' Will, 8 Paige, Ch. 519..... 477
— — Basch, 97 Fed., 761..... 531
Insurance Co. *v.* Hillman, 145 U. S., 285 477
Ireland *v.* White, 102 Me., 233, 238, 239 233
Iron Silver Min. Co. *v.* Cowie, 31 Colo., 450; 72 Pac., 1067.. 290
Izlar *v.* Railroad Co., 57 S. C., 332 (35 S. E. 583) 373
Jackson *v.* Crilly, 16 Colo., 103, 26 Pac., 331..... 341
Jacobson *v.* Ins. Co., 61 Minn., 330 75
——— *v.* Massachusetts, 197 U. S., page 11..... 389
James *v.* Butler, 54 Wis., 172.. 126
Jensen *v.* Kyer, 101 Maine, 106 468
Jersey City Gas Co. *v.* Dwight, et als., 29 N. J. Eq., 242..... 293
Jones on Mortgages, Vol. 2, Sec. 1231 .....176, 177
—— *v.* Ore Co., 41 N. J. Eq., (3 Atl. 517) 353
—— *v.* Manufacturing Co., 92 Maine 505 542
Jordan *v.* Pickett, 78 Ala., 331 30
Joy *v.* Oxford Co., 3 Maine, 134 426
— *v.* York, 99 Maine, 237.... 539
Kansas City *v.* King, 65 Kan., 64, 68, Pac., 1093..... 19
Keene *v.* Sage, 75 Maine, 138, 140 76
Keefe *v.* B. & A. R. R., 142 Mass., 251 402
Keith *v.* Pinkham, 47 Maine, 501 293
Kelley *v.* Portland, 100 Maine, 265 462
Keyes *v.* Westford, 17 Pick., 273 517
Kilburn *v.* Bennett, 3 Met., 199. 479
Knowles *v.* Toothaker, 58 Maine 172 42
——— *v.* Sullivan, 182 Mass., 318 255
——— *v.* Knowles, 205 Mass., 290 343
Knox *v.* Montville, 98 Maine, 493 478
Kreitz *v.* Behrensmeyer, 125 Ill., 141 477
L. N. A. & C. Ry. Co. *v.* Lucas, 119 Ind., 338, 21 N. E., 968... 403
Lake *v.* Milliken, et als. 62 Maine, 240 22
Lakeman *v.* Pollard, 43 Maine, 463 421
Lancey *v.* Foss, 88 Maine, 215, 218 253
Land Co. *v.* Lewis, 101 Maine, 78 435
Lane *v.* Lane, 76 Maine, 521...35, 38
Lapish *v.* Wells, 6 Maine, 175.. 128
Larrabee *v.* Sewall, 66 Maine, 376, 381 240
Latremouille *v.* Railroad Co., 63 Vt., 336 542
Laugham *v.* Thomason, 5 Texas, 127 283
Lawler *v.* Baring Boom Co., 56 Maine, 443 17
Lawton *v.* Lane, 92 Maine, 170 170
Laymen's Will, 40 Minn., 371.. 476
Leach *v.* Pillsbury, 15 N. H., 137 .....473, 477
Leavitt *v.* Canadian Pacific Railway Co., 90 Maine 153.386, 387, 390
Lee *v.* Chase, 58 Maine, 432.... 345
---- *v.* Boston Elevated Railway, 182 Mass., 454 402
Legge *v.* N. Y., N. H. & H. R. R., 197 Mass., 88, 123 L. R. A., N. S., 633..... 403

Lemieux *v.* Young, 211 U. S., 489 166
LeProhon, Applt., 102 Maine, 455 .....233, 475
Lewiston Steam Mill Co., *v.* Foss, 81 Maine, 593..... 60
Lewis *v.* Mason, 109 Mass., 169 233
Libby *v.* Haley, 91 Maine, 321, 333 .....12, 56
Lime Rock Bank *v.* Hewett, 52 Maine, 531 338
Lindley on Partnerships, Sec. 563 301
Litchfield *v.* Hutchinson, 117 Mass., 195 137
Long *v.* Athol, 196 Mass., 508.. 128
Longfellow *v.* Quimby, 29 Maine, 196 426
Lord *v.* N. Y. Life Ins. Co., 27 Tex. Civ. App., 139, 65 S. W., 699 343
Louisville & N. R. Co. *v.* Miller, 104 Fed., 124, 125, 126..... 467
Louks *v.* Kenniston, 50 Vt., 115 43
Lovejoy *v.* Foxcroft, 91 Maine, 367 524
Loveland on Bankruptcy, 3d Ed. p. 845, Sec. 294 531
Low *v.* Windham, 75 Maine, 113 539
Lowe *v.* Kansas, 163 U. S., 81, 88 .....386, 389
Lowell Sav. Bank *v.* Winchester, 8 Allen, 109..... 521
Lunt's Case, 6 Maine, 412..... 387
Lyon *v.* Hamor, 73 Maine, 56.. 513
Maddox *v.* Brown, 71 Maine, 432 336
Mahoney *v.* Libby, 123 Mass., 20 336
99 Maine, 526 51
92 Maine, 433, 439, 440..... 267
Manning *v.* Perkins, 86 Maine, 419 216
Mfrs. Bottle Co. *v.* Taylor-Stites Glass Co., 208 Mass., 593..... 283
Marsh *v.* Hammond, 11 Allen, 484 413
Marshall *v.* Perry, 67 Maine, 78, 83 74
Martin *v.* Maine Central R. R. Co., 83 Maine, 100.....43, 514
Mather *v.* Cunningham, 105 Maine, 326 .....473, 478
Mattel *v.* Conant, 156 Mass., 418 255
Maxfield *v.* M. C. R. R. Co., 100 Maine, 79 .....226, 372, 401
Maynard *v.* Maynard, 49 Vt., 297 29
McCafferty *v.* Maine Central R. R. Co., 106 Maine, 284.... 382
McConnell *v.* Kelley, 138 Mass., 372 488
McDaniels *v.* Bank of Rutland, 29 Vt., 230 420
——— *v.* Lapham, 21 Vt., 220 420
McDonald *v.* Christie, 42 Barb., 36 30
McGoon *v.* Scales, 9 Wall., 23.. 509
McIntorff *v.* Ins. Co., 248 Ill., 92, 93 N. E., 369..... 339
McKenney *v.* Grand Street etc. Co., 104 N. Y., 352..... 234
McKim *v.* Odam, 12 Maine, 106 354
McKone *v.* Railroad Co., 51 Mich., 601, (17 N. W., 74)... 372
McLane *v.* Perkins, 92 Maine, 39 382
McLean *v.* Chemical Paper Co., 165 Mass., 5, 6..... 542
McLellan *v.* Crofton, 6 Maine, 334 218
McPheters *v.* Log Driving Co., 78 Maine, 329 465
McTaggart *v.* Maine Central R. R. Co., 100 Maine, 223, 228.. 515
Merchants' Trust & Banking Co. *v.* Jones, 95 Maine, 335..... 209
Messer *v.* Jones, 88 Maine, 349 .....169, 170

Miller *v.* City of Camden, 63 N. J. L., 501, 43 Atl., 1069, 1070 100
——— *v.* Jamieson, 24 N. J. Eq., 43 354
Minneapolis Railway Co. *v.* Beckwith, 129 U. S., 26, 29.. 387
Missouri *v.* Lewis, 101 U. S., 23, 31 388
Montague *v.* Railway Co., 82 Fed., 787 543
Montreal etc. Ins. Co. v. Charles, 17 Fed. Cas. No. 9975..... 75
Moody *v.* King, 74 Maine, 497.. 91
Moore *v.* Moore, 35 Vt., 98..... 169
——— *v.* Hopkins, 83 Cal., 270 283
——— *v.* Little, 82 Ky., 187 (56 Am. Rep. 889) 305
——— *v.* Veazie, 32 Maine, page 360 389
Moorman *v.* Gibbs, 75 Iowa, 537 283
2 Mor. Priv. Corp., Sec. 923.... 291
Moses *v.* Julian, 45 N. H., 52, 82 Amer. Dec. 114..... 510
Motheway *v.* Wall, 168 Mass., 333 126
Mott *v.* Packard, 108 Maine, 259 144
Mugler *v.* Kansas, 123 U. S., 623 387
Munn *v.* Reed, 4 Allen, 431.... 308
Murray *v.* Harway, 56 N. Y., 337 93
Mushrush *v.* Railway Co., 11 Ind. App., 192, (37 N. E., 954) 372
National Express & Transportation Co. *v.* Burdette, 7 App. Cas. (D. C.), 551..... 283
Neal *v.* Clark, 95 U. S., 704.... 531
Newhall *v.* Vargas, 13 Maine, 93 182
Nichols *v.* State Bank, 45 Minn., 102 283
Noble *v.* Hammond, 129 U. S., 65 531
Norfolk & Western Railroad *v.* Nunnally, 88 Va., 546..... 283
Northport W. G. Campmeeting Assn. *v.* Andrews, 104 Maine, 542 364
91 N. W., 1081 290
Norton *v.* University of Maine, 106 Maine, 436, 440..... 74
——— *v.* Soule, 2 Maine, 345. 218
Norway Bank *v.* Merriam, 88 Maine, 146 38
Norwich Gas Light Co. *v.* The Norwich City Gas Co., 26 Conn, 18 294
Nutt *v.* Morse, 142 Mass., 1.... 38
Ohio & M. R. Co. *v.* Ramey, 139 Ill., 9, 28 N. E., 1087..... 19
Opitz *v.* Karel, 118 Wis., 527, 62 L. R. A., 982..... 343
Orono *v.* B. R. & E. Co., 105 Maine, 428 247
O'Rorke *v.* Un. Pac. Ry. Co., 22 Fed., 189 542
Orr *v.* Hadley, 36 N. H., 578.... 42
—— *v.* ———, 36 N. H., 375.... 339
Ostmann *v.* Frey, 128 S. W., 250 283
Otto *v.* Doty, 61 Iowa, 23..... 472
72 Pac., 1067 290
Packard *v.* Brewster, 59 Maine, 404 301
——— *v.* Co. Commrs., 80 Maine, 45 426
——— *v.* ——— ———, 80 Maine, 43 508
Page *v.* Mitchell, 37 Minn., 368 283
—— *v.* Jewett, 46 N. H., 444.. 536
Paine *v.* Spartley, 5 Kan., 526.. 202
Palmer *v.* Est. of Palmer, 106 Maine, 23, 26.....437, 444
Park *v.* Piedmont, etc. Ins. Co., 48 Ga., 601, 606.....74, 75
Parker *v.* Williams, 77 Maine, 418 60
Parsons *v.* Copeland, 38 Maine, 537 59
Partridge *v.* Ins. Co., 15 Wall., 573, 579 74
Patten *v.* Starrett, 20 Maine, 145 536
Peabody *v.* Mattocks, 88 Maine, 164 444
Pease *v.* Bamford, 96 Maine, 23 251

——— *v.* Ballou, 108 Maine, 177 452
People *v.* Brown, 54 Mich., 15.. 102
——— *v.* Barrett, 202 Ill., 287 102
——— *v.* Molitor, 23 Mich., 341 206
——— *v.* Clute, 50 N. Y., 451. 206
——— *v.* Bloom, 193 N. Y., 1 234
Perry *v.* Griefen, 99 Maine, 420 60
——— *v.* Bailey, 94 Maine, 50.. 91
——— *v.* Worcester, 6 Gray, 544 463
Peterson *v.* Bank 32 N. Y., 21. 358
Petrie v. Ry. Co., 29 S. C., 363; 7 S. E., 515 341
Phelon *v.* Granville, 140 Mass., 386 7
Philbrick *v.* Kennebec Co., 17 Maine, 198 426
Phillips *v.* Chase, 201 Mass., 444, 449 234
——— *v.* Quick, 68 Ill., 324.. 283
——— *v.* Co. Commrs., 83 Maine, 541 427
Phoenix, etc. Ins. Co. *v.* Holloway, 51 Conn., 310 75
Pierce *v.* Emery, 32 N. H., 484, 507 290
——— *v.* Savings Bank, 129 Mass., 425 .....343, 346
——— *v.* Kimball, 9 Maine, 54 386
——— *v.* Bangor, 105 Maine, 412 508
Pittsburg C. & St. L. Ry. Co. *v.* McGrath, Admr., 115 Ill., 172, 3 N. E., 439 341
Plumby *v.* Birge, 124 Mass., 57 308
Pollock on Contracts (3d Am. Ed.) 572 74
1 Pom. Eq., Sec., 397..... 434
Pond *v.* Clarke, 14 Conn., 339... 217
Pooler *v.* Pooler, 95 Maine, 259. 65
Poor *v.* Sears, 154 Mass., 539.. 400
Porter *v.* Merrill, 124 Mass., 534 92
——— *v.* Kingsbury, 77 N. Y., 164, 167 283
——— et als. *v.* Railroad, 37 Maine, 349 301
Potter *v.* Webb, 6 Maine, 14.. 139
——— *v.* Small, 47 Maine, 293 177
Powell *v.* Pennsylvania, 127 U. S., 678 387
Powers *v.* Mitchell, 77 Maine, 361 138
Pratt *v.* Atwood 108 Mass., 40 169
Prentiss *v.* Ross, 16 Maine, 30.. 29
Pride *v.* Pride Lumber Co., 109 Maine, 452, (84 Atl. Rep. 989) 431
Purnall *v.* McLane, 98 Md., 589; 56 Atl., 830 294
Putnam *v.* Johnson, 10 Mass., 488 488
Quinebaug Bank *v.* Tarbox, 20 Conn., 510 283
Railroad Co. *v.* Trimble, 77 U. S., 367, 377 74
Ray *v.* Fletcher, 12 Cush., 200. 189, 190
Raymond *v.* Rockland Co., 40 Conn., 401 353
——— *v.* Co. Commrs., 63 Maine, 112 508
Readfield Tel. Co. *v.* Cyr, 95 Maine, 287 294
Readman *v.* Conway, 126 Mass., 374 400
Reardon *v.* Thompson, 149 Mass., 267 231
——— *v.* Byrne, 195 Mass., 146, 149, 150 467
Re Webb, 89 Wis., 354, 27 L. R. A., 356 103
— Bloom, 53 Mich., 597, 19 N. W., 200 104
— Markuson, 5 N. D., 180, 64 N. W., 939 104
Reed *v.* Howard, 2 Metcalf, 36 60
——— *v.* Copeland, 50 Conn., 472 343
Reeder *v.* Holcomb, 105 Mass., 93 479
Renfro *v.* Railroad Co., 86 Mo., 302 542
Richmond *v.* Thomaston, 38 Maine, 232 478

Ripley *v.* Trask, 106 Maine, 550 363
Roberts *v.* W. H. Hughes Co., 83 Atlantic Reporter, 807, Supreme Court, Vermont, June, 1912 176
Robinson v. Fair, 128 U. S., 87 472
Robinson *v.* Co. Commrs., (Maine 1886) 4 Atl., 556..... 514
Rockland Water Co. *v.* Adams, 84 Maine, 474..... 421
——— *v.* Deer Isle, 105 Maine, 155 487
Rockport *v.* Searsmont, 103 Maine, 495 396
Rodick *v.* M. C. R. R. Co., 85 Atl., 41 401
Rogers *v.* Portland & Brunswick St. Ry., 100 Maine, 86.. 12
——— *v.* Street Ry., 100 Maine, 86, 90 56
——— *v.* Hoskins, 15 Ga., 270. 283
——— *v.* Kennebec & Portland R. R. Co., 35 Maine, 319...462, 465
Ross *v.* Ross, 129 Mass., 245... 170
Sabre *v.* Rutland R. Co., Supreme Court of Vermont, Jan. 21, 1913, 85 Atl. Rep., 693 388
Salem *v.* Lynn, 13 Met., 544.... 479
Savings Bank *v.* Alden, 103 Maine, 237 176
Sawyer *v.* Gilmore, 109 Maine, 169 49
——— *v.* Paper Co., 90 Maine, 354 .....382, 467
Scammon *v.* Scammon, 28 N. H., 419 316
Schich *v.* Grote, 42 N. H. Eq., 352, 7 Atl., 852 39
Schippen *v.* Kempkes, N. J. Eq., (1907) 12 L. R. A., N. S., 355 38
Schroeder *v.* Young, 161 U. S., 334-344 252
Scott *v.* Harris, 113 Ill., at p. 454 476
Scovill *v.* Root, 10 All., 414.... 60
Section *v.* City of Chicago, 102 Ill., 323 128
Sewall *v.* Sewall, 122 Mass., 161 488
Shannon *v.* B. & A. R. R. Co., 78 Maine, 52, 61..... 240
——— *v.* Shannon, 111 Mass., 331 487
Shattuck *v.* Lovejoy, 8 Gray, 204 92
Shumway *v.* Collins, 6 Gray, 227-230 95
Sigourney *v.* Sibley, 21 Pick., 101 511
Skillman *v.* Wiegand, 54 N. J. Eq., 198 38
Skottowe *v.* Ry. Co., 22 Or., 430, 30 Pac., 222..... 400
——— *v.* Oregon Short Line, 22 Oregon, 430, 16 L. R. A., 593 403
Slaughter House Cases, 16 Wall., 36 387
Small *v.* Clark, 97 Maine, 304... 92
—— *v.* Mfg. Co., 94 Maine, 551 382
—— *v.* Pennell, 31 Maine, 270. 426
—— *v.* Thompson, 92 Maine, 593 443
—— *v.* Inh. of Dennysville, 51 Maine, 359 462
—— *v.* Pennel, 31 Maine, 267.. 513
Smart *v.* Lumber Co., 103 Maine, 50 465
Smith *v.* Western R. R. Co., 91 Ala., 445; 11 L. R. A., 619.... 22
—— *v.* Kezear, 115 Ala., 455, 22 So., 149 339
—— *v.* Poor, et als., 40 Maine, 415 431
—— *v.* Central Trust Co., 154 N. Y., 333 472
—— *v.* Cheshire, 13 Gray, 318 516
Southern Pac. Co. *v.* Pool, 160 U. S., 438, 444 542
Spaulding *v.* Life Ins. Co., 61 Maine, 329, 332 .....74, 75

J. P. Squire Co. *v.* Tellier, 185 Mass., 18 165
Stagg *v.* Ins. Co., 77 U. S., 589 74
Starbird *v.* Brown, 84 Maine, 238, 240 162
State *v.* Hatley (N. C.) 14 S. E., 751 99
—— *v.* Bennett, 4 Dev. & B., 42 100
—— *v.* Perkins, 82 N. C., 682. 100
—— *v.* Voss, 80 Iowa, 467.... 102
—— *v.* Intoxicating Liquors 50 Maine, 506..... 181
—— *v.* ——— ———, 101 Maine, 430 181
—— *v.* ——— ———, 108 Maine, 410 181
—— *v.* ——— ———, 102 Maine, 206 181
—— *v.* ——— ———, 102 Maine, 385 181
—— *v.* ——— ———, 104 Maine, 463 181
—— *v.* ——— ———, 106 Maine, 135 181
—— *v.* Crane, 36 N. J. L., 400 198
—— *v.* Int. Liq., 54 Maine, 564 198
—— *v.* Bangor & Brewer, 98 Maine, 114 199
—— *v.* Swearingen, 12 Ga., 23 206
—— *v.* Vail, 53 Mo., 97..... 206
—— *v.* Anderson, 1 N. J. Law, 366 206
—— *v.* McGeary, 69 Vt., 461.. 206
—— *v.* Smith, 14 Wis., 497.... 206
—— *v.* Whalen, 85 Maine, 467, 472 263
—— *v.* Riley, 86 Maine, 144, 146 264
—— *v.* Intoxicating Liquors (Iowa) 20 N. W., 445..... 264
—— *v.* Bunker, 98 Maine, 387, 389 266
—— *v.* Montgomery, 92 Maine, 433, 439, 440 267
—— *v.* Dougherty, 45 Mo., 294 283
—— *v.* Canal Co., 40 Kans., 96 19 Pac., 349 291
—— *v.* Topeka Water Co., 91 Kans., 547, 60 Pac., 337, 341.. 291
—— *v.* Twin Village Water Co., 98 Maine, 214, 230..... 292
—— *v.* Minn. Thresher Mfg. Co., 40 Minn., 213, 3 L. R. A., 510 292
—— *v.* Herlihy, 102 Maine, 310 339
—— *v.* Frederick, 69 Maine, 400 338
—— *v.* Houser, 26 Mo., 436... 341
—— Ins. Co. *v.* Waterhouse, 78 Iowa, 674 353
—— *v.* Montgomery, 94 Maine, 192 386
—— *v.* Mayo, 106 Maine, 62.386, 388
—— *v.* Phillips, 107 Maine, 249 387
—— *v.* Mitchell, 97 Maine, 66 389
—— *v.* Anthoine, 40 Maine, 435 462
—— *v.* Inh. of Freeport, 43 Maine, 198 462
—— *v.* Delesdernier, 11 Maine, 473 .....508, 511, 513
—— *v.* Richmond, 26 N. H., 232 511
—— *v.* Williams, 25 Maine, 561 .....515, 516
Stearns *v.* Wright 51 N. H., 600 510
Stetson *v.* Eastman, 84 Maine, 366 36
——— *v.* Everett, 59 Maine, 376 252
——— *v.* Bangor, 73 Maine, 357 364
Stevens *v.* Thatcher, 91 Maine, 70 60
——— *v.* Goodell, 44 Maine, 34 354
——— *v.* Co. Commrs., 97 Maine, 121-127 510
Stevenson's Heirs *v.* Sullivant, 5 Wheaton, 207 169
Stewart *v.* Wyoming, etc. Co., 128 U. S., 383..... 29

Steward *v.* Leonard, 103 Maine, 128, 132, 133 234
Story on Conflict of Laws, 7th Ed., Sects. 634, 645 477
Strickland *v.* Cox, 102 N. C., 411, 9 S. E., 414 100
Strout *v.* Lord, 103 Maine, 410 353
Stuart *v.* Cambridge, 125 Mass., 107 521
Stubbs *v.* F. & M. Ry. Co., 101 Maine, 355 .....42, 514
Sumner, Admr. *v.* Williams, 8 Mass., 198 358
——— *v.* Co. Commrs., 37 Maine, 112 508
Sylvester *v.* State, 65 N. H., 193 102
Tanner *v.* Wiggins (Fla. 1907) 45 So., 459 104
Taylor *v.* Mixter, 11 Pick., 341 346 499
Tenison *v.* Weadock, 89 (Mich.) N. W., 703 271
Thayer *v.* Boston, 19 Pick., 511 .....462, 465
The Hartford Wheel Club *v.* Travellers Ins. Co., 78 Conn., 355 93
Thomas *v.* Murphy, 89 Minn., 358 29
——— *v.* Churchill, 84 Maine, 446 513
Thompson *v.* Baker, 74 Maine, 48 60
Thorndike *v.* Boston, 1 Met., 242 479
Thurston *v.* Doane, 47 Maine, 79 346
——— *v.* Lowder, 40 Maine, 197 346
Ticonic Bank *v.* Bagley, 68 Maine, 249 218
Tobin *v.* Railroad Co., 59 Maine, 187 372
Toland *v.* Tichenor, 3 Rawle, 320, 324 283
Tolland *v.* Co. Commrs., 13 Gray, 12 510
Tomkins *v.* Hill, 145 Mass., 379 421
Travelers Ins. Co. *v.* Grant, 54 N. J. Eq., 208, 33 At. 1060.... 343
Trawick *v.* Martin Brown Co., 74 Texas, 522 283
Trevett *v.* Barnes, 21 N. J., Weeks Dig., 560 18
Tufts *v.* Lexington, 72 Maine, 516 521
Turney *v.* Bridgeport, 55 Conn., 412 521
Turner *v.* Webster, 24 Kan., 38 128
Tuttle *v.* Lang, 100 Maine, 123. 101
Twin Village Water Co. *v.* Damariscotta Gas Light Co., 98 Maine, 325 289
U. S. *v.* Riddle, 5 Cranch, 311, 312 266
99 U. S., 700, 25 L. ed. 496..... 387
Upshur *v.* Briscoe 138 U. S., 365 531
Valley *v.* B. & M. R. R., 103 Maine, 106 331
Van Noren *v.* Robinson, 16 N. J. E., 256 126
Vanfleet's Collateral Attack, 462 353
Varney *v.* Bradford, 86 Maine, 514 301
——— *v.* Stevens, 22 Maine, 334 365
Veazie *v.* Howland, 53 Maine, 38 396
——— *v.* Rockland, 68 Maine, 511 539
Venable *v.* Benton, 129 G. A. 537 126
Vickery *v.* Richie, 202 Mass., 247 128
Viles *v.* Waltham, 157 Mass., 542 479
Vincent *v.* Norton & Taunton St. Ry. Co., 180 Mass., 104... 271
Voter *v.* Hobbs, et al., 69 Maine, 19 189
Vridenburgh *v.* Burnet, 31 N. J. E., 229 126
Wade *v.* Ridley, 87 Maine, 368.. 474
Wagner *v.* Camden, 73 Maine, 485 539
Ward *v.* Oxford, 8 Pick., 476.. 487

Wandworth Board of Public Works *v.* Telephone Co., L. R., 13, Q. D., 904 202
Warder *v.* Henry 117 Mo., 530 283
Ware *v.* County Commissioners, 38 Maine, 482 426
Warren *v.* Thomaston, 43 Maine, 406 489
Water River Imp. Co. *v.* Nelson, 45 N. H. 578..... 18
Waterman *v.* Dockray, 78 Maine, 139 354
Waterville *v.* County Commissioners, 59 Maine, 80..... 51
Watson *v.* Railway Co., 91 Maine, 584 239
——— *v.* Fairmont Ry. Co., 49 W. Va., 528, 39 S. E., 193. 294
——— *v.* Props. of Lisbon Bridge, 14 Maine, 201..... 338
Wayne *v.* Greene, 21 Maine, 357 478
Webb *v.* Morrison, 137 N. Y., 712 126
Webster *v.* Nichols, 104 Ill., 160 92
Welch *v.* Bath Iron Works, 98 Maine, 361, 369 .....153, 382
Wentworth *v.* Sawyer, 76 Maine, 434 .....60, 535
——— *v.* Wentworth, 71 Maine, 72 345
Westbrook *v.* Deering, 63 Maine, 231 519
Whalen *v.* Mulholland, 89 Md., 199 38
1 Whart. Cr. Law, Sec., 174.... 266
Whitcomb *v.* McNulty, 105 Fed., 863, 865 542
White *v.* Oakes, 88 Maine, 367.. 177
——— *v.* L. A. & W. R. R. Co., 107 Maine, 412..... 402
——— *v.* Co. Commrs., 70 Maine, 317 513
Whitehouse Eq. Prac., 302..... 352
1 Wigmore on Evidence, sect. 64 139
2 ——— Ev., Sec. 1374..... 341
4 ——— on Evidence, Sect. 2341 474
4 ——— — ——— ——— 2336 474
4 ———, Sect. 2329..... 475
3 ——— on Ev., Sect. 1727.. 478
Willoughby *v.* Atkinson Furnishing Co., 93 Maine, 185... 535
Willis *v.* Yates, 44 N. J., 525... 126
Willock *v.* Wilson, 178 Mass., 68 472
Wilson *v.* Milliken, 103 Ky., 165 283
Windham *v.* Co. Commrs., 26 Maine, 406 508
Wing *v.* Merchant, 57 Maine, 383 343
Winner *v.* Kuchan, 97 Wis., 394 397, 398 283
Winslow *v.* Lombard, 18 Pick., 57 .....109, 110
Winters *v.* Winters, 102 Iowa, 53 476
Wood *v.* Carpenter, 11 Otto, 135 U. S. 126
Wood on Nuisances, Secs. 750, 754, 757 463
——— — ———, Sec. 632.. 465
Woodstock *v.* Calais, 66 Maine, 234 462
Woodward *v.* Perry, 85 Maine, 440 345
Wormell *v.* Railroad Co., 79 Maine, 397, 403, 406..... 542
Wright *v.* Stanley, 119 Fed., 330, 332 .....467, 468
——— *v.* Boston, 126 Mass., 161 .....478, 479
Yale *v.* Comstock, 112 Mass., 267 339
Young *v.* Hatch, 99 Maine, 465 59
——— *v.* Chandler, 102 Maine, 251 59
——— *v.* McGown, 62 Maine, 56 127
——— *v.* Jones, 64 Maine, 559 218
——— *v.* R. R. Co., 75 Iowa, 140, 39 N. W., 234..... 290

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

EMMA MONROE CARTER et als.

Petitioners for Leave to Enter Appeal.

Knox. Opinion December 4, 1912.

Allegations. Amendment. Appeal. Beneficiaries. Decree. Demurrer. Exceptions. Revised Statutes, Chapter 65, Section 30. Gurdy Appellant. 101 Maine, 73. Jurisdiction. Motion. Objections. Petition. Will.

This case comes up on exceptions by both the petitioner to enter an appeal from the decree of the Judge of Probate admitting to probate the will of Harriet A. Monroe, late of Rockland, deceased, and by one of the beneficiaries named in the will, to the allowance of an amendment of the petition. The Justice sitting as the Supreme Court of Probate dismissed the petition. To this ruling the petitioners took exceptions.

Held: that under the rule of liberal interpretation in this class of cases, it is the opinion of the court that the petition was sufficient to authorize the court to proceed to a hearing thereon, and upon this conclusion it becomes unnecessary to consider the exceptions to the allowance of the amendment.

On exceptions by petitioners to dismissal of petition. Sustained.

This is a petition by Emma Monroe Carter et als. for leave to enter an appeal from the decree of the Judge of Probate admitting to probate the will of Harriet A. Monroe, late of Rockland,

deceased, and comes to this court upon exceptions by the petitioners to the dismissal of said petition and by the inhabitants of South Thomaston, beneficiary under the said will, to the allowance of an amendment to said petition.

The case is stated in the opinion.

Coggan & Coggan, for the petitioners.

R. I. Thompson, for inhabitants of South Thomaston.

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

SPEAR, J. This case comes up on exceptions by both the petitioner to enter an appeal from the decree of the Judge of Probate admitting to probate the will of Harriet A. Monroe, late of Rockland, deceased, and by one of the beneficiaries named in the will, to the allowance of an amendment of the petition. The petition is as follows:

Respectfully petitions and represents to this Honorable Court the undersigned.

That Harriet A. Monroe, who last dwelt in Rockland, in said county, died on the 26th day of January, A. D. 1911.

That your petitioners are heirs-at-law and next-of-kin of the deceased.

That there was presented to the Probate Court for said county of Knox a petition asking for the probate of a certain instrument purporting to be the last will and testament of said Harriet A. Monroe, by David V. Smith, the executor named therein.

That upon said petition an order of notice issued out of said Probate Court, with order thereon, that the same be published for three weeks successively in the Rockland Opinion, a newspaper published at said Rockland, giving notice to all parties to appear at a Probate Court to be held at Rockland in and for said county on the 21st day of February, A. D. 1911.

That on said 21st day of February, said petition being uncontested, no one appearing to oppose the granting of said petition, a decree was entered in said Probate Court proving and allowing said document as the last will and testament of the said deceased, Harriet A. Monroe.

That your petitioners live in a remote part of the state, having had no previous knowledge of the sickness or death of the deceased, nor did any knowledge of the presentation of said instrument to said court come to their notice.

That they were entirely ignorant of the death of the deceased, or of the existence of any instrument purporting to be the last will of the deceased, or that any steps had been taken in the settlement of her estate.

That through accident, mistake and defective notice and without fault on your petitioners' part, they omitted to claim or prosecute their appeal, or to appear in said proceedings.

And your petitioners set forth as the reasons of said appeal that said instrument filed and admitted to probate as the last will and testament of the said deceased, Harriet A. Monroe, was not the will of the said Harriet A. Monroe, and that the same was not duly executed, that the said deceased was not at the time of the alleged execution of said instrument of sound and disposing mind, but was of unsound mind, and that undue influence was exerted upon the said deceased, thereby rendering the execution of said instrument, if executed at all, null and void.

Wherefore your petitioners pray that they may be allowed to enter an appeal from the decree of said court of probate to this Honorable Supreme Court of Probate, and be allowed to prosecute their appeal as if it had been seasonably done, and that due notice to all parties adversely interested may be given.

The inhabitants of South Thomaston, beneficiaries under the will, moved to dismiss the petition for the following reasons:

And now comes the Inhabitants of the town of South Thomaston, beneficiaries named in the will of said Harriet A. Monroe, and upon whom a duly attested copy of said petition has been served, and moved that said petition be dismissed for the following reasons, namely:

1. Because said petition does not allege that justice required a revision.

2. Because said petition does not allege that any will of said Harriet A. Monroe was ever presented for probate in the Probate Court of Knox county. It alleges only a petition therefor.

3. Because said petition alleges that an order of notice on said will was "issued out of said Probate Court" but does not allege that said order was not complied with.

4. Because said petition does not allege in what part of the State said petitioners lived at the time of the sickness or death of said Harriet A. Monroe or at the time of the presentation of her will for probate or at the time of the probate thereof.

5. Because said petition does not allege that the petitioners named therein did not have knowledge of the presentation of said will for probate. It says only that they had no knowledge of notice.

6. Because there is nothing in said petition to show that the petitioners did not have such knowledge within twenty days after the probate of said will (February 21, 1911) so that they or either of them might have appealed to the Supreme Court of Probate within that time if they or he had so desired.

The Justice sitting at the Supreme Court of Probate dismissed the petition upon the first, fourth and sixth grounds alleged in the motion. To this ruling the petitioners took exceptions. The motion to dismiss was equivalent to a demurrer. In Gurdy, appellant, 101 Maine, 73, involving a motion to dismiss, the court *held:* "This is in effect a demurrer. In passing upon the issue thus raised, all the allegations in the appeal and reasons of appeal must be taken as true." At the threshold, therefore, is raised the question whether this petition is sufficient, assuming every statement to be true, to give the Supreme Court of Probate jurisdiction to hear the evidence for the purpose of determining the question of fact, whether justice required such revision of the decree, as would authorize the appeal to be entered and prosecuted. The language of the statute R. S., Chap. 65, Sec. 30, authorizing the appeal is: "If any such person from accident, mistake, defect of notice, or otherwise without fault on his part, omits to claim or prosecute his appeal, as aforesaid, the supreme court, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted. . . ." But one of the objections to the validity of the petition is because it "does not allege that justice requires a revision." It is not necessary that it should. It is not a jurisdictional fact. The jurisdictional averments of the statute are accident, mistake, defect of

notice and want of fault on the part of the petitioner. These requirements are conditions precedent to any further inquiry, and hence must be alleged. Upon failure to aver and establish them the case ends, irrespective of its merits. But upon proof of these prerequisites, then the court may go further and inquire whether "justice requires a revision," this being a matter of proof and not of jurisdiction. In *Danby* v. *Dawes,* 81 Maine, 30, the court say: "Still it does not necessarily follow that the petition shall aver everything which may be proved to authorize jurisdiction. . . . We do not think that the technical rules of pleading should be stringently applied in a case of this kind." In Gurdy, appellant, 101 Maine, 73, where the question of jurisdiction was directly raised, the court say: "It is not denied that when an interested party, from accident, mistake or otherwise without fault on his part, omits to claim an appeal, the Supreme Court of Probate has authority to allow an appeal to be entered." In addition to these jurisdictional averments, it was held in Gurdy, appellant, 101 Maine, supra, that to justify an entry of an appeal, two things are indispensable. "Appeal must show what order, sentence, decree or denial of the Judge of Probate is appealed from; and taking all allegations in the appeal and the reason therefor to be true, it must appear that there was error." These are both found in the petition before us. The second reason for dismissal is obviated by the averment in another paragraph in the petition that the will was probated on the 21st day of February following the date of the petition. The other objections clearly go to matters of proof rather than averment. In Gurdy, appellant, 101 Maine, supra, the rule governing this class of cases was stated as follows: "Technical precision of statement and pleading are not required in probate appeals to the same extent as in actions at law." *Danby* v. *Dawes,* 81 Maine, 30; *Chase* v. *Bates,* 81 Maine, 182.

Under this rule of liberal interpretation, it is the opinion of the court that the petition was sufficient to authorize the court to proceed to a hearing thereon. Upon this conclusion it becomes unnecessary to consider the exceptions to the allowance of the amendment.

Exceptions to the dismissal of the petition sustained.

NAPOLEON DUCHARME *vs.* CITY OF BIDDEFORD, Apt.

York. Opinion December 11, 1912.

Appointment of Police Officers. Board of Police. Chapter 625 of Private Laws of 1893. Burden of Proof. City Charter. Mayor and Aldermen. Number of Police Officers. Records. Resignation. Vacancy.

The plaintiff seeks to recover the amount of his salary as patrolman in defendant city from September 5th to September 27th, 1911, having been prevented from serving during that time by the Chief of Police.

On March 27, 1893, the city government of Biddeford, acting within its legal powers, passed an ordinance restricting the number of regular policemen to four, which ordinance is still in force. On same date, Newcomb, Mogan, Palardis and Rumery were duly appointed and qualified as the four regular policemen of the city, and no one of them resigned or was removed prior to July 3, 1893.

By Chapter 625 of the Private Laws of 1893, approved and taking effect March 28, 1893, a board of police was created for the city of Biddeford, with the same powers previously vested in the city government, except as provided in the Act. Section 5, of said act provided that "said board of police shall not appoint any larger number of police officers than the present mayor or board of mayor and aldermen by the Statutes of the State, city charter, ordinances, by-laws, and rules of said city are now authorized to appoint, except as may be from time to time authorized by said city."

Held: 1. That the effect of Section 5 was to keep the number of regular policemen at four as fixed by the city ordinance of March 27th.

2. That on July 1, 1893, when the board assumed control, Goodwin, Mogan, Rumery and Ducharme were appointed regular patrolmen, Mogan and Rumery being two of the four appointed by the City on March 27, 1893. It not appearing in the case that Newcomb and Palardis had either resigned, died or been removed from office, the burden was on the plaintiff to show death, resignation or legal removal.

3. If there had been neither death, resignation nor legal removal of either Newcomb or Palardis, there was no vacancy in the existing police force and the board had no authority to appoint either Goodwin or Ducharme.

4. That an officer de facto has no legal right to the emoluments of an office, the duties of which he may have performed under color of an appointment, but without legal title.

5. An action for salary puts in issue the legality of the title of the officer and the plaintiff has failed to prove that he was an officer de jure.

Reported on agreed statement of facts. Judgment for defendant.

This is an action of assumpsit to recover the sum of $49.50 as salary as patrolman in the defendant city from September 5 to September 27, 1911, having been prevented from serving during that time by the chief of police. Plea, the general issue. The case was submitted to the Law Court for decision upon an agreed statement of facts.

John P. Deering, for plaintiff.

Arthur J. B. Cartier, and Robert B. Seidel, for defendant.

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

CORNISH, J. The plaintiff seeks to recover the sum of $49.50, the amount of his salary as patrolman in the defendant city from September 5, to September 27, 1911, having been prevented from serving during that time by the chief of police.

His right of action depends upon whether or not he was an officer de jure. His continued service for the seventeen previous years may have made him an officer de facto, but a de facto officer has no legal right to the emoluments of an office the duties of which he may have performed under color of an appointment, but without legal title. *Andrews* v. *Portland,* 79 Maine, 484; *Dolliver* v. *Parks,* 136 Mass., 499; *Phelon* v. *Granville,* 140 Mass., 386. An action for salary therefore puts in issue the legality of the title to the office, and the vital question here is not how long the plaintiff may have acted as patrolman, but whether he had a legal title to the office during the period covered by his writ.

We think he had not. The following facts which appear in the agreed statement are conclusive upon this question.

On March 27, 1893, the city government of Biddeford, acting within its legal powers, passed an ordinance restricting the number of regular policemen to four, which ordinance is still in force. On the same date, Messrs. Newcomb, Mogan, Palardis and Rumery were duly appointed and qualified as the four regular policemen of the city, and no one of them resigned or was removed prior to July 3, 1893.

By Chapter 625 of the Private Laws of 1893, approved and taking effect March 28, 1893, a board of police was created for the city of Biddeford, with the same powers previously vested in the city government, except as provided in the act.

Section 5 of that act provided that "said board of police shall not appoint any larger number of police officers than the present mayor or board of mayor and aldermen, by the statutes of the State, city charter, ordinances, by-laws and rules of said city are now authorized to appoint, except as may be from time to time authorized by said city."

The effect of this section was to keep the number of regular policemen at four, as fixed by the city ordinances of March 27, and no action has since been taken by the city increasing that number.

Section 2 of said act provides that, "Said board of police of the city of Biddeford shall have authority to appoint, establish or organize the police force of said city, including the marshal and deputy marshal, and to remove the same for cause;" and section 3 further provides that, "The members of the police force of said city of Biddeford in office when said board of police are first appointed, shall continue to hold their several offices unless removed by said board of police."

So that when the board of police assumed control of the police department on July 1, 1893, they assumed it with the four regular policemen appointed on March 27, all of whom were legally entitled to continue in office, and none of whom could be removed by the board of police except for cause.

How did Ducharme receive his appointment?

The records of the police board show that on July 1, 1893, the board on assuming control, appointed Messrs. Goodwin, Mogan, Rumery and Napoleon Ducharme regular patrolmen. Two of these, Mogan and Rumery were two of the four appointed on March 27 by the city, but the case nowhere shows that the other two men previously appointed, viz., Messrs. Newcomb and Palardis, had either resigned, died or been removed from office. If not, and the burden was on the plaintiff to show death, resignation or legal removal, there was no vacancy in the existing police force and the board had no authority to appoint either Goodwin or Ducharme.

The board apparently regarded the appointment of Ducharme on July 1, as unauthorized and void because two days later, on July 3, the record reads: "It was voted that the following persons be removed from the police force, viz., Joseph Palardis" and five others who were apparently special police. "The following persons were elected police officers: Napoleon Ducharme . . ."

It is evident that the board attempted by this vote to remove Palardis and appoint the plaintiff in his place, but such removal was illegal, and therefore the plaintiff's appointment was void. The board could remove Palardis only for cause after charges preferred, notice given and hearing had. This arbitrary act on their part was utterly void. This was squarely decided in the case of *Andrews* v. *Police Board of Biddeford,* 94 Maine, 68, where this same act establishing the police board of Biddeford and the powers of the board thereunder were fully considered by the court. That case is decisive of this. In *Cote* v. *Biddeford,* 96 Maine, 491, the court in re-affirming the doctrine of *Andrews* v. *Police Board,* supra, say: "It is undoubtedly true that the action of the police board in attempting to remove the plaintiff and to elect a successor in the office was unauthorized and void. The plaintiff had been elected to the office just prior to the time when the act creating the board of police went into effect and he could only be removed for cause."

The burden resting upon the plaintiff to prove that he was an officer de jure has not been met, and the entry must therefore be,

Judgment for defendant.

CARL M. HOLT *vs.* NEW ENGLAND TEL. & TEL. COMPANY.

Somerset. Opinion December 11, 1912.

Acts. Agreement. Assumpsit. Breach of Contract. Conduct. Contract. Estoppel. Meeting of Stockholders. Shares. Stock. Waiver.

Waiver is a voluntary relinquishment of a known right, benefit or advantage which would otherwise have been enjoyed.

It is essentially a matter of intention which may be proved by a course of acts and conduct, or by such neglect or failure to act as to induce the belief that it was the intention and purpose to waive.

Estoppel is a rule of law which prevents a party from asserting his rights when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.

His conduct need not be characterized by an actual intent to mislead or deceive.

On exceptions by plaintiff. Overruled.

This is an action of assumpsit to recover the sum of five hundred dollars for an alleged breach of contract. The plaintiff alleges that on the 27th day of February, A. D. 1905, he entered into a contract to sell 351 shares of the capital stock of the Central Maine Telephone Company to the New England Telephone and Telegraph Company; that the contract contained the agreement by the Telephone Company that if it shall not within two years from the date of this agreement transfer to said Central Maine Telephone Company its plant and equipment connected with the operation of its present Telephone Exchange at Skowhegan, Maine, it will pay to said Holt five hundred dollars; that on the 14th day of March, 1905, he did transfer to the defendant the 351 shares as stipulated. At the annual meeting of the stockholders of the Central Maine Telephone Company, held at Fairfield, at which the plaintiff presided, and in which he was elected a director, and in which action was taken which provided for the transfer of the Central Maine, the plaintiff's own company, to the Maine Telephone and Telegraph Company.

The defendant pleaded the general issue with brief statement. At the conclusion of the evidence, the presiding Justice directed a verdict for the defendant and the plaintiff excepted.

The case is stated in the opinion.

Gould & Lawrence, for plaintiff.

Norman L. Bassett, for defendant.

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

SPEAR, J. This is an action of assumpsit in which the plaintiff seeks to recover $500.00 for an alleged breach of contract. The plaintiff avers that he was the owner of three hundred and fifty-one shares of the capital stock of the Central Maine Telephone Company, a corporation organized under the laws of Maine and having a place of business at Skowhegan, Maine; that on the 27th day of February, 1905, he entered into a contract whereby he agreed to sell 351 shares, a majority of the capital stock of the Central Maine Telephone Company to the New England Telephone & Telegraph Company, also a corporation duly organized by law; that the contract contained the following stipulation: "It is further agreed by the Telephone Company that if it shall not within two years from the date of this agreement transfer to said Central Maine Telephone Company its plant and equipment connected with the operation of its present telephone exchange at Skowhegan, Maine, it will pay to said Holt the further sum of five hundred dollars ($500.00); that on the 14th day of March, 1905, he transferred to the defendant the 351 shares, as stipulated; and that in all other respects he did fully perform all the requirements of the contract of sale between himself and the defendant; but that the defendant, notwithstanding the plaintiff's compliance with all the terms of the contract, failed and refused to perform its agreement and promise contained in the written memorandum above set forth that, if it did not within two years from the date of the agreement transfer its equipment and exchange it would forfeit to the plaintiff the sum of $500.00. All these allegations are admitted by the defendant, but are sought to be avoided upon the averment of waiver and estoppel. We think this contention must prevail.

1. Waiver is a voluntary relinquishment of a known right, benefit or advantage which would otherwise have been enjoyed. *Berman* v. *The Fraternities H. & A. Assn.,* 107 Maine, 368. It is essentially a matter of intention which may be proved by a course of acts and conduct or by such neglect or failure to act as to induce the belief that it was the intention and purpose to waive. *Burnham* v. *Austin,* 105 Maine, 196. It is also a question of fact. *Libby* v. *Haley,* 91 Maine, 321.

2. Estoppel is a rule of law which prevents a party from asserting his rights when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. His conduct need not be characterized by an actual intent to mislead or deceive. His acts, declarations or silence must be of such a character as to have the natural effect of influencing the person to whom it is addressed to do, or not to do, to his detriment, what he would not otherwise have done. *Rogers* v. *Portland & Brunswick St. Ry.,* 100 Maine, 86. Estoppel is a question of law. *Libby* v. *Haley,* supra. It will be seen from these rules that waiver is a voluntary relinquishment of a known right; yet, if a party without such intention by his conduct or silence, misleads the other party, he then is estopped.

Applying these familiar principles of law to the conduct, acts and necessary understanding of the plaintiff, touching the transaction of which he complains, we cannot avoid the conclusion that his attitude towards these proceedings, "all of which he saw, and a part of which he was," might well lead the defendant to the natural belief that he fully acquiesced in the result.

It appears that within two years from the date of the agreement the defendant had, with the knowledge and consent of the plaintiff, transferred its plant and equipment connected with the operation of its then existing telephone exchange at Skowhegan, Maine, to the Maine Telephone & Telegraph Company instead of the Central Maine Telephone Co., as was stipulated in that paragraph of the contract already quoted. Without going into the evidence in detail, it would seem that the plan of consolidation which had been conceived by the defendant company was finally consummated by this transfer. On May 10th, 1906, the annual meeting of the stock-

holders of the Central Maine Telephone Company was called at its office at Hinckley, Maine. This meeting was adjourned to May 24, 1906, at Hotel Gerald, Fairfield. The adjourned meeting was called to order by C. M. Holt, the plaintiff. A report of different officers was presented, and then directors for the succeeding year were chosen, of whom C. M. Holt, the plaintiff, was one. At this meeting, over which the plaintiff presided and in which he was elected a director, and in all the deliberations of which he took a part, action was taken which provided for the transfer of the Central Maine, the plaintiff's own company, to the Maine Tel. & Tel. Co., and contemplated the transfer of the defendant company's exchange at Skowhegan. The various votes which were passed to carry this consolidation into effect, covered in detail all the requirements necessary to fully consummate the purpose of the transaction. The plaintiff presided over the meeting during which were presented all the discussions, conversations, purposes and votes, calculated to consummate the reorganization, represented in this change in the original contract, and understood everything that was going on; yet he did not protest anything that was being done, never intimated that he did not approve of the scheme, nor hint that it was not perfectly satisfactory to him. He remained silent, although an active participant in the whole transaction from beginning to end. The transfer to the Maine Tel. & Tel. Co. operated to secure, to all parties interested, practically the same results as a transfer to the Central Maine would have done. He also fully participated in the accomplishment of the reorganization, after the stockholders' meeting was held, in pursuance of the action thereof.

We cannot avoid the conclusion that, by this silent acquiescence and active participation, the plaintiff waived his right under the original contract, or was estopped to assert it.

Exceptions overruled.

NATHANIEL C. HOWE *vs.* ASHLAND LUMBER COMPANY.

Aroostook. Opinion December 11, 1912.

Act of God. Accumulation of Logs. Booms. Damages. Burden of Proof. Declaration. Eminent Domain. Jam. Logs. Lumbering. Navigable Stream. Negligence. Obstruction. Overflowing. Privileges. Riparian Owners. Rainfall. R. S., Chapter 43, Sections 7 and 8.

1. This case comes on report. The facts show that the plaintiff during the period covered by his writ was the owner of a farm upon the west side of the Aroostook river, containing an intervale of about 14 acres bordering upon the river. The defendant is a corporation operating lumber mills at a dam across the Aroostook river near the village of Ashland and about six and one-half miles down the river from the land of the plaintiff. Bearce Island is a short distance north of the plaintiff's land. Near the upper end of the island are erected three large piers known as the "Upper Jam Piers."
2. The defendant for about six years has used the river exclusively for a distance of over six miles below the jam piers and about eight miles above them, for the driving and booming of its logs coming into the river from above. There was a large booming privilege below the piers, which during the period covered by the plaintiff's declaration, was entirely unused.
3. The plaintiff in his writ declares that in the years 1906, 1907 and 1908 the defendant negligently allowed its logs to jam and accumulate upon the jam piers immediately north of his land to such an extent as to cause the water to overflow his intervale and deposit thereon logs and other debris floating down the river to such a degree that he was damaged in each of these years and put to considerable expense in removing these deposits from his land.

It is the opinion of the court that the remedy for damages for these three years, under the plaintiff's declaration, if any there were, should have been sought under R. S., Chap. 43, Secs. 7 and 8.

4. The defendant, however, while not controverting the overflow of the plaintiff's land and the destruction of his crops by water, contends that by virtue of a special act of the Legislature it was authorized to erect at the place where located, piers and booms to collect, hold, separate and sort logs, pulp-wood and other lumber coming down the Aroostook river.
5. The only issue, which, therefore, seems to be raised upon the law and the evidence is whether the defendant exercised reasonable care in the

execution of the privileges conferred upon it by the Legislature. There can be no question that the defendant within the exercise of due care had a right to use its piers and booms for all the purposes they were intended to subserve, without liability for any damages incident to or consequent upon the result of such act.

6. The first question accordingly is, did the defendant in allowing its logs to drift down and accumulate upon the piers, as the evidence tends to show they did, make a reasonable use of the privileges granted by the Legislature. It is the opinion of the court that it did not.
7. The defendant also raised the defense of vis major or act of God, claiming that the rain-fall was unprecedented; that the defendant was not required to anticipate it and consequently the flood was vis major. But this contention is not sustained by the evidence.

On report. Judgment for plaintiff for $867.00 and interest from date of writ.

This is an action to recover damages from defendant for negligently allowing its logs to accumulate and jam upon the piers to such an extent as to cause the water to overflow the plaintiff's intervale and deposit thereon logs and other debris and thereby damaging his crops and putting him to expense in removing the aforesaid deposits from his land. Plea, the general issue with brief statement justifying its acts under Chapter 351 of Private and Special Laws of 1897. At the conclusion of the evidence, the case was reported to the Law Court to render such decision as the law and such evidence as is admissible requires.

The case is stated in the opinion.

Hersey & Barnes, for plaintiff.

Powers & Archibald, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, SPEAR, CORNISH, KING, HALEY, JJ. CORNISH concurred in the result.

SPEAR, J. This case comes on report. The facts show that the plaintiff during the period covered by his writ was the owner of a farm upon the west side of the Aroostook river, containing an intervale of about 14 acres bordering upon the river. The defendant is a corporation operating lumber mills at a dam across the Aroostook river near the village of Ashland and about six and

one-half miles down the river from the land of the plaintiff. Bearce Island is a short distance north of the plaintiff's land. Near the upper end of the island are erected three large piers known as the "Upper Jam Piers." The water space from the west shore to the first pier is 70 feet; from the first pier to the second pier, 120 feet; from the second pier to the third pier, 120; from the third to the east shore, 65 feet. The defendant for about six years has used the river exclusively for a distance of over six miles below the jam piers and about eight miles above them, for the driving and booming of its logs coming into the river from above. There was a large booming privilege below the piers, which during the period covered by the plaintiff's declaration, was entirely unused. It consisted of three miles of dead water, and was easily available for booming purposes.

The plaintiff in his writ declares that in the years 1906, 1907 and 1908 the defendant negligently allowed its logs to jam and accumulate upon the jam piers immediately north of his land to such an extent as to cause the water to overflow his intervale and deposit thereon logs and other debris floating down the river to such a degree that he was damaged in each of these years and put to considerable expense in removing these deposits from his land.

It is the opinion of the court that the remedy for damages for these three years, under the plaintiff's declaration, if any there were, should have been sought under R. S., Chap. 43, Secs. 7 and 8.

But the plaintiff further alleges in his writ that "on the first day of April, 1909, and on diverse other days and times between that day and the first day of November, 1909," the defendant carelessly and negligently allowed its logs to accumulate and jam upon these piers to the extent of causing the water to rise to an unusual height and flow back over his intervale and to remain there for so long a time as to destroy and render worthless a large field of potatoes.

The defendant, however, while not controverting the overflow of the plaintiff's land and the destruction of his crops by water, contends that by virtue of a special act of the Legislature it was authorized to erect, at the place where located, piers and booms to collect, hold, separate and sort logs, pulp-wood and other lumber coming down the Aroostook river. The act also provides that they shall

not be so constructed as to impede navigation or unreasonably obstruct the common use of the river. It further gave the defendant company the right of eminent domain to take and hold such lands as might be necessary for the location, erection and maintenance of its piers and booms. But this provision of the act is immaterial to the consideration of the question in issue. We are unable to discover from the evidence that the defendant had in any way violated the provisions of this act in the location, erection and maintenance of its piers.

The only issue which, therefore, seems to be raised upon the law and the evidence is whether the defendant exercised reasonable care in the execution of the privileges conferred upon it by the Legislature. There can be no question that the defendant within the exercise of due care, had a right to use its piers and booms for all the purposes they were intended to subserve, without liability for any damages incident to or consequent upon the result of such use. The intent and purpose of a legislative act conferring such privileges is to protect the exercise of those privileges to the full extent of the grant. This rule was stated in *Cushman* v. *Smith,* 34 Maine, 247, as follows: "When a company only does what, by its charter it is authorized to, and is free from fault and negligence, it is not liable for consequences and damages." *Boothbay* v. *Ack. Railroad Co.,* 51 Maine, 318, and *Lawler* v. *Baring Boom Co.,* 56 Maine, 443, and cases cited. From these very cases it is equally well established that there may be a negligent use of a lawful right. The decisions are numerous and varied in declaring the application of this principle of law to the use of piers and booms. It is found in *Lawler* v. *Baring Boom Co.,* supra, on page 447 in this language: "The test of exemption from liability for injury arising from the use of one's property, is said to be the legitimate use or appropriation of the property in a reasonable, usual and proper manner, without any unskilfulness, negligence or malice." In applying this general statement of the law to the specific use of a boom, the head note in this case fairly summarizes the law as follows: "A boom company, being without fault or negligence in the erecting and management of its boom, is not liable for the flowage of land not taken under its charter, caused by the boom, in co-operation of an unusual accumu-

lation of logs and a large rise of water." Stated in the affirmative way the converse of this principle is that if land not taken under a charter is flowed by the co-operation of an unusual accumulation of logs and a large rise of water through the fault or negligence of the boom company in the erection and maintenance of its booms, it is then liable for such flowage. In *Trevett* v. *Barnes,* 21 N. Y., Weeks Dig. 560, it is said: "One driving or floating logs on a navigable stream is required to exercise ordinary care to prevent the same from doing damage to the property of riparian owners." This rule is also extended to the exercise of such care as to prevent logs delivered in the streams from creating jams sufficient to cause injury. In Minnesota is found the same rule. In New Hampshire in *Water River Imp. Co.* v. *Nelson,* 45 N. H., 578, it is *held:* "When logs are allowed to form jams, and cause flowage more than would otherwise exist, the person or company driving the logs is liable for damages to lands or crops resulting from such excessive flowage when want of ordinary care is shown in not breaking up the jam." It is unnecessary to multiply quotations. In every state in the union where lumbering operations have been made and floatable streams driven, this rule of law touching the negligent use of a lawful right has been declared. But the defendant, while not controverting the application of these well established rules of law to the negligent management of a boom or piers, goes further and contends that even though found negligent in permitting the logs to accumulate upon the piers, as claimed by the plaintiff, he should even then be excused from liability upon the ground that the rise of water which overflowed the plaintiff's land was due to vis major. The rule of law pertinent to the issue of vis major, while familiar, has been very recently stated in *Emilie Willson* v. *Boise City,* 20 Idaho, 133, 117 Pac., 115, 36 L. R. A., (N. S.) 1162. Suit was brought against the defendant city for flooding certain lands and collars, where the city insisted that it was not liable for damages, basing its contention upon the claim that the flood was unprecedented and unusual and therefore attributable to vis major, or act of God. Upon this contention the court say: "The decisive question, however, arises in this case as to what constitutes vis major, or the act of God, within the meaning of the law of negligence.

Black in his law dictionary defines it thus: 'Any misadventure or casualty is said to be caused by the act of God when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man, and without human intervention, and is of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use.'"

In *Gulf Red Cedar Co.* v. *Walker,* 132 Ala., 553, 31 So., 374, the same court also say: "The term 'act of God' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." In *Kansas City* v. *King,* 65 Kan., 64, 68 Pac., 1093, the court hold that an unusual flood but such as had occasionally occurred and of rare occurance in that vicinity, yet under the laws of nature might be anticipated to occur again, was not within the rule of vis major. In *Ohio & M. R. Co.* v. *Ramey,* 139 Ill., 9, 28 N. E., 1087, the same doctrine is declared, the court saying: "Though of rare occurrence, such rain-falls are not phenomenal, and therefore not beyond reasonable anticipation." It was here held that a cloudburst which had irregularly and infrequently occurred within the memory of man in a particular locality was not classed as vis major.

Upon the rules of law governing this case there seems to be no particular controversy between the plaintiff and the defendant. The defendant in his brief says: "The propositions of law which are applicable to the case at bar are: First, 'if an inevitable accident such as a flood which the defendant could not reasonably anticipate, caused the damage and the acts of the defendant in no way contributed to the injury, he would not be liable.'" That is, if the unusual flood and the defendant's negligence coöperated, the defendant would then be liable. Second, "that the method provided in the special act of 1897 provides for the compensation of the plaintiff for such damage as he would suffer from the reasonable and proper use of the rights granted." That is, for an unreasonable use it would be liable. Upon the application of these two

principles of law to the facts the rights of these parties are to be determined.

The first question accordingly is, did the defendant in allowing its logs to drift down and accumulate upon the piers, as the evidence tends to show they did, make a reasonable use of the privileges granted it by the Legislature. It is the opinion of the court that it did not. We cannot avoid the conclusion based upon fair inferences from the testimony, that the plaintiff has sustained the burden of showing that the defendant's logs, together with the drift-wood and other debris which would naturally flow down the river with the logs, accumulated and jammed upon the piers, until they filled the river from the very bottom to a height even with the top of the piers, which were two or three feet above high water mark. The uncontradicted testimony shows that from the bottom of the river this jam was 24 to 30 feet high, at the piers, and extended back about 40 rods. It also appears that this jam had been for a long time upon these piers, with no effort on the part of the defendant corporation to remove it, although Mr. West, who had driven the river nearly fifty years, says the logs "could be put down very easy." It should also be charged with the common knowledge that waste from the mills above, shingle butts, billets, shingle hair, saw-dust, bark and the natural debris of the stream, coming down against the jam and sifting into the interstices of the logs, would construct what was a comparatively tight dam across the river. Nor is any valid reason shown by the defendant why it was not entirely practicable for it to have run these logs through the large openings between these piers to the ample booming ground below. On the other hand, its manager admits that it was practicable, and that there was plenty of room. While ordinarily this condition occasioned no particular damage, as the water would perculate through this jam of logs sufficiently to prevent the formation of a pond above, we cannot believe that the defendant had a right, under the act of the Legislature, to allow this large accumulation of logs and debris to completely close this river for an indefinite time, so far as any act on its part seems to have been contemplated for its removal.

But the mere negligence of the defendant in allowing this accumulation, would not be sufficient to enable the plaintiff to maintain his action. It is incumbent upon him to show that the defendant, in connection with this jam of logs across the river, was charged with the duty of anticipating that such a rainfall, as had actually come and caused the damage complained of, might occur; and that in anticipation of such an event, it should have removed these logs to the extent, at least, of preventing the flood which occurred. Upon this phase of the case the defendant raised the question of vis major, or act of God, claiming that the rainfall was so unusual and unprecedented that the defendant was not required to anticipate it and that consequently the flood was vis major. But we are unable to see how defendant's contention, either that the flood was vis major, or if vis major, relieves the defendant.

The first proposition may be decided independently of the evidence by reference to that great fountain of all information—common knowledge. There is no claim in this case that there was a cloudburst, that this was a mountain stream, but simply that there was a heavy rain for three days in the month of September, 1909. There is scarcely a year when during some month in the year such a rain storm does not occur; and it will be observed that there was not an element contributory to this flood, as it is called, outside the water of a very heavy rain fall.

It is attempted, however, to show that this rise of water above the piers, was no higher than all along the river. But this contention is clearly negatived by the testimony of the plaintiff who says the river itself in front of his intervale rose from 12 to 15 feet "from the natural condition of the river before it started to rain." While at other places along the river defendant's witnesses say the water was at the ordinary freshet height, "somewhere in the neighborhood of four feet, a little strong, I should think," as stated by Mr. Churchill. We think that it requires no evidence to establish the conclusion that every man of mature age and common experience, must be held to anticipate that in this climate a rain storm for three or four days may occur in any month of the year. We think it can even be said that it is not unlikely to occur. Therefore, our conclusion is that the rainfall which overflowed the river

and flooded the plaintiff's intervale was not vis major. But even if it was vis major, it does not relieve the defendant. It already appears that the accumulation of logs upon the piers was negligence and beyond the protection of the legislative act. If, therefore, the rainfall was unprecedented, the defendant's negligence coöperated with it to produce the rise of water above the piers and the overflow of the plaintiff's land. Without the jam, it is evident that the flood would not have been so great and certainly could not have continued for any great length of time. This situation falls directly within the rule laid down in *Smith* v. *Western R. R. Co.*, 91 Ala., 445, 11 L. R. A., 619, supra, in which the court said: "While it is true that no human agency can prevent or stay an act of God, the act itself being that of omnipotence and irresistible, it is frequently the case that the results or natural consequences of an act of God, by the exercise of reasonable foresight and prudence, may be foreseen and guarded against. Where this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence, and subject the party upon whom this duty devolved to damages, although the original cause was an act of God." This rule was also declared in *Lake* v. *Milliken,* et als., 62 Maine, 240, in which the head-note fairly states the result of the opinion as follows: "Every wrong-doer is at least responsible for all the mischievous consequences that might be reasonably expected under the circumstances to result from his misconduct. Where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable." Hence it could hardly be said that where the defendant's own negligence contributed that the consequences could be charged to the act of God.

At this point it is interesting to note that there is an apparent inconsistency in the decisions of the different courts in declaring, as was said in the Alabama case that although the original cause was an act of God, yet if it could be avoided with the exercise of reasonable diligence and prudence, a failure to do so would be negligence. But strictly speaking vis major or act of God is such an unprecedented and extraordinary operation of the forces of nature

that human providence is not required to anticipate its happening. Therefore, to say that vis major or act of God does not excuse, when negligence co-operates with it to produce injury, would seem to imply that human foresight should be held to anticipate the act of God. But in the practical application of these decisions, it will be seen that, although the operation of the forces of nature may be unprecedented, and in that sense the act of God, yet if they are not the proximate cause of the injury, but are aided in producing it by the negligence of human agency, then such agency is not excused.

In other words, the fury of the elements may be the act of God but its effect may be governed by the act of man.

Upon all of the evidence, it is the opinion of the court that the plaintiff has sustained the burden of showing that the defendant, in allowing its logs to accumulate and remain, as they did, upon the piers in 1909, was guilty of negligence.

The plaintiff also charges the defendant with negligence in allowing its logs to accumulate and remain upon the piers in the spring of 1910 when, on account of the freshet in June of that year, his meadow was again overflowed and his growing grass, oat and potato crop materially injured. It is also the conclusion of the court that in 1910 the defendant was guilty of negligence in allowing those logs to accumulate entirely across the river, and form a dam sufficient to cause the rise of water that produced the overflow upon the plaintiff's land. It appears from the evidence that it was entirely feasible for the defendant company to have run these logs down between these piers so as to have prevented the jam which completely filled the river. Nor was it permitted to let the logs so jam, by its legislative favor. While a mere violation of the act, would not enure to the benefit of the plaintiff in this case, it may properly be recalled to show that the defendant in accepting the legislative act regarded with approval the feasibility of keeping the channel clear, as required by the act.

Upon the question of damages alleged to have been sustained by the plaintiff in 1909, he declares upon an injury to the soil and grass then growing, upon which no evidence seems to have been offered, and upon damages to his potato crop, to the amount of $500.00. Upon this allegation evidence was offered tending to show dam-

ages to the amount of over $1200 for the market value of the potatoes in the field, and additional damages for labor, phosphate, etc. Under the plaintiff's declaration it becomes unnecessary to discuss the question of amount inasmuch as the uncontradicted evidence sustains this claim of $500.00. The plaintiff also alleges injury to his grass, oat crop and potato crop growing at the time of the freshet in 1910, and upon this we are inclined to take his figures upon the damages. He claims that the loss upon his potato crop was $162.00 and upon his oat crop, $155.00, making a total of $317.00. In accordance with the stipulation of the report, the entry must be,

Judgment for the plaintiff for $867.00 and interest from the date of the writ.

JOHN W. BARRETT

vs.

THE LEWISTON, BRUNSWICK & BATH STREET RAILWAY CO.

Sagadahoc. Opinion December 20, 1912.

Accident. Contract. Damage. Exceptions. Fraud. False Representations. Intent. Mental Capacity. Material Fact. Release. Settlement.

1. If one party to a contract, with intent to deceive, conceals or suppresses from the other a material fact which he is bound in good faith to disclose, it is tantamount to a false representation.
2. If one party conceals any fact material to the transaction, and peculiarly or exclusively within his knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if it were expressly denied.

3. The suppression to be fraudulent must relate to a material fact, known to one party and which it is his legal duty to communicate to the other. That duty may arise from a relation of trust, from confidence, or from inequality of condition or knowledge.
4. Concealment implies design and purpose. Mere silence is not of itself concealment. Whatever the purpose, if the party is not misled, no relief can be had for fraud.
5. The plaintiff in this case seeks to have a settlement made by him with the defendant, for damages occasioned by the defendant's negligence, regarded as null and void, on the ground that the settlement was induced and procured by a fraudulent suppression on the part of the defendant of the truth respecting the probability of the plaintiff's having to suffer the amputation of a leg. It is *held,* that a finding that the defendant was guilty of a fraudulent suppression of the truth, or that the plaintiff was misled by the defendant's conduct or silence could only be based upon inferences not warranted by the evidence.

On motion by defendant. Sustained.

This is an action on the case to recover for personal injuries to the plaintiff alleged to have been occasioned by the negligence of the defendant. The plaintiff was a passenger on one of the defendant's electric cars, on the eleventh day of October, 1906, going from Topsham Fair Grounds to Brunswick, and that during said passage, the car on which he was a passenger ran off the track, through the negligence of the defendant, and that he then and there received the injuries complained of. The case has been tried twice before, each trial resulting in a verdict for the plaintiff. On October 27, 1906, the defendant's superintendent paid the plaintiff, on account of the defendant company, five hundred dollars and agreed to pay in addition thereto all his hospital and surgical expenses, and the plaintiff in turn, in writing, released the defendant from all claims and demands. The plaintiff seeks to avoid this settlement on the ground that it was fraudulently obtained and not binding. Plea, the general issue. The jury returned a verdict for the plaintiff for $2912, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Newell & Skelton, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

SAVAGE, J. Case for negligence. The plaintiff was a passenger on one of the defendant's cars, and was injured in some way. The manner is not described in the case, for the defendant admitted at the trial that it was originally liable. The plaintiff sustained a compound, comminuted fracture of the bones of the right leg, near the ankle. The accident occurred in Topsham, October 11, 1906. The plaintiff was taken at first to the office of Dr. Palmer, in Brunswick, and from there to St. Mary's hospital in Lewiston, Dr. Palmer accompanying him. On November 21, 1906, his leg was amputated below the knee, and later it became necessary to amputate it above the knee. He remained in the hospital one hundred and forty-one days. On October 27, sixteen days after the accident, the defendant's superintendent paid him, on account of the company, $500, and agreed to pay all his hospital and surgical expenses, and the plaintiff in turn, by a general release, released the defendant from all claims and demands. The defendant relies upon that settlement as a complete defense. To this the plaintiff replies that the settlement was fraudulently obtained and not binding. The case has been tried twice before, each trial resulting in a verdict for the plaintiff. At those trials the question of fraud was eliminated by the court, and the only question submitted to the jury was the mental competency of the plaintiff to make the settlement, at the time he made it. Those verdicts were set aside, one after the other, by the Law Court. It appeared clearly to the court that the plaintiff was mentally competent to make the settlement, that he well understood at the time what he was doing, and fully appreciated the effect of the settlement.

At the third trial, the presiding Justice was of opinion that the evidence on the question of competency was no more favorable to the plaintiff that it had been at the other trials, and instructed the jury, in effect, that they would not be authorized to find a verdict for the plaintiff on the ground that he was mentally incompetent to make the settlement; but that if they found certain facts to be true, they would be authorized to find that the settlement was fraudulently procured. And the jury so found. The case comes

up on the defendant's exceptions to the instructions of the presiding Justice on the question of fraud, and on a motion for a new trial.

To understand the instructions, and the contentions of the plaintiff, it is necessary to state other facts. Two or three days after the accident Dr. Palmer was employed by Mr. Farr, the defendant's superintendent, to visit the plaintiff at the Lewiston hospital. He was directed, so he says, to "see that everything is done to save that man's leg." He says Farr told him to look out for him until he got out. He visited him at intervals generally of three or four days as long as he stayed in the hospital, and particularly, as relates to this case, October 14th, 18th, 22nd and 26th. The plaintiff did not know that Dr. Palmer was employed by the defendant; he had not himself employed him. It does not appear that he gave the matter any thought. The plaintiff testified that Dr. Palmer at one time told him that he thought the leg would be saved, but he was unable to fix the time the statement was made. Binette, a hospital nurse, testified that Dr. Palmer told the plaintiff every time that he was going to save his leg. Dr. Palmer testified that he never told the plaintiff that he would save his leg, but he says he had some hope of saving it. But on cross-examination he said that at one of the first two or three visits he might have told him that "he hoped to save the leg." He also said that he reminded him that Dr. Russell, the surgeon in charge of the hospital, told him at the start that he "thought the leg would have to come off." He further testified that on October 26, the last time he saw him before the settlement, he thought there was "some chance of saving the leg," and that he talked with him that day about the leg, and the plaintiff said, in connection with some talk about a settlement, that he was "going to have the money and keep the leg." Binette testified that the plaintiff asked him several times if the leg could be saved, and that he told him "no." Dr. Russell testified that he advised amputation at the first, and that although he talked with him about it, he never gave the plaintiff any encouragement that the leg could be saved. It appears that the plaintiff and Farr agreed upon the terms of settlement in a room in the hospital to which the plaintiff had been removed for that purpose, and that no one else was present, but nothing was said by either as to the prospects of sav-

ing the leg. But before the release was executed, Dr. Russell was called in by Farr, and the terms of settlement were stated to him. Dr. Russell testified that he read the release to the plaintiff, and explained to him that he would not get any more money, even if the leg had to be amputated. This is all the testimony that bears on the probabilities, on October 27th, of saving the leg, or on the plaintiff's expectations.

Upon the evidence in the case, we think the jury would have been warranted in finding that Farr's purpose in employing Dr. Palmer was not alone to secure his professional services in the treatment of the case, but that he might be of some assistance either in making a settlement, or failing that, in litigation which might ensue on the question of damages, which in itself was not an unlawful purpose. It does not appear, and should not be inferred that Dr. Palmer was asked to say anything to the plaintiff about a settlement. Nor does the case warrant the inference that, if Dr. Palmer encouraged the plaintiff to think that the leg could or might be saved, he did so for the fraudulent purpose of inducing him to settle for a less sum than he would otherwise have insisted upon.

But Farr asked him to let him know if the plaintiff wanted to see him, or said anything about a settlement. On October 26th, as the doctor testified, the plaintiff said he thought "it would be better to effect a settlement with the road and not be bothering with lawyers; that he would like to talk with somebody about it; and that he said he did "not want to see any of his folks" about it. Dr. Palmer communicated the fact of this conversation, and, we think it fair to assume, the substance of it also, to Farr, who had been called to the hospital that day by Dr. Russell to see the leg dressed. He also advised Farr that the plaintiff was in a suitable condition physically to make a settlement. An arrangement was made for Farr to see the plaintiff the next day. The evidence makes it probable that Dr. Palmer made the arrangement with Dr. Russell. Dr. Russell gave directions that no opiates be administered in the meantime to the plaintiff. The plaintiff was not told of the arrangement, nor did he know that he was to meet Farr, nor that a settlement was to be attempted, until the nurse was preparing to move him from his cot in the general ward to a private

room. Farr came to the meeting with a general release all prepared, except filling blanks, and with one hundred five dollars bills, which at some time during the negotiation were laid in a pile on the table before the plaintiff.

Although the evidence is clear that the plaintiff was mentally competent, at the time, to make a settlement, it appears that morphia at different times had been administered to him from time to time to alleviate suffering, and that while under its influence he was "dopy," and his mind was not clear. And it would be a warrantable inference from the testimony, that by reason of the shock of the accident, the nature of his injury and the condition of his leg, that he was naturally, if not necessarily, weakened to some extent in body, and unstrung in mind and in will, and therefore more susceptible to the influence of impressions, false or otherwise.

Upon this evidence, with the additional fact as the plaintiff claims it to be, that the settlement was unfair and grossly inadequate, it is contended in his behalf that the jury were warranted in finding the settlement to have been fraudulently procured, in these respects:—that the defendant, through the opinion of Dr. Palmer, knew that the leg could not be saved; that the plaintiff, also through the opinion of Dr. Palmer, the defendant's paid agent, believed that the leg could be saved, that the defendant was bound in good faith to disclose to him the truth, and that, having failed to do so, it was equivalent to a false representation, and the concealment being intentional, it was fraudulent.

The law is unquestioned. If, with intent to deceive, one party to a contract conceals or suppresses from the other a material fact, which he is in good faith bound to disclose, it is tantamount to a false representation. The gist is fraudulently producing a false impression upon the mind of the other party. *Stewart* v. *Wyoming etc., Co.,* 128 U. S., 383. If a party conceals any fact material to the transaction, and peculiarly or exclusively within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if it were expressly denied. *Thomas* v. *Murphy,* 89 Minn., 358; *Maynard* v. *Maynard,* 49 Vt., 297; *Prentiss* v. *Ross,* 16 Maine, 30; *Atwood* v. *Chapman,* 68 Maine, 36.

The suppression must relate to a material fact, known to the party, and which it is his legal duty to communicate to the other party. The duty may arise from a relation of trust, from confidence, from inequality of condition and knowledge. *Jordan* v. *Pickett,* 78 Ala., 331. Concealment implies design, purpose. Mere silence is not of itself concealment. *Stewart* v. *Wyoming etc., Co.,* supra. Whatever the purpose, if the party is not misled, no relief can be had for fraud. *McDonald* v. *Christie,* 42 Barb., 36. We think that these citations cover every phase of suppressio veri that is open to argument in this case. And the question now is whether the facts bring this case within these rules.

In support of the charge of fraud and deception, the plaintiff relies upon the conduct and statements to him of three persons, Dr. Palmer and Mr. Farr, the defendant's superintendent, and Dr. Russell, the surgeon in charge of the hospital. Of Dr. Russell it need only be said that he seems to have believed from the first that the leg would not be saved, and so expressed himself to the plaintiff. Though he assisted in making the arrangement for the meeting between the plaintiff and Farr, we do not discover that he did anything more than was proper for a surgeon in charge to do under such circumstances. On the contrary he seems to have taken especial pains that the plaintiff's mind should not be clouded by the effect of opiates at the time of the meeting, and actuated, as we think the evidence shows that he was, by the belief that the proposed settlement was inadequate, he also took especial pains to make certain that the plaintiff fully understood and appreciated what he was doing. We do not think the situation called upon Dr. Russell to intervene, like a guardian of the plaintiff.

The plaintiff in his brief says that Dr. Palmer "was secretly the defendant's paid agent to procure a settlement." We have already said that he was employed by the defendant, and that that employment was not known by the plaintiff. What would have been the result if Dr. Palmer in the course of his employment had misled the plaintiff by false statements of his belief as to the probability of saving the leg, or if he had falsely created an unfounded belief that the leg would be saved, for the purpose of inducing the plaintiff to make an easy settlement, we need not discuss. We think that a finding of fact to that effect could be based only upon infer-

ences not warranted by the evidence. It may be conceded that Dr. Palmer, as the plaintiff testified, told him at one time that he "thought the leg would be saved." But that of itself is not enough. If it appeared that this statement of opinion was intentionally false, it might probably be inferred, under the circumstances, that the purpose was fraudulent. But it does not so appear. The opinion was, as it turned out, a mistaken one. But it is asserted, and not denied, that the plaintiff's condition became worse about a week after the settlement, and yet the amputation was deferred two weeks longer. No reason for the delay is suggested, unless it was that further efforts could be made to save the leg.

Mr. Farr's part in the settlement has already been described.

The situation then was this. Mr. Farr, we assume, feared that the leg could not be saved. Indeed, he may have had a strong conviction of it. The plaintiff had the opinions of two doctors to be guided by, one unfavorable, and the other more favorable, but not fraudulent. He hoped to save the leg. He says he believed he would save it. He chose to act upon that belief, and he made what may be called an improvident settlement. It is asserted and not denied that he said he meant to "have the money and keep the leg." This statement indicates, we think, that he knew that the question of saving the leg was debatable, or, at least, had been debated.

Under these circumstances we think it cannot be said properly that the defendant, or its agent, had fraudulently produced a false impression upon the mind of the plaintiff; or, that the probability of saving the leg was a fact peculiarly or exclusively within the knowledge of the defendant or its agents; or, that it was the defendant's legal duty to communicate to the plaintiff the belief of its agents as to a recovery. Although the plaintiff was weakened, as already stated, we think the case shows, almost beyond dispute, that he clearly understood what he was doing, that he was in a condition to judge intelligently and decide for himself; that he knew or ought to have known the risk or chance he was taking, and therefore that there was no such inequality of condition or knowledge as made it the legal duty of the defendant to impart its own belief to him. The verdict was clearly wrong, and the motion for a new trial must be sustained. It is unnecessary to consider the exceptions.

Motion for a new trial sustained.

FRANK L. STAPLES, Admr., *vs.* JOHN H. BERRY, Admr. and Trustee.

Sagadahoc. Opinion December 20, 1912.

Administrator. Agent. Agreed Statement. Bank Deposits. Beneficiary. Burden of Proof. Delivery. Gift. Joint Tenancy. Money Had and Received. Revised Statutes, Chapter 75, Section 10. Personal Property. Possession. Survivorship. Trust.

During the married life of plaintiff's intestate, Fred E. Savage, and his wife, Nellie A. Savage, up to the death of her husband January 26, 1904, she had deposited in the Gardiner Savings Institution, in the name of Fred E. Savage and from his earnings, the sum of $1870.98. On or about July 1, 1901, when the deposits amounted to $1400, the title of the Savings Bank account was changed by one of the officers of the Bank, presumably by direction of the husband, on its ledger, and on the deposit book, by inserting the necessary words so as to read, "Nellie A. Savage and Fred E. Savage, may be drawn by either in any event." After the death of her husband, she deposited in said Institution on February 8, 1904, $2900, of the $3000 which she received as insurance on his life, she being the beneficiary in said policy. The defendant claims that a joint tenancy was created in 1901 with a right of survivorship and that on the death of Fred E. Savage, the wife took the whole deposit.

Held:

1. That the money deposited, prior to the death of the husband belonged to him and the burden is on the defendant to show that the title to it or any part of it passed from him to his wife, a fact which must be proved by clear and convincing evidence.
2. That the defendant's claim that the change made on the bank ledger and deposit-book followed by the joint possession of the book created a joint tenancy with the right of survivorship, and that on the death of the husband the wife took the whole deposit, cannot be sustained.
3. That the more natural and reasonable inference to be drawn from the transaction is that the husband intended one of two things,—either to constitute the wife his agent in order that the deposit could be drawn more conveniently in which case no title passed to the wife; or to make a gift to take effect at his death, that is, a testamentary disposition which was void under the statute of wills.
4. That the defendant has not produced evidence sufficient to divest Fred E. Savage of the title to the deposit at the time of his decease, and that the plaintiff as the administrator of his estate is entitled to the amount found due by the presiding Justice.

Agreed statement. Exceptions by the defendant. Exceptions overruled.

This is an action of assumpsit for money had and received brought by the plaintiff as administrator of the estate of Fred E. Savage, against John H. Berry, executor of the last will and testament of his wife, Nellie A. Berry, who was the former wife of Fred E. Savage, to recover the amount of a Savings Bank deposit. Plea, general issue. The case was heard by a single justice without a jury, upon an agreed statement of facts. The Justice found for the plaintiff in the sum of $2400.46, with interest from date of writ, and the defendant excepted to said finding.

The case is stated in the opinion.

Frank L. Staples, for plaintiff.

Barrett Potter, and William T. Hall, Jr., for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

CORNISH, J. The following essential facts appear in the agreed statement upon which the finding of the Justice at nisi prius was based.

Fred E. Savage and Nellie A. Savage were married in March, 1873, and lived together until the death of the husband, on January 26, 1904. Two children were born to them, a son, Fred, born in 1877 and still living, and a daughter born in 1874, who married one Lewis and died in 1906, leaving a daughter Marguerite.

December 7, 1910, the widow married the defendant, John H. Berry, executed her will on December 9, 1910, and died testate January 22, 1911, leaving him practically all her estate. He was subsequently appointed administrator with the will annexed. The plaintiff was appointed administrator of the estate of the first husband, Fred E. Savage, on July 10, 1911.

This controversy arises over a savings bank deposit, and the agreed facts as to that are as follows:

April 17, 1893, Nellie A. Savage deposited $150 in the Gardiner Savings Institution in the name of her husband, Fred E. Savage. All, or nearly all, the subsequent deposits were made by her. Withdrawals of $45 and $25 were made by Fred E. on June 28, 1893,

and July 15, 1896, respectively; and one of $30 was made by the wife on July 13, 1893, upon the order of the husband. No other withdrawals were made during the life of Fred E. On or about July 1, 1901, when the aggregate deposits amounted to about $1,400, the title of the Savings Bank account was changed by one of the officers of the institution, presumably by direction of the husband, on its ledger and on the deposit book, by inserting the necessary words so as to read "Nellie A. Savage and Fred E. Savage, may be drawn by either in any event." After that change and until the death of Fred E. Savage, the deposit book was most or all of the time in their joint possession, each having access to it. At the time of the death of Fred E., on January 26, 1904, the account amounted with accrued dividends to $1,870.98. On February 8, 1904, the widow deposited to the credit of this account $2,900, out of $3,000 which she had received as insurance on his life, she being the beneficiary in the policy. On January 16, 1907, the account then amounting to $4,878.46 was transferred by the widow to the Bath Savings Institution and there deposited to her sole credit.

Mr. Savage was for several years prior to the opening of the account with the Gardiner Savings Institution, and most of the time thereafterwards until his death, in the employ of Lawrence Brothers of South Gardiner, as their head sawyer, at wages of three dollars per day, with usually a gift or bonus at the end of the sawing season. During a part of the time, he and his wife carried on a boarding house for employees of Lawrence Brothers, but had ceased to carry it on before the account in the Gardiner Savings Institution began. The deposits of said account, prior to his death, consisted of his earnings and their joint savings. At the time of their marriage, neither husband nor wife had any property worth mentioning and neither received any during their married life except from their earnings.

Under these agreed facts, the plaintiff seeks to recover in this action for money had and received the amount of the deposit in the Gardiner Savings Institution at the husband's death, with interest.

The case was heard by a single justice, who found for the plaintiff in the sum of $2,400.46, with interest from the date of the writ;

and the defendant has brought the case to the Law Court upon exceptions to this finding.

The single issue is, was that deposit the property of Fred E. Savage at the time of the decease on January 26, 1904?

We start out with the conceded fact that the money deposited belonged to the husband. It came primarily from his earnings, and was his alone. How was the title to it, or any part of it, taken from him and given to his wife? The burden is on the defendant to show this; and it must be proved by clear and convincing evidence.

"A strong instinctive passion for property often leads a husband or wife into schemes for the absorption and conversion of the other's possessions, and equity is watchful to defeat all such wrongful appropriations. It requires that the donor's intention to divest himself or herself of the property, and the execution of that intention by an act of delivery, shall be clearly proved by the donee." *Lane* v. *Lane,* 76 Maine, 521. The same requirement exists in the case at bar which is an action for money had and received and equitable in its nature.

It is not claimed by the defendant that prior to July 1, 1901, the wife had gained any title to the deposit, but the contention is set up that by causing the entry to be changed on the bank ledger and the deposit book by adding the words "Nellie A. Savage and" and "may be drawn by either in any event" followed by the joint possession of the book, the wife was thereby made an owner in joint tenancy in the technical sense, so that at the husband's death not only the deposits made prior to such change but also all subsequent deposits became hers by right of survivorship.

The learned counsel for defendant admits in his brief that under the facts as agreed there was no gift causa mortis, and that no trust was created, and he "does not claim that what was done amounted to an absolute gift by Mr. Savage in his lifetime to Mrs. Savage of the entire deposit. In that sense but in that sense only there was no gift inter vivos." His own statement of his position is this: "That a joint tenancy was created in 1901, with a right of survivorship, and that on the death of Mr. Savage his wife surviving, she took the whole deposit; no part of it having been withdrawn after the change in title."

That is not, in our opinion, the true legal effect to be given to the transaction.

In the first place, estates in joint tenancy are not favored in law at the present day and cannot be created in this State without unequivocal and compelling language. *Stetson* v. *Eastman,* 84 Maine, 366. Our statute, first enacted in 1821, provides as follows: "Conveyances, not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed. Estates vested in survivors upon the principle of joint tenancy shall be so held." R. S., ch. 75, sec. 10.

In *Stetson* v. *Eastman,* supra, it was contended that this section applied to real estate but not to personal property, and this contention was answered by the court in these words: "It seems incredible to us that any such distinction could have been contemplated. There is more reason for rejecting the offensive doctrine in its application to chattels or moneyed securities than in its application to landed estates." While, therefore, joint tenancy in personal property may exist in certain rare cases, it must be created by apt and explicit terms.

Can it be said that the additional entry made upon these savings bank books created necessarily a joint tenancy?

In the second place, it is laid down by all the authorities that there are four essential characteristics of a joint tenancy; unity of interest, unity of title, unity of time and unity of possession. 23 Cyc., 484; 17 Am. & Eng. Enc. of Law, p. 649, and cases cited. Unity of title means that the interests must accrue by one and the same conveyance; and unity of time, that the interests must commence at one and the same time. *Case* v. *Owen,* 139 Ind., 22, 38 N. E., 395.

This would seem to contemplate conveyance or devise by A, the sole owner, to B and C, as joint tenants, not a splitting up of A's ownership so that B becomes a joint tenant with A. But granting for the sake of argument that this might be done by carefully worded conveyance, it can hardly be said that this naked book entry meets the requirement which is so jealously guarded by the law, and that is the only evidence in the case to disclose the husband's intention.

In the third place, a joint tenancy implies that the interests of the joint holders remain the same until death, and then that the survivor takes all. Here, according to the book entry, either party could at any time withdraw the entire deposit, so that the joint property would be dissipated and the survivor would take nothing. This is utterly at variance with the attributes of a joint tenancy.

Another incongruity arises in regard to the deposits made after July 1, 1901, amounting to nearly $500. Were they also transferred, as fast as made? Was it a continuing conveyance in joint tenancy?

So much for the technical requirements of the estate claimed.

But it must not be forgotten that preliminary to the character of the estate granted is the prerequisite of the gift itself. Whatever the interest conveyed, the transfer itself must first be proved, and this case is barren of facts tending to show that the husband intended to make his wife at that time a gift of the whole, either in joint tenancy, or in tenancy in common, except what is to be inferred from the meagre entry in the book. No officer of the bank testified as to what was said when the addition was made or the reason for making it. No declaration of Savage to any one at any time is offered. Neither the intention to give is proved, nor the consummation of that intention by loss of dominion over the property given. The husband continued to have the same control over the deposit after July 1, 1901, as before. The book being in their joint possession, he could have withdrawn every dollar.

The more natural and reasonable inference to be drawn from the transaction is that the husband intended one of two things, either:

First, to constitute the wife his agent in order that the deposit could be drawn more conveniently; or

Second, to make a gift to take effect at his death, that is, a testamentary disposition which is void under the statute of wills.

The first inference is not far-fetched. The husband was a busy breadwinner.. His work was at South Gardiner at some distance from the bank in which his money was deposited. To avoid the trouble of making out an order to his wife whenever he might wish to withdraw, this change might have been made. One such order had already been given by him, and while there happened to be no

withdrawals after the change, the reason apparently was that the husband and wife were prudent savers and they were able to make deposits instead of withdrawals. Before the change, only the husband could withdraw, after it, either could, as the book remained in their joint possession. "A possession which is as consistent with agency as with gift must indicate agency instead of gift. . . . Between husband and wife, his possession of her property is her possession, and her possession of his property is presumed to be his possession." *Lane* v. *Lane,* 76 Maine, 521.

The following are a few of the vast number of cases where entries similar to the case at bar have been held to have been made for convenience only and no title was transferred: "Julia Cody or daughter Bridget Bolin," In re Bolin, 136 N. Y., 177, 32 N. E., 626; "August Grote and wife Edvina or either," *Schich* v. *Grote,* 42 N. J. Eq., 352, 7 Atl., 852; "Lawrence McDonald, Sarah McDonald and the survivor, subject to the order of either," *Dougherty* v. *Moore,* 71 Md., 248, 18 Atl., 35; "A or B, either to draw," *Schippen* v. *Kempkes,* N. J. Eq., (1907) 12 L. R. A. N. S., 355; *Skillman* v. *Wiegand,* 54 N. J. Eq., 198.

On the other hand, if the husband by this entry intended to make a gift that should take effect at his decease, such a testamentary disposition would be void under the statute of wills.

This principle is so firmly established that it needs no discussion. *Burns* v. *Burns,* 132 Mich., 441, 93 N. W., 1077; *Whalen* v. *Mulholland,* 89 Md., 199; *Nutt v. Morse,* 142 Mass., 1; *Drew* v. *Hagerty,* 81 Maine, 231; *Norway Bank* v. *Merriam,* 88 Maine, 146; *Bath Savings Institution* v. *Fogg,* 101 Maine, 188.

It is therefore the opinion of the court that the defendant has not produced evidence sufficient to divest Fred E. Savage of the title to the deposit in the Gardiner Savings Institution at the time of his decease.

The justice at nisi prius gave judgment for the plaintiff in the sum of $2,400.46 with interest from date of the writ. This sum was evidently made up by adding to the principal, $1,876.98, the dividends thereon declared by the banks. The plaintiff claims that as the wife treated the fund as her own, her estate should be charged at the rate of six per cent, making a total of $2,740.07 with interest from date of the writ. But the plaintiff did not except

to the finding, and if he had, such a charge would not be equitable under the circumstances of this case. On the other hand, the defendant claims that the amount is too large and that in any event the plaintiff, as administrator of the husband's estate, should recover in this action only two-thirds of the amount due, because the wife would have been entitled to one-third of her husband's estate, which would now belong to the defendant as her administrator. We think, however, that the amount found by the court, is correct, and that the judgment should be for the full amount and not for a fractional part, the distribution between the estates being a matter for the Probate Court and not for this court.

Exceptions overruled.

JOHN F. PROCTOR *vs.* FRED E. LIBBY et al.

Cumberland. Opinion December 20, 1912.

Adjoining owners. Adverse possession. "Clapp lines." Conventional line. "Deed lines." Deed. Description. Estoppel. Fence. Monuments. Muniments of title. Records.

This is an action of trespass quare clausum, the tract in question being a triangular lot about five feet wide at the base with side lines about twenty-seven feet long, situated between Free street and Congress street in the city of Portland, and in rear of Congress street stores.

The parties are adjoining owners, and the issue is the true line between their respective lots.

It is conceded that the record line between the lots is the line as claimed by the defendants, but the plaintiff relied for his title, first, upon a line established by agreement and by estoppel, and second, upon adverse possession.

Held:

1. That it is well settled that when a line is located and marked upon the face of the earth by the parties, and thereafterwards the line thus established is recognized and treated by them as the true line, it is conclusive

upon the parties and their assigns, although it is subsequently ascertained that this so-called conventional line varies from the one given in the deeds.

2. That the establishment of this conventional line by the parties was a question of fact for the jury.

3. That the claim of the plaintiff that the defendants were estopped from denying that the fence was on the true line because of an alleged statement to that effect made to the plaintiff by the defendants' predecessor in title at some time prior to the plaintiff's purchase also rests upon the question of fact whether such a statement was made. This also was for the jury to determine, and the evidence of the conversation comes from a deeply interested party and was uncorroborated. Muniments of title are not to be lightly set aside, and testimony to overcome a record title should be full, clear and convincing.

4. That the evidence of open, notorious, exclusive, uninterrupted and adverse possession for more than twenty years was not so strong as to require the court to set aside a verdict to the contrary.

On motion by plaintiff. Overruled.

This is an action of trespass quare clausum against Fred E. Libby and Sarah A. Libby for wilfully breaking and entering the plaintiff's close, described as a certain lot of land with buildings thereon, situated on the northerly side of Free street in Portland, and erecting a wall and a portion of a brick building on said premises, etc. Plea, general issue and brief statement as follows: And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendants further say; that the defendants deny that the plaintiff at the time of bringing of said suit had the possession of the premises described in his writ as against these defendants and they also deny that the plaintiff had any title; that the premises described in the writ and declaration of the plaintiff are not the property of said plaintiff, but are now and were at the date of plaintiff's writ and prior thereto, the property and freehold of the said defendants. The jury returned a verdict for the defendants and the plaintiff filed a general motion for a new trial.

The case is stated in the opinion.

Symonds, Snow, Cook & Hutchinson, for plaintiff.

Wilbur C. Whelden, and Foster & Foster, for defendants.

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

CORNISH, J. This is an action of trespass quare clausum, the tract in question being a triangular lot about five feet wide at the base with side lines about twenty-seven feet long, situated between Free street and Congress street in the city of Portland and in rear of Congress street stores. The jury having found for the defendants, the case is before the Law Court on plaintiff's motion for a new trial.

The parties are adjoining owners and the issue is the true line between their respective lots.

So far as the record title goes, the deeds introduced by the plaintiff, beginning in 1886, and those by the defendant, beginning in 1866, show conclusively that a line run according to their calls would leave the triangle as a part of the defendants' land. The plaintiff's surveyor testified unequivocally that from an examination of all the deeds he found that the line as claimed by the defendants, the "Clapp line," so called, was the "deed line" between the two properties.

This "Clapp line," after running several courses, passes "thence northeasterly by said McCarthy's land twenty-six feet to land now or formerly belonging to George H. Cushman; thence southeasterly by the line of said Cushman's land and line of land belonging to C. D. Livermore to said Free Street." This is the description in all the deeds, and it is this last call, "Line of land belonging to C. D. Livermore" over which the controversy arises, the defendants having succeeded to the land that C. D. Livermore formerly owned.

The record line being in the defendants' favor, the plaintiff relies for his title:

First, upon a line established by agreement, and by estoppel;

Second, upon adverse possession.

We will briefly consider these in their order, without entering upon a discussion of the evidence with too great detail.

The propositions of law involved are not seriously in controversy, and the only issues before this court are those of fact.

1. A line established by agreement and by estoppel.

The plaintiff claims that when a line is located and marked upon the face of the earth by the parties, and thereafterwards the line thus established is recognized and treated by them as the true line, it is conclusive upon the parties and their assigns, although it be subsequently ascertained that it varies from the one given in the deed. This is sometimes termed a conventional line and the plaintiff's contention as to the recognition of the validity of such a line in law is sound. *Hathaway* v. *Evans,* 108 Mass., 267; *Orr* v. *Hadley,* 36 N. H., 578; *Davis* v. *Judge,* 46 Vt., 655; *Knowles* v. *Toothaker,* 58 Maine, 172. In these cases, however, the parties by uncontradicted agreement and by positive acts such as running the line, establishing monuments, building a fence, and subsequent occupancy up to the conventional line and no further, left no room for doubt as to their intention, and the law simply enforced that intention. The defendants claim that the weakness of the plaintiff's evidence on this point is the absence of both the agreement and acts in furtherance of such agreement.

It is true that for more than thirty years a fence had existed on what the plaintiff claims to be the agreed line, extending back from Free Street, to the corner of a building on the Livermore lot, and that the side of the building formed a continuation of the line for some distance along the easterly side line of the triangular lot in question, the balance of that line being unfenced. This was undoubtedly an apparent boundary line so far as it went, but it was for the jury to say under all the facts of the case how much weight the existence of the fence, on what was admittedly not the true record line, had as to its constituting a line actually agreed upon by the parties. The existence of a fence on a wrong line is not conclusive proof that it stands upon an agreed line.

In addition to this, the plaintiff testified that prior to his purchasing the property, one Glazier, the trustee of the Clapp estate, pointed out this fence as the true boundary and that on another occasion, but also prior to his purchase, Mr. Livermore, a predecessor in title to the defendants, "came out of his house on his own land, came along to his fence and said that was the fence line, that was the line he bought his property by," and "claimed the fence line was his property line."

Here, again, it was for the jury to determine whether these conversations actually took place. The evidence is uncorroborated. It comes from a deeply interested party. Glazier and Livermore are both dead. While this testimony might in the first instance have great weight with the court, we are not of the opinion that its rejection by the jury was manifestly wrong. Muniments of title are not to be lightly set aside, and testimony to overcome a record line should be full, clear and convincing, and should be scanned with care and caution. It nowhere appears by whom, or under what conditions or for what purpose the fence was built; no agreement between owners is proved, simply the inference to be drawn from the maintenance of the fence itself.

If the old fence marked the true line, then a small triangle on Free street was taken from the plaintiff's lot and given to the defendants, because the deed line and the fence line intersected. This triangle, however, the defendants do not claim.

Again, the projection of the fence line toward the rear of the stores on the north would create a jog and call for three courses instead of one in all deeds subsequent to the making of the conventional line, and instead of reading "thence southeasterly by the line of said Cushman's land and line of land belonging to C. D. Livermore to Free street," they should have read "thence southeasterly by the line of said Cushman's land; thence easterly by the line of said Cushman's land; and thence southerly by line of the land of C. D. Livermore to Free street." Yet the original description was followed in all subsequent deeds, and the alleged conventional line was never recognized in them.

In this connection, the plaintiff claims that the defendants are estopped from denying the fence line because of the conversation between Livermore and himself already recited, which took place prior to the plaintiff's purchase and on the strength of which he claims to have made his purchase, and he relies upon *Louks* v. *Kenniston,* 50 Vt., 115, as conclusive upon this point.

The legal doctrine of estoppel in pais has been recognized and fully discussed in many cases in this court, and needs no further elaboration. *Martin* v. *Maine Central R. R. Co.,* 83 Maine, 100; *Rogers* v. *Street Ry.,* 100 Maine, 86; *Stubbs* v. *F. & M. Ry. Co.,*

101 Maine, 355. The crucial question usually is, do the facts warrant the application of the principle?

In *Louks* v. *Kenniston,* supra, so confidently relied upon by the plaintiff, the defendant, who owned land adjoining land that plaintiff was about to buy, told the plaintiff that a certain fence was on the true boundary line, and the plaintiff relying upon this statement bought the land. The court held that the defendant was estopped to deny that the fence was on the true line.

That decision is undoubtedly sound, but it should be noted that in that case the suit was between the very parties who had held the conversation. The defendant whose statement was relied upon was still living and in court. He was the person estopped, not a remote grantee from him, and it might perhaps well be doubted whether such remote grantee, who is a bona fide purchaser for value and without notice, but relies upon the record title, would be also estopped.

Passing this point however, without deciding it, it should be observed in the second place that there was no doubt about the representation having been made in the Vermont case. That fact was conceded. While in the case at bar, as has been said before, the only evidence of that fact comes from the plaintiff himself. The credibility of his statement was for the jury and their finding on that issue we are not disposed to set aside.

So far then as the conventional line or line by estoppel is concerned, we cannot say that the verdict is glaringly wrong.

2. Adverse possession.

The plaintiff's evidence on this branch of the case is even less strong than on the other. Open, notorious, exclusive, uninterrupted and adverse possession for more than twenty years was not made out. While the plaintiff and his predecessors in title had made use of the disputed tract, so had the defendants and their predecessors, and also outside parties, as this was used more or less as a thoroughfare for people having occasion to go from Free street to the rear of stores on Congress street.

The plaintiff claims to have received rent during the past ten years for a portion of the lot; but, if so, it is not shown that the owners of the defendants' lot ever had any knowledge of the fact.

The sides of the triangle were never fenced and a fence placed across the base about eight years after the plaintiff took title in himself was torn down by the defendants. It is significant also that the plaintiff erected a small building on his premises close to this triangle, but not over the line.

Many other facts and claims on the one side and the other might be referred to, but it is unnecessary. It is sufficient to say that a critical study of all the testimony has failed to convince us that the jury, in deciding that the plaintiff had not gained title by adverse possession, were controlled by bias or prejudice, or that they failed to comprehend the issues involved.

The case was carefully tried on both sides, the legal principles were fully stated to the jury in a charge to which no exceptions were taken. Only questions of fact are before us, and on these the evidence is conflicting. While the issue is not free from doubt, yet in view of the fact that the record title is in the defendants, the verdict in their favor upon the claims presented is not so manifestly wrong that it should be set aside.

Motion overruled.

INHABITANTS OF BAYVILLE VILLAGE CORPORATION

vs.

INHABITANTS OF BOOTHBAY HARBOR.

Lincoln. Opinion December 20, 1912.

Apportionment. Assessment. Distribution. Demurrer. Equality. Improvements. Municipality. Policy. Private and Special Laws, 1911, Chapter 227. Taxation.

The issue raised by the defendant's demurrer is to Section 5 of Chapter 227 of the Private and Special Laws of 1911, which provide for the distribution of the taxes when assessed and collected and is as follows: "The town of Boothbay Harbor shall annually pay over to the Treasurer of said Corporation, out of the taxes collected from the inhabitants and estates within the territory of the Bayville Village Corporation aforesaid, a sum equal to sixty per centum of all of the town taxes, exclusive of the State and county tax, collected from said inhabitants and estates."

Held: 1. That inequality of assessment of taxes is necessarily fatal; inequality of distribution is not, provided the purposes be the public welfare.

2. The method of distribution of the proceeds of such a tax rests in the wise discretion and sound judgment of the Legislature.

3. If this discretion is unwisely exercised, the remedy is with the people and not with the court.

On exceptions by the defendant. Exceptions overruled.

This is an action on the case to recover of the defendant town a sum equivalent to sixty per centum of the taxes levied and collected by the defendant Corporation for the year 1911, from the inhabitants and estates of that part of Boothbay Harbor incorporated under the name of Bayville Village Corporation, as authorized by Chapter 227 of the Private and Special Laws of 1911. The defendant filed a general demurrer, which was overruled by the Justice presiding and the defendant excepted.

The case is stated in the opinion.

Clement F. Robinson, and George W. Heselton, for plaintiff.

James B. Perkins, and Heath & Andrews, for defendants.

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

SPEAR, J. This is an action based upon Chap. 227 of the Private and Special Laws of 1911, in which the plaintiff seeks to recover of the defendant a sum equivalent to sixty per cent of the taxes levied and collected by the defendant corporation for the year 1911. The defendant filed a general demurrer which raises the decisive questions of law.

Bayville is a seaside resort in the town of Boothbay Harbor occupied by summer residents who desire the enjoyment of certain advantages adapted to their own special comfort, for which they are amply able to pay, and for which it would be inequitable and unjust to tax the residents in other parts of the town, to whom the improvements desired would be of no particular benefit. In accordance with the long and well settled policy of this State, these residents, in order to secure the enjoyment of these privileges sought a charter, which the Legislature in its discretion granted, incorporating a portion of the town of Boothbay, within certain described limits into a special municipality, called the Bayville Village Corporation. The charter also prescribes the rights and duties of the corporation, its financial relation to the rest of the town, and declares the administrative rules and regulations by which the taxes shall be apportioned and assessed, collected and distributed.

The defendant raised no question of the propriety of the administrative policy for the regulation and adjustment of the municipal and corporate relations. Nor under the well settled law in this State is it easy to perceive how any well grounded objections could be suggested.

The issue which the defendant raised under their demurrer is to that section of the special act which provides for the distribution of the taxes when assessed and collected in accordance with the machinery provided in the act. Section 5 reads: "The town of

Boothbay Harbor shall annually pay over to the treasurer of said corporation out of the taxes collected from the inhabitants and estates within the territory of the Bayville Village Corporation, aforesaid, a sum equal to sixty per centum of all of the town taxes exclusive of the state and county tax, collected from said inhabitants and estates." The objection raised to this section is not that the town of Boothbay Harbor is required to pay to the corporation 60 per cent, but that it is authorized to expend for its own purposes the other forty per cent, a provision which it is contended violates that clause of our Constitution which says that "all taxes upon real estate and personal property assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof." In order to determine the precise application of this contention, it becomes necessary to ascertain the manner in which the tax is apportioned and assessed, from the proceeds of which sixty per cent is to be returned to the village corporation and forty per cent retained for general town purposes. By reading Section 11, it will be seen that this assessment is made by Boothbay Harbor upon all of the property of the town, including Bayville, precisely as if no corporation existed. The valuation and the rate are uniform upon all property. The levy for corporation purposes is immaterial to the issue here raised. It accordingly appears that the apportionment and assessment of the tax is in perfect harmony with the constitutional requirements. This proposition is not, as we understand it, controverted by the defendants. But they contend, notwithstanding this may be true, that the provision for the distribution of the proceeds of the assessment, whereby the town is authorized to retain forty per cent, must result in unequal taxation, and comes within the ban of the constitutional provision. This raises the question: Of what does the inequality consist? Is it in the apportionment and assessment of the taxes? If so, the plaintiff must fail. If in the distribution of the proceeds of the tax, then the plaintiff should prevail. It already appears that the apportionment and assessment of the tax, from the proceeds of which 60 per cent were to be paid to Bayville and 40 per cent retained by the town, were in accord with the constitutional provision requiring that all taxes shall be assessed equally and according to the just

value of the property upon which they are imposed. There was consequently no inequality in the apportionment and assessment of the taxes under the act in question. The only question remaining, therefore, is whether the distribution of the proceeds of the tax thus raised must be made with that strict equality required in the assessment. It is evident from a casual view, if such equality were demanded, that no distribution of the proceeds of a tax could ever be constitutionally made. But we think this question has been fully settled in the recent opinion of *Sawyer* v. *Gilmore,* not yet published, but found in 83 Atl., page 673. This was a bill in equity brought to enjoin the Treasurer of State and his successors in office from collecting a tax assessed under the provision of Chap. 177 of the Public Laws of 1909. The question raised was that this act provided for an unequal distribution of the taxes levied and was consequently a violation of the same constitutional provision invoked by the defendants in the case at bar. In this case the precise issue under consideration was raised, the court stating it as follows: "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." As four subdivisions of the State were made to contribute to this fund and only three were permitted to share in the financial benefit, it is clearly a case of unequal distribution. The court, nevertheless, say: "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."

Another objection was raised, that the method of distribution was unconstitutional because it was made not according to the number of scholars, as in the school mill fund, but one-third according to the number of scholars and two-thirds according to valua-

tion, thus benefiting the cities, and richer towns more than the poorer. Upon the assumption that this method of distribution worked an inequality, the court say: "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 distribution of 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." With reference to the general authority of the Legislature, the court in this case further say: "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. . . . It follows, therefore, that a legislative act is to be held constitutional unless a positive restriction or limitation or prohibition is found in the Constitution which renders it invalid." In support of the defendant's contention has been cited *Brewer Brick Co.* v. *Brewer,* 62 Maine, 62, and *Dyer* v. *Farmington Village Corporation,* 70 Maine, 515. The first case involved an exemption of property from taxation, which was clearly a violation of the constitutional provision that all property taxed, etc., shall be apportioned and assessed equally. It requires no further comment to show that the omission to tax certain property is not taxing all property. The latter case, as stated by the court, was one in which "five lots of land may be burdened with a tax from which the remainder of the real estate of the town is exempt," which is also so evident an unequality of assessment as to require no comment. These cases, therefore, cannot be regarded as precedents for a decision in the case at bar.

The court in the Sawyer case said: "Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare." It remains, therefore, to consider whether the act in question comes within the public welfare clause of the Constitution which commands: "That the Legislature shall make and establish all reasonable laws and regulations for the defense and benefit of the people." As has already been seen, legis-

lative powers are not measured by grants, but by limitations. The Legislature represents the sovereign power of the people and is, therefore, limited in the exercise of sumpreme authority, only by the inhibition of the Constitution. The Legislature has a large discretion with reference to its control of municipalities. Municipal corporations are but instruments of government created for political purposes and subject to legislative control. Cooley says: "They are created for convenience, expediency and economy in government, and, in their public capacity, are and must be at all times subject to the control of the State which has imparted to them life, and may at any time deprive them of it." In fact the decisions are so numerous and uniform, conceding the power of the Legislature in its dominion over municipal corporations, including counties and towns, that citations are unnecessary. It may be well, however, to refer to the leading case of *Waterville* v. *County Commissioners,* 59 Maine, 80, and the opinion of a minority of the Justices in 99 Maine, 526, where many of the authorities are collated. These cases tend to illustrate the power of the Legislature in directing the expenditure of moneys, received from taxation, for public purposes.

The question, therefore, recurs whether the special act under consideration was reasonable and beneficial to the community affected. The natural advantages of the coast of Maine offer flattering inducements to non-residents, seeking recreation and rest, to establish permanent summer homes within the State. It has become a matter of common knowledge and statistics, that no factor, in the progress of our social and financial interests, has contributed more to our general prosperity than our summer resorts and game preserves. The people who come here are usually segregated in isolated communities. They often select unimproved lands. Out of waste places they create millions of dollars of taxable property. The increment upon these lands is taxed to its full value, under the law, although they may occupy it but a fraction of the year. The numerous islands along our coast are conspicuous examples of this development and creation of taxable property. It is not infrequent that the tax imposed upon a summer community, and occupying but a small section of a town, exceeds the assessment upon all the

rest of the estates. They demand and are entitled to vast improvements which the municipalities are unable to furnish. In justice and in equity, these communities are entitled to receive back, for the establishment and maintenance of their own public utilities, a part at least, of the money they have paid in taxes. This end is precisely what the act under consideration was calculated to attain.

The Legislature has exercised its discretion as to the amount which, in this particular case, should be paid back, making it a fixed amount, instead of leaving it to the discretion of the selectmen to determine the amount, which might be entirely inadequate, or even nothing.

It may accordingly well be said that the enactment of laws tending to encourage the growth of this kind of enterprise, is both reasonable and beneficial. Upon a careful investigation of the authorities, therefore, we are of the opinion that the act comes within the public welfare clause of the Constitution. Our conclusion is that the demurrer should have been overruled.

Exceptions overruled.

SAMUEL SEIGER *vs.* DAVID GERBER.

DAVID GERBER *vs.* SAMUEL SEIGER.

Cumberland. Opinion December 20, 1912.

Abandonment. Consent. Conveyance. Covenant. Consideration. Compensation. Estoppel. Eviction. Quiet Enjoyment. Privilege. Rental. Sale. Waiver.

The plaintiff, Seiger, leased from the defendant, Gerber, by written lease dated December 18, 1909, the entire building situated at No. 2 Portland Pier in Portland, in Cumberland County, with the exception of the fruit store at the corner of said building for the term of four years from the first day of January, 1910. The rental was $330 per year, payable $25.50

monthly in advance; lessor to pay taxes, water rates and do outside repairing and lessee to do inside repairing. The lessee occupied the premises and paid the rent until January 9, 1912, when he abandoned the premises. The reason given for such abandonment was that on November 20, 1911, the lessor, without the lessee's consent, sold to the adjoining proprietor the privilege of attaching a structure to one side and one end of the leased building, thereby shutting out the light and thus constituting a breach of the covenant for quiet enjoyment, and operated as an eviction. The defendant claimed and introduced proof that the sale aforesaid was with the knowledge and consent of the lessee, and that whatever rights the plaintiff had were waived.

Held: That upon all the evidence both waived and estoppel on the part of the plaintiff are established.

On motion and exceptions by defendant David Gerber. Sustained.

This is an action to recover damages for breach of covenant for quiet enjoyment of certain premises described in written lease given by said David Gerber to said Samuel Seiger dated December 18, 1909, of the whole building, situated at Number 2, Portland Pier, in Portland, Cumberland County, excepting the fruit store at the corner of said building, to have and to hold for four years from January 1, 1910. The plaintiff claims that on the 20th day of November, 1911, the lessor David Gerber, sold and conveyed in writing, without his consent, to an adjoining proprietor, the privilege of attaching a structure to one side and one end of the leased building, which shut out the light from his premises and rendered them useless and operated as an eviction. The plea was the general issue with brief statement denying the breach of covenant for quiet enjoyment; that he never made any covenant for quiet enjoyment. That the erection of the adjoining building that shut out the light of plaintiff's premises was done with the knowledge, consent and advice of the plaintiff, and that whatever rights he had were waived for a good and sufficient consideration. The jury returned a verdict for the plaintiff for $250. The defendant filed a motion for a new trial.

The case is stated in the opinion.

This is an action between the same parties in *Seiger* v. *Gerber* to recover for one month's rent of the premises described in *Seiger*

v. *Gerber,* from January 1, 1912, in the sum of $27.50, heard in connection with the action between *Seiger* v. *Gerber.* Plea the general issue with brief statement in substance that before said rent became due and before this suit, the plaintiff against the will and consent of the defendant wrongfully entered the premises and ejected and expelled the defendant from possession and kept him out of possession. The jury returned a verdict for the defendant and the plaintiff filed general motion for a new trial, and the following is the mandate of the court in said case.

This case was tried in connection with the action of *Samuel Seiger* v. *David Gerber.* Upon the conclusion Seiger was not evicted from the premises rented to him by Gerber, we see no reason why Gerber should not recover the rent for which he brought suit. There seems to be no defense except that of eviction, based upon a breach of covenant. The verdict, therefore, in this case should be set aside and a new trial granted.

Verdict set aside. New trial granted.

Clifford E. McLaughlin, for David Gerber.

Augustus F. Moulton, for Samuel Seiger.

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

SPEAR, J. This case comes before the Law Court upon exceptions and motion for a new trial by defendant after verdict of the jury against him.

The case submitted to the jury under instructions from the court, as appears from the plaintiff's declaration and defendant's pleadings, is briefly as follows: The plaintiff, Seiger, leased from the defendant, Gerber, by written lease in the usual form, dated December 18, 1909 "the following described premises, to wit: the entire building situated at No. 2 Portland Pier in said city, county and State, with the exception of the fruit store at the corner of said building." The term of the lease was four years from the first day of January, 1910. The rental was $330 per year, payable $25.50 monthly in advance. Lessor to pay taxes and water rates and do outside repairing and lessee to do inside repairing.

The lessee, Seiger, who was already occupying the premises, continued his occupancy after January 1, 1910, under the lease, making due payment of rent and complying with the terms of the lease until January 9, 1912, when he abandoned the premises. The reason given for such abandonment was that the lessor, Gerber, had, November 20, 1911, by conveyance in writing, without the lessee's consent, sold to the adjoining proprietor the privilege of attaching a structure to one side and one end of the leased building. Upon this state of facts the plaintiff contends that from the language of his lease was implied a covenant for quiet enjoyment and that the sale of the right to the adjoining proprietor to attach a structure to the side and end of his leasehold amounted to a breach of his convenant, in that such structure shut out the light from his premises, and rendered them useless, and operated as an eviction.

The defendant, Gerber, pleaded the general issue with brief statement admitting the erection of the adjoining building and that it shut out the light of the plaintiff's quiet enjoyment, but denied that any covenant had been broken, and alleged that the plaintiff consented to the erection of the building that shut out the plaintiff's light, and further that whatever rights the plaintiff had were waived for the consideration that Gerber in his conveyance of the said wall rights to the proprietors of Portland Pier had procured for Seiger the right to continue to rent from them for two years the lower floor of another adjacent building, this being the same floor then occupied by Seiger as tenant at will for a place of storage.

It is the opinion of the court that upon the question of waiver and estoppel the defendant's contention must prevail. The plaintiff's admission, that he was present at Booth's office when $300, the amount which the proprietors of the attaching structure were to pay, and that he, himself, told Gerber, through Booth, of this offer together with the positive testimony of Gerber and the convincing testimony of Booth, that the plaintiff consented to Gerber's taking the $300 and even urged it, constitutes a degree of evidence so overwhelming that we cannot avoid the conclusion that the plaintiff, when he denies that he consented to Gerber making the lease for $300, was mistaken. We should put but little stress upon Gerber's testimony alone as against that of the plaintiff but the

circumstances, under which Mr. Booth's knowledge was obtained, touching what was said and done in this transaction, were such that he could scarcely fail to perfectly understand and comprehend them. He was in his office. Both Seiger and Gerber were there. Gerber says he brought Seiger to talk with Booth, because he could not talk English much. This question was under discussion. Booth was telephoning Baxter with regard to what he would pay for the right of attaching the proposed building. He communicated to Seiger, and through Seiger to Gerber, the amount which Baxter offered, and Seiger admits it. Booth further says that the building had been started and that, previous to this occasion, both these parties had been to the proposed location to determine where it was about to be erected, and discovered that it was going to be put up close to the wall of the Gerber block and would as completely shut out the light as if the timbers attached. He also advised them that "they might as well sell the wall rights because they were as badly off any how;" that Seiger agreed with him, and spoke to Gerber about it; that Seiger appeared to be urging him to accept the proposition; that they discussed the matter back and forth for a long time; that Gerber held off for a long time, but finally consented. Then follows this positive testimony of Mr. Booth: Q. After the offer was finally made by Baxter and the matter was explained, did he thereafter make any objection at all? A. No. Q. Did he acquiesce? A. I understand he did. Q. Did he even advise Mr. Gerber to? A. He certainly advised him to. Yes. Q. To accept the Baxter proposition? A. Yes. It also appears that as a compensation for the shed at the end of the building occupied by the plaintiff, Gerber procured the right for Seiger to use and occupy the ground floor of the new building to be erected on the easterly end of the Gerber building at a rental of $2.00 per month for the remaining term of the lease from Gerber to Seiger.

Upon all the evidence it is the opinion of the court that proof of both waiver and estoppel on the part of the plaintiff was ample to establish the defendant's contention upon these issues. *Libby* v. *Haley,* 91 Maine, 333; *Rodgers* v. *Street Railway,* 100 Maine, 90.

Motion sustained.

A. J. TOLMAN *vs.* GUY CARLETON.

Knox. Opinion December 20, 1912.

Annexation. Attachment. Chattels. Conversion. Demand. Landlord and Tenant. Officer's return. Personal Property. Possession. Recording. Removal of property attached. Revised Statutes, Chapter 83, Section 27. Trover. Vendor and Vendee.

1. Lathes, a drill press, and a hand milling machine in a shop, bolted to the main shaft, and part of them bolted in the floor, are all attachable as personal property.
2. An attachment of a machine weighing 1200 pounds, of two others weighing 800 pounds each, of another weighing 400 pounds, and of another weighing 100, all in a shop, belted to the main shaft, the three heavier ones not fastened to the floor, and the others bolted to the floor, held, to be well preserved by filing copy of return in the town clerk's office.

On report. Action to stand for trial.

This is an action of trover to recover damages for the conversion of personal property attached by the plaintiff, as sheriff, of the County of Knox, on a writ, in the suit of *Gustaf A. Anderson* v. *Eastern Coupling Company*. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court with the stipulation that if the action is maintainable upon the evidence, the action is to stand for trial; otherwise, a nonsuit is to be entered.

Reuel Robinson, and M. T. Crawford, for plaintiff.

Montgomery & Emery, for defendant.

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

SAVAGE, J. Trover for the conversion of personal property attached by the plaintiff, as sheriff. The case comes up on report, with the stipulation that if the action is maintainable upon the evi-

dence, the action is to stand for trial; otherwise, a nonsuit is to be entered.

The evidence warrants a finding of the following facts. On a writ against the Eastern Coupling Company the plaintiff attached three lathes, a drill press, and a hand milling machine, all of which were then in the shop of the Eastern Coupling Company at Camden. Instead of removing these machines, or otherwise retaining physical possession of them, he filed within the town clerk's office, within five days, an attested copy of his return. He claimed the right to do so under R. S., Chap. 83, Sect. 27, which provides that "when any personal property is attached which by reason of its bulk or other special cause cannot be immediately removed, the officer may within five days thereafter, file in the office of the clerk of the town an attested copy of so much of his return on the writ as relates to the attachment, . . . and said attachment is as effectual and valid, as if the property had remained in his possession and custody."

One of the machines weighed 1200 pounds, two others 800 pounds each, one 400 pounds, and one 100 pounds. They were all belted to the main shaft. The three heavier ones were not fastened to the floor. The other two were bolted to the floor to keep them "steady." There were two entrances to the shop, through one of which the machines could have been removed only with great difficulty, perhaps not at all. Through the other, they could have been removed, and were in fact removed later, the heaviest one being taken apart. The plaintiff did not know of the existence of the latter entrance.

The defendant was the manager of the Eastern Coupling Company. He was not present at the time the attachment was made. There is no evidence that he knew of the attachment, unless knowledge may be inferred from the circumstances. Afterwards, and before judgment in the action against the Coupling Company, the defendant caused the machines to be removed to his own shop in Rockport, and to be used there by his own employees. After judgment and issue of execution, the plaintiff demanded the machines of the defendant, and gave him a copy of the original return. The result of the demand is shown by the following excerpt from the plaintiff's own testimony: Q. "And as a result of that demand

did you get the machinery?" Ans. "I did not." Q. "Whether or not he would give it to you?" Ans. "He did not." This is all the evidence there is on that point. The demand was made at the defendant's "home" in Rockport. The machines were then in his "shop, back of his residence."

The defence is three fold, first, that the machines were a part of the realty, and not attachable as personal property; secondly, if the machines were personal property, that the plaintiff did not retain possession of them, and so lost the attachment; and lastly, that the evidence does not show any conversion by the defendant.

1. We think the first point clearly is not tenable. None of the cases cited by the defendant apply to the facts of this case. They are all cases of annexations made by the owner of the fee, and the controversies were between vendor and vendee, or attaching creditor and the owner of the fee attached, or on partition proceedings. It is well settled that an article may constitute a part of the realty, as between vendor and vendee, or owner of the realty and attaching creditor, mortgagor and mortgagee, which would not under similar conditions and circumstances be so treated as between landlord and tenant. *Parsons* v. *Copeland,* 38 Maine, 537; *Young* v. *Hatch,* 99 Maine, 465; *Young* v. *Chandler,* 102 Maine, 251. It was conceded at the argument of this case that the Eastern Coupling Company was not the owner of the building in which the machines were, but was merely a tenant. So the rule to be applied in this case is that of landlord and tenant. That rule was very clearly stated in the recent case of *Hayford* v. *Wentworth,* 97 Maine, 347. As between landlord and tenant, a chattel does not merge into the realty unless there is physical annexation, at least by juxtaposition, and an adaptability for use with the realty to which it is annexed, and an intention of the party annexing it to make it a permanent accession. And the burden is on him who claims a merger. There is a very strong presumption that a tenant, when he installs a removable machine in the shop which he has hired, does not intend to make it permanently a part of the real estate. And that presumption warrants a finding in this case that the machines attached were not a part of the realty, but were attachable as the personal property of the tenant.

2. It is true that an attachment of personal property is dissolved unless the attaching officer retains possession of the property attached. And in this case the plaintiff did not retain actual physical possession. But the statute quoted above permits the filing of a copy of the officer's return in the town clerk's office as a substitute for retention of possession, when the property attached cannot be immediately removed by reason of bulk or other special cause. *Perry* v. *Griefen,* 99 Maine, 420. The plaintiff here filed a copy of his return. The only point made is that there was no reason, for bulk or otherwise, why the machines could not have been immediately removed, and, therefore, that the officer was not justified in filing the copy as a substitute for possession.

The statute furnishes no standard. The nature of the property, its situation and expense of removal, are to be considered. The officer is left to use his judgment. His judgment is not conclusive. *Thompson* v. *Baker,* 74 Maine, 48. Still, his decision fairly exercised is entitled to some weight. Attachments have been upheld where copies of return were filed in case of hay in mow. *Wentworth* v. *Sawyer,* 76 Maine, 434; of logs, *Parker* v. *Williams,* 77 Maine, 418; *Stevens* v. *Thatcher,* 91 Maine, 70; of a wooden building, *Lewiston Steam Mill Co.* v. *Foss,* 81 Maine, 593; of bark, *Grant* v. *Albee,* 89 Maine, 299; of a temporary track and sleepers, *Fifield* v. *Maine Central R. R. Co.,* 62 Maine, 77; of charcoal and cordwood, *Reed* v. *Howard,* 2 Metcalf, 36; of pig iron, *Scovill* v. *Root,* 10 All., 414. In the latter case the court construing a statute like our own, said: "If the statute applies to such property as cordwood and charcoal piled up, millstones, logs, timber and wood, hewn stones and hay in a barn, the court cannot judicially see that it does not apply to fifty tons of pig iron stored in a foundry." And we are led to say that we cannot see why it does not apply to machines of the bulk and weight of those under consideration, and situated as they were. The statute does not mean that the property must be so bulky or so heavy that it cannot be moved at all. Hay can be moved by the pitchforkful, or by the load; wood and bark can be moved a little at a time; logs one at a time; pig iron a piece at a time. These machines could have been moved. The heaviest one might have been taken apart to facilitate removal, as was afterwards

done, when it was removed by the defendant. But we think that machines like these, and situated as those were, fairly come within the meaning of the statute.

3. The plaintiff contends that conversion by the defendant is shown by an invasion of the defendant's right, by such interference, use of, and dominion over the property, as against the plaintiff's right, as would itself be conversion. He also contends that there was a demand and refusal, which would be sufficient evidence of conversion to maintain the action on that ground.

We conclude that there was sufficient evidence to go to a jury on the question of conversion, but since the case must be tried again, it is inexpedient to discuss the effect of the evidence which is a question for the jury.

In accordance with the stipulation, the certificate will be,

Action to stand for trial.

EMMA J. CHENEY, Petitioner for Partition,

vs.

GEORGE F. CHENEY et als.

Oxford. Opinion December 20, 1912.

Descent. Dower. Inheritance. Personal Property. Partition. Real Estate. Release. Tenants in common. Waiver. Will.

1. The question presented by the petition is solely that of the rights of Emma J. Cheney in the real estate of her deceased husband, Charles J. Cheney, who died testate and in whose will no provision was made for his widow.
2. Public Laws of 1895, Chapter 157, amending Section 1, Chapter 75, Revised Statutes of 1883, which is found in Section 13, Chapter 77 of

Revised Statutes of 1903, abrogated the old rule of dower regarding the interest of a widow in the deceased husband's lands and conferred upon her an estate of inheritance instead of an interest for life.

3. The Legislature, by the act of 1907, did not intend to repeal or modify the widow's right by descent in the contingencies named nor by the use of the language employed did it do so.

4. This provision of the act of 1907, although incorporated into Section 13 of Chapter 77, Revised Statutes of 1903, relating to title by descent must be construed to mean just what the language conveys and be confined to personal estate only.

Petition for partition. Judgment for partition.

This is a petition for partition of certain real estate situated in Rumford, in the County of Oxford, by the widow of Charles J. Cheney, late of Rumford aforesaid, deceased. The real estate in question belonged to her husband, Charles J. Cheney, at the time of his death, and Emma J. Cheney claims, as the widow, to be entitled under Revised Statutes of 1903, Chapter 77, Section 13, to one undivided half part of said real estate in fee instead of for life. The respondents filed the following answer to said petition:

"And now, on this first day of said term, the said respondents, George F. Cheney, Levi M. Powers, Cora C. Adams and Etta Pierce, and by way of brief statement say; that the partition of the real estate described in said petition as prayed for ought not to be made, because they say that the said Emma J. Cheney was not, at the date of her said petition, and is not now, the owner of one undivided half part, or any other part, of the real estate described in her petition, and was not, at the date of her said petition, and is not now, a tenant in common, or joint tenant, in said real estate with the respondents. And that respondents further say that they were, at the date of said petition, and now are, the owners in fee simple of the whole of said real estate. At the conclusion of the evidence, the case was reported to the Law Court, which is to render such judgment upon so much of the foregoing evidence as is legally admissible and material as the law, the facts and the proper inferences from the facts may require.

The case is stated in the opinion.

Newell & Skelton, for the petitioner.

John P. Swasey, Aretas E. Stearns, and H. H. Hastings, for respondents.

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

SPEAR, J. This is a petition for partition brought by Emma J. Cheney of Rumford, in Oxford County, under the provisions of Chapter 90 of the Revised Statutes of Maine, to have set off to her in severalty, her alleged share of certain real estate, situated in said Rumford, and in which the said petitioner claims that she is the owner in fee, of one-half interest, held in common, undivided, and in tenancy in common with the respondents named in said petition. The basis of the petitioner's claim is that she is the widow of Charles J. Cheney, late of said Rumford.

The question presented by this petition is solely that of the rights of Emma J. Cheney in the real estate of her deceased husband, Charles J. Cheney, who died testate and in whose will no provision was made for his widow.

The matter under consideration is an enactment of the Legislature obviously intended to abrogate the old rule of dower regarding the interest of the widow in her late husband's lands, and to confer upon her an estate of inheritance instead of an estate for life.

The solution of this problem involves a construction of R. S., Chap. 77, Sec. 13, in which is found a consolidation of the previous statutes relating to this subject. It is now an established rule of construction that the intent of the Legislature is the law when such intent can be declared without doing violence to the clear and unambiguous language of the statute. With this end in view, it becomes necessary to interpret Section 13 with an effort to discover, (1) the intent of the Legislature in changing the law, and (2) if that intent is consistent with the language of the enactments calculated to accomplish the desired result.

The title of the act which initiated this legislation is found in the Public Laws of 1895, Chapter 157, and reads as follows: "An act to amend Section 1 of Chapter 75 of the Revised Statutes, (1883) relating to title by descent, and to establish the rights of widows and widowers in the real estate of deceased husbands and wives." It may here be said that only those sections of the chapter which relate to the right of widows and widowers are involved in this

case, and consequently relate solely to lands or real estate. It was, then, evidently the primary intention of the Legislature, in enacting this chapter, to change the quality of the estate to which a widow was entitled under the law of dower, from a life estate to an estate in fee, and in other respects neither to increase nor diminish the attributes of the estate. Whether the phraseology of the statute does more than this is the question.

R. S., 1883, Chapter 103, provided for dower at common law. This was a right of which the widow could not be deprived by the husband by will or otherwise, except as hereinafter noted. If he made no will, she received her interest as a matter of course, upon petition. If he made a will and devised to her less than her dower interest, she could waive the devise and obtain her dower. R. S., 1883, Chapter 65, Section 5; Chapter 103, Section 10. If he made a will without provision, her right was preserved. Chap. 103, Sec. 1. Dower, then, was an absolute right unless barred or released. It was, however, but a life interest.

In 1895 the Legislature proceeded to the enactment of a statute, the sole purpose of which seems to have been to change dower from a life interest to an estate in fee. It did not pretend to affect the quantity of the estate, nor the nature of the right. Its absolute character for the protection of the widow was not intended to be disturbed, as will appear from the following analysis. Section 1, Paragraph 1, Public Laws of 1895, reads as follows: "If he leaves a widow and issue, one-third to the widow. If no issue, one-half to the widow. And if no kindred, the whole to the widow. And to the widower shall descend the same share in his wife's real estate. There shall likewise descend to the widow or widower the same share in all such real estate of which the deceased was seized during coverture, and which has not been barred or released as herein provided." The latter part of this paragraph is a substitute for the old provision for dower. It vests in the widow an absolute estate, if not barred or released, as hereinafter provided. In other words, the substitute clothes the new estate with all the attributes of dower, except the quality of the estate.

It will now be noted that the provisions for bar or release, Sections 3, 4 and 5, have adopted, in a little different phraseology, the rules of defeasance that are found in the Revised Statutes relating

to dower. Section 3 provides precisely as in case of dower: "But shall not be deprived of such right and interest by levy or sale of the real estate on execution." This would seem to prove that this new estate was to vest in the widow, precisely as dower did, as a right of which she could not be deprived, except in one of the ways mentioned as a bar or release. Section 4 provides for the waiver of a specific provision of a will, which is also identical with the right under the rule of dower. The other provisions for bar and release are immaterial to the issue here. It, therefore, appears from an analysis of the statutes of descent touching a widows' rights, that the properties and characteristics of the new estate are practically the same as those of the dower estate. All the bars and releases are identical in meaning, although changed in phraseology in condensing. This leaves the positive rights in the new estate equivalent to the positive rights in the old. Our court in *Pooler* v. *Pooler,* 95 Maine, 259, has so construed the statute, in which it is *held:* "The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes not as heir, but as widow." At this juncture, the status of the widow in relation to her inheritance in her husband's estate is precisely as it was with reference to dower. Up to this point her rights in the personal estate of her husband are not affected or even referred to.

It would appear, then, that when the statute of 1895 became a law, the only change the Legislature intended to make, or in the use of the language employed, did make, was to enlarge the interest of the widow by giving her an estate in fee instead of an estate for life. In all other respects, whether there was a will or no will, or a will with no provision for her, her interest in the lands of her husband was not affected, nor were her rights in the personal estate of her husband altered in the least, or even referred to in this act. If, therefore, this case was to be decided upon the act of 1895, no controversy could arise respecting the right of the widow to share one-half the real estate of her late husband.

But the defendants claim that the phraseology of Section 13, as consolidated in the revision of 1903, if considered, in clear and unequivocal terms confines the right of the widow, when no provision is made for her in the will, to personal estate only. But the provision which confines the right of the widow to personal estate, when no provision is made in the will, is incorporated from Chapter 221 of the Public Laws of 1897 and Chapter 160 of the Public Laws of 1903. Now in order to arrive at a proper interpretation of section 13, it becomes necessary to refer to these statutes and discover, if possible, their bearing upon the construction already given to the statute of 1895. It has been noted that the act of 1895 in no way related to the rights of the widow in the personal property of her husband's estate. The act of 1897, therefore, is not in any way an amendment of Chapter 157 of the laws of 1895, but an entirely new section having no relation to that chapter or to the subject matter of it. It pertains wholly to personal estate. The first paragraph of Section 221 is a provision that the widow may waive a bequest under the will of her husband, and upon such waiver, be entitled to the same distributive share of his personal estate, as is provided by law in intestate estates. By the second paragraph, if no provision is made in the will of the testator for his widow, she may receive the same distributive share of the personal estate of such testator as is provided by law in intestate estates, upon filing a written notice that she claims such share. Even from a casual observation, it is apparent that this section in no way did, or was intended to, effect the right of descent provided for in the act of 1895. But it is the last paragraph of this section as found in the consolidation of Section 13, Chapter 77, R. S., 1903, which the respondents invoke as limiting the right of descent, when no provision is made in the will of the husband, to personal estate only. It was undoubtedly the purpose of the Legislature in enacting this independent statute, to bring the provision for the distribution of personal property, in the two instances named, in harmony with the law governing the descent of real estate. For an examination of our statutes will show that, previous to the enactment of Chapter 221, there was no law providing that the widow, in either of these contingencies, should receive one-third or one-

half the personal property, as the case might be. Under the old statute, if there was no will, the widow received one-third or one-half, as the case might be, of the personal estate. R. S. Chapter 75, Section 9. If a will, without provision for her, she could petition for an allowance. Chapter 65, Section 21. If a will with provision for her, she could waive the provision and petition for an allowance. Chapter 65, Section 21. By Section 2 of Chapter 221 the rights above enumerated are not molested. It therefore appears that the two contingencies provided for in Section 21 of Chapter 65, R. S. are identical with the contingencies provided for in Chapter 221, laws of 1897, and that by the latter chapter, in addition to the right of an allowance, is given to the widow the absolute right to one-third or one-half of the personal property of her late husband, precisely the interest she had been allowed in his real estate. It therefore seems to be established beyond cavil that the sole intention of the Legislature in the enactment of Chapter 221 was to confer upon the widow the additional rights, in the personal estate, prescribed, and to do nothing more. At this point we think it may be said that Chapter 221, when it became a law, in no way amended or modified the provisions of the act of 1895.

The only other statute relating to this matter is Chapter 160 of the Public Laws of 1903, which is an amendment of Chapter 221, supra, that places the widower, with reference to his personal estate, in the same category with the widow, and need not be further noticed.

Our conclusion, therefore, is that upon an analysis and comparison of these various statutes the Legislature by the act of 1907 did neither intend to enact a statute repealing or modifying the widow's right by descent in the contingencies named, nor by the use of the language employed, did it do so; and that the provisions of 1897, although incorporated into a section of the statute relating to title by descent, must be construed to mean just what their language conveys and be confined to personal estate only. It will be observed also that there is nothing in the phraseology of these two provisions, as they are read in Section 13, R. S., Chapter 77, that connects them with the widow's right of inheritance.

An examination of the composition of this section confirms this view. The first part of Section 13, to the point where Section 221 is inserted, is a consolidation of Section 5 of Chapter 157 of the laws of 1895, which is but a restatement of R. S., Chapter 103, Section 10, and of Chapter 88, Public Laws of 1887 relating solely to widows' dower, and so much of Chapter 75, Public Laws of 1903, as related to the time when the election must be made; all pertaining to the rights of the widow in the real estate of her husband.

If Section 13 comprising a consolidation of these acts relating solely to the widow's right of inheritance in the real estate of her husband had been permitted to complete the section, it would have accomplished precisely what the Legislature intended to have enacted. But instead of stopping here, it adds to the end of the consolidation of these acts, verbatim, Chapter 221, relating to the widow's additional rights in the personal estate of her husband, created by this act, with so much of the act of 1903 as relates to the time when waiver of petition must be filed. This, we think, should have been a section by itself among those provisions of the statute relating to the rights of a widow in personal estate. However that may be, the mere fact that this act was added to a consolidation of the acts relating to descent, cannot be accorded the effect of defeating the plain intent of the Legislature with regard to the former enactments.

In 1909, Public Laws, Chapter 260 the Legislature amended Section 13 by inserting the proper words and phrases to make the last paragraphs include real as well as personal estate, but by so doing simply made clear, what was left obscure in the act of combining the different statutes in one section. The amendment did not affect the interpretation of the section as it stood. It did, however, in harmony with one of the objects of Legislation, remove ambiguity and doubt.

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

Judgment for partition.

JOHN M. GOODING

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Cumberland. Opinion December 18, 1912.

Agents. Applications. Contracts. Commissions. Compensation. Custom. Insurance. Money had and received. Policies. Premiums. Referee. Renewals.

1. Assumpsit to recover commissions on renewal premiums, after two years from the date of the last service of the plaintiff to the company.
2. The continued payment of the fixed premium by a policy holder does not warrant the recovery by the agent upon a count for money had and received of a commission on such renewal premiums collected, after he ceased to be agent, in the absence of any contract of the company with the agent for the payment of such commissions.
3. When the terms of a contract are clear and unambiguous, evidence of acts of the parties claimed to be an interpretation of the contract cannot be permitted to vary such terms.
4. Custom cannot be taken into account when the contract is express, clear and unambiguous.
5. In the absence of express stipulations to the contrary, the agent of a life insurance company is not entitled to commissions on renewal premiums paid to the company after the termination of the agency.

On report. Judgment for defendant with costs of reference taxed at $20.40 and cost of court to be taxed by the clerk.

This is an action of assumpsit to recover commissions on renewal premiums collected by the defendant from policy holders obtained for the company by the plaintiff while in the employ of the company as general or sub-agent. The claim is only for commissions on renewal premiums collected after the expiration of two years from the date of the last service of plaintiff to the company. The case was referred to Mr. Chief Justice Emery, who reported his findings of fact and referred to the court the question of law, whether upon

the facts reported the plaintiff is entitled to recover. The case, by agreement of the parties, was reported to the Law Court for determination upon the facts found by and the written evidence made a part of the report of the referee.

The case is stated in the opinion.

Fred V. Matthews, for plaintiff.

H. & W. J. Knowlton, for principal defendant and for George E. Smith, Trustee.

Verrill, Hale & Booth, for United States Trust Company, trustee.

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

BIRD, J. This action of assumpsit was referred to Mr. Chief Justice Emery who reported his findings of fact and referred to the court the question of law whether upon the facts reported the plaintiff is entitled to recover. The contention of the parties is clearly and succinctly set forth in the opening statement of the report of the referee.

"The plaintiff brought this action to recover commissions on the renewal premiums collected by the company from policy-holders obtained for the company by the plaintiff while in the employ of the company as general or sub-agent. The claim is only for commissions on renewal premiums collected after the expiration of two years from the date of the last service of the plaintiff to the company, he having been paid such commissions on renewals up to the end of that two years. In his declaration are two counts. In the first he claims the commissions as due under a contract to pay them. In the second he claims them as money collected by the defendant company of its policy holders which it ought in equity and good conscience to pay over to him. The company claims that all the services of the plaintiff were rendered under express contracts, by the terms of which the payment of commissions on renewal premiums was to cease at the end of two years after the expiration of the contract, if not renewed; and that it has collected no money he should receive."

The case is now before this court upon report for determination upon the facts found by and the written evidence made part of the report of the referee, the stipulation of the parties under which the reference was made, the rule of reference and the writ and pleadings.

The plaintiff's first connection with the company was in September, 1888, when he and one Merry became the general agents of the company for certain counties of the State. They were constituted such agents under a written contract signed by them as well as the company, dated September 18, 1888. "In this contract [we quote from the findings of the referee] it was stipulated that their full compensation for services and work and expenses in procuring applications and collecting and remitting the first year's premiums should be a commission on the first year's premium. It was also stipulated that they should collect and be entitled to 'collect the renewal premiums on all policies obtained by themselves and their agents under this contract during the term thereof within the limits of said agency, for which collections the said agents shall receive seven and one-half per cent of such renewal preimums while they retain such agency, but not longer, as to any policy, than the person thereby insured remains resident within the territory of said agency.' There was also in the contract this stipulation: 'In case this contract is not renewed at the end of the term upon as favorable terms regarding commissions as the said company is at that time contracting for similar agents, the said company will pay said agents two years' renewal commissions less two per cent on the premiums collected on all policies obtained under this contract and then in force within the limits of this contract, said renewal commission to be paid quarterly as premiums are paid and reported to the company. It is further agreed that in case of disability by sickness or death of either of said agents, the company will pay two years' renewal commissions less two per cent of the premiums collected on all the policies obtained under this contract and then in force within the limits of this contract, in the same manner as above mentioned.'

"There was finally this stipulation: 'It is further understood and agreed that upon the discontinuance of this contract in any way, all

interest of said agents in this contract in commissions on premiums shall revert back to the company, except as above mentioned, and upon the deferred premiums on new business unless otherwise specially agreed.'

"The above contract by its terms was to continue till September 15, 1893; but Merry having withdrawn, Gooding, the plaintiff, December 29, 1891, made a new written contract with the company by which he was appointed sole agent for the same territory, with like stipulations as to compensation and payment of commissions on renewal premiums. This contract was by its terms to continue till November 17, 1896; but on September 30, 1893, the company appointed Mr. Wright general agent for the same territory by written contract to continue till October 1, 1898, containing like stipulations as to compensation and commissions on renewals. Mr. Gooding, the plaintiff, acquiesced in this appointment, surrendered his contract, and accepted a sub-agency under Mr. Wright, under which sub-agency his service was not continuous, there being an interval when he was not acting under it nor for the company. Wright died in March, 1896, and May 12, 1896, the company appointed the plaintiff Gooding and Mr. C. C. Chapman as general agents for the same and other territory. This contract by its terms was to continue until May 1, 1897, and contained stipulations similar to those in the prior contracts as to compensation and payments of commissions on renewals.

"This last contract was not renewed at its expiration May 1, 1897, but Mr. Gooding continued for a time to act as the general agent, expecting to be reappointed under a renewal of the written contract of May 12, 1896.

"In November, 1897, however, the company appointed Mr. Blanchard general agent in the place of Mr. Gooding, by the usual written contract, but requested Mr. Blanchard to retain the services of Mr. Gooding as sub-agent under him, and so advised Mr. Gooding, who continued to work for the company with the expectation of a favorable arrangement with Mr. Blanchard, as verbally proposed. Mr. Blanchard did not take charge till January 1, 1898. Some friction or misunderstanding arose between the two, and the draft of a contract of sub-agency under Mr. Blanchard, and pre-

pared by him and submitted to Mr. Gooding, was deemed by the latter unreasonable and impracticable, and he refused to sign it. Mr. Blanchard refused to modify it, and after a little while requested Mr. Gooding to give up his keys and leave the office, which he did March 8, 1898.

"Throughout his employment Mr. Gooding's work was generally satisfactory to the company itself, the only criticisms made being that he was sometimes slow in reporting and remitting collections. The relations, however, between Mr. Blanchard and Mr. Gooding became strained, and Mr. Blanchard became convinced that Mr. Gooding would not work faithfully and efficiently under him. I do not pass upon the question whether such was the fact, as I deem is immaterial. I only find that Mr. Blanchard became convinced that such was the fact, and from his information had some reason for so believing.

"The company only dealt with its general agents, holding them responsible for their sub-agents, and leaving them free to select their sub-agents and make such contracts with them as they could agree upon.

"The company has paid Mr. Gooding the agreed commissions on renewal premiums on all the business secured by him for the company from the time of the first application obtained by him in 1888 down to the last in 1898, and for, two years after the date of the last. It continued these payments without reference to any intervals in service or between the successive contracts.

"The company, however, has refused to pay commissions on any renewals since the expiration of two years from the last service."

Considering the first count of the declaration in which plaintiff claims commissions as due under a contract to pay them, the report shows that during the time covered by the first count there were periods during which plaintiff acted as general agent under written contracts made by defendant, other periods during which plaintiff acted as sub-agent under written contracts entered into by general agents with plaintiff and still other periods when plaintiff acted as agent or sub-agent without contract, either written or oral. The contracts of general agency provide that the full compensation of the agent for labor and disbursements in procuring applications

and collecting and remitting the first year's premiums was to be a commission on such premiums; that as to commissions on renewals premiums on policies procured by him and his sub-agents during the term of the contract, the agent shall receive seven and a half per cent while he retains such agency; and that upon the discontinuance of the contract in any way all interest of the agent in commissions on premiums should revert back to the company "except as above mentioned." The only exception "mentioned" necessary to be considered is "In case this contract is not renewed at the end of the term upon as favorable terms regarding commissions as the said company is at that time contracting for similar agents, 'the company will pay' said agents two years' renewal commissions less two per cent on the premiums collected on all policies obtained under this contract."

In all this the contracts are clear and unambiguous. The plaintiff, however, urges that another interpretation has been placed upon the contract in view of the payment and receipt of renewal premiums by defendant and plaintiff respectively until two years had elapsed after the latter ceased to act in any capacity for the defendant. But if the acts of the parties in question, are evidence of an interpretation of the contracts by the parties, the evidence cannot be permitted to vary their terms, since they are clear and unambiguous: *Clarke* v. *Eastern Advertising Co.,* 106 Maine, 59, 61; *Bishop* v. *White,* 68 Maine, 104, 107; *Railroad Co.* v. *Trimble,* 77 U. S., 367, 377. Pollock on Contracts, (3d Am. Ed.) 572.

We understand the plaintiff to invoke custom to sustain his contention. While the report of the referee is silent as to custom, there may be evidence as to custom in the evidence taken before the referee, but it is sufficient to say that custom cannot be taken into account where the contract is express, clear and unambiguous. *Stagg* v. *Ins. Co.,* 77 U. S., 589; *Partridge* v. *Ins. Co.,* 15 *Wall,* 573, 579; *Spaulding* v. *Life Ins. Co.,* 61 Maine, 329, 332; *Norton* v. *University of Maine,* 106 Maine, 436, 440; *Marshall* v. *Perry,* 67 Maine, 78, 83; see also *Park* v. *Piedmont, etc. Ins. Co.,* 48 Ga., 601, 606.

The contracts of general agents with plaintiff by which he became sub-agent make substantially the same provisions as to

compensation, mutatis mutandis, as the contracts already considered. Each stipulates that "nothing herein contained shall make or be so construed as to make the said company liable to the said agent under any of the provisions of this contract, or in any manner whatever, anything herein contained to the contrary notwithstanding." Each contract also provides "that in the event of the death, resignation or removal from office, of the said general agent, the said Gooding, this contract being then in force, shall be entitled to two years' renewal commissions on business already placed by him, provided he continues during such two years to act as an agent for the company."

The later sub-agency contract bears a rider executed by a general official of defendant approving the contract, in the event of the death, etc., of the general agent, in so far as to protect the plaintiff in the enjoyment of the renewal premiums specified therein, provided and so long as said Gooding continues to work satisfactorily and exclusively for the company. It is clear that this proviso does not extend the period during which the commissions on renewal premiums are to be paid but imposes additional conditions during the same period.

We can come to no different conclusion regarding the claim of plaintiff under the sub-agency contracts from that reached upon the contracts for general agency above considered.

The remaining period of his service the plaintiff acted under no contract. There could therefore during this period have been no express contract entitling plaintiff to commissions on renewal premiums and it has been held that "in the absence of express stipulation to the contrary, an agent is not entitled to commissions on renewal premiums paid after the termination of the agency." *Spaulding* v. *Ins. Co.*, 61 Me., 329; *Phoenix etc. Ins. Co.* v. *Holloway*, 51 Conn., 310; *Park* v. *Piedmont etc. Ins. Co.*, 48 Ga., 601; *Frankel* v. *Ins. Co.*, 158 Ind., 304; *Jacobson* v. *Ins. Co.*, 61 Minn., 330; *Montreal etc. Ins. Co.* v. *Charles*, 17 Fed. Cas. No. 9975; and other cases, see 22 Cyc., 1441.

The second count of the declaration is a count for money had and received and as to this count the referee finds the following additional facts:

"The defendant company is a mutual life insurance company located in Wisconsin, and doing a large business all over the United States and Canada. It fixes and did fix the rates, the amount of the initial and annual renewal premiums, at such sums as it deemed necessary to provide for the payment of policies as they might become payable, for the salaries of officers and compensation to agents, for office and other expenses, and in addition a surplus fund for investment as security for policy-holders. In providing for compensation to agents, the rate, or amount of premium, was fixed on the assumption that commissions on annual renewal premiums would be paid the agent as long as the policy remained in force. If, however, the payment of these commissions upon any policy ceased before the maturity or expiration of the policy, the premium upon that policy was not reduced pro tanto, but continued to be collected in full, and the saving was carried to the general surplus or distributed with other savings in the form of dividends to all the policy holders of that class."

The payment of renewal premiums by policy holders to defendant was coupled with no promise or agreement on the part of defendant to pay any one to whom the policy holders were indebted. They were under no obligation to the plaintiff. If upon receiving payment of renewal premiums from policy holders there was any agreement by defendant, it was to pay its own indebtedness, if such existed. Such payment by the policy holders was primarily for the benefit of defendant and but incidentally for that of plaintiff, if the defendant was under obligation to pay him. *Keene* v. *Sage,* 75 Maine, 138, 140. But, as we have seen in considering the first count of the declaration, defendant was under no obligation to pay plaintiff commissions. If any suit may be maintained against defendant for the commissions included, with other estimated expenses of defendant's business, in the renewal premiums paid by a policy holder and not paid to any one because of the absence of contract for such payment, it would seem that a policy holder alone can institute it.

We think the plaintiff cannot recover upon the second count. To hold otherwise would be a denial to defendant of liberty to make its own contracts and maintain uniform premium rates. The fact

that commissions are included in the estimate of its expenses upon which the premiums are based cannot, in itself, entitle an agent thereto any more than it would entitle a lessor to the defendant of real estate to rent after the expiration of the lease or to the continued payment of the same rent although by agreement of defendant and lessor the rent had been reduced.

Judgment for defendant with costs of reference taxed at $20.40 and costs of court to be taxed by the clerk.

FLORENCE W. WHITTAKER *vs.* FRANK W. SANFORD.

Cumberland. Opinion December 20, 1912.

Authority. Case. Damages. Evidence. Exceptions. Habeas Corpus. Imprisonment. Motion. Physical Restraint. Pleading. Responsibility. Revised Statutes. Chapter 101.

In this action for false imprisonment, the plaintiff claims that she was unlawfully detained and restrained of her liberty by the defendant upon a yacht under his control. Habeas corpus proceedings were commenced in her behalf. A writ of habeas corpus issued, on which the plaintiff was taken before a Justice of this court and she was discharged. No notice of the proceedings had been given to the defendant. The defendant contends that she was free to leave the yacht whenever she chose.

Held:

That the record of the habeas corpus proceedings was admissible, as tending to show an improbability that the plaintiff was free to leave the yacht when she chose, but not to charge the defendant with responsibility for her restraint.

It having become pertinent for the plaintiff to show the nature and extent of the authority and influence of the defendant over the yacht's officers and others, all of whom believed in his religious doctrine, and who were members of the religious society of which he was the head, the plaintiff

was properly permitted to introduce evidence that the defendant claims that he is the second Elijah who is to prepare the way for the coming of Christ, and that he is the King mentioned in Biblical prophecies,—the King David who is to reign and rule in righteousness, and before whom all the earth is to bow.

In an action for false imprisonment, the plaintiff must show that the restraint was physical, but not necessarily that force was used upon the person.

If one, in control of a yacht, who is under a duty to furnish transportation to the shore, to a person on board, intentionally refuses to furnish the transportation, and there be no other means of escape, it is a physical restraint, and constitutes unlawful imprisonment.

On motion and exceptions by defendant. Exceptions overruled. If the plaintiff remits all of the verdict in excess of $500 within thirty days after the certificate is received, by the clerk, motion overruled; otherwise, motion sustained.

This is an action on the case to recover damages for false imprisonment. The plaintiff claimed that the defendant held her under restraint on the barkentine "Kingdom" from May 10 to June 6, 1910, in such manner as to constitute false imprisonment. Plea, general issue. The jury rendered a verdict for the plaintiff for $1100. The defendant filed a motion for a new trial and excepted to certain rulings and refusals to rule by the presiding Justice.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

H. E. Coolidge, and Oakes, Pulsifer & Ludden, for defendant.

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

SAVAGE, J. Action for false imprisonment. The plaintiff recovered a verdict for $1100. The case comes up on defendant's exceptions and motion for a new trial.

The case shows that for several years prior to 1910, at a locality called "Shiloh" in Durham in this State there had been gathered together a religious sect, of which the defendant was at least the religious leader. They dwelt in a so called colony. There was a similar colony under the same religious leadership at Jaffa, in Syria. The plaintiff was a member of this sect, and her husband

was one of its ministers. For the promotion of the work of the "movement" as it is called, a Yacht Club was incorporated, of which the defendant was president. The Yacht Club owned two sailing yachts, the "Kingdom" and the "Coronet." So far as this case is concerned, these yachts were employed in transporting members of the movement, back and forth, between the coast of Maine and Jaffa.

The plaintiff, with her four children, sailed on the Coronet to Jaffa in 1905. Her husband was in Jerusalem, but came to Jaffa, and there remained until he sailed, a year later, apparently to America. The plaintiff lived in Jerusalem and Jaffa, as a member of the colony, until March, 1909. At that time she decided to abandon the movement, and from that time on ceased to take part in its exercises, or to be recognized as a member. She made her preparations to return to America by steamer, but did not obtain the necessary funds therefor until December 24, 1909. At that time the Kingdom was in the harbor at Jaffa, and the defendant was on board. On Christmas day he sent a messenger to ask the plaintiff to come on board. She went, first being assured by the messenger that she should be returned to shore. The defendant expressed a strong desire that she should come back to America on the Kingdom, rather than in a steamer, saying, as she says, that he could not bear the sting of having her come home by steamer, he having taken her out. The plaintiff fearing, as she says, that if she came on board the defendant's yacht she would not be let off until she was "won to the movement" again, discussed that subject with the defendant, and he assured her repeatedly that under no circumstances would she be detained on board the vessel after they got into port, and that she should be free to do what she wanted to the moment they reached shore. Relying upon this promise, she boarded the Kingdom on December 28, and sailed for America. She was treated as a guest, and with all respect. She had her four children with her. The defendant was also on board.

The Kingdom arrived in Portland Harbor on the afternoon of Sunday, May 8, 1910. The plaintiff's husband, who was at Shiloh, was telephoned to by someone, and went at once to Portland Harbor, reaching the yacht about midnight of the same day. The

Coronet was also in Portland Harbor at that time. Later both yachts sailed to South Freeport, reaching there Tuesday morning, May 10. From this time until June 6 following the plaintiff claims that she was prevented from leaving the Kingdom, by the defendant, in such manner as to constitute false imprisonment.

THE EXCEPTIONS.

1. The first exception relied upon relates to the admissibility of the record of habeas corpus proceedings, by virtue of which the plaintiff was removed from the Kingdom by a sheriff on June 6, and under which she was discharged later. This record was admitted subject to the defendant's objection and exception. Further, the presiding Justice was requested to instruct the jury that the habeas corpus proceedings were inadmissible, and must be entirely disregarded by them. The presiding Justice declined to give the requested instruction, saying, "I have said all that I desire in regard to the habeas corpus. You have the right to consider the fact as bearing on the conduct of the plaintiff and the situation under which she had applied for it." The presiding Justice in his charge had already said: "It is my duty to say to you that that [the discharge of the plaintiff on habeas corpus] is not a judicial determination of the question involved here. The defendant would not be bound by that adjudication of a single Justice under the circumstances of this case, there being no notice to him and he having no opportunity to be heard upon it. You have a right, I say to you, for the purposes of this trial, to consider the fact that she did resort to this petition of habeas corpus to obtain her release as bearing upon the testimony and all the circumstances surrounding her at that time as tending to show that she was restrained of her liberty." To this refusal to instruct, the defendant took an exception. These exceptions will be considered together.

The case shows that on June 4, 1910, application was made to a Justice of this court for a writ of habeas corpus to take, and bring before the court, the plaintiff and her four minor children, who it was alleged were restrained of their liberty on a certain yacht named Kingdom by the defendant, or by the captain or commanding officer of said Kingdom, or by the person or persons in charge of said Kingdom. The application was made by one Harriman,

under the provisions of R. S., Chap. 101, Section 4, which provides that application may be made "by any person." The Justice ordered "writ to issue as prayed for, returnable before me at the Court House in Auburn, and to be heard on Wednesday, June 8, 1910, 2 P. M." The form prescribed by statute for such a writ contains the following direction to the officer, "and summon the said A. B. [the person alleged to be holding the party in restraint] then and there to appear before our said court, to show cause for taking and detaining said C. D. [the party restrained]." R. S., Chap. 101, Sect. 18. The order for the writ to issue therefore necessarily embraced the direction in the writ to the officer to "summon the defendant." No further order of notice was necessary. But in the writ, as issued by the clerk, the clause commanding the officer to "summon" the defendant was omitted. The officer took the writ and proceeded to the Kingdom, then lying about three miles off shore. He exhibited the writ to the plaintiff's husband, to whom, it is now claimed by the defendant, he had committed the care of, and responsibility for, the plaintiff. Mr. Whittaker read it. The commanding officer asked to take the writ, in order that the stenographer could make a copy of it. This request was complied with. But no service of the writ was made on either the defendant or the commanding officer. The defendant himself was not then on board the Kingdom, but was on the Coronet, lying not far away. The officer took the plaintiff and children, and carried them before the Justice, who after hearing discharged them. The defendant did not attend the hearing. But Mr. Whittaker, the plaintff's husband, went to Auburn, and was in the Court House when the hearing was had, but did not go into the room where it was being held.

It is not necessary now to consider the propriety or legality of the discharge, in the absence of notice to the defendant. The presiding Justice correctly instructed the jury that it was not a judicial determination of the question involved in this case, which was whether the defendant had wrongfully restrained the plaintiff of her liberty. He expressly instructed the jury also that the defendant was not bound by the adjudication. In considering the exception we must assume that the jury heeded the instruction. Limited in its application as it was by the presiding Justice, we think the

record was admissible. In the first place, it was proper for the plaintiff to show when and how she obtained her liberty. It is so closely connected with the question of restraint as to be practically inseparable. It was a part of the history of the transaction, the concluding part. Besides, the pith of the proposition lies not in the discharge, concerning the effect of which the jury were instructed favorably to the defendant, but in the fact that the situation was such that resort was had to habeas corpus. It was a part of the conduct of the parties. It had a tendency to show an improbability that the plaintiff was free to leave the yacht when she should choose. The probative force of it was well stated by the presiding Justice in his charge, in stating the differing contentions of the parties. "It is argued on the part of the plaintiff," he said, "that it is unreasonable and improbable to assert that she was not restrained of her liberty when you find her resorting to a writ of habeas corpus; that if she could have had at any time a boat to go on shore and be taken on shore, that she would not in all human probability have resorted to, or even acquiesced in, the resort of any of her friends to a writ of habeas corpus, for there was no necessity for it." We think the argument is not devoid of merit. How much weight should be given to it was for the jury to say. It will be noticed that this evidence, as the case was submitted by the court to the jury, was applied to the question of restraint of liberty by some one, and not to the responsibility of the defendant for it. We think the rulings were right.

2. The plaintiff claimed and testified that on two or three occasions the defendant personally refused to furnish her with a boat so that she could leave the Kingdom, that when she wanted to go ashore, "they," evidently referring to the defendant and her husband, "had talked against it," that the defendant "had spoken plainly that it was out of the question," that when she spoke to him about it he said he would leave it to her husband to do what he wanted to, that he would not take the responsibility of separating families, but that when she asked her husband to take her ashore, he replied, "We will see Mr. Sanford about it and see what he says." The plaintiff contended that in this way the defendant and her husband in effect played into each other's hands, and shifted

the responsibility from one to the other, while she was the victim of this play of battledore and shuttlecock. It was contended that by virtue of the peculiar religious character attributed to the defendant by those who were in the movement, of whom the plaintiff's husband was one, being a minister of that faith, he possessed and exercised supreme control over the members, both on sea and on land, and that his wish was law both to their wills and to their consciences, and that the plaintiff's husband, whatever part he took in the matter, was either merely the defendant's instrument, or else was colleagued with him.

It therefore became pertinent for the plaintiff to show the nature and extent of the defendant's authority and power. This, of course, was only one step, but it was a step. Another would be to show that the defendant exercised that authority and that it was effective in restraining the plaintiff of her liberty.

And the plaintiff was permitted to testify, subject to exception, to the following effect:—Several years ago the defendant said that God gave him a message, that Elijah was here, that he was the second Elijah, and had come to prepare the way for the coming of Christ, that he talked that to the people in the movement for years, and that they knew him as Elijah; that later he said God gave him messages and made him know that the Kingdom of God was established again on earth, and that God made him know that he was to be king among the people, the twelve tribes of Israel scattered out over all the earth, that God scattered them when they were in Palestine after he had brought them out of the land of Egypt, that they sinned and he scattered them, but he said that in the last days they should be restored and brought back to Palestine, and Palestine should be made a glorious land again as God intended it to be, and these people should be gathered up and brought back and restored to the true religion of Jesus Christ, and that God said in the Bible among the prophesies that when these days come and the people are restored He is going to give them a king; he said that a king shall reign and rule in righteousness; he said that God made him know that he was King David, and that he was to reign and rule in righteousness, and that all the earth was going to bow to him. And the witness testified further, that all the people in the

movement at Shiloh, which seems to have been the original home of the movement, and the place where the plaintiff's husband was minister, know him as King David, and call him so.

In connection with this exception it may be noticed that one of the defendant's witnesses, a member of the movement, and apparently a frank and intelligent man, being asked on cross-examination to explain why the defendant is sometimes called King David, testified without objection:—"We believe that Mr. Sanford is the David that is spoken of as the character that is to appear in the last days to prepare God's people for the coming of Christ."

Under the circumstances of this case, we think that the evidence objected to was admissible. We think it is a fair inference that a person believed by his followers to possess the character thus attributed to the defendant would be very likely to obtain the power and influence over them, which it is claimed the defendant had. This is not a religious question, but a question of law. We are not concerned in this case with the beliefs of the defendant and those connected with him. We do not seek to impugn in the slightest degree the grounds of their beliefs. But, whether right or wrong, we think that it is clear that to the trusting and devout followers of such a leader, his influence, his will, his wish, might easily, and probably would, become paramount over their minds, and would control their actions. Besides, the question of the nature and extent of the defendant's control was made relevant by the defendant's contention that the captain and other officers of the yacht, and not the defendant, were in control of the small boats and that the control was practically independent of the defendant. It must be remembered that this discussion goes only to the admissibility of the evidence, and not to its effect. If in fact the power was not used by the defendant to keep the plaintiff on board the yacht against her will, the possession of the power cannot count against the defendant.

3. The plaintiff's writ was brought in a plea of the case, but the defendant contends that the declaration in her writ was in its effect a declaration for trespass to the person. The defendant requested the court to instruct the jury that "to maintain her action the plaintiff must show some actual physical force exercised

by the defendant or by someone acting as his agent and by his authority to restrain her of her liberty."

We think the defendant's assumption in his request that the action in effect is trespass to the person is without warrant. In argument, stress is laid upon the use of the words "with force and arms." These words appear only in the first and fourth counts. But the record shows that the court at the defendant's request instructed the jury that the plaintiff could not recover under either of these counts. They are out of the case now. In the remaining counts it is alleged that the unlawful restraint was "by force and against the will of the plaintiff." The court instructed the jury that the plaintiff to recover must show that the restraint was physical, and not merely a moral influence, that it must have been actual physical restraint, in the sense that one intentionally locked into a room would be physically restrained, but not necessarily involving physical force upon the person; that it was not necessary that the defendant, or any person by his direction, should lay his hand upon the plaintiff, that if the plaintiff was restrained so that she could not leave the yacht Kingdom by the intentional refusal to furnish transportation as agreed, she not having it in her power to escape otherwise, it would a physical restraint and unlawful imprisonment. We think the instructions were apt and sufficient. If one should, without right, turn the key in a door, and thereby prevent a person in the room from leaving, it would be the simplest form of unlawful imprisonment. The restraint is physical. The four walls and the locked door are physical impediments to escape. How is it different when one who is in control of a vessel at anchor, within practical rowing distance from the shore, who has agreed that a guest on board shall be free to leave, there being no means to leave except by rowboats, wrongfully refuses the guest the use of a boat? The boat is the key. By refusing the boat he turns the key. The guest is as effectually locked up as if there were walls along the sides of the vessel. The restraint is physical. The impassable sea is the physical barrier.

There are other exceptions, but the points involved are all covered by the foregoing discussion. The exceptions must all be overruled.

THE MOTION.

A careful study of the evidence leads us to conclude that the jury were warranted in finding that the defendant was guilty of unlawful imprisonment. This, to be sure, is not an action based upon the defendant's failure to keep his agreement to permit the plaintiff to leave the yacht as soon as it should reach shore. But his duty under the circumstances is an important consideration. It cannot be believed that either party to the agreement understood that it was his duty merely to bring her to an American harbor. The agreement implied that she was to go ashore. There was no practical way for her to go ashore except in the yacht's boats. The agreement must be understood to mean that he would bring her to land, or to allow her to get to land, by the only available means. The evidence is that he refused her a boat. His refusal was wrongful. The case leaves not the slightest doubt that he had the power to control the boats, if he chose to exercise it. It was not enough for him to leave it to the husband to say whether she might go ashore or not. She had a personal right to go on shore. If the defendant personally denied her the privilege, as the jury might find he did, it was a wrongful denial.

It is shown that on several occasions the defendant told the plaintiff she could have a boat when she wished, but it is also shown by testimony which the jury might believe that each time she made request for a boat to be used at the time, she was refused. The plaintiff did not ask the captain or other officers of the yacht for a boat. These officers testified that they had authority to let anyone have the use of a boat, and that, without consulting the defendant. We do not think the defendant can justly claim that she should have asked the officers under him, if he had himself denied her a boat. And in the one specific case shown in the evidence, when she did ask the captain for a boat to go on shore, he referred the discussion of the matter to the defendant. This was at Malta. She apparently believed that an appeal to the officers would be useless. It was not an unreasonable belief.

The defendant did not become a witness, but it is claimed for him that after Tuesday, May 10, he assumed no responsibility whatever for the plaintiff, and left her in the care of her husband,

specifically saying that he would leave it to her husband to say whether she could leave the yacht. From that date, he stayed on the Coronet, only coming aboard the Kingdom once, though on that occasion she says he refused her the use of a boat. From that date she was in the company of her husband, though they were not living in marital relations. She went ashore with him. She visited neighboring islands with him. She was trying to persuade him to leave the movement and make a home for her and their children. He was trying to persuade her to become again a member of the movement. When on shore with him she made no effort to escape. She says she believed it would be useless, and thus went back to the yacht with him. She says that when she did ask her husband to put her ashore to leave, he replied, "We will see Mr. Sandford about it and see what he says." She further says that the defendant had told her that "he" (her husband) "couldn't do it" (put her on shore).

Besides the evidence of express personal refusal on the part of the defendant, we think that a jury might well find upon the evidence that the defendant was strongly desirous that the plaintiff should not leave the yacht, probably for the reason that he hoped her husband's influence might lead her back into the movement, that the husband was strongly desirous of the same end, that if she left the yacht she would be beyond the influence of her husband; that the subject was a matter of conversation between the defendant and the husband; that in view of the relation which the defendant bore to the movement and to the husband, in view of the mystical character attributed to him, in view of the manifest power possessed by him over the minds of the members, growing out of a belief which we have already stated, and which the husband shared in, the husband, if not acting by express mutual understanding with the defendant, was the minister of his known will, with the result that the plaintiff was prevented from leaving the yacht; that the defendant was the superior, the controlling factor, by an influence intentionally used, in keeping her there; that he possessed the key that would unlock the situation; and that in violation of his duty he refused to use it, and thus restrained her of her liberty. If all this was true, the defendant is liable to the plaintiff. The verdict should not be set aside on that ground.

But the damages awarded seem to us manifestly excessive. The plaintiff, if imprisoned, was by no means in close confinement. She was afforded all the liberties of the yacht. She was taken on shore by her husband to do shopping and transact business at a bank. She visited neighboring islands with her husband and children, on one of which they enjoyed a family picnic. The case lacks the elements of humiliation and disgrace that frequently attend false imprisonment. She was respectfully treated as a guest in every way, except that she was restrained from quitting the yacht for good and all.

The certificate will be,

Exceptions overruled.

If the plaintiff remits all of the verdict in excess of $500, within 30 days after the certificate is received by the clerk, motion overruled; otherwise, motion sustained.

THE LINN WOOLEN COMPANY *vs.* C. O. BROWN.

Somerset. Opinion December 20, 1912.

Consent. Covenant. Forfeiture. Gist of action. Lease. Possession. Rent. Surrender. Sublease. Trespass quare Clausum. Voidable. Waiver.

In an action of trespass quare clausum brought by the owner and lessor of certain land, water power and buildings against a sublessee of a portion thereof.

Held:

1. That the gist of the action is the injury to the possessory right, and the plaintiff cannot maintain the suit unless it was in possession at the time of the alleged trespass.

2. That as the original lease contained a covenant that the lessee, Page, should not assign or underlet the premises or any part thereof, without the consent of the lessor in writing on the back of the lease, the act of the lessee in subletting a portion to the defendant without such consent was without authority, and rendered the sublease voidable at the option of the plaintiff, but not void.
3. That under the further covenant in the original lease providing that the lessor might enter to expel the lessee if he should violate any of the covenants in the lease, the plaintiff could have availed itself of this privilege and could have treated the lease as at an end or it could waive the privilege and treat the lease as still subsisting.
4. That the evidence in this case clearly shows that the plaintiff waived this ground of forfeiture and recognized the continued existence of the original lease.
5. That even if the facts warranted a re-entry for failure to pay rent, which is very doubtful, there was no re-entry in fact.
6. That the alleged surrender of the premises by Page to the lessor was apparent rather than real, and gave the plaintiff no rights.
7. That the possession of Page, the original lessee, was not actually disturbed until the very day on which this writ was brought.
8. That as the original lease was in full force until that date, the defendant's estate existing under it continued according to the terms of its creation. The defendant was rightfully in possession unless the plaintiff saw fit to assert its rights in a legal way, and this it did not do.

On report. Judgment for defendant.

This is an action of trespass quare clausum, brought by the plaintiff, owner of the saw-mill and novelty-mill situated on Sebasticook river in Hartland village, in the county of Somerset. The plaintiff, on June 7, 1909, leased all this property to Ira W. Page, Jr., for seven years at an annual rental of four hundred dollars, payable quarterly. The lease to Page contained a covenant that the lessee should not sublet the premises, or any part thereof, without the consent of the lessor in writing on the back of the lease, and also provided that the lessor might enter to expel the lessee if he should fail to pay the rent. On the 14th day of September, 1910, Page, without the consent in writing, sublet the saw-mill and machinery and a portion of the yard to the defendant for one year, and he entered into possession and occupancy of the premises. Plea, general issue with brief statement justifying under his lease.

The case is stated in the opinion.

J. H. Haley, and George H. Morse, for plaintiff.
Merrill & Merrill, for defendant.

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

CORNISH, J. This is an action of trespass quare clausum.

The plaintiff corporation is the owner of two large woolen mills situated on what is known as the lower dam across the Sebasticook river in Hartland village. It is also the owner of a dam situated about one-half mile further up the river, known as the upper dam, on which is a saw-mill and connected with which are a piling-ground, yard and a novelty-mill, all constituting what is known as the Moore property.

On June 7, 1909, the plaintiff leased all this upper estate to Ira W. Page, Jr., for seven years at an annual rental of $400, payable quarterly. The lease contained a covenant that the lessee should not assign or underlet the premises, or any part thereof, without the consent of the lessor in writing on the back of the lease, and also provided that the lessor might enter to expel the lessee if he should fail to pay the rent, whether demanded or not, or if he should violate any of the covenants in the lease.

Page went into possession of the property and operated the novelty-mill, but it does not appear whether he ever operated the saw-mill or not.

On September 14, 1910, he sublet a portion of the premises, consisting of the saw-mill and machinery and a certain portion of the yard, to the defendant for the term of one year from November 14, 1910, at a rental of $400 a year, payable quarterly. This subletting was without the written consent of the plaintiff and it appears that the defendant at the time he took this sub-lease had knowledge of the covenants in the original lease and said he would take his chances. During the following spring and summer there was more or less complaint on the part of the plaintiff of the manner in which the defendant was handling the water at the upper dam, the result being, as the plaintiff claims, that the work at its woolen mills was seriously interfered with.

The plaintiff contends that it did not know that the defendant was a sub-lessee until about the first of June, 1911, having assumed up to that time that he was merely foreman for Page, the lessee, that it took advantage of Page's failure to make his quarterly payment of rent on June 17, 1911, to claim a forfeiture, that on July 14, 1911, it gave Page a written notice to quit the premises at the expiration of thirty days from July 17, or on August 16, 1911, that on July 16, or 17, Page voluntarily surrendered the premises to the plaintiff, but defendant continued to operate the saw-mill until the 28th of August when a deputy sheriff acting for the plaintiff boarded it up and prevented further occupation. On the same day, August 28, 1911, this action of trespass quare clausum was brought, claiming damages from November 14, 1910, the date when the defendant entered into possession under his sub-lease.

At the trial, the jury made a special finding of fact, to the effect that the plaintiff knew on February 12, 1911, of the lease of the saw-mill from Page to Brown, and with that finding the case was reported to the Law Court for final determination.

The rights of the parties depend upon certain well-settled principles of law, somewhat technical in their nature and yet resting on reason as well as authority. A logical treatment of the case works out as follows:

This being an action of trespass quare clausum, the gist of the action is the injury to the possessory right, and the plaintiff cannot maintain the suit unless it was in possession at the time of the alleged trespass. If a tenant was in possession, the plaintiff as landlord cannot prevail, except in case of permanent injury to the freehold. *Moody* v. *King,* 74 Maine, 497; *Perry* v. *Bailey,* 94 Maine, 50. Such permanent injury is not claimed here.

It follows, therefore, that if the lease to Page was in force when this suit was brought, he and not the plaintiff would be the party entitled to bring an action of trespass, and Page could not bring it because the defendant was in possession under a sub-lease from him. He certainly could not treat his own lessee as a trespasser.

Now the lease to Page did not expire by its terms until June 7, 1916, and it was still in force unless it had been forfeited and the plaintiff had entered for breach of covenant and was in possession.

What is the legal situation on this point?

It cannot be disputed that in the first instance Page had no legal right to sub-let a portion to Brown without the consent of the lessor in writing on the back of the lease, but his act in doing so rendered the lease voidable at the option of the plaintiff and not void. The plaintiff could avail itself of the privilege, and treat the lease as at an end, and re-enter for covenant broken, if it saw fit, or it could waive this privilege and treat the lease as still subsisting. Dumpors case, 4 Coke, 119, 1 Smith Lead. Cas. and note; *Webster* v. *Nichols,* 104 Ill., 160; *Shattuch* v. *Lovejoy,* 8 Gray, 204; *Porter* v. *Merrill,* 124 Mass., 534; and see *Small* v. *Clark,* 97 Maine, 304.

Waiver is a question of fact, and it is clear that the plaintiff waived this forfeiture.

All the circumstances combine to prove it. The defendant went into possession of the saw-mill and made repairs upon it in November, 1910, and the evidence fairly leads us to believe that Mr. Linn, the treasurer and managing director of the plaintiff corporation, must have known the fact, especially as the defendant had previously talked with Mr. Heinze, the plaintiff's superintendent, in regard to leasing it.

But the jury have found specially that the plaintiff knew of the sub-lease on February 12, 1911, by reason of a conversation that took place on that day between Mr. Linn and the defendant; and the evidence warrants the finding. Yet the plaintiff took no steps to regain possession of the property. It virtually recognized Brown as the party in possession of the saw-mill property. It complained to him, not to Page, of his manner of using the water. It purchased from him lumber sawed out in the mill to the amount of $160 and gave him credit therefor on its books. There is evidence to the effect that it sent Page to learn from Brown on what terms he would surrender his rights. In short, having knowledge of the sub-lease, it treated the sub-lessee as the party rightly in possession of the portion under that sub-lease.

Moreover, it continued to treat its lease with Page as still subsisting. It made no move to the contrary and on April 14, 1911, it assigned to Geo. M. Lancey its charge for rent from March 7, 1910, to March 7, 1911, which at that time remained unpaid, thereby

recognizing the tenancy of Page up to March 7, 1911, for on no other basis could the rent be due.

The proof of waiver of the breach of covenant for sub-letting is abundant, and when asked on cross-examination what covenant he relied upon when he gave the notice to quit on July 14, 1911, Mr. Linn replied "on account of his forfeiture to pay rent."

The plaintiff therefore cannot successfully rely in this action upon the breach of covenant against sub-letting because it never availed itself of its rights thereunder.

This brings us to the alleged re-entry for non-payment of rent.

On March 7, 1911, four quarters remained unpaid, and it was then the right of the plaintiff, as it had been at the expiration of each of the preceding quarters, to enter for breach of covenant, without making previous demand, it being so specified in the lease. But no such step was taken, and more than one month later, namely, on April 14, 1911, two days after Brown began his season's sawing, as has already been stated, it assigned the bill against Page for the year's rent to George M. Lancey. This was as effective a recognition of Page's tenancy to March 7, 1911, as if the plaintiff had received the money therefor from Page. And the acceptance of rent by the owner from either lessee or sub-lessee, after knowledge of the fact, is regarded as strong if not conclusive evidence of waiver. *Dendy* v. *Nicholl,* 4 C. B. N. S., 376; *The Hartford Wheel Club* v. *Travellers Ins. Co.,* 78 Conn., 355; *Murray* v. *Harway,* 56 N. Y., 337. Page's possession up to March 7 is therefore secure.

The next quarter day fell on June 7. It appears that within a day or two prior to June 7, Page went into the plaintiff's office and finding Linn and Heinze there, asked them if they would accept Brown's order for $100 for the rent falling due on that date as the Company then owed Brown $160 for lumber bought of him. Mr. Heinze replied that he thought there would be no doubt but that they would accept it. On the strength of that promise, Brown gave Page the order on June 10, and Page took it to the plaintiff; but the plaintiff refused to accept it, not, however, on the ground that it had not been paid on the exact quarter day. Under these circumstances, we think the court should be slow to declare that there had been a breach of covenant for non-payment of rent, the

money on the 7th of June being in the plaintiff's hands, due primarily to Brown and by him on the 10th ordered to be retained by the plaintiff in payment of the Page rent, in accordance with the previous arrangement. Forfeiture is not a favorite with the law, and under circumstances like these we decline to recognize it.

But even if there was a breach which gave the plaintiff a right of re-entry, it was not availed of by the plaintiff. The defendant was still in the occupation and operation of the saw-mill with its appurtenances; and Page in the occupation and operation of the novelty-mill. This continued until July 14, when the plaintiff served a written notice upon Page "to quit and deliver up to me at the expiration of thirty days from July 17, 1911, the possession of the following described premises now occupied by you and belonging to me," etc. Then follows a description of the entire property covered by the original lease. This notice does not claim any possession by virtue of forfeiture, but on the contrary, by its very terms, concedes the possession to be then in Page, and asks him to surrender it, for no stated reason, on August 16.

Two or three days later, Linn appeared upon the premises and Page, in his presence at the novelty-mill and in the presence also of Brown at the saw-mill, said that he surrendered and forfeited all claims that he had upon the property to the Linn Woolen Co. Linn then ordered the defendant to "vacate," and the defendant replied "very well;" and Linn said "vacate at once," and the defendant answered, "that is impossible." It is apparent that some arrangement had been made by the plaintiff with Page to go through this farcical performance in order to get rid of Brown, so that Page could retain the novelty-mill and the plaintiff regain possession of the saw-mill. This is shown by the new lease given by the plaintiff to Page on August 17, 1911, covering the novelty-mill alone.

There was no real intention on Page's part to surrender the whole property. In fact, he never did surrender it, for he continued to occupy the novelty-mill the same after this declaration as before, and Brown continued to occupy the saw-mill. When the notice to quit expired on August 16, the situation remained the same. A notice to quit does not of itself change possession, and

there was no change here and no bona fide re-entry until August 28, when the saw-mill was boarded up and the defendant practically evicted.

On the evening of that day this writ was brought.

Page's right of possession therefore was not actually disturbed under the original lease until August 28, 1911, and trespass could not have been maintained against him before that time.

So much for Page's right under the lease.

What of the defendant's, under his sub-lease? It is this: As the lease subsisted until that time in full force, the defendant's estate existing under it continued according to the terms of its creation. *Shumway* v. *Collins,* 6 Gray, 227-230.

The defendant was not a disseizor. He was rightfully in possession, unless the original lessor saw fit to assert his legal rights in a legal way. Whether this was done on August 28 might well be questioned, but certainly it was not done at any time prior to that, and therefore the defendant was not a trespasser at the date of the writ, and had not been previous thereto.

Judgment for defendant.

STATE OF MAINE, In Scire Facias *vs.* CHARLES E. STURGIS et als.

Kennebec. Opinion December 20, 1912.

Alternative sentence. Conditional sentence. Fine. Imprisonment. Judgment. Liquor nuisance. Postponing sentences. Recognizance. Revised Statutes, Chapter 136, Sections 5 and 9. Scire facias.

Action of scire facias to recover the penalty of a recognizance entered into under the stipulation therefor in the following sentence imposed on Charles E. Sturgis for maintaining a liquor nuisance:

"Sentence: Fine $1000 and in addition imprisonment at hard labor in jail for the term of six months, and in default of payment of fine, thirty days additional in jail, the imprisonment part of the penalty to be cancelled on payment of the fine, if respondent shall recognize with sufficient sureties in the sum of $1500 to keep the peace and be of good behavior, and especially to violate no provision of law for the prevention of the traffic in intoxicating liquors for the term of two years."

The fine was paid and the peace recognizance given, but subsequently violated.

Held:

1. A voluntary engagement entered into on the part of a citizen with the State to keep the peace and be of good behavior, and especially not to violate a particular law does not create an enforceable contract.
2. The sentence in a criminal case should be definite and certain, and not dependent upon any contingency or condition. Accordingly, where no statute is found to authorize it, a sentence in the alternative is bad for uncertainty.
3. There is no statutory provision in this State for alternative sentences, except that contained in Sec. 5, Ch. 136, R. S., which is special and limited in its application.
4. After the judgment in a criminal case is rendered and the sentence pronounced, the court has no power to indefinitely postpone the execution of that sentence, or commute the punishment and release the convict therefrom in whole or in part.
5. The power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishment for offences against the State, has not been given to the courts, but is confided exclusively to the Governor of the State with the advice and consent of the council.
6. It is not to be understood, however, that the court has not the power to temporarily postpone the execution of its sentence in order that the convict may exercise his legal rights to obtain a reversal or modification of the judgment against him, also in cases where cumulative sentences are

imposed, and perhaps also in some cases of great necessity and emergency. But 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 contingency or to render it void upon the performance of some condition by the defendant at his option, and any such order is void and a recognizance given in pursuance of such an order is also void.

On report. Judgment for the defendants.

This is an action of scire facias to recover the penal sum in a recognizance entered into by the defendants. The defendant, Charles E. Sturgis, was convicted of maintaining a liquor nuisance at the January term, 1910, of the Superior Court for Kennebec County, and the following sentence was imposed upon him by the court:

"Sentence: Fine $1000 and in addition imprisonment at hard labor in jail for the term of six months, and in default of payment of fine, thirty days additional in jail, the imprisonment part of the penalty to be cancelled on payment of fine, if respondent shall recognize with sufficient sureties in the sum of $1500 to keep the peace and be of good behavior, and especially to violate no provision of the law for the prevention of the traffic in intoxicating liquors for the term of two years." The case was reported on an agreed statement of facts to the Law Court, which is to render judgment thereon and if said judgment is for the plaintiff to assess damages.

The case is stated in the opinion.

Joseph Williamson, County Attorney, for the State.

George W. Heselton, for defendants.

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

KING, J. This case is reported to the Law Court on an agreed statement.

At the January term 1910 of the Superior Court for Kennebec County, Maine, the defendant, Charles E. Sturgis, entered a plea

of nolo contendere to an indictment pending against him for maintaining a liquor nuisance and the following sentence was imposed upon him by the court:

"Sentence: Fine $1000 and in addition imprisonment at hard labor in jail for the term of six month, and in default of payment of fine thirty days additional in jail, the imprisonment part of the penalty to be cancelled on payment of the fine, if respondent shall recognize with sufficient sureties in the sum of $1500 to keep the peace and be of good behavior, and especially to violate no provisions of law for the prevention of the traffic in intoxicating liquors for the term of two years."

The fine was paid and the peace recognizance given. Thereafter, at the September term 1911 of said court, Sturgis entered a plea of nolo contendere to a search and seizure process issued against him for a violation of a provision of law for the prevention of the traffic in intoxicating liquors, and was sentenced thereunder to pay a fine and costs which he paid. Thereupon, at said September term 1911 of said court, and after the conviction and sentence of said Sturgis in said search and seizure proceedings, he and his sureties in said peace recognizance were defaulted and this action of scire facias is brought to recover $1500 as the penalty of the recognizance.

It must be conceded that a voluntary engagement entered into on the part of a citizen with the State to keep the peace and be of good behavior and especially not to violate a particular law would not create an enforceable contract. Therefore, the real question presented in this case is, whether the recognizance was given in compliance with a lawful requirement therefor.

The statutory penalty for maintaining a liquor nuisance is as follows: "Whoever keeps or maintains such nuisance, shall be fined not less than one hundred dollars and not exceeding one thousand dollars, and imprisonment in jail not less than thirty days and not more than one year, and in default of payment of said fine an additional imprisonment of thirty days in jail." Section 2, c. 22, Revised Statutes as amended by Chapter 231, Laws, 1909.

It is also provided by Sec. 1, c. 136, R. S., that where the statute provides for punishment "by imprisonment and fine, or by impris-

onment or fine, or by fine and in addition thereto imprisonment," the sentence may be "to either or both." And Sec. 9, c. 136, reads as follows: "In addition to the punishment prescribed by law, the court may require any person convicted of an offense not punishable by imprisonment in the state prison, to recognize to the state, with sufficient sureties, in a reasonable sum, to keep the peace and be of good behavior for a term not exceeding two years, and to stand committed until he so recognizes."

Under these provisions of statute the court could have sentenced Sturgis for maintaining a liquor nuisance to a fine of not less than $100 nor more than $1000, or to imprisonment in jail for not less than thirty days nor more than one year, or to both fine and imprisonment. And, assuming that the provision of Sec. 9, c. 136 applies to this statutory offense, the court could have required, in addition to the punishment imposed, as prescribed by law, that Sturgis should recognize to keep the peace and be of good behavior for a term not exceeding two years, and to stand committed until he so recognized.

Before passing to the consideration of the construction of the sentence pronounced in this case, it may be well to note some principles applicable to judgments and sentences in criminal cases.

It is fundamental law that the sentence in a criminal case should be definite and certain, and not dependent on any contingency or condition. Bishop Crim. Proced. § 1309. Ency. Plead, and Pract. Vol. 19, p. 476 and cases cited. Cyc. Vol. 12, p. 779 and cases cited. Accordingly, where no statute is found to authorize it, a sentence in the alternative is bad for uncertainty. In *Brownbridge* v. *People,* 38 Mich., p. 753 the court, referring to Mr. Bishop, said: "He says that where there are no statutory provisions for sentences in the alternative, 'the judgment should be direct and unconditional and distinctly limited in its terms,' and the authorities he cites and many others fully sustain him."

In *State* v. *Hatley,* (N. C.) 14 S. E., 751, the court said: "It is earnestly insisted by counsel for the defendants that the judgment is an alternative judgment, and, as such, is void. Is it an alternative judgment? If so, the authorities are abundant to settle the question of its invalidity." Citing *Strickland* v. *Cox,* 102 N. C.,

411, 9 S. E., 414, where it is said: "Alternative or conditional judgments at law are void in civil as well as in criminal cases. *State* v. *Bennett,* 4 Dev. & B., 43; *State* v. *Perkins,* 82 N. C., 682." In *Miller* v. *City of Camden,* 63 N. J. L., 501, 43 Atl., 1069, 1070, the court said: "The sentence complained of is further objectionable, from a legal standpoint, by reason of its alternative character. It leaves it to the prosecutor (the convict) either to pay a fine or submit to a term of imprisonment as he may select." And in Ex parte Martini (Fla.) 2 So., 689, 690 it was said: "If the sentence is to be considered as inflicting in the alternative a fine of $100, or the performance of 60 days' work on the public streets as the punishment adjudged for the offense, not only is the latter part of it wholly unauthorized as a punishment by the ordinance denouncing the offense, but the sentence is void for uncertainty. If it be left by the court to either the prisoner, or the ministerial officer of the court having him in charge, or to any one else, to say whether the prisoner shall pay a fine or do something else, then the court has not fixed the sentence, and we have no certain sentence of the court; and whichever of the two things may be done, is not done by virtue of any decision of the court as to which shall be done." We find no authorities to the effect that an alternative sentence is valid, except where it is authorized by statute. There is no statutory provision in this state for alternative sentences except that contained in Sec. 5, c. 136, R. S., which is that when a convict is sentenced to either of the work jails "the court or magistrate may in addition sentence him to the other punishment provided by law for the same offense, with the condition that if such convict cannot be received at the work jail to which he is sentenced, or if at any time before the expiration of said sentence, in the judgment of the inspectors of jails, he becomes incorrigible, or unsafe, they may order that he suffer such alternative sentence or punishment." That provision is special and limited; and its very enactment emphasizes the fact that alternative sentences without statutory authority therefor are unlawful.

Again, it is a well recognized principle, that after a sentence has been imposed the court has no authority to relieve the convict from its execution. The authorities draw a clear distinction

between the suspension of the imposition of a sentence and the indefinite suspension or remission of its enforcement. There is a conflict of authority as to the power of the court after a conviction to indefinitely postpone the imposition of the punishment therefor prescribed by law, but however the courts may differ as to such power, it is well established that the court cannot, after the judgment in a criminal case is rendered and the sentence pronounced, indefinitely postpone the execution of that sentence, or commute the punishment and release the prisoner therefrom in whole or in part. Of course it is not to be understood that the court has not the power to temporarily postpone the execution of its sentence pending an appeal and other proceedings to obtain a new trial or review of the judgment, and in cases where cumulative sentences are imposed, and perhaps in some cases of great necessity and emergency. And the power of the court to correct errors in its judgment, and to change its sentence, during the term at which it is imposed and before its execution has begun, is another and different matter. The act which the authorities hold that the court has not the power to do, is not the act which stays the execution of its sentence in order that the convict may exercise his legal rights to obtain a reversal or modification of the judgment against him, and not the act done to correct its sentence so that it shall be in accord with its final and lawful judgment, but the act done for the purpose of exonerating the convict, in whole or in part, from the final and lawful judgment and sentence of the law which has been imposed upon him. That is the power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishments for offenses against the State, which power has not been given to the courts, but confided exclusively to the Governor of the State, with the advice and consent of the Council. Const. Maine, Art. V., part First, Sec. 11.

It may be unnecessary to cite authorities in support of this principle, that after sentence has been pronounced in a criminal case the court cannot as a matter of leniency to the convict, do that which would in effect cancel the sentence and reprieve or pardon the offender in whole or in part.

In the recent case, *Tuttle* v. *Lang,* 100 Maine, 123, the defendant

was sentenced to fine, costs and imprisonment, but with the proviso that no mittimus in execution of the sentence should issue until the petitioner should again be guilty of selling intoxicating liquors. Nearly two years afterward a mittimus was issued under that sentence and he was committed thereon. The court said: "If after conviction and sentence any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person." Citing, Ex parte Gordon, 1 Black, 303; In re Webb, 89 Wis., 354; *People* v. *Brown,* 54 Mich., 15; *State* v. *Voss,* 80 Iowa, 467; *People* v. *Barrett* 202 Ill., 287. While the precise question decided in *Tuttle* v. *Lang* was that a convict who had been sentenced and then permitted to go without day could not be subsequently committed under the original sentence, yet that decision is necessarily grounded in the fundamental principle that after a sentence is imposed the court has no power to indefinitely suspend its execution.

It has already been suggested that the court may temporarily suspend the execution of its sentence to enable the defendant to prosecute authorized proceedings to reverse or modify the judgment against him, also in cases where cumulative sentences are imposed, and probably in some cases of extreme necessity therefor. And it will be found we think that most of the cases occasionally cited in support of the proposition that the court has power to suspend the execution of its imposed sentence are clearly within some of these classes of permissible temporary suspensions. We shall not attempt here to review those cases. Many of them were cited in behalf of the State in the quite recent case, Ex parte Clendenning, 22 Okl., 108, 97 Pac., 650, 19 L. R. A., (N. S.) 1041, and the court there exhaustively reviewed and analyzed them, finding that none of them (except *Sylvester* v. *State,* 65 N. H., 193) is to be regarded as an authority in point that the court has power to indefinitely postpone the execution of its imposed sentence. And we do not think that *Sylvester* v. *State,* supra, holds that such a stay of execution of sentence is lawful. The Clendenning case is on all fours with that of *Tuttle* v. *Lang,* and the decision was the

same. Referring to the authorities the court there said: "Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent, that in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future, indefinite time, depending on the happening of a contingency."

The case of re Webb, 89 Wis., 354, 27 L. R. A., 356, was one where the petitioner was convicted of the crime of adultery and was sentenced to pay a fine of $200 and to be committed to the common jail for six months. He paid the costs and the court directed "that the sentence of imprisonment be suspended until the further order of court." After the expiration of that term, and after six months had expired he was ordered to comply with the sentence, and the court, in holding that the judgment of the court committing him was void, said: "While it may be said that the defendant is in no position to complain or take advantage of the clemency of the court, the question at issue is one of power, involving serious considerations of public policy respecting the administration of criminal justice. After the defendant had been convicted, and the sentence of the law in legal and proper form had been pronounced against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of the court, for cause, within the exercise of a reasonable discretion, to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of the sentence after it has been pronounced cannot be sustained, except as incident to a review of the case upon a writ of error, or upon other well established legal grounds."

In re Strickler, 51 Kan., 700, 33 Pac., 620, the defendant was sentenced to imprisonment, and it was "further ordered by the court that the operation of this sentence shall be suspended during such time as the defendant shall keep the peace with all mankind, and desist from all unnecessary use of intoxicating liquor, and refrain from becoming intoxicated." The court held the stay of

the execution of the sentence "wholly unauthorized by law." See also re Bloom, 53 Mich., 597, 19 N. W., 200; re Markuson, 5 N. D., 180, 64 N. W., 939, *Tanner* v. *Wiggins,* (Fla. 1907) 45 So., 459. In the last case cited, the defendant was sentenced to imprisonment for 12 months with the following stipulation: "It is further ordered that on payment of $50 and costs the above sentence will be suspended during such time as defendant abstains from selling, by himself or others, any spirituous, vinous, or malt liquors, or from staying or being where any such liquors are sold, or from maintaining, keeping or being interested in any place of business or institution where any of such liquors are sold or kept." The court held the attempted suspension of the execution of the sentence to be a nullity. The citation of authorities need not be multiplied, for they are in substantial harmony in holding that where the court has pronounced the sentence of the law against one convicted of a criminal offense, 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 contingency, or upon the performance of some condition by the defendant at his option, and that any such order is void and any bond or recognizance given in pursuance of such order is also void.

It may not be entirely clear as to what should be the construction of the sentence under consideration in the case at bar.

The language used, "Sentence: Fine $1000 and in addition imprisonment at hard labor in jail for the term of six months, and in default of payment of fine thirty days additional in jail," must, we think, be construed as an actual imposition of a sentence authorized by statute for the offense of which the defendant stood convicted. If the additional words, "the imprisonment part of the penalty to be cancelled on payment of the fine, if respondent shall recognize," etc., are to be construed as imposing a further sentence to be accepted or rejected at the option of the defendant in lieu of the imprisonment part of the original sentence, then we are constrained to hold that the sentence was unauthorized and void because in the alternative, and therefore not definite and certain as required by law. If on the other hand those additional words are

to be construed (and this seems to us to be the meaning intended) as a condition stipulated by the court, the performance of which by the defendant, at his option, should relieve him from the imprisonment part of the sentence imposed upon him, then it must be held that the court had no power to so stipulate, and, accordingly, that the recognizance given in carrying out that stipulation was void.

It follows, therefore, as the opinion of the court that the recognizance to enforce which this action is brought was not given in compliance with a lawful requirement therefor, and for that reason is not enforceable.

Judgment for the defendants.

CATHARINE BIGELOW *vs.* MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion December 20, 1912.

Appearance of cans. Canned goods. Chemically analyzed. Damages. Defect. Guaranty. Imperfections. Insurer. Inspection. Privity. Proximate cause. Responsibility. Rule of law. Unwholesome food. Victualer.

In this action, the plaintiff seeks to recover damages for injury to her health caused by unwholesome and poisonous canned asparagus served to her by the defendant in its dining-car on the 25th day of February, A. D. 1910, upon the consumption of which the plaintiff was soon after taken violently ill, and in consequence of which suffered the injuries complained of.

The plaintiff contends that the strict rules of law which prevails in this class of cases will hold the defendant responsible, that the defendant in this class of cases is an insurer of the quality of the food product which he serves.

Held:

1. That this is not a sound rule when confined to the sale or use of canned goods.
2. The wholesaler, the retailer and the user of these goods, whether in the capacity of caterer, seller or host, sustain an entirely different duty respecting a knowledge of their contents and quality than prevails with regard to knowing the quality of those food products which are open to the inspection of the seller or victualer.

3. The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearances and quality of the food products they offered to the public were accordingly charged with knowledge of their imperfections.
4. Upon the state of facts in the case at bar, a situation arises that cannot fall within these rules. No knowledge of the original or present contents of a perfect appearing can is possible in the use of canned products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of canned goods that will more nearly harmonize with what is rational and just.
5. Upon the assumption that the plaintiff was made sick by the asparagus furnished her by the defendant company, the defendant is not liable in the absence of an express warranty.

On report. Judgment for defendant.

This is an action on the case by Catharine Bigelow against the Maine Central Railroad Company to recover damages for injuries to her health occasioned by eating canned asparagus furnished to her in its dining-car on the 25th day of February, A. D. 1910, by defendants' caterers in said car. The plaintiff contends that the asparagus furnished her by the defendant in said dining-car was unwholesome and poisonous. The plea, the general issue with brief statement that the defendant is in no way responsible as it did not know, and by the exercise of reasonable prudence and care, could not have known, that said food was unwholesome. At the conclusion of the evidence, the case was reported to the Law Court for final determination upon so much of the foregoing evidence as is legally admissible, the Law Court, to render such judgment as the case and the evidence warrant, including the assessment of damages, if the plaintiff is entitled to recover.

The case is stated in the opinion.

George H. Morse, for plaintiff.

Forrest Goodwin, for defendant.

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

SPEAR, J. This is an action on the case brought by the plaintiff against the Maine Central Railroad Co. to recover damages for

injury to her health alleged to be caused by unwholesome and poisonous food served to her by the defendant in its dining-car on the 25th day of February, 1910. The case comes to the Law Court on report. The food specifically complained of was canned asparagus served on toast, upon the consumption of which the plaintiff was soon after taken violently ill. Upon the assumption that the asparagus was poisonous and was the proximate cause of the injuries of which the plaintiff suffered, is the defendant then, under the evidence in the case, liable? The undisputed evidence shows that the train crew on the dining-car was experienced and intelligent. The conductor had had a long experience and the chef had served fifteen years as a cook. The can of asparagus from which the plaintiff was served was purchased by the commissary agent of the company, who was, at the time handling the dining-car service upon the Boston & Maine and Maine Central Railroads. He purchased this particular can with others either on February 15th or 17th of the month in which it was served, of S. S. Pierce Company, Boston. It was a well-known brand, called "The Red Label Brand" and the only kind used upon the dining-car. It was guaranteed by the S. S. Pierce Company as pure, under the Pure Food and Drug Act of 1906. It was bought by S. S. Pierce Company of a dealer who packed it expressly for that company. It was the highest grade and bore the S. S. Pierce label. This company sells a quarter of a million of this label every year, and has done so for the last ten or fifteen years, and in that time no case of poisoning has arisen. After this can was purchased, it was properly kept for either eight or ten days until the morning of its use, when it was placed in the custody of the officials of the dining-car. This can, with others, was sealed; none had been opened. There was apparently no defect in the can nor any other indications of imperfection. It was opened by the chef and prepared in the usual manner. The dining-car was inspected that morning and found perfect in every department. The chef in opening the can and preparing the asparagus discovered nothing in the appearance, taste or odor that was not right. He says it appeared perfect in every particular; nor did the waiter who served it, or the conductor who saw it, notice anything. The plaintiff also testified that it looked

all right and tasted all right; that there was nothing whatever to indicate any trouble with it. No evidence is offered tending to show negligence on the part of the defendant company in the purchasing, preparation, or serving of this asparagus. The allegation in the plaintiff's writ is that it was negligently prepared, unwholesome and poisonous, and that the defendant ought to have known these facts.

The plaintiff, however, contends, admitting all these things to be true, that the strict rule of law which prevails in this class of cases will hold the defendant responsible. It is claimed, under the plaintiff's declaration, that it is not necessary for her to show privity of contract or negligence, and due care is no defense; that scienter need not be alleged, and if alleged, need not be proved; negligence need not be alleged, and if alleged, need not be proved; that the defendant from the nature of its business and calling was bound to know; that it impliedly represented and guaranteed that the food was wholesome and fit for consumption, and, if it was not, and the party eating it was injured, it was liable. In other words, the plaintiff's contention is that the defendant in this class of cases is an insurer of the quality of the food product which it serves. We are unable to believe that this is a sound rule, when confined to the sale or use of canned goods.

It has been the boast of the common law that it was able to adjust itself to the inevitable vicissitudes and changes that occur in the development of industrial life, business methods, social progress and scientific invention. Within the last century has appeared from time to time the discovery of devices that have revolutionized the methods and accomplishments of human effort. The subjugation of steam and control of electricity, and the consequent inventions for their practical use, have become instrumental in introducing an epoch in the history of science. Industrial, commercial and financial projects have also assumed new forms and employed new methods. Yet, to the adjustment of all the new and varied relations arising from the adoption, application and use of these new agencies and new methods, the principles of the common law have adapted themselves so aptly as to render almost imperceptible the radical transitions that have taken place.

Of little less importance than the appearance of the great achievements referred to, is the establishment and development of the canning industry in this country and in other parts of the world. It may be said that the art of canning, if not invented within the last century, has, at least, assumed the vast proportions which it has now attained, within a comparatively few years. It involves a unique and peculiar method of distributing, for domestic and foreign use almost every product known to the art of husbandry. The wholesaler, the retailer, and the user of these goods, whether in the capacity of caterer, seller or host, sustain an entirely different duty, respecting a knowledge of their contents and quality, than prevails with regard to knowing the quality of those food products, which are open to the inspection of the seller or victualer. With reference to these it may well be considered, as has been held, that having an opportunity to investigate, and thereby to know the quality of their merchandise, they are charged with a responsibility amounting to a practical guarantee.

The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products they offered to the public, were, accordingly charged with knowledge of their imperfections. *Winslow* v. *Lombard,* 18 Pick., 57; *Bishop* v *Webber,* 139 Mass 411. But upon the state of facts in the case at bar, a situation arises that cannot, in the practical conduct of the canning business, fall within these rules. No knowledge of the original or present contents of a perfect appearing can is possible, in the practical use of canned products. They cannot be chemically or bacteriologically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of canned goods, that will more nearly harmonize with what is rational and just.

The statement of facts before us shows that the asparagus served to the plaintiff was of a very high brand, sold by a most reliable firm, guaranteed under the pure food law, and without fault or blemish discoverable to the eye, to the smell or taste. It was apparently a perfect can of what it purported to contain. The plaintiff, in February, must have known it was a canned product when she

ordered it. *Winslow* v. *Lombard,* 18 Pick., 57. Upon her order she was entitled to a reputable brand, packed and inspected in accordance with approved methods, and the law implied a warranty on the part of the defendant to furnish it. This obligation was fully met. But what was the legal relation sustained by the plaintiff and defendant with respect to their knowledge, and means of knowledge, of this can of asparagus? It seems to us it was absolutely mutual. To make this relation clear, suppose, by way of illustration, this identical can of asparagus had been shown to the plaintiff for inspection. Then what are the necessary inferences? The defendant knew it was a can of asparagus. The plaintiff knew it was a can of asparagus. The defendant knew it was The Red Label Brand. The plaintiff knew it was the Red Label Brand. The defendant knew it was put up by the S. S. Pierce Company. The plaintiff knew it was put up by the S. S. Pierce Company. The defendant knew it was guaranteed by the pure food act. The plaintiff knew it was guaranteed by the pure food act. The defendant could discover no imperfection about the can. The plaintiff could discover none. The defendant observed no fault with the contents. The plaintiff found none. It, therefore, appears that it was utterly impossible for the defendant to know anything more about the contents of this can of asparagus than did the plaintiff. With regard to this knowledge, or means of obtaining it, they were upon a perfectly equal footing. The plaintiff and the defendant necessarily understood the situation precisely alike. There could be no mistake. The plaintiff knew, or should be charged with knowledge, that the defendant could have no possible information concerning the contents of that can which she did not have. We know of no rule of law, which will imply a warranty of that, of which it is impossible for a defendant to know by the exercise of any skill, knowledge or investigation, however great. In other words, neither law nor reason require impossibilities. As was said by Chief Justice Shaw in *Winslow* v. *Lombard,* 18 Pick., 57, with reference to the inference of an implied warranty in a sale of fish: "In applying this rule to the present case, the question is what did the parties mutually understand by the contract, as it was reduced to writing." If we apply this rule to the case at bar the only pos-

sible conclusion is, that the parties understood the matter precisely alike, and that the defendant sold, and the plaintiff bought, exactly what she ordered. She, therefore, assumed the risk of its imperfections, as there was no possible way, either for her or the defendant, consistent, with the practical use of the product, to test its quality.

But in this same case the rule which we invoke seems to be sustained by analogy of reasoning, and the distinction made between a sale of provisions, which are open to inspection, and a sale of food products, which are packed under inspection, and calculated to be offered in the markets for sale in the inspected packages. On page 62 it is said: "In a case of provisions, it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions, packed, inspected, and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor, but both rely upon the skill and responsibility of the inspector, as verified by the brand, for all qualities which the brand indicates; and for damage which may happen afterwards, and against which, therefore, the brand offers no security, the vendee must secure himself by the terms of the contract; and unless he does so or unless he is deceived by a false representation of the present and actual condition of the commodity, on which he would have a remedy of a different character, he must be supposed to have been content to take the risk on himself."

Whatever may be the rules of law, and they are not uniform, pertaining to the liability of caterers, victualers, hotel-keepers or retailers of provisions, with respect to the warranties implied from the transaction of their various kinds of business, there can be little doubt that, in the class of cases now under consideration, the rule laid down by Chief Justice Shaw with respect to packed and branded products is the prevailing and correct one, and should apply

with increased force to the sale of canned goods. What duties the law may impose upon manufacturers of food products, which turn out defective, we do not assume to decide.

But in the case at bar, upon the assumption that the plaintiff was made sick by the asparagus furnished her by the defendant company, it is the opinion of the court that, in the absence of an express warranty, the defendant is not liable.

Judgment for the defendant.

JOHN TRAINER *vs.* MARINE NATIONAL BANK.

Sagadahoc. Opinion December 20, 1912.

Appropriation. Bond. Call Deposits. Credibility of witness. Change. of note. Checks. Discount Handwriting. Exceptions. Interest. Motion. Notes. Overdraft.

Action of assumpsit to recover three different items: First, $500, which plaintiff claimed to be due him as a balance of a call deposit which he made with the defendant bank December 1, 1905; second, $111.25, corrected during the trial to $101.25, as an over charge of interest on two notes discounted for him by the bank; third, $295.83, as interest on the alleged call deposit. This last item was abandoned at the trial. The verdict was for $601.25, showing that the jury found the plaintiff entitled to recover the first item of $500 and the second item as corrected of $101.25.

Held:

The finding of the jury in plaintiff's favor upon the issue presented to the jury, whether the plaintiff authorized the appropriation of the $500 of his deposit to the purchase of a bond for that amount of the Monson Consolidated Slate Company alleged by the defendant and denied by the plaintiff, is sustained.

The plaintiff who was in 1907 engaged in building a vessel borrowed on August 31, 1907, of defendant, $2200, and gave his note on two months therefor and November 13, 1907, he borrowed $1300 and gave a mortgage on certain vessel property to secure both notes. The first note of $2200 having been renewed October 13, 1907, for four months. In both notes was written "interest after at 7%." The plaintiff claimed that he should

have been cahrged with only 6% interest on this loan of $3500 and the item of $101.25 is the difference between 6% and 7% interest, and that the notes were altered after he signed them, and the jury so found.

Held:

That this finding of the jury was against the weight of the evidence.

A witness for the defendant who was Treasurer of the Monson Consolidated Slate Company from 1896 until it went into a receiver's hands in 1910, was asked this question concerning the value of the property covered by the mortgage which secured an issue of $50,000 of bonds of which issue the $500 bond in question was a part, "Could it have been sold for enough, in your opinion, even at forced sale, to have paid the bonds in full," and the exclusion of his answer is sustained.

On exceptions and motion by the defendant. Exceptions overruled. Motion sustained unless the plaintiff files a remittitur for all of the verdict over $500 within thirty days after the certificate of decision is filed.

This is an action of assumpsit to recover the following sums of money; first, $500 claimed by the plaintiff to be due him as the balance of call deposit made by him with the defendant bank on December 1, 1905; second, $111.55, which amount was corrected during the trial and reduced to $101.25, claimed by plaintiff to be an overcharge of interest on two notes discounted for him by the defendant bank. The third item of $295.83 as interest on the alleged call deposit was abandoned at the trial. Plea, the general issue with brief statement in substance that the $500 referred to in plaintiff's declaration was on the 31st day of January, 1906, paid out by said bank by authority of the plaintiff and for his benefit; that the notes referred to were written so as to carry interest at the rate of 7% until fully paid, and no higher rate was charged on them; that defendant never received any accommodation notes from the plaintiff and the two $1500 notes referred to were notes to cover actual loans made to the plaintiff. The jury returned a verdict for the plaintiff for $601.25; the defendant filed a general motion for a new trial and exceptions to the admission and exclusion of testimony.

The case is fully stated in the opinion.

George W. Heselton, for plaintiff.

Arthur J. Dunton, for defendant.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

KING, J. This is an action of assumpsit to recover three different items.

First, $500 which the plaintiff claimed to be due him as a balance of a call deposit which he made with the bank December 1, 1905; second, $111.55 as an overcharge of interest on two notes discounted for him by the bank; and, third, $295.83 as interest on the alleged call deposit.

Under the ruling of the presiding Justice, acquiesced in by the plaintiff, the third item was abandoned; and the second item was, by agreement of the plaintiff, reduced to $101.25. The verdict was for $601.25, showing that the jury found the plaintiff entitled to recover the first item of $500, and the second item, as corrected, of $101.25. The case is before the Law Court on the defendant's motion for a new trial, and also on its exceptions as to the admission and exclusion of testimony.

The Motion.

1. The $500 item. The plaintiff, a sea captain, was a customer of the defendant bank from some time prior to December, 1905, until the bank went into liquidation in 1910 or thereabouts. During the period covered by the transactions in question Horatio A. Duncan was president of the bank and his son, Silas H. Duncan, was its cashier. December 1, 1905, the plaintiff deposited in the bank $5,843.75. After charging against that deposit an overdraft of $362.97 and the balance due on two notes of the plaintiff, his balance was $4,350.86.

The plaintiff claimed that immediately after that deposit was made the cashier of the bank proposed to him that if he could allow $3,000 of his deposit to remain in the bank for some material time it would pay him 5% interest thereon, the same rate it was then paying for borrowed money, and that he assented to that proposition, but on condition, however, that his money should be subject to call. This alleged arrangement was the basis of the third item in the plaintiff's writ, which, however, was abandoned. On the part of the bank it was claimed that no such arrangement was

made, and the evidence introduced relating to it, on the one side and on the other, became of little consequence after the third item was abandoned.

On December 8, 1905, three days after the deposit was made, an item of $2,500 was charged against the plaintiff's account, and it appears to have been represented by a "debit" slip containing the words "note purchased." It was claimed in behalf of the bank that this sum was applied, on authority of the plaintiff, to the purchase of the joint and several note, for that amount, of Silas H. Duncan, Horatio A. Duncan, and John S. Hyde, bearing 5% interest; that this note was kept in the bank with other papers of the plaintiff; and that the interest accruing thereon from time to time was credited to his account, and that finally the note was paid and the amount credited to him. The plaintiff, on the other hand, denied that he had any knowledge that such a transaction had occurred until after the bank went into liquidation, when he saw for the first time his cancelled checks and debit slips, which up to that time had been in the possession of the bank. The validity of this $2,500 note transaction was not directly involved in the issues submitted to the jury, and was material only so far as it shed any light upon those issues.

We come now to the first matter in issue, the $500 item. On January 31, 1906, the plaintiff's account was charged with an item of $500. The bank claimed the charge was made by authority of a counter check for that amount, dated December 18, 1905, payable to cash, and signed "John Trainer by S. H. D. authorized." This check was made out and signed by the cashier, Silas H. Duncan, and the bank claimed that it was given for the purchase of a $500 bond of the Monson Consolidated Slate Company, which bond was then the property of the cashier. The bond was kept in the bank, and it claimed to have credited to the plaintiff's account such of the maturing coupons thereon as were paid. The Slate Company is in the hands of a receiver, and it was not claimed that the bond was of full value, at least, at the time of trial. The First National Bank of Bath became the liquidating agent of the defendant bank and Mr. Low, vice-president of the First, testified that in searching, at

the request of Horatio A. Duncan, for pass books, cancelled checks, and other papers and vouchers relating to the plaintiff's account in the Marine Bank, among the books and papers turned over to the First by the Marine Bank, he found a tin box containing a pass book in which were some cancelled checks and other vouchers relating to the plaintiff's account, and that the $500 bond was with the other papers, and that he passed the bond to the plaintiff who, after inquiring of him what it was and how it came there, passed it back to him.

The question of fact presented to the jury concerning the $500 item was, whether the plaintiff authorized the appropriation of $500 of his deposit to the purchase of the bond, and the burden was on the defendant to prove that fact.

Silas H. Duncan now resides in Seattle, Washington, and he was not present at the trial, but a statement of what the plaintiff admitted he would testify to if present was read to the jury, in which it was stated that he would testify if present that he called the plaintiff's attention to the $2,500 note and the $500 bond and suggested to him that they would prove a good investment, yielding a good rate of interest, and that the plaintiff agreed to buy both the note and bond and authorized him to charge his account with the amount necessary for the purpose which he did, and that after the transaction the matter was talked over between them, and that the plaintiff saw and handled the note and bond. In rebuttal the plaintiff called several witnesses who gave testimony tending to impeach the credibility of Silas H. Duncan.

The plaintiff testified that he did not authorize Silas H. Duncan to sign his name to the $500 check, that he did not purchase the bond or give any one authority to purchase it for him, and that he never saw the bond or heard it spoken of until Mr. Low of the First National passed it to him in that bank with some of his cancelled checks and other memoranda relating to his account as kept by the Marine Bank.

The defendant urged in support of its contention the circumstances, that on March 13, 1906 the plaintiff's account was overdrawn $902.11 according to the books of the bank and that, at the request of the cashier, he gave his note for $1500, the proceeds

of which were placed to his credit; that in December following his account was again much overdrawn and he gave another note for $1,500, the proceeds of which were credited to his account. And the bank contended that the plaintiff used the $2500 note and the bond as collateral security for the $1500 notes.

On the other hand the plaintiff contended that he then told the cashier that he did not understand how his account could be overdrawn, or why he should be asked to give a note to the bank when the bank was indebted to him, and that the cashier told him it would be inconvenient for the bank at that time to call in the $3000 of the plaintiff's deposit which the bank had used, and that it could make no financial difference to him if he gave the note, as the bank would allow him the same rate of interest on his call deposit as he would pay on the note, and that he gave the $1500 notes relying upon that explanation and because he then had implicit confidence in the cashier. He admitted that he signed his name on the back of the $2500 Hyde note, claiming that he did so at the time he gave the first $1500 note, and saying that the cashier called him back into the bank to do that, but he denied that he then knew that he had any ownership or interest in the $2500 note, and supposed he was asked to indorse it to assist the bank so it would not be obliged to call in his call deposit as the cashier had explained to him.

Much evidence was introduced, on the one side and on the other, bearing upon this issue, but it is impracticable to attempt here any extended reference or detailed analysis of it. The direct evidence was conflicting, and there were other facts and circumstances shown which the parties claimed tended to support their respective contentions. The issue was clearly presented to the jury by the presiding Justice in these words: "Did he authorize the appropriation of that money which the bank owed him to be expended for this $500 Monson bond? If he did authorize the bank or its officials to appropriate his money to the purchase of that bond, why then that is the end of his case, as far as the bond is concerned. On the other hand, if he did not authorize the appropriation of his money to the purchase of that bond then this bank is responsible for it and is responsible for it today, because there is no claim that

that amount of money was appropriated upon the plaintiff's order except for the purchase of this Monson bond and that is the issue. That is purely a question of fact for you to determine upon all the evidence in this case."

The jury found that issue of fact in the plaintiff's favor, and we are not persuaded by a study and consideration of all the evidence that their finding on that issue ought to be set aside as manifestly wrong. They saw the witnesses as they testified and had a better opportunity to judge of their credibility than this court now has.

2. The item of $101.25.

August 31, 1907, the plaintiff, who was then engaged in building a vessel, borrowed of the defendant bank $2200 and gave his note on two months therefor. His account was credited on that day with the proceeds of the note discounted at 6%. But it appears that on September 3, 1907, his account was charged with $3.70, it being the difference between the proceeds of the $2200 note discounted at 7% instead of 6%. When that note matured, October 31, 1907, a new note for $2200 was given on four months on which appears written "with int. after at 7%." November 13, 1907, the plaintiff borrowed of the bank $1300 more and gave his note for that amount on four months on which appears written "with int. after at 7%." On the same day, November 13, 1907, a mortgage of certain vessel property was given by the plaintiff to the bank to secure the two notes, that of October 31, for $2200 and that of November 13, for $1300. This mortgage was written by George H. Clark, an insurance agent, now deceased. After the description of the notes in the mortgage there is written "both notes 'with interest after at 7%.'" On November 14, 1907, the plaintiff's account in the bank was credited with $1218.34 which appears to be the amount of the $1300 note less the discount on both notes at 7% for four months, the time on which each was written. On the back of each note there appears indorsed at regular intervals of four months, down to 1910, payments of interest at 7%, and, so far as we have been able to determine, corresponding charges of interest were made against the plaintiff's account in the bank.

The plaintiff claimed that he should have been charged with only

6% interest on this loan of $3500, and the item of $101.25 is the difference between the charges made against his account for interest on these notes, and what it would have been at 6%.

It was the plaintiff's contention that these notes were altered after he signed them, and manifestly the jury so found. We do not think that finding is reasonably justified by the evidence.

The plaintiff's testimony relating to this matter was not positive and certain. He could only testify that he did not remember that anything was said about 7% interest when the notes were made, and that he did not believe that the words relating to the interest were written on the notes when he signed them, and on cross examination, being questioned with reference to the notes being changed after he signed them by adding the clause "with int. after at 7%," he testified: "Q. Would you swear positively that that was not on there at the time you signed it? A. I would not. I don't believe it was. Q. But you wouldn't swear positively that it wasn't? A. I wouldn't want to, no."

The evidence justifies the conclusion, we think, that in the summer of 1907 the plaintiff required a loan of $3500 and arranged for the same with the defendant bank; that the loan was to be secured by a mortgage of certain vessel property, but the execution of the mortgage was necessarily delayed on account of the registration of some of the vessels; that the $2200 note, dated August 31, 1907, on two months, was taken temporarily until the mortgage security could be given, which was done later, on November 13, 1907, when the $1300 note was given for the balance of the loan, and a new $2200 note was given bearing date October 31, 1907, the date of the maturity of the first note for that amount. Horatio A. Duncan, the president of the defendant bank at the time of the transaction, testified that the rate of interest on the loan at 7% was agreed upon when the first note of $2200 on two months was taken, but that by an error of the bank officials only 6% discount was charged on the books in the first instance, which error, however, was corrected three days after, on September 3, 1907, and the difference charged to the plaintiff's account; that the notes in question were filled out by him on printed blank notes, and that the clauses "with int. after

at 7%" were written by him in both notes before they were signed, and that no change had been made in the notes since they were signed. He further testified that the mortgage was written by Mr. Clark, with whose handwriting he was familiar, and that the clause in the mortgage relating to the interest on the notes is in Mr. Clark's handwriting and was in the mortgage when it was first delivered to the bank. But the plaintiff contended that an inspection of the notes and mortgage disclosed some evidence in support of his contention that the interest clauses in question were not written into the notes and mortgage at the same time the rest of the notes and mortgage was written. And the defendant called one witness who gave it as his opinion, from an inspection of the notes and mortgage, that the clauses in question were written into the notes after they were signed. The jury had the original notes and mortgage for their inspection, and we have examined them with care. While it is possible, perhaps, to discern from an inspection of the mortgage a slight difference between the quantity or shade of the ink in the writing of the clause relating to the interest and the other writing, yet that difference, if any, is extremely slight, and all the writing we think was manifestly done by the same person. And from an inspection of the notes we fail to discern anything that sufficiently indicates that the words relating to the interest were written after the notes were signed. Further, the improbability that these notes were altered by the bank officials after they were signed is an important consideration. It is quite impossible to believe that an intelligent person would wrongfully alter a note after it was signed, thereby committing forgery under the statute, for no other motive than that a bank should get the benefit of an increase of 1% in the rate of interest on a comparatively small loan for a short time.

After a careful and painstaking examination of all the evidence relating to this issue, especially, the fact that the plaintiff himself was unwilling to state positively that the interest clauses were not in the notes when he signed them, the positive testimony of the president of the bank who wrote the notes that he wrote the interest clauses into them before they were signed, the absence of any substantial evidence from an inspection of the notes that they have

been altered since they were signed, and the improbability that any intelligent person would make such an alteration on a note after it had been signed by the maker, we are constrained to the opinion that the jury's finding on this issue was against the weight of the evidence.

It may be that the other issue relating to the item of $500 so engrossed the consideration of the jury that they failed to give discriminating consideration to the evidence bearing on this issue. But whatever may have been the cause for it, the court is of the opinion that the finding of the jury on this issue was unmistakably wrong and that it ought to be set aside.

The Exceptions.

In the reply to the plaintiff's brief the defendant's learned counsel says: "As to the exceptions, we will say that the only one of the exceptions to which any attention was devoted in our brief, was the exception to the exclusion of the testimony of George W. Johnson. This is the one to which the plaintiff does not seem to refer in his brief but is the one on which we rely."

George W. Johnson, Treasurer of the Monson Consolidated Slate Company from 1896 until it went into a receiver's hands in 1910, as a witness for the defendant, testified that the bond issue, of which the $500 bond in question was a part, was $50,000, of which $20,000 were issued, and that the bonds were secured by a mortgage of property which he said "cost about $200,000 at that time." He was then asked this question: "Could it have been sold for enough, in your opinion, even at forced sale, to have paid the bonds in full?" and his answer was excluded, to which ruling the defendant excepted.

We think the ruling was right. The fact sought to be elicited by the question was immaterial. The issue was whether or not the plaintiff purchased the $500 bond of Silas H. Duncan and authorized the appropriation of $500 of his deposit in the defendant bank for that purpose. The opinion of the treasurer of the Slate Company as to what the property securing the bonds would sell for at a forced sale could not be material to that issue. As bearing upon the probability that the plaintiff did or did not purchase the bond his knowledge of the value of the bond at the time of the alleged

purchase, or facts relating thereto then brought to his attention, might have been competent. But there was no such evidence offered. The court, however, did allow witnesses to be inquired of relative to the market value of the bonds. This was as far, we think, as the court was permitted to go in admitting testimony in relation to the value of the bonds.

It is therefore the opinion of the court that there was no reversible error in the ruling complained of.

We do not understand that the other exceptions are urged, but we have considered them and do not find the rulings complained of exceptionable.

In accordance with the foregoing opinion of the court the entry in this case must be,

Exceptions overruled. Motion sustained unless plaintiff files remittitur for all of the verdict over $500 within thirty days after the rescript is filed.

HUDSON STRUCTURAL STEEL COMPANY

vs.

SMITH & RUMERY CO., AND MASONIC TRUSTEES OF PORTLAND, Trustees.

Cumberland. Opinion December 20, 1912.

Building. Contract. Contractor. Cancellation of Contract. Fraud. Mistake. Money had and received. Unilateral mistake. Reforming contract. Referee. Specification. Stipulation. Quantum Meruit.

1. This case comes up on the following stipulation: "It is hereby stipulated and agreed that the above entitled cause shall be reported to the Law Court for final decision upon the facts as reported by the Referee."
2. There is no controversy that the contract provided for the materials and work for the structural steel for the roof framing for the School for Feeble Minded, and that the buildings were to consist of two dormitories.
3. The Referee finds that when the contract was signed the plaintiff understood it to call for one building only; that the defendant understood it to call for two buildings; that until some time in November, several months after the contract was made, the plaintiff did not understand that the specifications called for two buildings or that defendant was expecting more than one roof.
4. That the plaintiff was not negligent in not discovering that the plans and stipulations covered two buildings before it executed the contract, and defendant did not know that plaintiff understood that only one building was embraced in the contract.
5. In view of the smallness of the amount which plaintiff proposed to furnish the steel roof framing, it being many hundred dollars less than it would actually cost to furnish roof framing for two buildings, the defendant, an experienced contractor and bidder on contracts embracing iron and steel structural work, ought to have been put upon inquiry as to whether the plaintiff was not acting under a mistake as to the number of the buildings.
6. But notice sufficient to put one upon inquiry imposes upon him such a degree of diligence as will enable him to ascertain the truth, and in failing to so do he will be charged with the knowledge he ought to have obtained by investigation.

7. Being put upon inquiry it was the duty of the defendant to have informed the plaintiff of its apprehension, if not knowledge, as to the plaintiff's misunderstanding.

On report. Judgment for the plaintiff for $1789.29 and interest from December 28, 1909, and costs of reference $25.86 and costs of court to the taxed by the court.

This is an action of assumpsit brought by the Hudson Structural Steel Company against the defendant to recover the value of certain structural steel roof framing furnished by the plaintiff as subcontractor to the defendant, the general contractor, for the school for the Feeble Minded at West Pownal. The case was referred to Mr. Justice Savage and is reported to the Law Court for final determination upon the facts as reported by the Referee and upon the record. Plea, the general issue, with brief statement claiming in substance that the plaintiff, without lawful excuse, failed to complete its contract by finishing only one roof instead of two; that in any event the defendant is entitled to recoup damages to the amount of the cost to defendant of the second roof, and also to recoup for delay in delivering materials and for defective workmanship.

The case is stated in the opinion.

Robert T. Whitehouse, and Whipple, Sears & Ogden, for plaintiff.

Payson & Virgin, for defendant.

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

SPEAR, J. This case comes up on the following stipulation: "It is hereby stipulated and agreed that the above entitled cause shall be reported to the Law Court for final decision upon the facts as reported by the Referee; that the record of the case on report shall include the pleadings, the rule of reference, the report of the Referee and this stipulation, that the evidence need not be printed but that the official stenographer's typewritten transcript of the same may be used before the Law Court by either party in the manner and to the extent stated in the Refereee's report." In view of the findings of fact by the Referee, but one of the questions of law need

be considered, and this will be referred to in its application to the contention of the parties when reached. There is no controversy that the contract provided for the materials and work for the structural steel for the roof framing for the School for Feeble Minded, and that the buildings were to consist of two dormitories. The specifications bore upon the outside of the cover the words "Specifications for Two Brick Dormitory Buildings for the Maine Home for Feeble Minded." As the specifications were made a part of the contract, as before suggested, the contract provided for a roof for each dormitory, while the Referee found "There was nothing in the iron and steel items to indicate that the specifications were intended to cover more than one building." The contract was made on the 16th day of August, 1909.

The Referee finds that when the contract was signed the plaintiff understood it to call for one building only; that the defendant understood it to call for two buildings; that until some time in November, several months after the contract was made, the plaintiff did not understand that the specifications called for two buildings or that defendant was expecting more than one roof; "that the plaintiff was not negligent in not discovering that the plans and specifications covered two buildings before it executed the contract;" and defendant did not know that plaintiff understood that only one building was embraced in the contract. The Referee also says: "I find, subject to the opinion of the court, in view of the fact that the defendant had knowledge before executing the contract that at least one other contractor had misinterpreted the plans and specifications as to the number of buildings, and in view of the smallness of the amount which plaintiff proposed to furnish the steel roof framing; it being many hundred dollars less than it would actually cost to furnish roof framing for two buildings that the defendant, an experienced contractor and bidder on contracts embracing iron and steel structural work, ought to have been put upon inquiry as to whether the plaintiff was not acting under a mistake as to the number of the buildings." It is the opinion of the court that this finding should be sustained.

But notice sufficient to put one upon inquiry imposes upon him such a degree of diligence as will enable him to ascertain the truth,

and in failing to so do he will be charged with the knowledge he ought to have obtained by reasonable investigation. *Wood* v. *Carpenter,* 11 Otto., 135 U. S., in which it is said: "The means of knowledge are the same thing in effect as knowledge itself." *Vredenburgh* v. *Burnet,* 31 N. J. E., 229; *Gale* v. *Morris,* 30 N. J. E., 285. "Notice sufficient to put a person on inquiry need not contain complete information on every fact material to his knowledge." *Barnes* v. *McLellen,* 3 P. N. W., (Pa.) 6723 Am. D., 62; *Van Noren* v. *Robinson,* 16 N. J. E., 256; *German etc.* v. *Western, etc. Co.,* 137 Cal., 598; *Furman* v. *Upry,* 106 N. Y., 579.

Being put upon inquiry it was the duty of the defendant to have informed the plaintiff of its apprehension, if not knowledge, as to the plaintiff's misunderstanding. The rule touching this duty is forcibly stated in the Harvard Law Review for June, 1910, page 622. See also Cyc. 34, 921 and 922. *Webb* v. *Morrison,* 137 N. Y., 712; *Essex* v. *Day,* 52 Conn., 483; *Willis* v. *Yates,* 44 N. Y., 525; *James* v. *Butler,* 54 Wis., 172; *Venable* v. *Benton,* 129 G. A., 537; *Motheway* v. *Wall,* 168 Mass., 333.

While under the circumstances not chargeable with positive fraud or actual misrepresentation, in failing to do so, it nevertheless put the plaintiff to the disadvantage of being deceived and mislead by the silence or passive conduct of the defendant. Under the finding of the Referee that "the plaintiff understood it to call for one building only," thereby laboring under the mistake with regard to a material matter, while the defendant, put upon inquiry, understood the contract to call for two buildings, it is the opinion of the court, the contract being subject to cancellation, that the plaintiff should be permitted to recover upon quantum meruit.

But upon this issue the defendant contends that a unilateral mistake cannot avoid a contract. But in view of the facts found by the Referee, this contention cannot be sustained. While this view may be correct as to the reforming of a contract, it is not of universal application as to the cancellation of one. *Andrews* v. *Andrews,* 81 Maine, 337, a bill in equity to reform a deed, holds that with no allegation of fraudulent or other inequitable conduct, the plaintiff must prove a mutual mistake. The converse is that if inequitable conduct was proved that might be sufficient. It further holds: "If

the parties differently understood the original agreement as to the identity of the premises, the relief would take on the form of cancellation rather than reformation." *Young* v. *McGown,* 62 Maine, 56, notes the distinction with respect to the application of the law to the reformation and cancellation of contracts. The court say: "It must be a mistake on both sides, for if it be by one party only, the altered instrument is still not the real agreement of both. A mistake on one side may be a ground for rescinding a contract, or for refusing its specific performance; but it cannot be a ground for altering its terms." This case is cited with approval in *Andrews* v. *Andrews.* In *Bibber* v. *Carville,* 101 Maine, 59, a bill was brought for the cancellation of a deed. In discussing this case the court say: "In this case the court is asked to cancel a deed which expressed just what the plaintiff intended it should. The mistake was unilateral on the part of the grantor alone, induced by no fraud, falsehood, misrepresentation or concealment of the grantee, relating to the grantors own title, the true state of which ordinary care and diligence on his part should have revealed to him. It does not appear that the grantor will obtain an unconscionable advantage by the deed." Conversely, if the court had found "concealment" of facts or an unconscionable advantage, by the party who ought to have communicated them, it might be sufficient to warrant the cancellation of the deed. In *Boyden* v. *Hill,* 198 Mass., 447, the court say: "Having made a contract explicit in its terms, as to which he has been in no wise deceived or mislead by the active or passive representations or conduct of the plaintiff, he must abide by its terms." In other words, if the party was deceived or misled by the active or passive representation or conduct of the plaintiff he might be relieved. 24, Ency. of Law, page 618 upon this subject says: "Where a contract in writing is executed under a mistake by only one of the parties as to a fact which is of the essence of the contract, the mistake constitutes the ground for the court of equity to rescind and cancel the apparent contract as written, and place the parties in statu quo, but does not constitute a ground for reformation." Also: "That the court may treat the case as though no writing ever existed and restore the parties to their original positions." In 9 Cyc. 396 is found this principle: "One is not per-

mitted to accept a promise which he knows that the other party understands in a different sense from that in which he understands it. In such a case there is no agreement although equity sometimes rectifies the contract so as to make it express the real intention." Under this quotation is cited *Lapish* v. *Wells,* 6 Maine, 175, which contains an elaborate opinion upon this subject.

In referring to this matter generally the court quoted with approval the following language: "The fraud, said the counsel, consists in such cases, in dealing with the party in ignorance and leaving him so. It is not necessary that the other party should have created the false impression or intended it; it is sufficient that he knows it, and takes advantage of it." Also: "The laws of morality can never give sanction to such a proceeding; and it surely cannot be the duty of a court of justice to be more indulgent in its judgment." If this apparent contract then could be "cancelled," or treated "as though no writing ever existed" or as "no agreement," because the plaintiff, upon a material matter, understood it one way, and the defendant understood it another, and was charged with knowledge of the plaintiff's mistake, then the minds of the parties did not meet and no contract between them was ever consummated. It therefore follows that the plaintiff can recover upon quantum meruit. *Cobb* v. *Stevens,* 14 Maine, 472; *Long* v. *Athol,* 196 Mass., 508; *Secton* v. *City of Chicago,* 102 Ill., 323; *Vickery* v. *Richee,* 202 Mass., 247; *Turner* v. *Webster,* 24 Kan., 38. The Referee has found that the plaintiff upon a quantum meruit is entitled to recover judgment for $1789.29 and interest from December 28, 1909 and cost of reference tax at $25.86 and costs of court to be taxed by the court.

In accordance with the stipulation the entry must be,

Judgment for the plaintiff for $1789.29 and interest from December 28, 1909, and costs of reference $25.86, and costs of court to be taxed by the court.

ULYSSES S. LITTLEFIELD *vs.* THE NEWPORT WATER COMPANY.

Penobscot. Opinion December 23, 1912.

Evidence. Motion. Negligence. Pipe. Surface water. Water. Verdict.

The plaintiff claims that the defendant so negligently laid its street main in the street opposite to the plaintiff's house and fifty feet therefrom, that the heaving of the soil, in freezing and thawing, caused the pipe to break, and the water to escape, so that it percolated into the plaintiff's cellar, causing damage. One ground of alleged negligence is that the defendant left a perpendicular pipe reaching from the main to the surface of the ground, uncased, and unprotected from the frost; but as the water had been shut off from that pipe, and there was no water in it, that allegation is of no consequence, since it is not claimed that water froze in the pipe and thus cracked it.

Held:

That upon the evidence, the only conclusion upon which the jury could base a verdict for the plaintiff is that water had been for three years, but intermittently, percolating through the soil fifty feet from the pipe to the cellar and that without showing anywhere on the surface. The evidence does not warrant such a conclusion.

On motion by defendant. Sustained.

This is an action on the case to recover damages to plaintiff's house and cellar situated in Newport village, in the county of Penobscot, and opposite one of the defendants' water mains. The defendant is the owner and operator of a certain water system in said Newport, by which it supplies the town of Newport with water. The claim of the plaintiff is that each winter since the pipes were laid, large quantities of water coming from a leak in defendants' pipe in the ground have flowed into his cellar, causing much damage. Plea, the general issue. The jury returned a verdict for plaintiff for $393.75, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

F. W. Halliday, for plaintiff.

W. H. Mitchell, and John E. Nelson, for defendant.

SITTING: SAVAGE, KING, BIRD, HALEY, HANSON, JJ.

SAVAGE, J. Case for negligence. The plaintiff obtained a verdict, and the case comes here on the defendant's motion for a new trial. In September, 1907, the Newport Water Company laid a two inch water main up Park Avenue in Newport to a point in front of the plaintiff's house. The main was in the southerly side of the street. The house was on the northerly side of the street, and fifty feet from the main. The main was about eight inches lower than the bottom of plaintiff's cellar. At this point in front of the plaintiff's house, the pipe was reduced to a one inch pipe by a reducing nipple, a few inches long, a shut off was put in, and a perpendicular one inch pipe with elbow was connected by a nipple to the shut-off, and came to the surface of the ground. Then it was extended on the surface to a trotting park, as a service pipe. At about the same time a service pipe was laid from the main across the street and into the plaintiff's cellar. It started within a few inches of the shut-off just referred to. This service pipe also had a shut-off on the plaintiff's premises, from twenty to twenty-five feet from the house. It is undisputed that the ground sloped away from the plaintiff's house to the north and the west; it is disputed whether it sloped to or from the house on the east; it is undisputed that on the south or road side of the house the ground sloped slightly from the traveled part of the road to the house,—from two to four inches in fifty feet.

The plaintiff complains that, each winter since the pipes were laid, large quantities of water have either flowed or percolated into his cellar, doing him much damage. He alleges that the water came from a break in the defendant's pipe in the ground at or near the connection between the two inch main and the trotting park service pipe. The negligence alleged and relied upon in argument is that the defendant laid the trotting park horizontal service pipe so closely to the surface of the ground, at the point where it was connected with the perpendicular pipe, that the heaving of the frozen ground in winter wrenched the pipe in the ground from its connection with the main, thus allowing the water to escape from the main. Counsel in his brief states the claim in these words: "As soon as

the frost came the pipe above the ground was raised, and acting on the connection under the ground, pulled it away from the main, causing a leak." It is not claimed that water froze in the pipe, and thus cracked it.

In February, 1911, the fourth winter, the pipe at this point was uncovered, and it was found to be broken or cracked. The parties agree substantially as to where the break or crack was. They disagree as to size of the pipe in which it was, and as to the size of the leak. But these latter questions are of no importance at present. The leak was between the main pine and the trotting park service pipe shut-off. And as it is not disputed that the water had been shut-off from that service pipe, and that there was no water in it that could freeze, the allegation in the writ that the perpendicular pipe had been left uncased, and unprotected from the frost, is of no consequence. The trouble was not in the perpendicular pipe. A few days previous to the discovery of the leak already referred to, the plaintiff uncovered a portion of his own service pipe on his own ground, and at the point where the shut-off was connected he found, he says, slush and water in large quantities. It is testified to for the defendant, and not denied by the plaintiff, that this service pipe also was cracked at that point.

The plaintiff contends that all the water which came into his cellar came from the break in the plaintiff's pipe in the street; and that at times it came in such quantities as to stand from one to three feet in depth. The defendant concedes that water has flowed into the plaintiff's cellar at times from some source, and that, when the cellar drain has been clogged, it has stood there to the depth of a foot and a half, but it denies that any part of the water has come from its pipe in the street. It contends, on the contrary, that it has come partly from surface water flowing from the street and ground in front of the house down to the house, and emptying into the cellar through holes in the walls, but chiefly from springs, or moisture in the ground at that place. It suggests indeed, that as there were two cracked pipes, one in the street fifty feet away, and one in the plaintiff's ground twenty or twenty-five feet away, there is no ground for saying that the water came from the street pipe

rather than the other, if it came from either; and that the presumption would be that the water came from the nearer one. The nearer one is not complained of in the writ.

With the plaintiff's testimony to guide us, it is clear that the same cause has been operative during the entire period from the first trouble in January, 1908, until the leak was discovered and repaired in February, 1911. The only difference has been in degree. This presents a rather remarkable, if not incredible, situation. It is, that the water was burrowing or percolating from the pipe to the cellar for three years, and yet no sign of it appeared on the surface of the earth. It is argued that it followed the service pipe under the ground. But the evidence tends to refute that. The plumber who repaired the break in the service pipe testified positively that no water was coming in the ditch from the street, and the plaintiff does not say that there was any. Although the plaintiff says that he spent many days, for which he now seeks to recover compensation, in seeking the leak, he seems to have found on the top of the ground no evidence of any. And no softening of the ground, even, was ever noticed anywhere, until about the time the street pipe was uncovered in 1911. Then the ground was found to be soft in the vicinity of that leak. It is true that the plaintiff testifies that in the winter of 1909 "it broke out, it filled the street, it flowed there for months, two feet of ice all over the street." But it would seem that the plaintiff must be in error about this, for in 1911, when the water was coming into his cellar, he renewed his search. Instead of digging up the pipe in the street, where he says it broke out so seriously in 1909, he began his search at the shut-off on his own service pipe. It would seem quite clear that at that time he had forgotten the alleged surface indications of 1909, if such exer existed.

Upon the plaintiff's theory, that the break existed as far back as January, 1908, another singular feature appears. The water flow into the cellar, as the plaintiff testifies, has been intermittent for the most part. The principal trouble has been in the winter. In fact, the plaintiff in his testimony omits all reference to summer conditions. Doubtless the freezing of the cellar drain made conditions worse in the winter than they otherwise would have been. But it

has been in the winter that the large quantities of water have come in, as he says. In one instance, as the plaintiff claims, the cellar filled two feet in less than twenty-four hours. If, as is argued, water from the break in the street pipe followed the plaintiff's service pipe ditch, or if it percolated through the soil to the cellar, we can think of no reason, and none has been suggested to us, why the flow should not be practically constant the year round. The pressure on the water in the pipes naturally would be about the same, summer and winter. This intermittent condition would be more likely to exist in case of water coming from a springy, wet soil, which is naturally affected by droughts, and, as well, by the ordinary summer heat and dryness in this climate.

We mention these points as illustrative of some of the difficulties in the plaintiff's case upon his own testimony. But we go further. The testimony is overwhelming that the soil in the vicinity of the plaintiff's cellar is wet and springy, that water from the soil flows into the cellar, that both before the defendant's pipe was laid in the street, and since it was repaired, the same conditions that the plaintiff complains of have existed in the cellar, though to a lesser degree than he states them.

Upon the evidence, the only conclusion upon which the jury could base a verdict for the plaintiff is that water had been for three years, but intermittently, percolating through the soil fifty feet from the pipe to the cellar, and that without showing anywhere on the surface. We do not think the evidence warranted such a conclusion. The verdict is manifestly wrong, and must be set aside.

Motion sustained.

GEORGE A. PIERCE *vs.* CHARLES J. COLE.

Kennebec. Opinion December 23, 1912.

Advertisement. Deceit. Exceptions. Evidence. Fraud. Intention. Immateriality. Inducement. Instruction. Intention. Material Fact. Opinion. Personal Property.

In this action for deceit in the sale of a farm, the plaintiff alleged that the defendant misrepresented the amount of hay which had been cut upon the farm in years past.

1. If one person makes a statement of a positive fact, which is material, the truth of which can be ascertained as of his own knowledge, and that statement is untrue, and if he made the statement for the purpose of inducing another party to act upon it, and the other party relying upon the statement, without knowledge of its falsity on his own part, acts thereon to his damage, it is such a misrepresentation as will sustain an action of deceit.
2. In an action for deceit it is not necessary that the false statements complained of should have been made with a fraudulent purpose and with intention to cheat or defraud. Good faith in making the statement is immaterial.
3. The admission of inadmissible evidence which is harmless will not support an exception.

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

This is an action of deceit in the sale of a farm in 1907. It is alleged by plaintiff that the defendant represented that the farm for several years then last past had produced and cut thirty tons of hay in each year, which representation, he alleged, was untrue. The plaintiff testified that the defendant said that the farm "was cutting thirty tons of hay," and showed him the hay in the barn cut in 1907, and said it was all that year's hay. Plea, general issue with brief statement in which defendant says: that in making the representation that said farm would cut thirty tons of hay, he so believed and had good reasons to so believe that his statements were true; that any statement made by the defendant of the amount

of hay that the farm would cut was based upon facts and made in good faith by the defendant which facts the plaintiff had an opportunity to investigate and verify, and that in all respects in the sale of said farm to the plaintiff, the defendant acted in good faith, without intention of deceiving or defrauding the plaintiff. Verdict for plaintiff for $488.56 The defendant excepted to the admission of certain evidence and filed a general motion for a new trial.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

George W. Heselton, for defendant.

SITTING: SAVAGE, BIRD, HALEY, HANSON, JJ.

SAVAGE, J. Action for deceit in the sale of a farm in 1907. The particular misrepresentation alleged is "that said farm for several years then last past had produced and cut thirty tons of hay in each year," which representation it is alleged was untrue. The plaintiff testified that the defendant said that the farm "was cutting thirty tons of hay;" and particularly of that year, 1907. "He showed me the hay in the barn there, and told me there was thirty tons; he said it was all that year's hay."

The defendant denies making any representation about the quantity of hay cut, except that, at the interviews in the barn, being asked by the plaintiff how much hay he thought there was in the barn, he replied, "I don't know. You must judge for yourself. I think there is about thirty tons." He does not deny that he said the hay in the barn was cut that year. In fact it is his claim that the farm did cut substantially thirty tons of hay that year, and had done so for the preceding years; or if not, that he had reason to believe, and did believe so, that whatever representations he made, he made in good faith, and without an intention to deceive. The verdict being for the plaintiff, the case comes up on the defendant's exceptions and motion for a new trial.

Several of the exceptions relate to one subject matter, and may be considered together. To the question, "Were all the representations you made to the plaintiff made in good faith?" the answer was excluded on the ground that it was immaterial. The presiding Justice declined to instruct the jury, as requested by the defendant,

that the plaintiff, to prove his case, must show "that the defendant intentionally made false representations of the amount of hay cut on his farm; that the defendant knew that the representations regarding the hay were false, or so recklessly made them as a fact, without regard to their truth or falsity, when he was able to ascertain their truth or falsity; that if the statements which the defendant made regarding the hay were based upon honest beliefs that they were true, and not recklessly made by him as a fact when the truth could have been ascertained, and he did not in making these statements intend to deceive, the action cannot be maintained; so, if the defendant did not know that the statements were false, or did not recklessly state a larger amount when he could readily have ascertained the actual amount, but gave the plaintiff his best judgment without intent to deceive; so, also, unless the plaintiff shows that there was an intent on the part of the defendant to deceive the plaintiff concerning some material fact, by representation made with a knowledge of the falsity of this fact, or made recklessly without regard to the truth or falsity of the fact."

The presiding Justice instead of giving the jury the requested instructions, instructed them as follows:—"If one person makes a statement of a positive fact, the truth of which can be ascertained, as of his own knowledge, and that statement is untrue, and he has made that statement for the purpose of inducing another party to act upon it, and the other party relying upon the statement, being induced by the statement, and without knowledge of its falsity on his own part, does act upon such statement to his damage, then such statement is such a misrepresentation as will sustain an action of deceit, . . . and it is not necessary that the false statement should be made with a fraudulent purpose and with intention on his part to cheat or defraud." This statement omits to say that the representation must be concerning a material fact, and that it must be the representation of a fact, and not the expression of an opinion, but these are covered elsewhere in the charge.

The defendant urgently contends that the requests do, and that the charge does not, correctly state the fundamental requisites of proof in an action of deceit. We must hold otherwise. The law in this State has been stated, affirmed and reaffirmed, several times of late, and must now be regarded as settled. The full rule of proof,

as was said in *Hotchkiss* v. *Coal & Iron Co.,* 108 Maine, 34, 41, is that the plaintiff must show that the representations were intentionally made with the intent that he should act upon them, or in such manner as would naturally induce him to act upon them; that they were false, and were known to the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of his own knowledge; that they were expressions of past or existing facts, and not expressions of opinion; that they were material; and that he relied upon them, was deceived, was thereby induced to act, and was thereby damaged. *Braley* v. *Powers,* 92 Maine, 203; *Atlas Shoe Co.* v. *Bechard,* 102 Maine, 353; *Eastern Trust & Banking Company* v. *Cunningham,* 103 Maine, 455. See also *Litchfield* v. *Hutchinson,* 117 Mass., 195. In the latter case the court said:— "If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has no such knowledge." Therein is the deceit.

It is true that the defendant in his requests states conditions which are themselves evidence of deceit, but he omits the more comprehensive condition, correctly given in the charge, of representations of matters susceptible of knowledge, made as of a fact of the defendant's own knowledge, and shown to be untrue. The defendant can take nothing by these exceptions.

In 1905, the defendant had his farm listed for sale in a "Farm Agency," the one by whose means the sale was ultimately effected. At that time, upon a blank prepared for that purpose, to the question "How many tons of hay are cut?" he answered, "thirty." The agent prepared an advertisement of the farm, in which he used the expression "Thirty tons of good English hay cut in smooth fields." It is not shown that the defendant had anything to do with the preparation or phrasing of the advertisement, and it never came to the attention of the plaintiff until after he had bought the farm. The agent who prepared the advertisement was called by the defendant as a witness. On cross examination he was asked with reference to the advertisement.—"Can you tell or recollect why

there was any reason for putting it just that way, "thirty tons of good English hay cut from smooth fields," instead of saying "cuts good English hay?" Against the objection of the defendant the witness was permitted to answer, "We have to make a little variety in advertizing. Can't use the same language in our advertisements."

Inasmuch as it appears that the advertisement had nothing to do with the trade, and does not appear that the defendant personally had anything to do with the expression in the advertisement, the evidence was immaterial for all purposes except to impeach the witness. And as to that, it did not contradict anything that the witness had testified to, nor, so far as we can see, impeach him otherwise. We think the evidence was not admissible, but we also think that it was harmless. And for that reason the exception must be overruled. *Hovey* v. *Hobson,* 55 Maine, 256; *Powers* v. *Mitchell,* 77 Maine, 361.

Besides the farm, the plaintiff purchased of the defendant live stock, farming machinery, implements and tools, of which a list was attached to the contract of sale of the farm. The price of the farm was $3200; of the personal property, $900. The plaintiff testified that after the trade he had some talk with the defendant about a shortage of the small tools. He then testified in answer to questions as follows:—Q. "In connection with that talk did he make any general statement to you about the whole transaction?" A. "Yes sir." Q. "What did he say to you?" A. "I asked him what represented the "twenty" on my list. He says plows, cultivators, bars, rollers—" (witness interrupted) Q. "Did he make any statement to you?" A. "Yes sir." Q. "About this whole transaction, selling the farm and everything?" A. "Yes sir." Q. "What was it?" A. "I asked him and he said it represented (objection, as not responsive) the roller. I said, 'Mr. Cole, that roller is not on the list.' He said 'That is your roller,' and I says 'Very well, that is your idea.' He said 'The trap was not set for you, it was set for the other fellow.'" The admissibility of this statement being challenged, the presiding Justice ruled that it was admissible, allowed it to stand, and allowed an exception. The defendant denies having made the statement.

The previous testimony of the witness, in response to leading questions, that the statement related to "the whole transaction, selling the farm and everything, obviously made it impossible to object successfully to the statement until after the witness had stated it.

Then the point was made that it did not relate to the farm. Plaintiff's counsel contended that that was for the jury to decide, and the presiding Justice so ruled.

But we think that the entire conversation not only did not show that the statement objected to related to "selling the farm," but it showed clearly that it did not relate to "selling the farm." If true, it did not show that the defendant had a purpose of cheating the plaintiff in regard to the hay. Regarded as an admission, it was an admission only of a trap set for some other "fellow," but not for the defendant. And that too, as the context shows, concerning something else than the sale of the farm. Giving it the utmost probative force that can be claimed for it, it showed that in a specific instance, the defendant "set a trap" for another person, and, it may be inferred, a dishonest trap. The statement may have been some evidence of character. But evidence of character is not admissible in a civil action of this kind. And when evidence of character is admissible, it is to be shown by general reputation, and not by specific acts. 1 Greenleaf on Evidence, sect. 55; 2 Greenleaf on Evidence, sect. 269; 1 Wigmore on Evidence, sect. 64; *Potter* v. *Webb*, 6 Maine, 14; *Thayer* v. *Boyer*, 30 Maine, 475. Nor is the evidence any more admissible because it comes in the form of an admission than it would be otherwise. It may be noticed that when, later in the trial, the plaintiff offered to show the same statement by another witness, the presiding Justice, having had further opportunity to consider it, said, "I do not think it was quite connected the way it was put in before," and excluded the evidence.

We think the evidence was inadmissible. It should have been excluded, or if it was let in through a misunderstanding of its scope, it should have been stricken from the record, and the jury instructed to disregard it, which was not done. The evidence was not only inadmissible, but it was calculated to be mischievous, and extremely prejudicial to the defendant. This exception must be sustained. The remaining exceptions and the motion for a new trial need not be considered.

Exceptions sustained.

JOHN GAMRAT, pro ami, *vs.* WORUMBO MANUFACTURING COMPANY.

Androscoggin. Opinion December 20, 1912.

Appreciation of danger. Accident. Damages. Danger. Exceptions. Fellow servant. Fright. Inexperienced. Immature. Instructions. Machinery. Master. Minor. Suitable machinery. Warning.

An action on the case to recover damages by the plaintiff, a minor, for injuries to his hand which, while he was at work in the defendants' factory on the 18th day of December, 1911, was caught and drawn in between two rollers on a washing machine. It is claimed by the plaintiff that he was inexperienced, ignorant of and did not appreciate the danger. The plaintiff came to this country three years before the accident and had worked one year and eight months in the carding room of the defendant factory, and about fourteen months in other mills where machinery was used. The machine by which the plaintiff was injured consisted in part of two sets of rollers and the plaintiff's work, when injured, was in placing a piece of cloth so it would pass between the rollers.

Held: That the plaintiff's experience in various mills where machinery was used for nearly three years must have taught him the danger of contact with revolving wheels and cylinders, and that he must have known and appreciated the danger of the work he was doing. That he would have learned the danger by observation without instructions.

On exceptions by plaintiff. Overruled.

This is an action on the case to recover for personal injuries sustained while at work in the employ of the defendant corporation in a mill operated by said defendant at Lisbon Falls, in the County of Androscoggin, on the 18th day of December, 1911. The plaintiff claims that while at work assisting in operating a washing machine in the defendants' factory, one of his hands was caught between two rollers on said machine, causing the injuries complained of. Plea, the general issue. At the conclusion of the plaintiff's evidence, the Justice presiding ordered a nonsuit, to which order the plaintiff excepted.

The case is stated in the opinion.

Getchell & Hosmer, for plaintiff.

McGillicuddy & Morey, for defendant.

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

HALEY, J. This is an action on the case in which the plaintiff, a minor, seeks to recover damages of the defendant, for an injury that the plaintiff claims he sustained by reason of his hand being caught between two rollers in a washing machine, which the plaintiff was assisting another workman in preparing to start up, in the defendant's factory. The accident took place on the 18th day of December, 1911, the plaintiff being at that time eighteen years of age and having been in this country three years.

When the plaintiff first came to this country he worked one year and eight months in the card room of the defendant, putting wool in the carding machine. He then went to Connecticut and worked eight months in a scissors factory, sharpening scissors on a grind stone; he then worked six months in a plush mill at Bridgeport; he then returned to Lisbon Falls, Maine, and went to work for the defendant in the finishing room, and had been so employed about two weeks at the time of the accident.

He had, before the day of the accident, been called by a man operating the machine known as the washer to assist him in what is known as threading the machine, the plaintiff says three times, the workmen said four to six times.

The machine upon which the plaintiff was injured consisted, in part, of two sets of rollers. The work the plaintiff was engaged in when injured, was placing a piece of cloth so it would roll through a second set of rollers; the first set of rollers were about half an inch apart when the cloth was put through, which evidently, when the machine was running, dropped together. A few feet from the first rollers was another set of rollers about six or eight inches in diameter, one being of copper and one covered with hard rubber. The cloth run from the first set of rollers to the second set, and in order to thread it, or place the cloth so that it would run through the rollers, it was necessary for the workman to stand back of the second rollers, facing the first rollers, and reach over the second rollers and hold the cloth close to the rollers, when the machinery was started, and allow the cloth to roll through, so that it could be taken up over another roller some few feet higher, and it was while placing the cloth in position to run through the second rollers that

the accident happened. The plaintiff testified that the first time he attempted to put the cloth through the second set of rollers he did not succeed, and that another workman finished the job, and the man operating the machine made some talk to him about his being stupid. The day of the accident the plaintiff was called to assist the workman in placing the cloth between the rollers, as above stated, and told to step in and put the cloth through the second set of rollers; he did so by standing facing the rollers and reaching over, holding the cloth some five or six inches from the end, with the ends close to the rollers. The man operating the machine, in plain sight of the plaintiff, asked him if it was all right, and the plaintiff said all right, whereupon the man operating the machine turned on the power to start the cloth through the rollers. According to the testimony, the rollers turned about one-third round, and the plaintiff's hand was drawn in between them so that his fingers were jammed up to the end of his thumb, and he was obliged to have one of his fingers amputated. The man operating the machine testified that he turned on the power as usual, when the cloth was being put through as it was at this time; that is, he started the machine enough to carry the cloth through and then stopped it, that he saw the plaintiff's fingers as they started to go between the rollers and he stopped the machine and released the plaintiff's hand.

There is no allegation in the declaration, or evidence in the case, that the washing machine was not a suitable and proper machine for the purpose for which it was used, or that the master did not furnish a reasonably safe place to perform the work that the plaintiff was performing, when injured; but the action is sought to be maintained because the plaintiff was a minor, and inexperienced in the handling or working of such machines as the washing machine, and because he was immature, and inexperienced, and did not appreciate the danger of operating the machine, and that the defendant did not perform its duty, by properly instructing him of the dangers of operating a washing machine, and, in fact, gave him no instructions, or warnings of the danger of operating the machine.

Did the plaintiff know and appreciate the danger of the work he was doing? It was not his regular work, but he had seen the work done a few times, and had assisted in threading the machine at least twice. For over thirty-four months he had worked in factories;

one year and eight months putting wool in carding machines, where the wool was drawn in as the cloth was he was threading the washing machine with, was drawn in between the rolls; eight months in a scissors factory, grinding scissors, where there must have been revolving wheels and moving machinery; six months weaving in a plush mill, where there must also have been revolving wheels and moving machinery; he then worked two weeks in the defendant's factory among moving machinery. It would seem that his experience in the various mills for practically three years must have taught him the danger of coming in contact with revolving wheels or cylinders. He would have learned the danger by observation, without instruction; he would have learned it as the child learns that fire will burn, that a fall will hurt, or that a sharp instrument will cut. He must have known if his fingers got against the cylinders they would be drawn in between them. He was holding a piece of cloth against the cylinders that it might be drawn in between them. How could he help knowing that, if his hand came in contact with the cylinders, it would be drawn in as the cloth was drawn in? It is true that he testified he was frightened, but was he? What was there to frighten him? He was used to machinery. He had seen the same work done, and knew that the machine would be started but a few inches to allow the cloth to run through the rollers, and that when it was caught between the rollers, he could take his hands off the cloth, and if he did, as he might have done, there was no danger; and if he was afraid that his hand would be drawn in, although he need not have been, he knew the danger, and by the exercise of reasonable care, could have avoided it. When his fellow servant asked him if it was all right to start the machinery, and he replied that it was, he knew the danger, and he knew that his fellow servant was about to start the machinery that turned the rollers, and, although he complains that the machine started quicker than it had at other times, his experience with machinery should have taught him, that the speed of the machine would necessarily be regulated by the amount of power, that sometimes it might start faster than at other times, but in applying power enough to turn the cylinders a third round there could be no appreciable difference in the speed during the different times they were started; and, by the exercise of due care, by allowing the cloth to run through his hands, he

could have avoided all danger. No instruction of the master was needed to inform him of what he must have known. It was not a concealed or an unknown danger, but one that was perfectly apparent to him. *Mott* v. *Packard,* 108 Maine, 259.

Nor do we think the plaintiff's age was such that he should not have appreciated the danger of his employment. It seems incredible that a young man, eighteen years old, with three years' experience among machinery, was not old enough to appreciate the danger of coming in contact with revolving cylinders. It is contrary to human experience to think that he did not appreciate that danger. Reason and experience must have taught him the danger. Intelligence and reason are not developed the instant one becomes of age. From childhood to manhood they are growing and developing. Reason as well as authority says he was of sufficient age to appreciate the danger of coming in contact with machinery in operation. *Mott* v. *Packard,* supra, and cases there cited.

As the plaintiff was of sufficient age to appreciate the danger of the labor he was performing, at the time of the accident, if it was dangerous, and his knowledge of the working of machinery was such that it was not an unknown or an unseen danger, the conclusion is irresistible that the accident was caused by the contributory negligence and want of due care on the part of the plaintiff in not avoiding a danger known to him, and the judgment of nonsuit was properly ordered.

Exceptions overruled.

ADA CONTI *vs.* AMERICAN EXPRESS COMPANY.

Washington. Opinion December 26, 1912.

Baggage. Bill of Lading. Burden of Proof. Carriers. Condition of Goods. Contract. Damages. Directions. Goods in Transit. Negligence. Presumption.

An action to recover damages for injuries to seven trunks, one sewing machine and a quantity of music in one of the trunks carried by the defendant as a common carrier from New York to Eastport, Maine. The plaintiff returned from Italy to the United States in November, 1910, by the Hamburg American Line from Genoa to New York. She intended to take the trunks and sewing machine along with her as personal baggage, but it had not arrived when she sailed, and the steamer agent was to forward it later. About three weeks afterwards the trunks and sewing machine were delivered to her in Eastport in a damaged condition. No bill of lading or shipping receipt from defendant company is shown and no evidence was offered to show who delivered the property to defendant company in New York, or what its condition was when defendant received it.

Held:

1. In an action against the last of a series of carriers to recover for injuries to goods in transit, when the goods were shipped in good order, the presumption arises that they continue in that condition until they reach the hands of the delivering carrier, and the burden is on it to show that the injury occurred before the goods came into its possession.
2. To bring this case within the application of that rule it must be shown that the defendant company was the last of a line of successive carriers, carrying goods continuously in pursuance of a through bill of lading or contract of shipment, and that they were received by the initial carrier in good condition.
3. The evidence in this case does not show that the American Express Company was the last of successive carriers of the goods in pursuance of any continuous carrying of them under a through bill of lading from Italy to Eastport, but on the other hand; that the defendant received the goods in New York as a new shipment, independent of, and without connection with any previous carrying of them.
4. This suit is based on the negligence of the defendant. The burden is on the plaintiff to prove it. It is not enough for her to show that the goods were in a damaged condition when the defendant delivered them to

her. She must show that they were injured while in the defendant's possession by its negligence. If she had shown that they were uninjured when the defendant received them, that would have imposed upon it the burden of exonerating itself.

On report. Judgment for the defendant.

This is an action on the case to recover damages for injuries to seven trunks, one sewing-machine and a quantity of music in one of the trunks carried by the defendant company as a common carrier from New York to Eastport, Maine. The plaintiff, who was in Italy returned to the United States in November, 1910, by the Hamburg American line from Genoa to New York. She intended to take the trunks and sewing-machine with her as personal baggage, but they had not arrived when she sailed, and the steamer agent was to forward the baggage later. She says the sewing-machine was properly crated, and the trunks were in a sound condition and securely locked and tied with ropes. About three weeks after she arrived in Eastport, Maine, the trunks and sewing machine were delivered to her by the defendant company in a damaged condition. No bill of lading or shipping receipt from the defendant company were in evidence and no evidence offered to show who delivered the property to the defendant in New York or what its condition was when the defendant received it. Plea, the general issue with brief statement in substance that the alleged injury to the property of plaintiff did not occur while the same was in defendants' possession, and that defendant exercised due care in handling and transporting said property; and that it was delivered to plaintiff in same condition as it was when received by defendant. At the conclusion of the evidence, the case was reported to the Law Court upon so much of the evidence as is legally admissible, to render such judgment as the rights of the parties require.

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

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

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

KING, J. This case comes up on report. It is an action to recover damages for injuries to seven trunks, one sewing machine, and a

quantity of music in one of said trunks carried by the defendant, as a common carrier, from New York to Eastport, Maine.

It appears from the report that the plaintiff visited Italy in 1910. She returned to the United States in November of that year by the Hamburg American Line from Genoa to New York. She intended to take the trunks and sewing machine along with her as personal baggage, and says that the sewing machine was properly crated and that the trunks were in sound condition and securely locked and tied with ropes. It appears inferentially that this baggage may have been sent by rail to the steamship company at Genoa. It had not arrived there, however, when the plaintiff sailed and the steamer agent was to forward it later. About three weeks after she arrived in Eastport the trunks and sewing machine were delivered to her by the defendant, she paying the charges thereon, and she claims that they were then in a damaged condition. No bill of lading or shipping receipt from the defendant company is shown, and no evidence was offered to show who delivered the property to the defendant company in New York, or what its condition was when the defendant received it.

The plaintiff says she heard nothing about the baggage after she left Genoa until she received it in Eastport. But when asked on cross examination if she left any directions with the steamship agent in New York as to what should be done with her baggage when it arrived there she said: "Yes, I told him to send it to me." It is, therefore, reasonable to infer that the steamship company, in compliance with the plaintiff's request, delivered the baggage to the American Express Company in New York to carry to Eastport.

The plaintiff contends that having shown that the property was in a damaged condition when the defendant delivered it to her, the burden was thereby imposed on it to exonerate itself by showing that the property was not injured while in its possession. She evidently relies upon the well established rule that in an action against the last of a series of carriers to recover for injuries to goods in transit, when the goods were shipped in good order, the presumption arises that they continue in that condition until they reach the hands of the delivering carrier, and the burden is on it to show the injury occurred before the goods came into its possession. *Colbath* v. *B. & A. R. R. Co.,* 105 Maine, 379 and cases cited.

To bring this case within the application of that rule it must be shown that the defendant company was the last of a line of successive carriers, carrying the goods continuously in pursuance of a through bill of lading or contract of shipment, and that they were received by the initial carrier in good condition.

It sufficiently appears that the goods in question were transported by some means of conveyance from some other place in Italy to Genoa, for the plaintiff testified that they had not "arrived" at Genoa when she sailed, and she was asked if there were not washouts on some of the Italian roads on the day she sailed which delayed the goods, and she replied, "I supposed it did." There is no other evidence relating to this initial carriage of the goods, and in the absence of any information as to the terms of the contract therefor, it seems just and reasonable to infer, under the circumstances, that this first carriage of the goods was not a part of a through shipment of them from their starting point in Italy to Eastport, Maine, but only an independent transportation of them to Genoa, thence to accompany the plaintiff, as "personal baggage," on her passage from Genoa to New York by the Hamburg American line.

If the carriage of the goods before they arrived in Genoa was not in pursuance of a contract for a through shipment of them to Eastport, and we think it was not, then there is no evidence, or presumption that can be legitimately applied, that the goods were in good condition when received by the Hamburg American line.

Further, there is no evidence that when the goods were later taken to New York by the steamship company they were carried in pursuance of a through shipment from Genoa to Eastport. No bill of lading or contract for shipment by the Hamburg American Line is shown. And it is not shown that the plaintiff herself had a through ticket to Eastport. In the absence of any contract for through transportation to Eastport, the inference would seem to be that the goods were merely taken by the steamship company from Genoa to New York as the plaintiff's delayed baggage, and that the steamship company's only duty as a common carrier, with respect to the goods, was to land them safely in New York, where the plaintiff was to take charge of them. And this inference is made quite indisputable by the plaintiff's testimony that she left directions with

the steamship agent in New York to send the goods to her when they arrived.

It is therefore the opinion of the court that the evidence in this case does not show that the American Express Company was the last of successive carriers of the goods in pursuance of any continuous carrying of them under a through bill of lading from Italy to Eastport, but on the other hand, that the defendant received the goods in New York as a new shipment, independent of, and without connection with any previous carrying of them. The plaintiff alleges in her declaration that she delivered the goods at New York to the defendant, as a common carrier, to be carried to Eastport. That allegation is sustained by her evidence, for the goods were delivered to the defendant in New York by the plaintiff through her representative, the agent of the steamship company, acting under her directions to send the goods to her.

This suit is based on the negligence of the defendant. The burden is on the plaintiff to prove it. It is not enough for her to show that the goods were in a damaged condition when the defendant delivered them to her. She must show that they were injured while in the defendant's possession by its negligence. If she had shown that they were uninjured when the defendant received them, that would have imposed upon it the burden of exonerating itself. But she offered no evidence on that point. The mere fact that the goods were in a damaged condition when the defendant delivered them to the plaintiff is not, in the opinion of the court, sufficient evidence to sustain the burden of proof that the goods were injured by the defendant's negligence, because there is no evidence, or presumption applicable in this case, that the goods were uninjured when received by the defendant.

Judgment for defendant.

E. J. HILL *vs.* W. S. LIBBY et al.

Androscoggin. Opinion December 26, 1912.

Appreciation. Blasting. Dangerous. Duty. Dynamite. Defect. Explosion. Experienced. Ignorance of Danger. Instructions. Motion for new trial. Negligence. Special Motion. Personal injuries. Risks.

1. When an employer directs his employee to perform a dangerous service which requires skill and caution to avoid the risks and hazards incident to its performance, knowing the employee is inexperienced in such service and ignorant of its dangers, it is the duty of the employer to give him adequate information as to the dangers he is likely to meet in performing the service and suitable instructions and warnings as to the manner and method of doing it so that he may be able, by the exercise of reasonable care, to avoid the danger.
2. An additional duty is imposed upon an employer who finds it necessary to adopt the use of particularly hazardous agencies and appliances of giving full information to his servant who does not already have the information of the peculiar dangers arising from the use of such extraordinary hazardous agencies.
3. It was a question of fact for the jury to determine from the evidence whether the plaintiff, at the time of the accident, from experience or otherwise, had adequate information as to the risks and dangers incident to inserting a fuse into a loaded cap for the purpose of exploding dynamite.
4. The care required of an employee depends upon his knowledge, actual or constructive, of the risks and dangers to be met with in the performance of the duty assigned him.
5. If a party to an action, being himself a witness, commits wilful perjury or makes use of false testimony which he knows to be false, and thereby obtains a verdict in his favor, the court in its discretion may set aside the verdict so obtained.

On motion for new trial. Overruled.

This is an action to recover damages for personal injuries while in the employ of the defendants. The plaintiff had been for some years, an overseer in their woolen mill, and while the mill was shut down, at the request of the defendants, he took charge of a small crew of their laborers, in the work of grading an electric railroad

which they were constructing from Lewiston to Portland. While so employed, it became necessary to have some blasting done. The defendants' superintendent of construction asked him if he knew anything about using dynamite, to which he replied that he did not. A. M. Clark, who was experienced in that work, was put in charge of the blasting that was done at that time. There are two kinds of caps used in exploding sticks of dynamite. The plaintiff saw Clark use the cotton fuse caps in his work of blasting, but was not instructed by Clark, or by anyone else, as to the risks of exploding a cap by inserting a fuse into it, or as to the care to be exercised in doing it to avoid those risks. Subsequently, he was directed by said superintendent to do some blasting with dynamite and while so employed, received the injuries complained of by the explosion of a cap. Plea, the general issue.

The jury returned a verdict for the plaintiff for $1494, and the defendant filed a general motion for a new trial; and also a special motion for a new trial, alleging that the plaintiff had testified falsely.

McGillicuddy & Morey, for plaintiff.

Joseph M. Trott, and Newell & Skelton, for defendants.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, HALEY, JJ.

KING, J. Action for personal injuries occasioned to the plaintiff while in the employ of the defendants. Verdict for $1494. The case comes before this court on defendants' motions for a new trial. GENERAL MOTION.

The plaintiff had been in the employ of the defendants for some years as an overseer in their woolen mill. The mill being shut down for a time, at the defendants' request, the plaintiff took charge of a small crew of their laborers in the work of grading an electric railroad which they were constructing from Lewiston to Portland. To facilitate the work it became necessary from time to time to have some blasting done, and a short time after the plaintiff began work the defendants' superintendent of construction asked him if he knew anything about using dynamite, to which he replied that he did not, and Mr. Clark, a man experienced in that work, was put in charge of the blasting that was done at that time. It appears that there are two methods, or two kinds of caps, used in exploding sticks of dynamite. One is the electric fuse cap which is exploded

by heat from a battery, and the other the cotton fuse cap which is exploded by fire through the fuse. The latter cap is about an inch long and of small diameter, a little larger than a lead pencil. The explosive substance is at the bottom or closed end of the cap being congealed there or dried in. The fuse is connected with the cap by carefully inserting its end without twisting it as far into the cylinder of the cap as prudent and not strike the explosive substance, and then the top of the cap is crimped upon the fuse so that it may not move when the cap is pushed into the soft stick of dynamite. If the end of the fuse should be pushed against the charge in the cap the slight friction thereby caused would be apt to explode the cap. It is important also that there should be no dirt or grit in the cylinder of the cap or on the end of the fuse. The plaintiff saw Mr. Clark use the cotton fuse caps in his work of blasting, but he was not instructed by Clark or by any one else as to the risks of exploding a cap by inserting a fuse into it, or as to the care to be exercised in doing it to avoid those risks. Subsequently the plaintiff did some blasting with dynamite using the battery caps which are less dangerous. He did however on one occasion at least before the accident in question use some of the cotton fuse caps. As to the number of cotton fuse caps he had previously used the evidence is not definite. He admitted that at a previous trial he answered that he might possibly have used one hundred, saying, however, in explanation of his last testimony and of that answer, "I couldn't tell you the exact number. I have thought that over since the last trial and I don't see where it could have been over thirteen or fourteen."

On the 29th or 30th of September, 1910, about five months after the plaintiff began work on the railroad, the superintendent directed him to do some blasting with dynamite to facilitate the work. He told the superintendent that he had no caps and the latter directed him to send to the "shanty" and if there were none there to send to the other crews for some, saying, "I believe Kendall has got some." There were no caps at the shanty and the plaintiff sent Tim Mulrooney to Kendall's crew for some, and he brought back a small tin box about two inches square containing "probably twenty" caps. This box with the caps in it Mulrooney obtained at Kendall's crew, "at the root of a pine tree," with a piece of pasteboard for a cover

laid in the box and leaves put on top of that. As the plaintiff held one of these caps in his right hand and with the other hand was inserting the end of the cotton fuse into the cylinder of the cap, and when, according to his testimony, "the fuse had entered the cap but a short distance" the cap exploded blowing off the thumb and fore finger of his right hand and injuring him otherwise to some extent.

The negligence on the part of the defendants on which the plaintiff relies is: (1) failure to instruct him as to the dangers, risks and hazards incident to the work of blasting with dynamite, and especially in inserting a fuse into a small cap loaded with an explosive charge; (2) furnishing him with an explosive cap that was defective and dangerous on account of having been exposed to water and moisture, the dangerous condition of which he did not know and was unable to determine because of his lack of knowledge of explosive caps and his want of experience in their use; and (3) failure to inform him of the special dangers and risks in using a cap that had become defective from water and moisture, and how such defective condition could be detected.

When an employer directs his employee to perform a dangerous service which requires skill and caution to avoid the risks and hazards incident to its performance, knowing that the employee is inexperienced in such service and ignorant of its dangers, it is the duty of the employer to give him adequate information as to the dangers he is likely to meet in performing the service, and suitable instructions and warnings as to the manner and method of doing it, so that he may be able by the exercise of reasonable care on his part to avoid the danger. This rule is too well established in judicial precedent to need the citation of authorities. The duty imposed upon an employer who makes use of agencies and appliances that are especially dangerous was stated by this court, in *Welch* v. *Bath Iron Works,* 98 Maine, 361, 369 in these words: "And an additional duty, one that is to be particularly considered here, is imposed upon an employer who finds it necessary to adopt the use of particularly hazardous agencies and appliances, of giving full information to his servant, who does not already have that information, of the particular dangers arising from the use of such extraordinarily hazardous agencies, and sufficient instructions to enable him to

intelligently determine whether or not he will accept the dangerous employment, and, if he does, that he may know how to avoid them by the exercise of due care upon his part." Numerous cases, in this and other jurisdictions, are there cited, wherein that principle has been stated and applied.

The defendants do not contend against this rule, but claim that at the time of the accident to the plaintiff he was not inexperienced in the use of these cotton fuse caps in exploding sticks of dynamite, and was not then ignorant of the risks and dangers incident to their use, and, therefore, that they then owed him no duty to instruct and warn him as to those risks and dangers. But that was a question of fact in the case for the jury, and they have decided it in the plaintiff's favor, and although it appears to this court that that question was a close one on the evidence, yet we think it cannot be said with reasonable certainty that there was not sufficient evidence to justify the jury in so deciding. It clearly appears that there were actual risks and hazards incident to the work of inserting the fuse in the loaded cap. As already noted, if the end of the fuse should be pushed against the explosive substance in the bottom of the cap, or if there should be any grit in the cylinder of the cap, or on the fuse, or if the fuse should be twisted while being put in, then an explosion of the cap would be apt to result. These were not obvious but latent risks and dangers. A person who had not learned from instruction or experience how slight the friction is that may explode the cap would not appreciate the caution and delicate touch necessary to be used in inserting the fuse in the cap to avoid the risk of an explosion. True, the plaintiff admitted that he knew dynamite to be a dangerous agency, but it was the cap and not the dynamite that exploded in this case. Did he know and appreciate the imminent risk—the risk near at hand—that the cap might be easily exploded by a slight friction in inserting the fuse? He was asked on cross examination, "You knew if you scratched whatever compound there was in the barrel of that cap or the bottom of it it would go off, didn't you?" A. "No. I didn't." Therein, we think, was the risk which he did not understand and appreciate, and as to which it was the defendants' duty to instruct and warn him.

And we do not think the fact, that the plaintiff had used several of these caps before the accident, shows that he had thereby

acquired sufficient knowledge of the risks and dangers incident to their use. He was not instructed by any one as to these risks in using the cap, and the fact that he did use some of them without causing an explosion does not prove that he had thereby learned of these particular risks that must be guarded against. That no explosion occurred from his previous use of the caps was the result of good fortune rather than the result of the exercise of that care and caution in their use which an appreciative knowledge of the imminent risks and dangers likely to be met with in using them would incite.

The defendants also claim that the plaintiff was not exercising reasonable care on his part and therefore was not entitled to recover. But this, too, was a question for the jury which they decided in the plaintiff's favor, and rightly so, we think, for the care required of him depended upon his knowledge, actual or constructive, of the risks and dangers to be met with in the performance of the duty assigned him. If he did not know that the cap was apt to explode if the end of the fuse came in contact with the compound in the cap, or because of particles of dirt or grit on the fuse, then he should not have been held chargeable with negligence because he did not avoid those dangers.

It is urged further by the defendants that if the plaintiff's theory of the cause of the explosion advanced at the trial was correct, that is, that the cap was defective and exploded on that account when the fuse had been inserted in it but a short distance, then they should not have been held liable. In support of this claim they contend that they had no knowledge of such a defective condition of the cap, and that the plaintiff was negligent in using a defective cap. The plaintiff did claim at the trial that the cap had been wet and thereby rendered more liable to explode. But he did not know that at the time of the explosion. He did say that he remembered that the inside of the cap looked green or blackish, but he did not know what that signified. He had a right to assume that the cap the defendants directed him to send for was suitable for use. It was their duty to use reasonable care to furnish him caps safe for use. The jury may have found that they failed in that duty. Moreover, the plaintiff claims that he was unable to determine whether the cap was defective or not because the defendants had failed to

properly instruct him. We, think, therefore, that the jury was justified in not finding that the plaintiff was negligent in using the cap even if they accepted his theory that it was defective.

It is also true that the plaintiff testified at the trial that the fuse had entered the cap but a short distance when the cap exploded, that he thought there was no dirt on the fuse, and that he did not think he twisted it as he put it in. He was cross examined, however, in reference to his testimony given at a former trial, the substance of which appears to have been that he was not then sure as to how far he had inserted the fuse into the cap before the explosion, or that there was not grit on the fuse, or that he might not have twisted it. Evidently he could not be accurate as to those details. But the cap exploded, and there can be no doubt that the explosion was caused by friction as he inserted the fuse. That friction may have resulted from the contact of a particle of grit on the fuse and the side of the cylinder of the cap when the fuse had been inserted but a short distance as he thought, or it may have resulted, as the learned counsel for the defendants states in his brief, when "the gritty end of the fuse scratched and ignited the explosive in the bottom of the cap as the fuse was twisted." The jury may not have been able to determine precisely where in the cylinder of the cap the friction occurred that caused the explosion. But that was not an essential to a justification of their finding in the plaintiff's favor. They evidently did find that the defendants failed to discharge the duty imposed upon them, when they assigned the plaintiff to the work of using the fuse caps, to instruct and warn him as to the dangers and hazards incident to the use of them, and that the explosion occurred because of their failure to discharge that duty, and without any negligence on the plaintiff's part. It is the opinion of the court that that finding is not unmistakably wrong in view of all the facts and circumstances disclosed in the case.

The jury awarded the plaintiff $1494.00. As the result of the explosion he lost his thumb and forefinger of his right hand and pieces of the cap were blown into his face and chest causing an infection, somewhat in the nature of blood poisoning, on account of which he suffered much pain and was considerably sick and disordered for a period of several months. In the opinion of the court the damages assessed were not excessive.

SPECIAL MOTION.

The defendants also filed a special motion for a new trial on the ground that the plaintiff testified falsely.

During the trial the defendants introduced, against objection, a copy of a letter claimed to have been written by the plaintiff to Tom Mulrooney, after the accident and before the trial, inquiring if the caps he got at the root of the pine tree were not tipped over into the dirt, or in some other way exposed to the dirt, and which letter taken as a whole the defendants contended indicated dishonesty on the plaintiff's part in procuring testimony. Ashley S. Ferguson, called for the defendants, testified that Mulrooney gave to him the original letter from the plaintiff, and that his (witness') wife made the copy of it which was put in evidence, and that the copy was compared with the original and was an exact copy of it, and that he returned the original letter to Mulrooney. He stated on cross examination that he did not testify at the former trial that he first made a copy of the letter himself and that his wife made the copy introduced in evidence from his copy, and that he destroyed his copy.

Just before the testimony was closed the plaintiff was recalled and testified, as to Ferguson's former testimony concerning the copy of the letter, as follows: "He said it was a copy that he had made from the original letter. Later he stated it was a copy his wife made, and then to fix it up he says that he copied the letter and his wife copied it from the one he had." Q. "What did he say he did with his copy?" A. "Tore it up."

The stenographer's official report of Ferguson's testimony at the former trial, made a part of the report in this case by consent, shows that he testified the same at both trials.

If a party to an action, being himself a witness, commits willful perjury, or makes use of false testimony which he knows to be false, and thereby obtains a verdict in his favor, the court in its discretion might, and perhaps it should, set aside the verdict so obtained.

But the court should not set aside a verdict and vacate its judgment because it is subsequently shown that false testimony was given at the trial, or even that the party in whose favor the verdict was given testified falsely. Something more than that must appear.

It must be shown that the winning party wilfully gave false testimony, or wilfully made use of false evidence to obtain the verdict, and the court must be reasonably satisfied that the verdict was thereby obtained.

We think the defendants have not shown that this case is within the application of that rule. The plaintiff's version of Ferguson's former testimony does differ somewhat from the stenographer's report of it, and no doubt the official report should be accepted. But the court ought not to find, we think, that the plaintiff thereby committed willful perjury. He may have believed what he testified to, although it appears that he was mistaken. Nor does it seem reasonably probable to us that the jury could have been materially influenced as to their verdict by the plaintiff's false statement of Ferguson's former testimony. The controversy was as to whether the copy of the letter put in evidence was made from the original letter or from a copy of it. Ferguson testified that it was made from the original, and the plaintiff stated, incorrectly it appears, that Ferguson had previously testified that it was made from a copy of the original. We do not think it can be reasonably inferred that the plaintiff's verdict was obtained because he testified incorrectly in that particular.

It is accordingly the opinion of the court that the special motion for a new trial must be overruled.

Motions overruled.

JOHN S. JUMPER *vs.* FRANK I. MOORE et al.

Cumberland. Opinion December 26, 1912.

Appraisal. Assignment. Attachment. Certiorari. Creditors. Disclosure commissioner. Exemptions. Personal labor. Record. Revised Statutes, Chapter 114, Sec. 280. Writ.

1. Subdivision VI, Sec. 55, C. 88, R. S., as amended by Chapter 256, Laws of 1909, and as further amended by Chapter 175, Laws of 1911, which provides that no person shall be adjudged a trustee under trustee process, "By reason of any amount due from him to the principal defendant as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month next preceding the service of the process, and not exceeding twenty dollars of the amount due him as wages for his personal labor; and ten dollars shall be exempt in all cases,"—is in effect a general exemption from attachment of at least ten dollars of a debtor's wages, since the trustee process is the only appropriate proceeding under our statutes for the attachment of such property right.
2. A poor debtor should not have been required, under the provision of Sec. 28, C. 114, R. S., to assign to his judgment debtor, whose original debt was for necessaries, a claim of $8, which was the only sum due him as wages for his personal labor earned within one month next preceding the date of his disclosure, because that amount of his wages at least is exempt from attachment.
3. The decision of the disclosure commissioner in this case not to require the debtor to assign to the creditors the $8, being the balance due him as wages for his personal labor, was correct.

Writ denied. Petition dismissed with costs.

This is a petition for a writ of certiorari to quash a record of a disclosure commissioner relating to the disclosure and discharge of a poor debtor under the provisions of Chapter 114 of the Revised Statutes. The sole question presented is whether under Chapter 114, sec. 28, R. S., a poor debtor should have been required to assign to his judgment creditor, whose original debt was for necessaries, a claim for $8.00, the only sum due him as wages for his personal labor earned within one month next preceding the date of his disclosure. The commissioner who took the poor debtor's disclosure

refused to require the debtor to assign the $8.00 to his creditor. The case is reported to the Law Court upon the petition, answer and agreed statement of facts.

The case is stated in the opinion.

D. A. Meaher, for petitioner.

Frank I. Moore, for defendants.

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

KING, J. This is a petition for a writ of certiorari to quash a record of a disclosure commissioner relating to the disclosure and discharge of a poor debtor under the provisions of chapter 114 of the Revised Statutes. The case is reported to the law court upon the petition, answer, and agreed statement of facts.

The question presented is whether under the provisions of sec. 28, c. 114, R. S., a poor debtor should have been required to assign to his judgment creditor, whose original debt was for necessaries, a claim for $8.00 which was the only sum due him as wages for his personal labor earned within one month next preceding the date of his disclosure.

The section of the statute referred to, so far as material, reads as follows:

"When from such disclosure it appears that the debtor possesses, or has under his control, any bank bills, notes, accounts, bonds or other contracts or property, not exempted by statute from attachment, which cannot be come at to be attached, and the petitioner and debtor cannot agree to apply the same towards the debt the magistrate hearing the disclosure shall appraise and set off enough of such property to satisfy the debt, costs and charges; and the petitioner or his attorney, if present, may select the property to be appraised. If the petitioner accepts it, it may be assigned and delivered to him by the debtor, and applied towards the satisfaction of his demand. Except where the original debt was for necessaries, the debtor shall not be required to assign any sums due him as wages for his personal labor earned within one month next preceding the date of the disclosure and not exceeding twenty dollars."

It is contended that the debtor should not have been required to assign said claim, because it was exempt from attachment under the statutes of this State in force in 1912 when the judgment was obtained and the disclosure made. And the statute quoted applies only to such bank bills, notes, accounts, etc., as are "not exempted by statute from attachment." Was the $8.00 in question "exempted by statute from attachment," within the meaning of the statute quoted? We think it was.

Subdivision VI, sec. 55, c. 88, R. S., as amended by chapter 256, of the Laws of 1909, and as further amended by chapter 175 of the Laws of 1911, provides that no person shall be adjudged a trustee, under trustee process, "By reason of any amount due from him to the principal defendant as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month next preceding the service of the process, and not exceeding twenty dollars of the amount due to him as wages for his personal labor; and ten dollars shall be exempt in all cases."

By these legislative acts of 1909 and 1911 it was expressly provided that in "all cases" ten dollars of the wages for the personal labor of a debtor should be exempt from attachment under the trustee process. That we think is in effect a general exemption from attachment of that much of a debtor's wages, since the trustee process is the only appropriate proceeding under our statutes for the attachment of such a property right.

But it is suggested in behalf of the creditor that if the legislation, amending the statute relating to the trustee process so that in all cases at least ten dollars of the debtor's wages is exempt therefrom, is to be regarded as an exemption from attachment of that much of his wages within the meaning of sec. 28, c. 114, nevertheless, the provision of sec. 28 requiring an assignment, not having been expressly repealed, was still in force, and the debtor should have been required under that provision to make the assignment of the $8.00, the original debt being one for necessaries.

It is, however, a well recognized principle, that where a new legislative act covers the same subject matter as an existing statute, and the two are so plainly repugnant and inconsistent that they cannot stand together, the old statute is to be regarded as amended by the new so as to become conformable thereto.

In *Starbird* v. *Brown,* 84 Maine, 238, 240, the court said: "The test is whether a subsequent legislative act is so directly and positively repugnant to the former act, that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident? Can the new law and the old be each efficacious in its own sphere?"

Let us apply this test to the case at bar.

It is reasonably certain that the intention of the Legislature, when it amended the trustee process as above noted, was to make ten dollars of a debtor's wages secure and available to him for the immediate succor of himself and family.

While the new legislative acts expressly amended the statute relating to the trustee process, still it cannot be reasonably contended that it was not the legislative purpose to make at least ten dollars of a debtor's wages in all cases exempt from any attachment.

The new provision cannot work in harmony with the old law, for the operation of the old would completely destroy the efficacy of the new. If a poor debtor is to be required in certain cases to assign all the wages due him, then certainly he would not have ten dollars exempt for his benefit in all cases as the Legislature manifestly intended.

It is therefore the opinion of the court that the decision of the disclosure commissioner in this case, not to require the debtor to assign the $8.00 to his creditors, was correct.

Writ denied.

Petition dismissed with costs.

ROBERT A. MCGRAY *vs.* ORRIN B. WOODBURY.

Waldo. Opinion December 27, 1912.

Attachment. Assumpsit. Creditors. Contract. Exceptions. Lease. Mortgage. Nonsuit. Notice to Creditors. Sale of goods in bulk.

This is an action to recover for a stock of goods claimed to have been sold by plaintiff in bulk and delivered to the defendant. The plaintiff, who was a grocer at East Knox, in January, 1912, occupying a store belonging to defendant under a lease, entered into an agreement with Walter Woodbury to sell him the stock of goods at cost with a bonus of $60. An account of the stock was taken and amounted to more than Woodbury thought he would be able to pay, and thereupon the defendant, with consent of plaintiff took the stock off his hands. Before the requisite notices to the creditors could be mailed, the creditors attached the goods and the defendant refused to pay for them.

Held: That under such circumstances there was no sale of the goods to the defendant.

The plaintiff contended that Chapter 114 of the Public Laws of 1905, which requires full information to be given to creditors together with notice of such sale is unconstitutional in that it deprives persons of their rights, privileges and liberty to control their property and thus violates Section 6 of Article I of the Constitution of Maine.

Held: That the objection stated is insufficient to justify the conclusion that the act is unconstitutional.

On exceptions by plaintiff. Overruled.

This is an action of assumpsit to recover for goods alleged to have been sold and delivered to the defendant in January, 1912. The plaintiff was at the time of the alleged sale a grocer at East Knox and occupied, under a lease which was then in force, a store owned by the defendant. The stock of goods was under mortgage to defendant. The plaintiff and Walter Woodbury, a brother of defendant, entered into an agreement for the purchase of the goods at cost and a bonus of $60. The stock amounted to more than Walter Woodbury thought he could pay, and by consent of plaintiff, the defendant undertook the purchase, but before the necessary notices could be sent to creditors, the goods were attached

by them. Plea, the general issue. At the conclusion of the plaintiff's evidence, the Justice presiding ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

Arthur Ritchie, for plaintiff.

Dunton & Morse, for defendant.

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

HANSON, J. This is an action of assumpsit for goods sold and delivered, and comes to this court on plaintiff's exceptions to the ruling of the presiding Justice ordering a nonsuit.

The plaintiff was a grocer in East Knox, and occupied a store belonging to the defendant under a lease for five years. The lease was still in force. The defendant held a mortgage on the goods in the store for $200. There was a second mortgage for $50. The stock inventoried $775.79, plaintiff's debts amounted to $1161.81, and he had no other property. In January, 1912, the plaintiff entered into an agreement with Walter Woodbury, a brother of the defendant, to sell to said Woodbury the stock of goods at cost, and a bonus of $60. The plaintiff delivered the key to the store and the unexpired lease to the defendant. An account of stock was taken, and the amount being larger than the buyer anticipated, he expressed doubt as to his ability to pay. Thereupon the defendant offered to take "the stock off his hands." The plaintiff claimed that this offer was accepted and agreed to by him. The defendant says the offer was not accepted. Walter Woodbury went to Belfast the same day, and the next morning the plaintiff and defendant rode to Belfast together. On the way they met Walter Woodbury returning. There was a conference in which the defendant asked his brother "if he had made up his mind about the goods," and he testified: "I told him I had made up my mind to turn them over to him. He said he would take them off my hands and Mr. McGray said he was perfectly willing." The plaintiff and his witness are not in agreement as to this, the plaintiff claiming a sale to defendant at the store the day before.

On reaching Belfast, the plaintiff and defendant ascertained for the first time that it was necessary to notify the creditors of the

plaintiff, as provided in chapter 114 of the Public Laws of 1905. Advice of counsel was had and proper steps taken to make a valid sale. A list of creditors was then and there made and sworn to by the plaintiff and furnished to the defendant, and there was full understanding and agreement between the parties as to their further duty, one to the other. The largest creditor of the plaintiff was represented at the meeting in Belfast. In reference to this branch of the case the plaintiff was asked: "Q. Was it understood when that (the list of creditors) was made, that Mr. Woodbury would notify or send the list and notices to the creditors? A. That was the way I understood it. Q. You understood that he was not to pay for the goods until that had been done according to the statute, didn't you? A. Why, yes; yes. Q. He refused to pay anything that morning? A. Yes."

Whatever occurred at the meeting on the way to Belfast, or the day before at the store, was modified by mutual consent on reaching Belfast, both parties seeing the necessity of beginning over, and proceeding according to law. They undertook to comply with the law, but creditors, exercising their rights, attached the goods *within five days* from the date of the meeting at Belfast.

Under such circumstances there could be no sale to the defendant. That the plaintiff so concluded appears from his testimony. He says that, after the meeting at Belfast, and on leaving the office of Dunton and Morse, the defendant advised him "to go into bankruptcy," and that on his return to East Knox "he demanded the return of the lease and the key of the store from the defendant."

The plaintiff urges that Chapter 114, of the Public Laws of 1905, which requires full information to be given to creditors, together with notice of such sale, is unconstitutional, "in that it deprives persons of their rights, privileges and liberty to control their property," and thus violates Section 6 of Art. 1 of the Constitution of Maine. We are of the opinion that the objection stated is insufficient to justify the conclusion that the act is unconstitutional.

In *J. P. Squire Co.* v. *Tellier,* 185 Mass., 18, in which a similar statute was under consideration, the court say: "that the purpose of the Legislature evidently was to provide creditors protection against a class of sales which are frequently fraudulent and which leave creditors with no means of collecting that which they ought to

receive. The statute deals only with sales in bulk of a part, or the whole of a stock of merchandise, which are not made in the ordinary course of trade, and in the regular and usual prosecution of the sellers' business. It does not interfere with the transaction of ordinary business, but relates to unusual and extraordinary transfers. In substance it declares that a sale of this kind shall not be made without first giving creditors an opportunity to collect their debts so far as the property to be sold might enable them to collect, or subsequently make satisfactory provision for the payment of these debts. . . . That this is within a class of legislation for which there is constitutional authority is too plain for question. . . . The statute requires of the vendor nothing that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and receive payment for himself. But under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it."

Lemieux v. *Young,* 211 U. S., 489.

The nonsuit was properly ordered, and the entry will be,

Exceptions overruled.

EBEN A. HOLMES *vs.* HARRIET A. ADAMS.

Waldo. Opinion December 27, 1912.

Divorce. Descent. Distribution. Domicil. Estate. Heirship. Illegitimate Child. Issue. Laws of Nevada in relation to heirship. Money had and received. Nonsuit. Public Laws, Chapter 14.

The plaintiff is the son of Aurelius Holmes, deceased, who was the illegitimate child of Rhoda A. Patterson, mother of Alonzo Patterson, deceased.

Held:

1. That whatever rights the plaintiff has are derived from legislative enactment. At common law his father was incapable of inheriting.
2. It has been invariably held that a statute allowing an illegitimate child to inherit from his mother does not allow him to inherit from her lineal or collateral kindred.
3. It is clear that the words "the same as if born in lawful wedlock" do not in this case enlarge the rights of the plaintiff to include inheritance from lineal or collateral kindred.
4. The plaintiff cannot invoke the aid of the present statute of Maine to control or in any manner influence the distribution of personal estate of an intestate whose domicil was in the state of Nevada.
5. As all rights of inheritance become vested at the death of the person from whom they are derived, the statutes in force at the time of his death govern the disposition of the estate.
6. The succession to and disposition and distribution of personal property, wherever situated, is governed by the law of the domicil of the owner or intestate at the time of his death, without regard to the location of the property, or the place of the death.

On agreed statement of facts. Plaintiff nonsuit.

This is an action of assumpsit for money had and received and is submitted to the Law Court upon an agreed statement of facts, with the stipulation that, if under the statement of facts, the plaintiff can maintain this action upon proof of the relationship claimed by him, the action is to stand for trial; otherwise, a nonsuit is to be entered. Plea, the general issue.

The case is stated in the opinion.

Arthur Ritchie, for plaintiff.

Dunton & Morse, for defendant.

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

HANSON, J. This is an action for money had and received, and comes to this court on the following agreed statement of facts:

Alonzo Patterson, brother of the defendant, Harriet A. Adams, was a resident of the state of Nevada and died in that state previous to May 20, 1907, leaving no widow or issue. His estate was duly administered in the state of Nevada, and the defendant, Harriet A. Adams, on May 20, 1907, received from the administrator of said estate the sum of thirteen hundred and ten dollars and four cents ($1310.04) as her proportion of said estate, being one-half of said estate, and her brother Frank M. Patterson received the other half of said estate as his share. The plaintiff in this action received no part of said estate.

The following is a correct copy of so much of the Compiled Laws of the state of Nevada, as relates to heirship of illegitimate children or their offspring, compiled in 1900.

"ILLEGITIMATE CHILD.

"3046. Sec. 280. Every illegitimate child shall be considered as an heir of the person who shall acknowledge himself to be the father of such child by signing in writing a declaration to that effect in the presence of one credible witness who shall sign the declaration also as a witness, and shall in all cases be considered as heir of the mother, and shall inherit in whole or in part, as the case may be, in the same manner as if born in lawful wedlock. The issue of all marriages deemed null in law or dissolved by divorce shall be legitimate."

The plaintiff is the son of one Aurelius Holmes, deceased, and claims that said Aurelius Holmes was the illegitimate child of Rhoda A. Patterson, mother of said Alonzo Patterson, deceased.

If, under this statement of facts, the plaintiff can maintain this action upon proof of the relationship claimed by him, the action is to stand for trial, otherwise a nonsuit to be entered.

The writ and pleading are made a part of the case.

It is contended by the counsel for the plaintiff that this action may be maintained, because:

1. The words "in the same manner as if born in lawful wedlock" appearing in the statute of Nevada, supra, should have the same force and effect as the Act of 1887, ch. 14, Public Laws of Maine, which includes in express terms lineal and collateral kindred.

2. Because ch. 14 of the Act of 1887 is almost identical with the statute of Nevada, and he has a remedy in this State notwithstanding the decree of the Judge of Probate in Nevada ordering distribution of the personal estate involved in this case.

The defendant contests each position taken by the plaintiff.

Ch. 14 of the Public Laws of Maine for the year 1887 reads as follows:

"An illegitimate child born after March 24, in the year of our Lord 1864, is the heir of his parents who intermarry. And any such child born at any time is the heir of his mother. And provided, the father of an illegitimate child adopts him or her into his family, or in writing acknowledges before some justice of the peace or notary public, that he is the father, such child is also the heir of his or her father. And in either of the foregoing cases, such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred and these from such child and its issue the same as if legitimate."

Whatever rights the plaintiff has are derived from legislative enactment. At Common Law his father was incapable of inheriting. Statutes similar to the statute of Nevada, presented in the agreed statement, have been passed upon in many states, and it has been invariably held that a statute allowing an illegitimate child to inherit from his mother does not allow him to inherit from her lineal or collateral kindred. 5 Cyc., 640, 641; *Messer* v. *Jones,* 88 Maine, 349; *Pratt* v. *Atwood,* 108 Mass., 40; *Moore* v. *Moore,* 35 Vt., 98; *Bacon* v. *McBride,* 32 Vt., 585; *Stevenson's Heirs* v. *Sullivant,* 5 Wheaton, 207. In the same authorities, the rule requiring strict construction of statutes is emphasized. Applying the rule to the statute of Nevada, it is clear that the words "the same as if born in lawful wedlock" do not in this case enlarge the rights of the plaintiff to include inheritance from lineal or collateral kindred. *Pratt* v. *Atwood,* supra. Prior to the Act of 1887, ch. 14, supra, the laws of Maine were practically the same as the present statute of Nevada, and illegitimate children could not inherit from lineal or collateral kindred. That act was passed for the express purpose of removing

such disability. *Messer* v. *Jones,* 88 Maine, 349; *Lawton* v. *Lane,* 92 Maine, 170.

But the plaintiff cannot invoke the aid of the present statute of Maine to control or in any manner influence the distribution of personal estate of an intestate whose domicil was in the state of Nevada. By the weight of authority as all rights of inheritance become vested at the death of the person from whom they are derived, the statutes in force at the time of his death govern the disposition of the estate. *Hughes* v. *Decker,* 38 Maine, 153; *Messer* v. *Jones,* supra; 14 Cyc, 20, and cases cited.

The succession to and disposition and distribution of personal property wherever situated is governed by the law of the domicil of the owner or intestate at the time of his death, without regard to the location of the property or the place of the death. 14 Cyc., 21 and cases cited. *Ross* v. *Ross,* 129 Mass., 245. And, too, as a general rule, legitimacy is to be ascertained by the law of the domicil. *Ross* v. *Ross,* supra.

Counsel for the plaintiff cites *Ross* v. *Ross,* supra, as favoring the doctrine that "where an illegitimate child has been legitimated, such legitimacy follows the child wherever it may go, and entitles it to all the rights flowing from such status;" but that case expressly holds that:

"It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicil; and that this status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicil at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status."

That case is therefore in harmony with the line of decisions hereinbefore cited in support of the contention of the defendant, that

the law of the domicil of the owner or intestate governs the distribution of his personal estate.

If the question involved related to the descent of real estate in this State, the remaining citations in plaintiff's brief would be in point; but where, as in this case, the only question is one relating to personal property, the law of the domicil of the intestate must control, and the proper course for a distributee is to apply to the Probate Court for a decree of distribution. Upon the passing of such decree in his favor, he has a plain remedy against the administrator, who also is protected by the decree. *Cathaway* v. *Bowles,* 136 Mass., 54.

All distributive shares must be determined in the Probate Court before they become payable to the distributee. *Howes* v. *Williams,* 92 Maine, 492; *Graffam* v. *Ray,* 91 Maine, 234.

So far as the case shows, the plaintiff did not apply to the Probate Court in the state of Nevada for a decree in his favor. It is apparent that he has no remedy in this State, even upon proof of the relationship claimed by him. In accordance with the stipulation in the agreed statement, the entry will be,

Plaintiff nonsuit.

GEORGE H. CARNEY et al. *vs.* ALBERT G. AVERILL.

Penobscot. Opinion December 27, 1912.

Assumpsit. Bankruptcy. Caveat Emptor. Consideration. Exceptions. Foreclosure. Mortgage. Peaceably and Openly. Personal Property. Possession. Receipt. Sale. Trustee. Warranty.

An action to recover forty dollars paid by plaintiff to the defendant for the stumpage of hay sold in July, 1910. The defendant was trustee in bankruptcy of the estate of Clarence Scott, consisting of a farm situate in Greenbush, which was mortgaged to W. S. Marshall. Clarence Scott was adjudicated a bankrupt April 23, 1910, and was then in possession of said farm. The defendant as trustee on May 25, 1912, petitioned for leave to sell the real estate and personal property, which was granted July 8th, and thereupon the defendant took possession of the real and personal property, and appointed an agent to care for it. On the 10th day of July, 1910, trustee sold the stumpage of hay on the Scott farm, so called, to plaintiffs for forty dollars. The plaintiffs undertook to cut the hay, but were forbidden by the mortgagee. On July 8, 1910, the mortgagee attempted to foreclose by taking peaceable possession and immediately sold the grass, but it was not harvested. The defendant contends that he sold the hay to plaintiffs in his official capacity and placed the proceeds in the depository of the court, and that the plaintiffs knew this. The receipt and warranty of the defendant to plaintiff were admitted against defendant's objection.

Held: 1. That this evidence was admissible. They were original documents, executed by the defendant in the transaction in question and under well known rules clearly competent, and no reason appears why the information they contain should be withheld from the court.

2. The bankrupt was in possession of the farm at the date of adjudication of bankruptcy and whatever interest he had in the real and personal estate, including the growing crops, passed to and vested immediately in the trustee.

3. The defendant had authority to sell such rights and interests as the bankrupt had. He was acting under an order to sell issued by the court of which he was an officer and the sale was therefore a judicial sale.

4. The rule of caveat emptor prevails in bankruptcy sales unless special direction otherwise is made in the order of sale.

5. An entry for the purpose of foreclosing a mortgage to be effectual, if not by consent in writing of the mortgagor or person holding under him, must not only be open, peaceable and unopposed, but followed up by the certificate and record required by the statute, or otherwise it becomes a nullity.

On exceptions by defendant. Sustained.

This is an action of assumpsit to recover the sum of forty dollars paid by the plaintiffs to the defendant for the stumpage of hay sold in July, 1910. The defendant was trustee in bankruptcy of the estate of Clarence Scott, which consisted of a farm situate in the town of Greenbush, and also certain personal property. This farm was mortgaged to W. S. Marshall for $400. Scott was adjudicated a bankrupt April 23, 1910, and was then in possession of the farm. The defendant qualified as trustee, and on June 6, 1910 was granted leave to sell the said farm and personal property. June 8, 1910, defendant took possession of the real and personal property, and on July 10, 1910, sold, as trustee, the standing grass on said premises to the plaintiffs for forty dollars. When the plaintiffs undertook to cut said grass, the mortgagee forbade them, and this action for money had and received was commenced. Plea, general issue with brief statement; viz., that whatever he did in the premises, he did in the capacity of, and by force and virtue of, his appointment and qualification as trustee in bankruptcy of the estate of Clarence Scott.

The case is stated in the opinion.

P. H. Gillin, for plaintiff.

A. G. Averill, and F. W. Knowlton, for defendant.

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

HANSON, J. This is an action of assumpsit to recover forty dollars paid by plaintiffs to the defendant for the stumpage of hay sold in July, 1910. There are two counts in the writ, one upon a special warranty, the other for money had and received.

The defendant was trustee in bankruptcy of the estate of Clarence Scott, which consisted of a farm of about two hundred acres located in the town of Greenbush, and also certain machinery and farming implements.

The property was mortgaged to W. S. Marshall for $400, and he was assignee of two other mortgages, all amounting to $1650.

Clarence Scott was adjudicated a bankrupt on April 23, 1910, and was then in possession of the farm. The defendant qualified as trustee on May 19, and on May 25th filed a petition for leave to sell

real and personal property, which petition was granted on June 6. On July 8, the defendant took possession of the real and personal property, and appointed an agent to hold possession, and care for the property. On July 10, the defendant as trustee sold to the plaintiffs the standing grass on the premises, and gave them a bill of sale and receipt for the purchase price thereof, as follows:

"Greenbush, Me., July 10, 1910.

Sold this day stumpage of hay on Scott farm so-called in town of Greenbush for consideration of forty ($40) dollars to be paid within five days.

G. A. Carney and B. R. Wheeler.
A. G. Averill, Trustee.

Received payment in full of above.
A. G. Averill, Trustee."

The plaintiffs undertook to cut the grass, but "got a letter from Mr. Fletcher (atty. for the mortgagee) forbidding us on the place; said he would hold us for damages." They notified the defendant by telephone, and he thereupon sent the plaintiffs a writing, dated July 14, 1910, which reads as follows:

"Old Town, Me., July 14, 1910.

To George Carney & B. R. Wheeler,
Greenbush, Me.
Gentlemen:

This is to certify that I, Albert G. Averill, Trustee of Clarence Scott Estate, Bankrupt, have sold the stumpage of the hay on the Scott farm in Greenbush, and that as said Trustee I had the title to same in me, and I did and hereby do give good title to said Carney & Wheeler and will warrant and defend the same to them and will stand by them otherwise in this regard.

Yours very truly,
Albert G. Averill, Trustee.

P. S. Get the hay as soon as possible as we talked, and it would be a great favor to me if you didn't show this paper to Scott's attorney and his friends. If you have the least doubt of my ability to sell you the hay and give you a good title go to *your own* attorney. This other crowd are only trying to bluff and to bother me.

A. G. A."

The plaintiffs, however, did not cut the grass, but commenced this action against the defendant as an individual. The defendant pleaded the general issue, with a brief statement that "whatever he did in the premises, he did in the capacity of, and by force and virtue of his appointment and qualification as Trustee in Bankruptcy of the estate of Clarence Scott." At the close of the evidence, the presiding Justice ordered a verdict for $40. The case comes to this court on exceptions. The plaintiffs claim that after the defendant took possession of the farm,—but on the same day, W. S. Marshall, the mortgagee, "went to the farm for the purpose of taking possession to secure the hay crop;"—that he found the agents of the defendant in possession, and gave them notice to quit; and that he returned on the following day and left a notice which reads as follows:

"Greenbush, July 8, 1910.

To whom it may concern:

This is to certify that I, Willie S. Marshall, in the presence of Mr. and Mrs. George Spencer and the undersigned, have this day taken peaceable possession of the so called Scott farm property, both personal and real. By right of mortgagee.

Willie S. Marshall.

Witnesses

Alfred Folsom,

Maude M. Folsom."

Immediately thereafter he sold the grass to one Alfred Folsom. It appears that before July 14, conferences were held in which all the parties interested took part, and the advice of the Referee in Bankruptcy was sought. It further appears that through fear of litigation on the part of the plaintiffs, and because the "amount was so small the mortgagee did not care to bother with it," the grass was not harvested. The mortgagee returned the purchase price to Mr. Folsom, and later foreclosed his mortgages by publication.

The plaintiffs contend that the mortgagee had the right to take possession of the farm as against the trustee at any time before the grass was cut, and that the license to sell under which the defendant was acting, conferred no authority that the mortgagee was bound to respect "when the mortgagee took possession for the purpose of harvesting the hay, and kept such possession."

The defendant contends that he sold the hay to the plaintiffs in his official capacity; that the proceeds were placed in the depository of the court and he paid out the same by order of court. It further appears that the plaintiffs knew that defendant was acting in his official capacity only, and nothing was paid by them as consideration for the warranty, so called.

The receipt and warranty were admitted against the objection of the defendant, and are the subjects of the first and second exceptions. Objection to their admission was made, 1, because each was signed by the defendant in his official capacity, while the action was brought against him as an individual, and 2, because the warranty which was signed four days later than the receipt was without consideration.

We think the evidence was admissible. They were original documents, executed by the defendant in the transaction in question, and under well known rules clearly competent. No reason appears why the information they contain should be withheld from the court.

Several of the remaining exceptions relate to one question,—that of jurisdiction, and may be considered together. The bankrupt was in possession of the farm at the date of adjudication. Being in possession, whatever interest he had in the real and personal estate, including the growing crops, passed to and vested immediately in the trustee. *Crosby* v. *Spear,* 98 Me., 544; Jones on Mortgages, Vol. 2, Sec. 1231.

It is admitted that the defendant was acting under an order to sell issued by the court of which he was an officer. The sale was therefore a judicial sale. In re Maloney, A. B. R., 502; *Savings Bank* v. *Alden,* 103 Me., 237.

The defendant had authority to sell such rights and interests as the bankrupt had. He could sell no more. The plaintiffs having knowledge of all the facts could not expect to receive a greater interest than that conveyed by the sale on July 10th. *Roberts* v. *W. H. Hughes Co.,* 83 Atlantic Reporter, 807, Supreme Court, Vermont, June, 1912.

The rule of caveat emptor prevails in bankruptcy sales as in all judicial sales unless special direction otherwise is made in the order of sale. A. B. R., Vol. 10, page 240; *Baker* v. *Vining,* 30 Me., 121.

The warranty of title, so called, was not a special warranty in which the defendant assumed individual liability, inasmuch as the document contains no promise or undertaking imposing such liability. Like the receipt, it was signed by the defendant in his official capacity, and having been so executed four days later than the original sale without any further consideration, no personal liability is imposed on the defendant. 34 Cyc., 408; *White* v. *Oakes,* 88 Maine, 367; *Brown* v. *Lyford,* 103 Maine, 362.

A Trustee in Bankruptcy is an officer of the court, and cannot be subjected to suits of this character without leave of the Bankruptcy Court. 34 Cyc., 411; same, 167; Jones on Mortgages, Vol. 2, Section 1231. It is so held even when the action is brought upon a paramount title. 34 Cyc., 411.

It is manifest that the entry made by the mortgagee was for the purpose of foreclosure. The character of the notice indicates the purpose and intention of the mortgagee to foreclose his mortgages by taking possession, "peaceably and openly, if not opposed, in the presence of two witnesses," and this is corroborated by the testimony of Caroline Spencer, who states: "He told me he came there to take possession of the farm and what there was on it, under a foreclosure." The mortgagee acquired no rights by such entry. His attitude thereafter negatives the claim that he entered "for the purpose of taking possession to secure the hay crop," and constitutes an abandonment of whatever intention he may have had with respect to the crops, or purpose to foreclose his mortgage.

In *Potter* v. *Small,* 47 Maine, 293, the facts are nearly identical, and the legal principles involved are the same. There the court *held:* "But such an entry must be accompanied with evidence of the intention for which it is made. The declarations of the party making the entry, being part of the res gestæ, are usually this evidence. It was so in this case. It appears that, at the time of making the entry, the plaintiff said 'he had a mortgage on the premises, and that the condition of the mortgage had been broken, and he therefore foreclosed.' This is the only evidence of intention explanatory of the act. It is apparent, therefore, that he had no design to enter for the purpose of taking the rents and profits, under the second section of the statute. His intention was to foreclose. An

entry for this purpose, to be effectual, if not by consent in writing of the mortgagor, or the person holding under him, must not only be open, peaceable and unopposed, but followed up by the certificate and record required by the statute, or otherwise it becomes a nullity. In this case this was not done. The plaintiff therefore acquired no rights by his entry. To permit him now, after such a failure on his part, to ascribe a new intention to his act, and to set up his entry for a different purpose, would be manifestly unjust. To do so would be, in effect, to cast reproach upon the law."

The defendant as trustee being then in possession, and holding as such all the rights and interests belonging to the bankrupt as of the date of adjudication, had the right, and it was his duty under the order of the court whose agent he was, to sell the crops growing on the farm. The fact that the plaintiffs failed to cut the grass, and in consequence were losers in the transaction, creates no personal liability on the part of the defendant. These exceptions must be sustained. The others need not be considered.

Exceptions sustained.

HALEY, J. concurred in the result.

STATE *vs.* INTOXICATING LIQUORS. FRANK A. HUNT, Claimant.

Androscoggin. Opinion December 29, 1912.

Claimant. Common carrier. Consignee. Consignor. Credit. Delivery. Forfeiture. Insolvency. Intoxicating liquors. Libel. Payment. Revised Statutes, Chapter 29, Section 51. Shipment. Stoppage in transitu.

This is a proceeding to enforce the forfeiture of intoxicating liquor alleged to have been intended for unlawful sale within this State.

On July 18, 1911, F. W. Hunt & Co., wholesale liquor dealers in Boston, Mass., shipped to S. Malo of Lewiston, Maine, by American Express, two boxes each containing ten gallons of whiskey, S. Malo not being a fictitious name. On July 19, 1911, these boxes were seized by an officer,

before delivery to the consignee and while in the possession of the carrier, and were duly libelled. The consignor appeared as claimant.

Held:

1. That under R. S., Ch. 29, Sec. 51, it is only a person who is found to be "entitled to custody of any part" of the seized goods who can be regarded as a lawful claimant.
2. That the lawful right to claim the property may arise either from ownership, as when the claim is made by the consignee, or from right to possession, as when made by the carrier.
3. That in the case at bar, the claim is made neither by the consignee nor by the carrier, but by the consignor, the seller, and on the sole ground of his alleged right of stoppage in transitu.
4. That there are two prerequisites to the exercise of the right of stoppage in transitu on the part of the seller; first, a sale upon credit; and second, the insolvency of the purchaser.
5. That the agreed statement is silent as to the terms of sale, and the price may have been paid in advance. The sale on credit is not proved.
6. Nor is there any proof or even suggestion of the insolvency of the consignee. The agreed statement simply alleges that before delivery to the consignee the liquor was seized by an officer, and the fair inference is, that had the seizure not been made, delivery would have taken place in the ordinary course of business.
7. That the claimant was not entitled to the custody of any part of the seized goods.

On agreed statement of facts.

The claim of the consignor must be disallowed. The liquors will remain in custody of the sheriff to be disposed of as provided by statute.

This is a proceeding to enforce the forfeiture of intoxicating liquor alleged to have been intended for unlawful sale within this State. The liquor was seized by a deputy sheriff of Androscoggin County, libelled and claim made for said liquor by the shipper. Upon a hearing, the lower court held that the liquors were kept for unlawful sale as alleged and that the claimant was entitled to no part of the same. The claimant appealed to the Supreme Judicial Court and the case was thence reported to the Law Court on the following agreed statement of facts:

"On July 18, 1911, Dudley F. Hunt and Francis A. Hunt, both of Boston in the Commonwealth of Massachusetts, co-partners as F. W. Hunt & Co., wholesale liquor dealers in said Boston, shipped

from said Boston to S. Malo, Lewiston, Me., by American Express, two boxes each containing ten gallons of whiskey and addressed to S. Malo, Lewiston, Me. S. Malo is not a fictitious name. Said shipment was a continuous inter-state shipment.

"On July 19, 1911, said shipment before delivery and while in transit and in the possession of the common carrier was seized by a deputy sheriff for the county of Androscoggin, libelled, and a claim made by this claimant the shippers.

"The question presented is whether F. W. Hunt & Co. as the shippers of said goods are entitled to a return of said liquors when seized from the possession of the common carrier while in transit and before delivery to the consignee."

The case is stated in the opinion.

Lewis J. Brann, for claimant.

W. H. Hines, County Attorney, for the State.

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

CORNISH, J. This is a proceeding to enforce the forfeiture of intoxicating liquor alleged to have been intended for unlawful sale within this State.

The libel was duly issued, notice given and at the hearing in the lower court Frank A. Hunt, one of the firm of F. W. Hunt & Co. of Boston, the consignors, appeared and filed his claim to the "right, title and possession in the items of property hereinafter named, as having a right to the possession thereof at the time when the same were seized. And the foundation of said claim is that they were in the possession of the American Express Company, whose business is that of a common carrier, and were in transit, from Boston, Massachusetts, to Lewiston in the State of Maine, and were taken from the lawful possession of said company and of your claimant . . . before the same had been delivered to the consignee and had reached its destination."

After hearing, the lower court held that the liquors were kept for unlawful sale as alleged and that the claimant was entitled to no part of the same.

The claimant appealed to the Supreme Judicial Court and the case was then reported to the Law Court on the following agreed statement of facts:

"On July 18, 1911, Dudley F. Hunt and Francis A. Hunt, both of Boston in the Commonwealth of Massachusetts, co-partners as F. W. Hunt & Co., wholesale liquor dealers in said Boston, shipped from said Boston to S. Malo, Lewiston, Me., by American Express, two boxes each containing ten gallons of whiskey and addressed to S. Malo, Lewiston, Me. S. Malo is not a fictitious name. Said shipment was a continuous inter-state shipment.

"On July 19, 1911, said shipment before delivery and while in transit and in the possession of the common carrier was seized by a deputy sheriff for the county of Androscoggin, libelled and claim made by this claimant, the shippers.

"The question presented is whether F. W. Hunt & Co., as the shippers of said goods are entitled to a return of said seizure when seized from the possession of the common carrier while in transit and before delivery to the consignee."

The precise question at issue is not whether the liquors were still in transit at the time of their seizure, but whether the claimant has any legal standing in court. If he has not, he is a mere stranger to the proceeding and cannot raise the point of non-completion of shipment.

It is only a person who is found to be "entitled to the custody of any part" of the seized goods who can be regarded a lawful claimant. R. S. ch. 29, sec. 51; *State* v. *Intox. Liquors,* 50 Maine, 506. If his claim is sustained, it must be on the ground that he is either the owner or has a right to the possession of the property, which shall thereupon be taken from the custody of the officer and delivered to him. Such delivery could not be made to a stranger.

The claim is not made in the case at bar by the consignee or owner, as in *State* v. *Intox. Liquors,* 101 Maine, 430, and *State* v. *same,* 108 Maine, 410, the last case being cited by the claimant in his brief. Nor is it made by the common carrier, as having the right of possession on the ground that the shipment had not been terminated as in *State* v. *Intox. Liquors,* 102 Maine, 206; *State* v. *same,* 102 Maine, 385; *State* v. *same,* 104 Maine, 463, and *State* v. *same,* 106 Maine, 135.

The claim is made here by the consignor on the sole ground of his right of stoppage in transitu. This raises a new question in this State, but the application of well established principles of law leaves no doubt as to the solution.

The doctrine of the right of stoppage in transitu is well expressed as follows. "An unpaid seller who has parted with the possession of the goods may, if the buyer is or becomes insolvent, stop the goods in transit, that is to say he may resume possession of the goods so long as they are in the course of transit and may retain them until payment or tender of the price." 35 Cyc., p. 493.

The logic of the doctrine is clearly worked out in the early cases of *Arnold* v. *Delano,* 4 Cush., 33, and *Newhall* v. *Vargas,* 13 Maine, 93.

The two indispensable prerequisites to the exercise of the right by the vendor are, first, a sale upon credit, and second, the insolvency of the vendee. Neither of these facts is established in the case at bar. The agreed statement is silent as to the terms of sale. It simply recites that the claimant shipped the liquors to one S. Malo by American Express. The price may have been paid in advance. It is more than possible that it was, as an action for the purchase price could not be maintained in this State if the liquor was intended for illegal sale. R. S., ch. 29, sec. 64.

In any event, the sale on credit is not proved.

Nor is there any claim or even suggestion of the insolvency of the consignee. The agreed statement simply alleges, that before delivery to the consignee the liquor was seized by an officer. The fair inference is that but for the seizure delivery would have been made in the regular course of business, and that certainly tends to negative the insolvency of the consignee.

In fact, the idea of stoppage in transitu apparently did not occur to the consignor until after the seizure was made, and then as neither the common carrier nor the consignee cared to appear as a claimant, the consignor took it upon himself to recover property, the title to which had passed from him on delivery to the carrier, only to be regained upon two conditions, neither of which he has established.

The claimant relies upon the decision in *Allen* v. *M. C. R. R. Co.*, 79 Maine, 327. The court there held that as between consignor and a common carrier, a notice to the latter not to deliver goods in transit to the consignee need not state the reason. That is undoubtedly sound law, but has no application here. In that case the sale was upon credit, the consignee was admittedly insolvent, the consignor therefore had a legal right to stop the goods in transit, and the court held that in the exercise of that right he was not obliged to give his reason to the carrier. In the case at bar, there is no evidence of a sale on credit, nor of the insolvency of the consignee, and the consignor gave no notice of any kind to the carrier. He simply set up his claim to the liquors after they had been seized. To hold that under such circumstances the wholesale dealer outside the State can successfully step in and recover what he has once sold and has no legal right to retake, would be to nullify in a large measure the efficiency of the search and seizure process in the prohibitory law of this State.

The claim of the consignor must therefore be disallowed.

The liquors will remain in the custody of the sheriff to be disposed of as provided by statute.

So ordered.

HALEY, J. concurred in the result.

SUMNER M. CARR

vs.

PISCATAQUIS WOOLEN COMPANY AND M. L. HUSSEY WOOLEN COMPANY.

Piscataquis. Opinion December 29, 1912.

Brief Statement. Complaint. Dam. Damages. Efficient height. Flowage. Freshet. Mill. Petition. Prescription. Repairing. Writ.

This is a complaint for flowage and is inserted in a writ of attachment. The plaintiff is the owner of several lots of land in the town of Abbott in Piscataquis County, bounded by the Piscataquis river. The defendants are owners of woolen mills in the town of Guilford. In 1881, the Piscataquis Woolen Company erected a water mill, or factory, and maintained same ever since, upon its land on the north side of said river in Guilford village. The M. L. Hussey Woolen Company, in 1906, erected a water mill upon its land on the south side of said river. The defendants, in 1909, erected a mill dam across said river at Guilford village to raise water for working their mills, and still maintain said mills and dam. The first dam was built in 1823, rebuilt in 1864, repaired in 1903, and replaced in 1909 by a dam of concrete.

Held:

1. That the defendants had the right to construct a new concrete dam a few feet below the old dam.
2. The uncontradicted testimony of the Engineer Crowley corroborates the theory of the defendants that the increase in the height of the water in the river above the logs on April 29th and May 15th was not due to the height of the dam, or the fault of the defendants.
3. It is admitted that the defendants in 1903 had acquired a prescriptive right to flow the plaintiff's land to the extent that it would be flowed by the water held back by the dam at its effective height, as said dam existed in that year prior to any repairs, changes or additions made in said year.
4. The defendants had the right to maintain a dam as it was before the repairs in 1903. If repairs were necessary, they had the right to make them and to build a new dam in place of the old dam.

On report. Judgment for defendant with costs.

This is a complaint for flowage inserted in a writ of attachment. The plaintiff is the owner of several lots of land in the town of Abbott, in Piscataquis County, bounded by the Piscataquis river. The defendants are owners of woolen mills in the town of Guilford. The Piscataquis Woolen Company, in 1881, erected a woolen mill in Guilford village, in said county, on the north side of said river, and said M. L. Hussey Woolen Company, in 1906, erected upon its land a water mill, on the south side of the said river. Said defendant, in 1909, erected a dam across said river and maintained same to date of this complaint upon and across said river at said Guilford village, to raise water for working said mills. This dam extends from and upon the land of the Piscataquis Woolen Company on the north side of the river to and across to land of said Hussey Woolen Company on the south side of said river. The plaintiff claims that this dam has caused the water in said river to overflow upon his land and to damage him. The defendants plead the general issue with the following statement of special matters of defense:

First, that they have a right to maintain the dam set out in the complaint of said plaintiff and to flow the lands of said plaintiff without any compensation.

Second, that said dam has been maintained at its present height for more than fifty years, and that said defendants have acquired the right by prescription to have and maintain said dam at its present height.

Third, that when the concrete dam which now exists across said river was built in the summer of 1909 it was not built to any greater height than the wooden dam which was taken down at the time said concrete dam was built.

The land described in this complaint is located about one and one-half miles above defendant's dam. That the defendant's had a right to construct a new concrete dam a few feet below the old dam is not questioned.

At the conclusion of the evidence, the case was reported to the Law Court by agreement of parties, upon so much of the evidence as is legally admissible, the Law Court to render such judgment as the law and evidence require.

The case is stated in the opinion.

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

Hudson & Hudson, for defendant.

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

HANSON, J. This is a complaint for flowage inserted in a writ of attachment, and comes before the court on report.

The plaintiff is the owner of several lots of land in the town of Abbott in Piscataquis County, bounded by the Piscataquis river, or near said river and its tributaries.

The defendants are owners of woolen mills in the town of Guilford. The complaint alleges: "That the said Piscataquis Woolen Company, a long time ago, to wit; A. D. 1881, erected and have ever since maintained a water mill, to wit, a woolen mill or factory, so called, at Guilford village, in said county, on the north side of said Piscataquis river, and upon its land; and the said M. L. Hussey Woolen Company, a long time ago, to wit; A. D. 1906, erected upon its land and has since maintained a water mill, to wit, a woolen mill or factory, so called, at Guilford village aforesaid, on the south side of said river, which said river is not navigable; and the said defendants in a certain year, to wit, A. D. 1909, erected a mill-dam and have maintained the same to the date of this complaint, upon and across said river at said Guilford village, to raise water for working said mills and still maintain the same to this date and still maintain said mills; said dam extending from and upon land of the said Piscataquis Woolen Company on the north side of said river across to and upon land of the said Hussey Woolen Company on the south side of said river; and said dam was erected and maintained and is still maintained by said defendants for the purpose of raising the water in said river to work and operate said mills:

"That by means of said dam the said defendants have caused the water in said river to overflow and drown, damage, injure and destroy from the date aforesaid, to wit, the year of our Lord 1909 to the present time the complainant's land aforesaid, whereby said land has been rendered useless, and your complainant has sustained great damage in his land by reason of said flowage by said mill-

dam, yearly, since the erection and during the maintenance of said dam as aforesaid, in a large sum of money, to wit, the sum of one thousand dollars."

The defendants plead the general issue, and by brief statement say: First, that they have a right to maintain the dam set out in the complaint of said plaintiff and flow the lands of said plaintiff without any compensation.

Second, that said dam has been maintained at its present height for more than fifty years, and that said defendants have acquired the right by prescription to have and maintain said dam at its present height.

Third, that when the concrete dam which now exists across said river was built in the summer of 1909, it was not built to any greater height than the wooden dam which was taken down at the time said concrete dam was built.

The land described in this complaint is located about one and one-half miles above defendant's dam. The first dam in the river at this point was built in 1823; was replaced in 1864 by a new dam similar to the first; this was re-built in 1881 and continued in use until 1903 when it was repaired by one Trafton. In 1906 it was again repaired, and in 1909 it became necessary to make more extensive repairs on the dam and the work had progressed to some extent when the owners concluded to build a new dam of concrete, which was done in that year. That the defendants had the right to construct a new concrete dam a few feet below the old dam is not questioned.

The plaintiff claims that the new dam has been raised above the level existing before 1903, when repairs were made by Trafton, making a radical change in the actual height of the dam, and necessarily a change in its effective height, and that the damage complained of followed the repairs of 1903 to some extent, but became greater after the year 1909, when the new concrete dam was built to supply the place and purposes of the old dam.

After the plaintiff introduced the testimony of civil engineers, and his own testimony as to the location of the dam, the property claimed to be flowed, the course of the river and distance of the land flowed above the dam, the presiding Justice ruled that the

defendant's plea admitted the flowage as claimed by the plaintiff; that plaintiff had made out a prima facie case, and that under the pleadings the burden of proceeding changed.

The defendants thereupon introduced evidence tending to show:

1, That since 1864 the actual height of the various dams, when in good repair, has been the same.

2, That since 1881 a mark in the granite wall of the Piscataquis Woolen Mill which then showed the upper side of the top log of the old dam, has been used as a guide in all repairs since made and was especially used in determining the height of the new concrete dam which was built in 1909, and that it was built no higher than the dam which it replaced, allowance being made for the planking which projected above the top log about four inches.

3, That the new dam did not, and does not, flow any more land than the dams of 1864, 1881, 1903, and 1906 flowed when in repair and in good order.

4, That any additional flowage occurring in April or May, 1911, as claimed by plaintiff, was due to an unusual freshet at the time, and also due to the presence of a large boom of logs in the river at a point one-half mile above their dam, belonging to the Piscataquis Lumber Company, and over which the defendants had no control.

The testimony on both sides was directed mainly to the actual height of the various dams, and the extent of the flowage at different periods. The plaintiff insists that the case should proceed and be governed by the points shown, upon a plan, to have been reached by the water on April 29, 1911,—as conclusive that a larger area was flowed on that date than ever before.

In answer to this contention the defendants claim that on April 29, 1911, there was an unusually high run of water, due to the spring freshet, and the case shows that on that day the level of the river was thirty-two inches above the dam, a point so high, defendants claim, that no act of theirs could influence the flow, and while at such stage their mills could not be used.

The defendants introduced the testimony of one Elmer Crowley, a civil engineer, who had made a survey of the river in January, 1911, and again on May 15, 1911, after the freshet had subsided and defendants' mills were in operation. On May 15, 1911, he

found a boom of logs in the river at a steam saw-mill located one-half mile above the concrete dam, and while there ascertained the level of the water below and above the logs, and found the elevation of the water above the logs to be five inches higher than below the logs "and the water was at the top of the dam but not running over."

This testimony is uncontradicted and corroborates the theory of the defendants that the increase in the height of the water in the river above the logs on April 29th and May 15th was not due to the height of the dam, or the fault of the defendants.

It is admitted "that the defendants in 1903 had acquired a prescriptive right to flow the plaintiff's land to the extent that it would be flowed by the water held back by the dam at its effective height, as said dam existed in that year prior to any repairs, changes or additions made in said year."

What was the effective height of the dam in 1903, before it was repaired? Counsel disagree as to the actual height of the structure of 1903, and 1909, but are in agreement that the definition of "effective height" as given in *Voter* v. *Hobbs,* et als, 69 Maine, 19, is correct and accurate. In that case the complaint and pleadings were the same as in the case at bar. The issue to the jury was on the defendants' right by prescription and it was found in their favor, and upon exceptions, was sustained. It was there held, that "the effective height of the dam is the height which flows. That is what is to govern, and that is precisely what the presiding Justice instructed the jury was to govern. The amount of land flowed would depend on the effective height of the dam, and the right to flow would be limited by it. Dams need repairing. They vary in tightness. The water may be used with more or less economy, at different times, depending upon the exigencies of business. As was remarked by Shaw, C. J., in *Ray* v. *Fletcher,* 12 Cush., 200, "although the water actually raised by it (the dam) may to some extent vary from one season, or one year to another, owing to the tightness of the dam, the mode of using the water, the different seasons, as being dry or wet and the like, yet these considerations are too variable and uncertain to be adopted or relied on as the basis of a right acquired by grant or prescription" . . . . The prescriptive right having been acquired, the right to flow with

a dam of the prescribed effective height necessarily follows. It is not what the dam may absolutely flow at a particular time, but what the dam in good condition ordinarily will flow. The dam is assumed to be in good condition, and being in such condition, the flowage is what must result from such condition—unaffected by the changes of the seasons or the occasional leakage of the dam." In reaching the conclusion quoted from *Ray* v. *Fletcher,* 12 Cush., 200, Shaw, C. J., said "It is not the actual height of the dam, which will regulate the prescriptive right of the party holding it, but its efficient height, according to its structure and operation, to maintain the height of the water, when in repair and in good order."

The defendants admittedly had the right to maintain a dam as it was before the repairs in 1903. If repairs were necessary, they had the right to make them. Plaintiff introduced testimony of Elmer Harrington as to additional flowage after such repairs in 1903. Mr. Harrington had knowledge of the river for a period of twenty years. He was asked, "Q. Has your attention been called to an increase in the rise of water along the farms, by your farm and the adjacent farms along the river? A. It has. Q. Since the repairs of L. B. Trafton? (1903) A. No, I didn't notice that in particular after the repairs by Trafton; not particularly. Q. I say since then, any time? A. Since then, yes, I have, since then. . . . When the water to your knowledge was at the height of the new dam? . . . A. Well, I have some. Well, I have a road, a driveway, I say I have it, that goes from my high land down on to my low intervale, and when it is to the height of the dam there, I have noticed in particular, just comes up so it makes it muddy for me to get across on to my low intervale. There is no water particularly across the road, just comes up to the road, and makes it deep and undermines it so it is impossible to haul a good load across there. Q. What was the condition of that road before the new dam was put in? A. It was always all right, without it was in a very big—else in a freshet, or something of that kind, it never bothered me at least carting across it."

Other testimony introduced by the plaintiff tends to show a noticeable, but not a substantial additional flowage after the repairs of 1903, and it appears that extensive repairs were made in 1906.

In 1909, the dam had worn down to such an extent that the owners decided to build a new concrete dam. The claim that the dam as repaired in 1903 caused actionable damage is not sustained by the evidence, and this conclusion is supported by the fact that no complaint was made or action taken by any riparian proprietor after the repairs in 1903, or 1906, and the testimony adduced as to flowage on other dates than April 29, 1911, is so unsatisfactory, and it is so evident that the logs in the river at and after that time contributed to the injury complained of, we are unable to agree with the complainant that the evidence justifies further proceedings.

We have before us a record of what is manifestly the highest point reached by a spring freshet of unusual severity, and with no intermediate marks or data, upon which a report of commissioners could be based without working an injustice to one side or the other. Complainant urges that a radical change was made in the dam and if such is the fact a further preparation of the case may establish the rights sought to be enforced. We cannot assume that such radical, unauthorized raising of the dam has occurred, especially in view of the fact that it does not appear in evidence that a corresponding change was made in the bulkheads, or wheels of either mill served by the new concrete dam.

The entry must therefore be,

Judgment for defendants with costs.

CITY OF AUBURN v. ETHER S. PAUL.

Androscoggin. Opinion December 30, 1912.

Appeal. Arbitration. Assessment. Benefits. Board of Public Works. Commission. Contract. Hearing. Interests. Jurisdiction. Municipal officers. Private and Special laws of 1905, Chapter 137. Petition. Sewers. Taxes. Taxpayers.

An action of debt to recover under Section 10 of Chapter 21 of the Revised Statutes, $1680, being the amount of an assessment made upon the defendant's land on Lake and Shepley streets and Gamage avenue in the city of Auburn, for the benefits received to said land by reason of the construction of a sewer through said streets. The assessment in question was made by the Board of Public Works of the city of Auburn, consisting of the mayor, a member ex-officio, and five citizens of Auburn chosen by the city council under the provisions of Private and Special Laws of 1903, Chapter 137, as amended by Private and Special Laws of 1905, Chapter 109.

The defendant questions the validity of the statute governing and regulating assessments for construction of sewers, as provided by Chapter 21 of the Revised Statutes.

Held:

1. That it was the intention of the Legislature by Section 6 of Chapter 21 of the Revised Statutes to provide a tribunal before which a party assessed for construction of a sewer, might have determined by proceedings in the nature of an appeal, the amount that should be assessed for the expense of the construction of the sewer by reason of the benefit to his land, which tribunal should act judicially in determining the amount of assessment.
2. That when a Statute merely imposes a tax for benefits like the act in question, involving no question arising under the exercises of eminent domain, no appeal to a jury need be provided.
3. Section 6 of said statute gives a party agrieved the right to have the amount of his assessment determined by arbitration, and the right to a hearing before a disinterested court or board, according to the rules of law and the procedure of our courts.
4. That the Legislature, by providing that the board of arbitration to fix the assessment should be citizens of the town in which the sewer was constructed, considered that the interest of the general taxpayer of the town was too minute or remote to warp or influence their judgment and that the disqualification by reason of that interest was removed by said act.

5. No express authority is given the Board of Public Works by the act creating said Board to estimate the benefits and make the assessment, and the grant of the power of taxation is not implied in said act nor incident to the powers expressly granted said board.

On report. Judgment for defendant.

This is an action of debt in which the plaintiff seeks to recover the sum of $1680 under the provisions of Revised Statutes, Chapter 21, section 10, being an assessment levied upon the defendant's land on Lake and Shepley streets and Gamage avenue in the city of Auburn for benefits received to said land because of the construction of a sewer through said streets. This assessment was made by the Board of Public Works of the city of Auburn, consisting of the mayor, a member ex-officio and five citizens of Auburn chosen by the city council under the provisions of Private and Special Laws of 1903, Chapter 137, as amended by Private and Special Laws of 1905, Chapter 109. This petition was signed by five of the six members of the Board of Public Works, who later made the assessment in question. Plea, general issue with brief statement. At the conclusion of the evidence, the case was reported to the Law Court by agreement of parties for determination; the Law 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.

Seth May, city solicitor, for plaintiff.

John A. Morrill, for defendant.

SITTING: SPEAR, CORNISH, KING, BIRD, HALEY, HANSON, JJ.

HALEY, J. This is an action of debt brought by the city of Auburn under the provisions of Chapter 21, Section 10, of the Revised Statutes of Maine, to recover the sum of $1680, the amount of an assessment levied upon the defendant's land on Lake and Shepley streets and Gamage avenue, in said city, for the benefits received by said land by the construction of a sewer through said streets. The assessment in question was levied by the Board of Public Works of the city of Auburn, which consisted of the mayor, a member ex-officio, and five citizens of Auburn, chosen by the city

council under the provisions of the Private and Special Laws of 1903, Chapter 137, as amended by the Private and Special Laws of 1905, Chapter 109.

October 2, 1909, the Board of Public Works voted to petition the city council to locate and accept a street from Lake street to Gamage avenue, to be on the line between the land of the defendant and the Davis estate; the signers of this petition included five of the six members of the Board of Public Works, who later made the assessment in question.

July 11, 1910, the city council authorized and directed the Board of Public Works to construct the sewer in question, and made the necessary appropriation therefor. The Board of Public Works received the order from the city council, accepted the same, and authorized the mayor to contract for the building of the sewer, and the mayor, in behalf of the city, executed a contract and the sewer was constructed. On December 10, 1910, the Board of Public Works took a view of the streets in which the sewer was located, for the purpose of making the assessments upon the property benefited by the said sewer. January 4, 1911, the question of the assessments for the sewer was taken up by the Board, and it was voted to make an assessment of $35 for each fifty foot lot, and the assessments were made and filed in the city clerk's office that day, and on the same day a hearing was ordered by said Board upon the subject matter of the assessments, to be held on February 13th, and due notice thereof was given.

On February 13, 1911, the hearing was had before the Board of Public Works, and it was voted to abate of the defendant's assessment the sum of $210, leaving the assessment at $1680, and the defendant was duly notified of the above action. February 21, 1911, the defendant notified the Board that he desired the assessment to be determined by arbitration. On February 25th the Board named six citizens of Auburn, from which two members of arbitrators were to be selected by the defendant under the provisions of Chapter 21, Section 6, R. S. March 3, 1911, the defendant notified the city clerk of his selection of two of the names submitted, and March 10, 1911, the city clerk notified the defendant that one of the parties selected by him refused to serve, and the defendant

afterwards declined to make a further choice, although the city clerk offered, in behalf of the Board of Public Works, to furnish another list of names for the defendant to select from.

The defendant questions the validity of the statute governing and regulating assessments for the construction of sewers, as provided by Chapter 21, R. S.

Section 5 of Chapter 21, R. S., provides that the municipal officers, after constructing a sewer, shall determine what lots or parcels of land are benefitted by such drain or sewer, and shall estimate and assess upon such lots and parcels of land, and against the owners thereof, or the person in possession or against whom the taxes thereon shall be assessed, . . . such sum not exceeding such benefit as they deem just and equitable toward defraying the expense of constructing and completing such drain or sewer, not to exceed one-half of the cost of such drain or sewer, and also provides for the filing by them with the clerk of the town a location of such drain or sewer with a profile description of the same, and the amount assessed upon each lot or parcel, and that the clerk shall record the same, and within ten days shall notify each person so assessed, with an order of notice by the clerk, stating the time and place for hearing upon the subject matter of such assessment, and upon such hearing, said officers shall have power to revise, increase or diminish any such assessment.

Section 6 provides:

"Any person not satisfied with the amount for which he is assessed, may, within ten days after such hearing, by request in writing given to such clerk, have the assessment upon his lot or parcel of land determined by arbitration. The municipal officers shall nominate six persons who are residents of said town, two of whom selected by the applicant, with a third resident person selected by said two persons, shall fix the sum to be paid by him, and the report of such referees made to the clerk of said town, and recorded by him, shall be final and binding upon all parties. . . ."

It was the evident intent of the Legislature, by Section 6, to provide a tribunal, before which a party assessed for the construction of a sewer might have determined, by proceedings in the nature

of an appeal, the amount that he should be assessed for the expense of the construction of the sewer, by reason of the benefit received by his land, which tribunal should act judicially in determining the amount of his assessment.

The power of the Legislature to authorize the assessment of a tax upon the owners of land whose property is benefited by a sewer, according to the benefit received, as in this case, is not questioned, the statute authorizing such assessment having been before this court in a suit between the same parties to recover an assessment for the construction of a sewer, *Auburn* v. *Paul,* 84 Maine, 212, in which that question was raised and decided, and the same principle as applied to the widening of a street was sustained in *Bangor* v. *Pierce,* 106 Maine, 527; but the position now urged by the defendant against the validity of the assessment was not presented to the court, nor passed upon, in *Auburn* v. *Paul,* supra.

The assessment having been made, under the taxing power of the Legislature, by the Board of Public Works, who, if they were authorized to make it, were, in the assessment thereof, acting as agents of the State, and having complied with the statute by fixing a time and place for a hearing before the Board of Public Works, when the parties assessed to pay a part of the cost of the construction of the sewer could be heard upon the assessment made, due notice thereof having been given, that hearing had, and its doings recorded, the proceedings were according to the statute, R. S., Chapter 21, Section 5, and the validity of the assessment must be judged and determined by the same rules of law as those by which other assessments are judged and determined.

It is objected that Section 6 of Chapter 21, R. S., providing for arbitration to fix the amount of the assessments, is invalid, as, by Section 6, the owner of the land is not given the right of appeal that he is entitled to by law, but in *Auburn* v. *Paul,* supra, the court said: "And when the statute merely imposes a tax for benefits, like the act now considered, involving no question arising under the exercise of eminent domain, no appeal to a jury need be provided," citing *Howe* v. *Cambridge,* 114 Mass., 388; *Chapin* v. *Worcester,* 124 Mass., 464. In the above cases the parties taxed urged that they were entitled to an appeal to a jury, which explains why

the court said, "to a jury." It would have been more accurate to have said, "No appeal need be provided." The assessment in question is the same as any tax assessed by the Legislature, within its constitutional limits, the exercise of the sovereign power, from which no appeal lies, except when given by statute. Upon the separation of Maine from Massachusetts, the Legislature of this State enacted a law giving parties aggrieved by the assessment of taxes by the assessors of the cities and towns the right of appeal from the assessment. Public Laws of 1821, Chap. 116, Sec. 13. The same right existed by statute in Massachusetts before the separation, and has existed in this State ever since the act of separation; but without a statute giving the right there could be no appeal from the assessment of taxes by the assessors of the cities and towns. An appeal from the assessment of taxes is a privilege, not a constitutional right, and can only be granted by the sovereign power; that alone has the power to impose the tax.

Section 6, by giving a party aggrieved the *right* to have the amount of his assessment determined by arbitration, gave him a right to a hearing before a disinterested court or board, according to the rules of law and the procedure of our courts. It does not mean a hearing before an interested court or board.

It is urged that Section 6, giving to a party aggrieved the right to have his assessment determined by arbitration, has not provided a disinterested board to fix the amount of the assessment, but that the board of arbitration that the statute provides to finally fix the amount, is an interested board, and therefore incompetent to judicially determine the benefits received by the various lots of land, and the amount of the assessments therefor, and the objection is urged because the board provided for by Section 6 must all be citizens of the town in which the sewer is constructed, and that, as citizens, they would be interested to assess the benefits to the full amount allowed by statute, that the burden to their town by reason of the construction of the sewer might be lessened. So zealous is the law in protecting its tribunals from even the suspicion that their judgments are influenced by any interest except the merits of the cause, that it was held, in *Commonwealth* v. *McLane,* 4 Gray, 427, that a recognizance, entered into before a justice of the peace resid-

ing in the town in which any forfeiture incurred under the recognizance, was given by statute, was void, if there was no statute expressly removing his disqualification by reason of such interests, if there was any other magistrate in the county before whom the recognizance could be taken. Lord Coke declared, while sitting judicially, that even an act of Parliament, made against natural equity, as to make a man a judge in his own case, is void in itself, "for jura naturae sunt immutabilia, and they are leges legnum," cited in *State* v. *Crane,* 36 N. J. L., 400. The maxim that no man can be judge in his own case is said to have had its origin in the fundamental nature of law; but while a law enacted by the Legislature giving a party power to act as judge in his own case is undoubtedly void, it does not follow that any interest, however small, is a disqualifying interest that cannot be removed; if the Legislature did not have that power, as said in *State* v. *Intoxicating Liquors,* 54 Maine, 564, "This argument, if carried out to its logical results, would prevent the imposition of any fine to and for the use of the State, by any magistrate in it, whether a justice of the peace or a judge of the Supreme Court. For all are citizens of the State and pay taxes, and have an interest in having a treasury supplied by penalties and fines,—in the same manner as the Judge of the police court of a city has in replenishing the city treasury by like means. It has been contended that, when the Legislature has, in express terms, given jurisdiction in cases where the magistrate might have a minute and remote interest, without in terms, or by implication, except as in such case,—the fair construction is, that jurisdiction is given notwithstanding such interest, and although there may be other courts of concurrent jurisdiction, . . . the limit and extent of the provision is within legislative discretion and determination." The court then quote Chief Justice Shaw in *Commonwealth* v. *Emery,* 11 Cush., 411, as follows: "We may go further and add, that, it being quite competent for the Legislature to provide, as they have in many cases, that such a municipal minute interest, shall not disqualify a judge, juror, or appraiser or other similar officer, when jurisdiction is given to a magistrate, who, by force of the same act, may have some remote municipal interest, it was their intention to remove such disqualification."

In the case of *State* v. *Crane,* supra, the court, in discussing the interest that would disqualify a party from acting judicially, after stating that the interest objected to in that case was that one of the commissioners to assess the damages for the laying out of the way was an owner of land over which the way passed, said: "This interest is different from that of a general taxpayer which, in some cases, from the necessity of things, might be disregarded, or if not so, could be relieved against by the Legislature, . . . That it may be done when the interest is only as a general taxpayer I think is clear. . . . It may, therefore, be considered as settled that disqualification for such interests as are common to all taxpayers may be removed by the Legislature." The Legislature has removed the interest of a justice or a judge in suits in which the county or town in which he resides are parties if the adverse party to such town or county enters on the docket a waiver of their interest, R. S., Chap. 84, Sec. 50, also the interest of trial justices, judges of municipal and police courts, in suits for taxes, R. S., Chap. 10, Sec. 27, and also interest of jurors in prosecutions for the recovery of money, or other forfeitures, when they are liable to pay taxes in the county, town or plantation, which may be benefited by the recovery. R. S., Chap. 84, Sec. 101.

We think that the Legislature, by providing that the board of arbitration to fix the assessment should be citizens of the town in which the sewer was constructed, considered that the interest of the general taxpayer of the town was too minute or remote to warp or influence their judgment, and that the disqualification by reason of that interest was removed by the act. *State* v. *Bangor & Brewer,* 98 Maine, 114.

Of course if the interest of any of the parties named as arbiters was more than the interest of the general taxpayer, that interest would not be removed, and they would not be competent to act. In other words, it is the duty of the town to name six citizens of the town, who are not interested in the benefits or assessments other than as general taxpayers, to act as arbiters, and a board selected as provided by Section 6 is a competent and disinterested board to act judicially in determining the amount of the assessment for the construction of sewers.

It also urged that Sections 5, and 6 are invalid because they prescribe no rule or standard of assessment; and it has been held that acts authorizing the assessment for local improvements upon designated property must determine the mode of distributing the burden; that the property out of which the tax is to be made must be designated, and the standard of assessment established, and can not be left to the discretion of others, and assessments like the one under discussion, where the officers making them were authorized to assess in such proportions as they deemed just and equitable, have been held invalid. But statutes authorizing assessments according to the benefits conferred upon the property assessed, are not subject to the objection, because the property to be assessed is designated, and the standard of assessment is fixed. The burden is to be borne by the property benefited, according to the benefits received.

So much of Section 5 as is material upon this branch of the case is as follows:

"When any town has constructed and completed a public drain or sewer, the municipal officers shall determine what lots, or parcels of land are benefited by such drain or sewer, and shall estimate and assess upon such lots and parcels of land . . . such sum not exceeding such benefit as they may deem just and equitable, toward defraying the expenses of constructing and completing such drain or sewer, the whole of such assessments not to exceed one-half of the cost of such drain or sewer." . . .

We think that this statute should be construed to mean, that the municipal officers shall determine what land, or parcels of land, are benefited by the sewer or drain, and that they shall assess upon such lots or parcels, according to the benefits received by such lots or parcels, such sums as they deem just and equitable, that is, equitable and proportionate; that the fair implication of the language is that the assessments are to be according to the benefits received by the lots or parcels, as compared with the benefits received by the other lots or parcels. It is not claimed that the assessments in question were not made according to the benefits received, but only that the statute does not prescribe how they shall be made, and does not specify that they shall be made according to the benefits received. But, as before stated, the fair implication of the statute is, that the

assessments are to be made according to the benefits received by the land assessed, and the statute is not invalid for the reason urged.

It is also objected that the Board of Public Works had no authority to make the assessment in question, that that duty was placed by statute upon the municipal officers of the city, and that, as the municipal officers did not make the assessment in question, no valid assessment has been made. The act creating the Board of Public Works, Chapter 137 of the Private and Special Laws of 1903, provided that said board were to have and exercise, "all the powers and be charged with all the duties relating to the construction, maintenance, and care of the streets, highways, bridges, sidewalks, drains and sewers in said city, which are now conferred or imposed upon the city council, municipal officers and commissioners of streets by the charter and ordinances of the city and the general law of the state."

This act took from the city certain of its powers and duties, among others, some relating to sewers and drains, and imposed those powers and duties upon the Board of Public Works. By Section 2, Chapter 21, R. S., the municipal officers of a town, or a committee duly chosen by the town, may construct public drains or sewers. By the law of 1905 that power was taken from the city of Auburn, and imposed upon the Board of Public Works. By Section 5, Chapter 21, R. S., it is provided that, "all drains or sewers shall forever thereafter be maintained and kept in repair by such town." The city of Auburn, by the law of 1905, had that duty taken from it, and it was imposed upon the Board of Public Works. The only powers and duties taken from the city government, as far as drains and sewers are concerned, and imposed upon the Board of Public Works, in express terms, are the construction, maintenance, care and control. The Board of Public Works could not construct the sewer, until authorized by the city council and an appropriation made therefor. Section 5, Chapter 21, R. S., provides that whenever any town has constructed and completed a public drain or common sewer, the muncipal officers shall determine what lots or parcels of land are benefited by such drain or sewer, and shall estimate and assess such sum, not exceeding such benefits, as they may deem just and equitable toward

defraying the cost of constructing and completing such drain or sewer. Was this duty and power taken from the municiapl officers by the act creating the Board of Public Works and imposed upon that board? If it was, it was so taken by the law of 1905 creating the board, as no amendment granting that power has since been enacted by the Legislature, and it must be determined by a construction of the act creating the board. The rule of construction as stated in Endlich on the Interpretation of Statutes, Section 352, is as follows: "The powers that are given to subordinate local authorities are strictly construed, and every reasonable doubt as to the existence of a particular power resolved against the same, and consequently of two possible constructions that has to be adopted, which is based upon the theory that the Legislature intended to delegate only such powers as were necessary to carry out the objects of the enactment, and not any larger powers than were necessary for that purpose. Hence, too, statutes delegating to municipal and other inferior authorities the power of imposing taxation must be in clear and unambiguous terms, and are subject to the rule of strict construction." Cyc., Vol. 37, page 725, after stating that the Legislature cannot delegate its power of taxation, states the exception as to municipal corporations, as far as necessary for their own purposes and in respect to property within their jurisdiction, and then states: "But, even in this case, the power must be expressly and distinctly granted." In *Wandworth Board of Public Works* v. *Telephone Co.,* L. R., 13, Q. D., 904, Bowen L. J., in discussing what powers were conferred upon the board, said: "The Board of Works have what the Metropolis Management Act, 1855, has given to them; they have no more, and no less. . . . It is wise to adopt such a construction, as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the act, and not give any unnecessary power."

In *Paine* v. *Spartley,* 5 Kan., 526, in discussing the powers of the city to assess taxes, the court said: "Such corporations possess and may exercise those powers which are granted in express terms; also those necessarily implied or necessarily incident to the powers expressly granted; and, lastly, those which are absolutely indis-

pensable to the declared objects and purposes of the corporation. In this connection it may also be stated that it is regarded as a settled principle of law that wherever there is a fair and a reasonable doubt as to the existence of a power in such corporations, the courts will not uphold or enforce its execution."

As shown above, there was no express authority given to the Board of Public Works to estimate the benefits and make the assessments. Their powers and duties were to have and exercise all the powers, and be charged with all the duties relating to the construction, maintenance, care and control of drains and sewers. Is the grant of the power of taxation necessarily implied, or necessarily incident to the power expressly granted said board? We do not think it is. The Board of Public Works do not need the power of taxation to construct, maintain and keep in repair sewers. By the law of the State sewers can only be constructed after an appropriation for that purpose has been made by the town, which in this case was done by the city council, who alone had the power to appropriate the money for that purpose. Under the act creating them they could only expend for drains and sewers the money appropriated for that purpose. Therefore, they did not need the power to assess the owners of the land benefited to enable them to perform the duties imposed by the act creating the board. Section 7, Chapter 109, of the Private and Special Laws of 1905, provides that all of the bills of said board shall be paid from the city treasury. The power of taxation is not indispensable to the declared object and purpose for which said board was created, and as the Legislature has not granted to the Board of Public Works the power of taxation, i. e., the power to assess land and the owners for the benefits received by the sewer, there has been no valid assessment, therefore this action cannot be maintained.

Judgment for defendant.

EDWIN O. HEALD *vs.* CLARENCE D. PAYSON et als.

EDWARD M. BENNER *vs.* CLARENCE D. PAYSON et al.

Knox. Opinion January 6, 1913.

Candidate. Chapter 6, Section 70-73, of the Revised Statutes. Election. Equity. Exceptions. Ineligibility. Irregularity. Mandamus. Minority. Peremptory Writ. Plurality. Votes.

1. When a case is before the Law Court upon exceptions, and by change of conditions or otherwise, the questions involved have become merely moot questions, and neither party has any further interest in their determination, the exceptions will be dismissed, without consideration.
2. A candidate receiving less than a plurality of the votes cast at an election is not elected, even if the opposing candidate receiving a plurality of the votes is ineligible. Votes cast for an ineligible candidate are at least so far effective as to prevent the election of a candidate who received a less number of votes.
3. If, as it has sometimes been held, the rule does not apply where the electors have full knowledge of the ineligibility of the candidate, in this case, the candidate receiving a plurality of the votes was eligible, and it is not shown that the electors had knowledge of any irregularity or imperfection in the ballot, if any such there was.
4. A candidate, who did not receive a plurality of all the votes cast for a county office, cannot maintain a petition under R. S., Chapter 6, Section 70, to try the title of his adversary.

Edwin O. Heald, Pet'r. v. *Clarence D. Payson* et als. On exceptions by respondent. Exceptions dismissed.

Edward M. Benner v. *Clarence D. Payson* et al. Petitioner, as in equity. Petition dismissed with single bill of costs.

In the case of *Benner* v. *Payson* et al., which was a petition as in equity under Revised Statutes, Chapter 6, Section 70, the petitioner claimed that he was legally elected to the office of Register of Probate for Knox County at the September Election of 1912. It is agreed that any evidence in *Heald* v. *Payson* may be considered in *Benner* v. *Payson* and any evidence in *Benner* v. *Payson* may be

considered in *Heald* v. *Payson,* provided same is legally admissible. It is agreed that the official return of the vote at the September election of 1912 for Register of Probate shall be considered a part of the case. The case was reported to the Law Court for determination.

The case is stated in the opinion.

R. I. Thompson, for Heald.

M. A. Johnson, for Benner.

Williamson, Burleigh & McLean, for respondents.

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

SAVAGE, J. The first of these cases is a petition for mandamus to compel the ward clerk of ward 3 in Rockland to correct the record of the votes cast for the democratic candidates for register of probate, at the primary election held June 17, 1912. The peremptory writ was awarded, and the respondent excepted.

The second case is a petition, as in equity, under R. S., Chap. 6, Sect. 70, wherein the petitioner claims that he was legally elected to the office of register of probate for Knox County, at the September election, 1912. The case comes up on report. The two cases relate, in effect, to the same subject matter.

The history of the case, and the contentions of the parties, briefly stated, are these. Heald and Payson were both candidates for the nomination of register of probate in Knox county at the primary election in June, 1912. The names of both were on the democratic official ballot. On the face of the returns throughout the county it appeared that Payson had been nominated. Heald claimed that there was an error in the record of the votes cast in Ward 3, Rockland, and in the returns thereof, which if corrected according to the fact, would show that he had received a majority of the votes cast, and was therefore legally nominated. Heald brought a petition for mandamus to compel the ward clerk to correct the record and return. The peremptory writ was granted and the corrections were made. After the writ was granted, as it seems, the exceptions in this case were allowed. It is unnecessary to inquire into the merits of the controversy as presented to the governor and council. In the end that body decided to place the name of Payson upon

the official ballot to be used at the September election. Benner was the republican candidate for the office of register of probate, whose name appeared upon the same ballot. At the election in September, Payson received a large plurality of the votes over Benner.

Benner's contention is that Heald was lawfully nominated as a candidate for the office of register, and should have been so declared by the governor and council, that Heald's name, instead of Payson's, should have been placed upon the official ballot for the September election, that the placing of Payson's name upon the ballot was unlawful, and that therefore all ballots cast for Payson are to be deemed null, and to be entirely disregarded, and not to be counted for any purpose. Upon that view of the case, the petitioner, Benner, claims that he received a plurality of all the votes that can legally be regarded and counted, and that he is entitled to judgment for the office.

We do not agree with the conclusion. Whatever may be said in regard to Payson's nomination, it is patent that Benner was not elected. It is fundamental that minorities cannot elect or rule. By the overwhelming weight of authority in this country, a candidate receiving less than a plurality of the votes cast is not elected, even if the opposing candidate receiving a plurality of the votes is ineligible. The votes cast for an ineligible candidate are at least so far effectual as to prevent the election of a candidate who received a less number of votes. Of the many authorities sustaining this proposition, we cite the following: *Crawford* v. *Dunbar,* 52 Cal., 36; *State* v. *Swearingen,* 12 Ga., 23; *People* v. *Molitor,* 23 Mich., 341; *Barnum* v. *Gilman,* 27 Min., 466; *State* v. *Vail,* 53 Mo., 97; *State* v. *Anderson,* 1 N. J. Law, 366; *People* v. *Clute,* 50 N. Y., 451; *Com.* v. *Cluley,* 56 Pa. St., 270; In re Corliss, 11 R. I., 638; *State* v. *McGeary,* 69 Vt., 461; *State* v. *Smith,* 14 Wis., 497. In some of these cases, following the English authorities, it is held that the rule does not apply where the electors have full knowledge of the ineligibility of the candidate. In some cases it is held that the rule does apply even when the candidate for whom the greater number of votes were cast dies before the election is completed, or indeed if there be no such person as the one named on the greater number of the ballots.

In this case the general rule must be applied. Payson was not dead. He was not ineligible. There was no reason why, at the election, any voter, who chose to do so, should not vote for him. A plurality did vote for him. There is nothing to show that the electors had knowledge of any irregularity or imperfection in the ballot, within the English rule, even if we assume that such an irregularity or imperfection existed. On the contrary, each elector was given, for marking, an official ballot prepared by authority of the State, on which Payson's name appeared.

There is no escape from the conclusion that Benner was not elected. That being so, we have no occasion to examine the other numerous questions raised in argument. If Benner was not elected, he cannot maintain this petition, under R. S., Chap. 6, Sect. 70. If he was not elected, he cannot have Payson ousted in this proceeding. It is only when a petitioner shows himself entitled to an office that "the court may issue an order to the party unlawfully claiming or holding said office, commanding him to yield up to the officer who has been adjudged to be lawfully entitled thereto, said office." R. S., Chap. 6, Sect. 73. Unless Benner shows himself elected, he cannot demand an ouster of Payson. It results that Benner's petition must be dismissed.

The foregoing conclusion in the case of *Benner* v. *Payson* virtually disposes of the case of *Heald* v. *Payson*. Nothing is left in it but moot questions. Neither party has any further interest in their determination. To overrule or to sustain the exceptions will not now affect either party's right. Therefore the exceptions should be dismissed.

Accordingly, the certificate will be,—in *Heald,* Pet'r. v. *Payson* et als,

Exceptions dismissed.

In *Bener* v. *Payson* et al.,

Petition dismissed, with single bill of costs.

WILLIAM H. STEWART
Liquidating Agent for Richmond National Bank

vs.

WILBUR C. OLIVER.

Sagadahoc. Opinion January 28, 1913.

Assumpsit. Accommodation. Brief Statement. Consideration. Exceptions. Indorser. Notice. Promissory Notes. Surety.

1. One who signs on back of a promissory note at its inception is a joint, or joint and several, maker with one who signs on its face, and want of demand and want of notice to him of non-payment affords him no defense.
2. An accommodation maker or surety on a note is discharged from liability, if, without his knowledge or assent, the holder, having notice that the accommodation maker or surety is such, extends the time of payment to the principal maker for a valuable consideration.
3. The payment of interest in advance is a sufficient consideration for an agreement to extend the time of payment of a promissory note.
4. It is immaterial whether the bank officers had actual knowledge that the defendant was an accommodation maker or merely that the circumstances were such as ought to have placed them on their inquiry.

On exceptions by defendant. Sustained.

This is an action of assumpsit on a promissory note dated December 20, 1905, for two hundred dollars, payable in four months to the Richmond National Bank, made and signed by F. B. Torrey, and indorsed by the defendant on the back. Plea, the general issue and by way of brief statement the defendant pleaded that he was an accommodation endorser or surety on the note, which fact was well known to the bank, and that the bank for a valuable consideration had extended the time of payment to the maker, Torrey, without the knowledge or assent of the defendant, and that no notice of non-payment, when due, had been given him. At the conclusion of the evidence, the presiding Justice directed the jury to return a ver-

dict for the plaintiff, which was done. The defendant excepted to this direction.

The case is stated in the opinion.

Charles D. Newell, for plaintiff.

Frank L. Staples, for defendant.

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

SAVAGE, J. This is an action of assumpsit wherein the plaintiff, as liquidating agent of the Richmond National Bank, seeks to recover of the defendant on a promissory note for two hundred dollars, made by F. B. Torrey and endorsed by the defendant on the back. The note was dated December 20, 1905, and the bank was payee.

Under the general issue, the defendant pleaded, by way of brief statement, that he was merely an accommodation endorser or surety on the note, which fact was well known to the bank, and that the bank for a valuable consideration had extended the time of payment to the maker, Torrey, without the knowledge or assent of the defendant. Another defense set up was that no demand had been made upon the defendant, and no notice of non-payment when due had been given to him. At the conclusion of the evidence, the presiding Justice directed the jury to return a verdict for the plaintiff, which was accordingly done. The defendant excepted to the direction.

That the defendant was in fact an accommodation endorser or a surety is not now disputed. But it is well settled law that one who signs on the back of a note at its inception is a joint or joint and several maker with one who signs on the face, so far as concerns the necessity for demand and notice of non-payment. *Adams* v. *Hardy,* 32 Maine, 339; *Merchants' Trust & Banking Company* v. *Jones,* 95 Maine, 335. Accordingly the defense of want of notice cannot avail him.

But there is evidence that the bank, without the knowledge or assent of the defendant, on payment of interest in advance, extended the time of payment to Torrey, the principal, nineteen times, for a period of four months each time. The payment of interest in

advance was a sufficient consideration for an agreement to extend the time of payment. And it is not denied that such an extension, for a valuable consideration, had the effect of discharging the defendant from liability, if at the time of the agreement to extend the bank had notice that the defendant was an accommodation maker or surety. *Andrews* v. *Marrett,* 58 Maine, 539.

It follows that the only debatable question under exceptions to the direction of a verdict for the plaintiff is, whether there was sufficient evidence to go to the jury that the bank did have such notice. We think there was, and that taking the case from the jury and directing a verdict for the plaintiff was error.

The evidence would warrant the jury in finding that Torrey alone made application for the loan, that the cashier asked him who was to sign with him, and that he gave the name of the defendant, that Torrey subsequently presented the note in his own handwriting, with defendant's name on the back, that the note was then discounted by the bank and the proceeds deposited to Torrey's account, that Torrey checked it out, that when the note was about to become due Torrey was notified by the bank, and the defendant was not, and that the defendant was never notified until March, 1912, a period of over seven years after the inception of the note. In this connection we note that the manner of the defendant's signing, being upon the back of the note, instead of on its face, was held significant of notice in *Andrews* v. *Marrett,* supra.

Upon finding the foregoing facts, we think the jury would have been warranted in concluding that the bank had actual notice that the defendant was surety for Torrey, or at least that the circumstances were such as ought to have placed the officers of the bank upon their inquiry. And we think it is immaterial which they might find. See *Andrews* v. *Marratt,* supra; *Merchants' Trust & Banking Co.* v. *Jones,* supra. The case must go back for a jury trial.

Exceptions sustained.

ALBERT G. BLUNT et al. *vs.* ALICE GLEDHILL MCCOOMBS, Admrx.

ALBERT G. BLUNT et al., in eq., *vs.* ALICE GLEDHILL MCCOOMBS, Admrx.

Somerset. Opinion January 28, 1913.

Accommodation. Accrued. Assignment. Agreement. Cause of Action. Creditors. Culpable Neglect. Equity. Liquidation. Promissory Note. Revised Statutes, Chap. 89, Section 21.

1. The defendant's intestate, Edwin Gledhill, agreed in writing to save the plaintiff harmless, at the time the notes should become due, from all loss, cost and expense which should result to them on account of their signing with him and another as accommodation makers two promissory notes, on six months time on which the Marston Worsted Mills was the principal maker. Before the notes matured, in July and August, 1906, Mr. Gledhill died.

Held:

1. That the cause of action accrued to the plaintiffs at the time the notes were first renewed.
2. That in any event an action at law on the agreement to indemnify is barred by the special statute of limitations of suits against executors and administrators.
3. That a bill in equity under Revised Statute, Chapter 89, Section 21, cannot be maintained by a creditor whose claim has not been presented within the time limited by statute, unless it appears that justice and equity require it, and that such creditor is not chargeable with culpable neglect.
4. That the plaintiffs in the pending bill are chargeable with culpable neglect and that justice and equity do not require the bill to be sustained.

On report. In the action at law, judgment for the defendant. In the bill in equity, between the same parties, the bill is dismissed with costs.

The first case is to recover damages for breach of a contract of indemnity made by the defendant's intestate, in which he agreed to save the plaintiffs harmless from all loss, cost and damage resulting to them on account of their having signed certain notes. The defense is the special statute of limitations applicable to suits

against executors and administrators under Revised Statutes, Chapter 89, Section 14-15.

The second case is a bill in equity brought by the same plaintiffs to recover judgment on the same cause of action under Revised Statutes, Chapter 89, Section 21. The defense to this bill is that the plaintiffs are chargeable with culpable neglect and are not entitled to equitable relief.

The case is stated in the opinion.

Gould & Lawrence, for plaintiffs.

Butler & Butler, for defendants.

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

SAVAGE, J. The first case is brought to recover damages for breach of a contract of indemnity made by the defendant's intestate, whereby he agreed to save the plaintiffs "harmless from all loss, cost and damage" resulting to them on account of their having signed certain notes. The defense is the special statute of limitations applicable to suits against executors and administrators. R. S., Chap. 89, Sects. 14, 17.

The second case is a bill in equity brought by the same plaintiffs to recover judgment on the same cause of action. It is brought under Section 21 of the same chapter, which provides that "if the Supreme Judicial Court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited" by statute "is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person." The bill is brought only as an alternative remedy, to avail the plaintiffs, in case it is held that the action at law is barred by the statute of limitations. The defense is that the plaintiffs are chargeable with culpable neglect, and are not entitled to equitable relief. Both cases come up on report.

ACTION AT LAW.

On January 26, 1906, the defendant's intestate, Edwin Gledhill, agreed in writing to save the plaintiffs harmless from all loss, cost

and expense which should result to them on account of their signing with him and J. Wallace Blunt, son of one of the plaintiffs, a note of even date with the agreement for $5000, and another note for the same amount to be signed afterwards. The latter note, dated February 12, 1906, was afterwards signed by all the parties. In both notes the Marston Worsted Mills, a corporation, was the principal maker, and all the other signers were accommodation endorsers. Both notes were made payable to the Second National Bank of Skowhegan, and each was made payable six months after date. The Second National Bank discounted the notes and the Marston Worsted Mills had the proceeds. On May 31, 1906, before either of the notes had matured, Edwin Gledhill died. When the notes became due, they were renewed by the Worsted Mills, and all the other signers, except Gledhill. And they were successively renewed in the same manner until 1910, the last notes maturing in January and February of that year. Beginning some time in 1907 or 1908, Roy L. Marston, representing a large stockholding interest in the corporation, voluntarily signed the renewal notes. During this entire period, the Marston Worsted Mills was also indebted to the First National Bank of Skowhegan for $10,000, on notes, renewed from time to time, on which the plaintiffs and J. Wallace Blunt voluntarily became accommodation endorsers in 1906, and Marston afterwards.

Soon after the death of Mr. Gledhill, the defendant was appointed administrator of his estate, gave notice thereof, and filed her affidavit of notice June 14, 1906. Within eighteen months thereafter, the plaintiffs filed in the probate office, under the provisions of R. S., Chap. 89, Sect. 16, their demand, arising under the contract of indemnity, alleging that the cause of action did not accrue within said eighteen months. The date of the writ is March 4, 1912.

Under the provisions of Revised Statutes, Chapter 89, Section 14, as amended by Laws of 1907, Chapter 186, "no action shall be maintained against an executor or administrator on a claim or demand against the estate," with certain exceptions stated, "unless commenced within twenty months" after the affidavit of notice has been filed in the probate court. Only one of the exceptions touches this case. By Section 17 of Chapter 89, the time for bringing action is extended in cases where a cause of action does not accrue within

eighteen months after affidavit of notice is filed. In such cases, when the claimant has filed his claim in the probate office within the eighteen months, and the heirs or devisees have given no bond to pay the claim, the claimant may bring an action within six months after his demand becomes due.

It being conceded that a cause of action has accrued upon the contract of indemnity, the question now to be considered is, when did it accrue? If it accrued within the eighteen months mentioned, then the action is barred by the general limitation of suits against administrators. If it accrued after the eighteen months, but more than six months before suit was commenced, it is likewise barred, under the exception. The plaintiffs claim that the cause of action accrued within six months before suit was commenced, and, therefore, that the action is not barred.

In order to understand the contentions of the parties, it is necessary to state the relations of the parties, and the history of the transactions subsequent to the giving of the contract for indemnity. Mr. Gledhill was the general manager of the Marston Worsted Mill. He was a large stockholder, holding 398 shares of the capital stock. He and his family and one Larzalaer of Philadelphia owned one-half of the capital stock. The other half belonged to the estate of Charles A. Marston, J. Wallace Blunt, and the plaintiffs, and perhaps others. At the time the original notes were given J. Wallace Blunt held the office of assistant treasurer. After the death of Mr. Gledhill, he was made the general manager, and the plaintiffs and J. Wallace Blunt, either constituted the whole board of directors, or were a majority of the board. They operated the mill until April, 1908, when, on a bill brought by creditors in the federal court, a receiver was appointed. The receiver continued the operation of the mill, until a reorganization was effected in 1910. In accordance with the plan of reorganization, a new corporation was formed, called the Marston Worsted Company. The creditors assigned their respective demands to a committee of creditors, as trustees. The committee purchased the property of the Marston Worsted Mills from the receiver, and conveyed it to the Marston Worsted Company. Preferred stock in the Marston Worsted Company was issued to the creditors on account of the claims so assigned by them, dollar for dollar. By the terms of the certifi-

cates, as well as by the plan of reorganization, the stock was preferred, both as to assets and dividends. The dividends were to be cumulative at seven per cent per annum. The preferred stock might be retired, in whole or in part upon any dividend date by payment of one hundred dollars per share and accrued dividends to any holder thereof. The preferred stockholders were to have the sole voting power. Certain common stock was provided for, for the benefit of former stockholders of the Marston Worsted Mill, but it was not to be delivered to them until all the preferred stock was retired. And until that time, the common stock was to have no voting power, nor be entitled to dividends. By this scheme, the creditors came into possession and control of the mill. They were the owners, subject to the retirement or redemption of their shares as provided. Whenever their shares should be so retired, the old stockholders, by virtue of their common stock, would come into possession and control.

The plaintiffs and J. Wallace Blunt and Roy L. Marston all became parties to the reorganization. The First National Bank and the Second National Bank had both proved their claims on the Marston Worsted Mills notes in the receivership proceedings. In January, 1910, the First National Bank assigned one-half of its proved claim to the plaintiff, Blunt. Thereupon he assigned the same to the committee of creditors. And on October 5, 1910, he received the stipulated preferred stock in the Marston Worsted Company. Similarly like assignments were made and preferred stock issued, with respect to the remainder of the indebtedness due to the banks. The First National Bank assigned the remainder of its claim to the plaintiff Young, and the Second National Bank assigned its claim, being renewals of notes on account of which the contract of indemnity was given, one-half to J. Wallace Blunt, and one-half to Roy L. Marston. At the time of the assignment, the plaintiff Young and Roy L. Marston each paid the banks respectively the amount due on account of the claim assigned. The plaintiff, Blunt, paid the whole amount due the banks on account of the claims assigned to himself and to J. Wallace Blunt, his son. As already stated, these four gentlemen were all endorsers on all the notes held by both banks. And by mutual arrangement they took the assignments and made the payments in the manner above

described. So that the fact that it happened that neither of the plaintiffs made payments specifically on account of the notes in the Second National Bank, for which the contract of indemnity was given, must be deemed of no importance in this action. In effect, they made the payments.

To this statement of the case, it is only necessary to add that the preferred stockholders operated the mill until February, 1912, when it became necessary to liquidate the affairs of the Marston Worsted Company. The mill was sold, and upon settling the business it was found that there were no proceeds whatever available for payment or distribution to the preferred stockholders. They had lost all.

The learned counsel for the plaintiffs suggests that four dates only are conceivable as those on some one of which this cause of action accrued; (a) the time the notes were first renewed; (b) the time of taking the assignments from the banks, and of the payments therefor; (c) the time of taking the preferred stock; and (d) the time of final liquidation of the new company without assets available for the preferred stock. It is conceded that if the cause of action accrued at any of the first three named dates, this action is barred by limitation, but the plaintiffs contend that no cause of action accrued at any of these dates, but did at the time of final liquidation.

As to the first date, that of the first renewals of the notes, counsel says that no cause of action accrued then, "because plaintiffs' only liability was a contingent one, and they had suffered no actual damage; that in order to have a cause of action for substantial damages they must either have paid or absolutely assumed the debt." We do not think this argument reaches the correct result. The rule is correctly stated in *Manning* v. *Perkins,* 86 Maine, 419, in these words,—"If the action rests on a breach of contract, it accrues as soon as the contract is broken, although no injury results from the breach until afterwards."

Now what was the contract? and how was it broken? The contract was to "save harmless" on account of the signing of the notes. It contained this clause,—"If said notes are paid by the said Marston Worsted Mills, or said Edwin Gledhill, at the time the same may become due and payable, then this agreement shall become

void, otherwise the said agreement shall remain in force." Nothing is said about renewals. The contract looked to the plaintiff's being saved harmless *at the time the notes should become due.* It was the contract duty of Mr. Gledhill to save them harmless then, by paying or otherwise taking care of the notes. Did he do so? We think he did not. We do not need to decide what would have been the result if Mr. Gledhill had lived and had signed the renewal notes with the plaintiffs. There might be such circumstances as would indicate an intention to waive any cause of action which might have accrued by reason of his failure to take care of the notes then. And in such a case, as shown by the authorities cited by the plaintiff, the indemnity contract would apply to notes given in renewal. *Pond* v. *Clarke,* 14 Conn., 339; *Boswell* v. *Greene,* 31 Conn., 74. But even if, as claimed by the plaintiffs, despite the terms of the contract, the loan was intended as a permanent one, which necessarily contemplated renewals, it is quite clear that it must have contemplated also renewals by Mr. Gledhill as well as by the others. But when the first notes became due, Mr. Gledhill was dead, and could not renew. The notes could not be renewed so to continue the same relative liability on the new notes as existed on the old ones. The notes became due. The plaintiffs might have paid them, in which case there is no doubt a cause of action on the indemnity contract would have accrued then. Instead, they signed new notes, without Gledhill, as co-surety. This changed the situation. They were then two sureties out of three, instead of two out of four. Their liabilities, as among themselves, were increased. Their proportionate rights as against one another as co-sureties were changed. We think it hardly admits of question that under the terms of this contract, and under these circumstances, a cause of action accrued to the plaintiffs on the failure of Mr. Gledhill to save them harmless, by taking care of the notes "at the time they became due." He had not saved them harmless.

But if this conclusion be not tenable, it is quite certain that a cause of action accrued in January, 1910, when the plaintiffs took up the notes by paying the banks the amounts due. The plaintiffs contend that the payment did not create a cause of action, because it was not the result of the liability against which they were indemnified. They claim that instead of being money paid by reason of

that liability, it was money spent in an effort to rehabilitate the principal debtor, so that it could pay its own debts, and thus prevent ultimate damage to endorser and indemnitor both, that the obligations of the notes were kept alive, in changed forms,—finally in preferred stock,—that they were and continued to be creditors even after taking the stock, that the original debt was not paid or discharged by them, and therefore that no cause of action then accrued. The plaintiff cites *Norton* v. *Soule,* 2 Maine, 345; *Howe* v. *Ward,* 4 Maine, 202; *McClellan* v. *Crofton,* 6 Maine, 334; *Young* v. *Jones,* 64 Maine, 559; *Ticonic Bank* v. *Bagley,* 68 Maine, 249; 32 Cyc., 280, and other authorities. We think none are in point. Some of them concern the reciprocal rights and liabilities of co-sureties, and some relate to the question what is to be regarded as a discharge or payment of a debt, or the effect of payment by surety upon his right of subrogation to security held by the creditor, but none to an express contract of indemnity. We find none that sustains plaintiff's position.

We think the renewal notes were paid or discharged by the plaintiffs in such sense as to be a breach of the contract to save harmless, for it is not denied that payment of the renewal notes would create a cause of action upon the contract of indemnity. This was the situation. The principal maker was unable to pay. Its property was in custodia legis. The plaintiffs were compellable to pay. They did pay. They took up the notes. The obligation to the bank was paid and discharged. They thereby became creditors of the Worsted Mills. True, they took assignments from the bank, and themselves assigned to the committee of creditors. These were steps in the proposed plan to establish their status as creditors, and entitle them to preferred stock. It may be conceded that from that time to the end they continued to be creditors of the principal maker. So would they have been if they had simply paid the notes, and taken no further steps. The preferred stock may be regarded as simply representing the obligation in another form. No doubt the steps taken by them were proper ones. Though the liability of the indemnity had become fixed, they might properly seek to save themselves and to save the Gledhill estate by such steps as might in the end enable them to reimburse themselves out of the assets of the Worsted Mill.

And it must be remembered that the question now is not what amount of damages they might have recovered, if they had sued seasonably. That question, and the further question whether if the estate of the indemnitor had paid them it would have been entitled to subrogation to their rights in the preferred stock, have not arisen. The question now is, did a cause of action accrue to them upon payment of the money to the bank? We think it did. We think that when the indemnitor, or rather his estate, instead of taking care of the notes, left the plaintiffs to pay them, and seek to retrieve themselves out of the uncertain fortunes of the Worsted Mill business, it did not "save them harmless from all loss, cost and damage," as Mr. Gledhill had agreed to do. We hold accordingly that the action is barred by limitation.

Judgment for defendant.

BILL IN EQUITY.

Necessarily many of the facts which are pertinent to a determination of the bill in equity have already been stated and discussed in our consideration of the action at law, and need not be repeated.

To sustain the bill, it is incumbent on the plaintiffs to show two things; first that justice and equity require it, and secondly, that they are not chargeable with culpable neglect. We think they have failed on both points.

When Mr. Gledhill died, and when the first notes became due, the Marston Worsted Mill was a going concern. So far as the case shows, though short of cash, it was solvent as to creditors. That year J. Wallace Blunt purchased the Larzalaer stock at par. It is in evidence that the plaintiffs considered the stock worth seventy-five cents on the dollar. They held as security for their endorsement 78 shares of Maine Spinning Company stock, admittedly good, which security was exchanged by them for Marston Worsted Mill stock, at the request of the defendant. This tends to show that the latter stock was regarded by them as having value. This is further shown by their voluntarily endorsing the notes in the First National Bank without security, or promise of indemnity. In this situation, when the first notes became due, they might have paid them. If they had paid them, they would have become creditors of the corporation for the full amount, and at the same time have fixed the liability of the Gledhill estate for the same amount. And the Gled-

hill estate on payment would have had its remedy against the corporation in its then condition. Instead of doing so, they elected to give new notes, and to take charge of and operate the mill, with the results already described. We do not impute the results to mismanagement. They may have been due to changed conditions. The case does not diclose the cause. But the property, all that the Gledhill estate could look to for reimbursement, is gone. We think it is not a sufficient answer to say that the Gledhill estate could have paid voluntarily, and saved the situation so far as the plaintiffs were concerned. The plaintiffs were, or might have been, the movers. It does not appear that they made any claim, even by filing it in the probate office, until after they had operated the mill about eighteen months, and within about four months of the receivership proceedings. And certainly an estate is not blamable for not paying before demand is made.

Under all the circumstances we think it would be unjust and inequitable now to extend the statute limitation, and award judgment against the estate.

Besides, and as more especially bearing upon the question of "culpable neglect," the evidence leads us to believe that the plaintiffs had no real intention of pursuing the estate, until the final failure of the Worsted Company. They allowed nearly six years to elapse after the appointment of the administratrix before commencing any action. Whether they had too little confidence in the ability of the estate to pay, or too much confidence in the ability of the company, is immaterial. They appear to have relied upon their own ability and the ability of their fellow creditors to work out their own indemnity. They were not trapped, misled or defrauded. Nothing but their own choice prevented them from commencing suit within the period of limitation. What is "culpable neglect" has been discussed by this court, and defined, so far as it is capable of exact definition, in the recent cases of *Bennett* v. *Bennett,* 93 Maine, 241, *Holway* v. *Ames,* 100 Maine, 208, and *Beale* v. *Swasey,* 106 Maine, 35. It is unnecessary to repeat the discussion. The facts before us bring this case, we think, well within the rules laid down in those cases. The plaintiffs have slumbered upon their rights, and that is "culpable neglect."

The certificate in this case, therefore, must be,

Bill dismissed with costs.

CLARENCE E. SPILLER *vs.* ERNEST E. BECHARD.

Cumberland. Opinion February 3, 1913.

Creditor. Collusion. Execution. Fraud. Levy. Notice. Officer. Possession. Sale.

1. In an action against an officer, under Revised Statutes, Chapter 86, Section 9, which provides that if an officer levying an execution on personal property commits any fraud in the sale or return, he forfeits to the debtor five times the sum of which he defrauds him, the plaintiff can recover only on proof of fraud and not by showing merely other faults, or neglects, of the officer not amounting to fraud.
2. Fraud must be proved, not merely surmised.

On report. Judgment for the defendant.

This is an action on the case against the defendant, a deputy sheriff, under Revised Statutes, Chapter 86, Section 9, relating to levies of executions on personal property. The plaintiff was judgment debtor in an execution on which defendant seized two automobiles, the property of the plaintiff. That the defendant has never made any return on the execution, nor accounted for the money received therefor. At the conclusion of the evidence, the case was reported to the Law Court. The Law Court, upon so much of the evidence as is legally admissible, is to render such judgment as the rights of the parties require.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, F. O. Watson, and Charles G. Keene, for plaintiff.

McGillicuddy & Morey, for defendant.

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

SAVAGE, J. This action is brought against the defendant, a deputy sheriff, under R. S., Chap. 86, Sect. 9. Chapter 86 relates to levies of executions on personal property, and Section 9 provides that if

an officer so levying an execution "commits any fraud in the sale or return, he forfeits to the debtor, five times the sum of which he defrauds him, to be recovered in an action on the case." The case comes up on report.

The plaintiff's right to recover depends upon the proof of the defendant's fraud, and not the proof merely of other faults or neglects. These are the facts.

The plaintiff was judgment debtor in an execution on which the defendant seized two automobiles, the property of the plaintiff. When seized the machines were in a garage occupied and controlled by the judgment creditors, one of whom was the defendant's brother, a lawyer, who had brought the action in which the execution issued. The manager of the garage, also, was a judgment creditor. The machines had been left in the garage by this plaintiff, but at a time prior to the possession by the judgment creditors.

The plaintiff claims that the defendant sold both machines to employees of the judgment creditors, presumably for the creditors; that they were sold for prices which in the aggregate largely exceeded the amount due on the execution, that the defendant has made no return on the execution, and has not accounted to the plaintiff for the surplus, that he has concealed from the plaintiff what he now claims to be the true history of the sale, and that upon a view of all the evidence it should be found that he was acting in fraudulent collusion with the judgment creditors, to the plaintiff's damage.

The defendant, being called as a witness by the plaintiff, testified in effect that after due notice he sold at the garage one of the machines at auction to an employee of the judgment creditors for $50, that he understood it was bid in for the creditors, and made a memorandum to that effect on the execution; that he then offered the other machine for sale; that it was bid off by one Whitney, a brother of the manager of the garage, for $395; that he told the purchaser he must pay for it then; that Whitney said he had no money and could not pay for it; that thereupon he gave notice of a second sale, as provided in Section 8, of Chapter 86 of the Revised Statutes; that at the time appointed for the second sale, he offered the machine for sale, but could get no bids; that he then left the machine where it was, it being the place where the plaintiff had put

it, and where he had seized it, and took no further steps towards a sale; that he received no money for either machine; that he took the execution to the office of his brother, the lawyer, that the latter might write out a return for him to sign; that his brother was then ill and some months later died; and that he never saw the execution again until after it had been found among his brother's papers, after the latter's death. It is a fact that no return has ever been made on the execution, and the execution has never been returned to court.

The defendant's testimony,—and there is really little in the case which rebuts it,—not only fails to show fraud, but it tends to show the contrary. One or two witnesses who were employed about the garage, including the manager, testify that they did not know of the attempted second sale. This may be true, and yet the sale may have been attempted as the defendant claims. So much for the history of the sale, of which we have given all the salient features that appear in the case.

The plaintiff relies in part upon the subsequent conduct of the defendant, first with respect to the return of the execution, and again because he failed, in various interviews with plaintiff's counsel, to disclose the fact that there had been an attempted second sale, and the reason for it. Under the circumstances of this case, we do not think that great significance can be attributed to these circumstances.

As has been said many times, fraud must be proved. It is not to be merely surmised. And the observance of this rule is especially important when recovery is sought under a statute so highly penal as is the one under which this suit is brought. We are unable to discover sufficient badges of fraud on the part of the defendant to warrant a judgment for the plaintiff on that ground. If there was fraud, it has not been proved.

Judgment for defendant.

WEBSTER WOODBURY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Hancock. Opinion February 3, 1913.

Contributory Negligence. Motion. Negligence. Ordinary Care. Passageway. Passengers. Reasonably Safe. Unobstructed View.

1 A railroad company is bound to use reasonable care to maintain the passageways to its trains in such a reasonably safe and suitable condition that passengers who are themselves in the exercise of ordinary care can walk over them safely. This is the extent of its duty.

On motion for new trial by defendant. Sustained.

This is an action on the case to recover damages for personal injuries occasioned by the alleged negligence of the defendant. The plaintiff claims that he was injured while walking along the passageway leading from the train shed to the street in the Union Station in Bangor, on the 6th day of June, 1912. Plea, the general issue. The jury returned a verdict for the plaintiff for $400.61. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

Daniel E. Hurley, for plaintiff.

Hale & Hamlin, for defendant.

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

SAVAGE, J. Action on the case for negligence. The verdict was for the plaintiff, and the case comes up on the defendant's motion for a new trial.

As to most of the facts there is little dispute. The accident occurred June 6, 1912, in the concourse or passageway leading from the train shed to the street in the Bangor Union Station. The passageway runs northerly and southerly. It is about one hundred feet long and twenty-five feet wide. A permanent fence is on the easterly side and the station building on the westerly. The flooring of the passageway consists of concrete blocks, practically five feet

square. One tier of these blocks, five in number, from the fence to the station building had become out of repair. This tier was about twenty or twenty-five feet from the street curb. At the trial, for convenience, the blocks were spoken of by numbers, number 1 being on the east, or next to the fence, number 2 next westerly, and so on to number 5, which was next to the station building on the west. On the day preceding the accident, workmen dug out blocks 1 and 2, and filled the empty space with fresh concrete, for new blocks. During the progress of the work, and during the night following, the area of blocks 1 and 2 was surrounded by a fence three or four feet high, with two boards on each, and board uprights at the corners. On the morning of the day of the accident, the fence was removed, and its length extended, and it was placed so as to entirely surround blocks 3, 4 and 5, and the workmen proceeded to repair blocks 3 and 4, in the same manner that blocks 1 and 2 had been repaired the day before. Thus the passageway was closed except over blocks 1 and 2. It was found that the concrete of those blocks was still too soft to permit traveling over them. Therefore the workmen placed boards over blocks 1 and 2, so as to allow a passage over them. The defendant's witnesses say they were placed lengthwise of the passageway. The boards were five or six feet long. They were matched sheathing boards, planed on one side, laid close together, and flat upon the concrete. The plaintiff estimated their thickness to be about one inch. The men who laid them said they were seven-eighths of an inch thick. The passageway remained in the same condition all day long, and all passengers to and from trains, going through the passageway, walked over these boards.

The plaintiff arrived that forenoon on a train that was due in Bangor at 12.05 P. M. Arriving at the Bangor station, he walked out through the passageway, over the boards on blocks 1 and 2, to the street, but he says that he did not notice either the boards, or the fence around blocks 3, 4 and 5. Later, about 1 o'clock, as he says, he returned to the station to take a train to Veazie. He says that while going along the passageway a companion called his attention to the Veazie train, then standing in the train shed, and that while he was looking at the train for a moment, he stepped with his right foot onto one, or perhaps two, of the boards, and the end

of one of the boards sprung up so that he caught the toe of the left foot on it, and was tripped and thrown down. His view was unobstructed, but he says he did not see the boards nor the fence around blocks 3, 4 and 5, and that he was not paying attention to where he was stepping. It is not claimed that, at the time of the accident, any workmen were at work on blocks 3 and 4.

The defendant claims that the accident occurred at about five o'clock in the afternoon, instead of 1 o'clock, and it has introduced so much testimony to that effect, documentary and otherwise, as to make it almost conclusive that the plaintiff's recollection on this point, at least, is faulty. Four witnesses, employees of the defendant, testified that the plaintiff's gait before the accident was unsteady, and that his breath had the odor of liquor afterwards. The plaintiff denied that he had drunk any liquor that day. The plaintiff testified that the boards across blocks 1 and 2 were laid "sort of diagonally." This is the whole case so far as material.

The plaintiff was in the passageway for the purpose of taking one of the defendant's trains. The defendant owed him the duty of exercising the care for his safety which a railroad company owes its passengers, while they are upon its platforms or grounds, either going to or coming from trains. Care in the highest degree was not required. The care owed to a passenger in a moving train was not required. It was not required to keep the passageway absolutely safe. Its only duty was to exercise ordinary care to maintain the passageway 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 safely. *Maxfield* v. *Maine Central R. R. Co.*, 100 Maine, 79.

The plaintiff himself was bound to exercise ordinary care. All passengers are. But unlike the passenger on a moving train, he was in a position to use his eyes and guide his steps. He could see and avert danger if it existed. He could by attention protect himself.

Now as touching the alleged negligence of the defendant. It was making necessary repairs. If it chose to work on blocks 3 and 4 before the cement hardened on blocks 1 and 2, so that the plaintiff was obliged to travel over these blocks, the defendant's duty to the plaintiff was to have that passage reasonably safe and convenient

for the plaintiff at the time and under the conditions, when he attempted to cross. What might have been its duty had the plaintiff been one of a crowd, passing over the boards, without reasonable opportunity for observation, is not the question. It is rather what was its duty to him walking alone, or with only one companion, in broad daylight, with a perfect opportunity for observation. Applying this test, we think it cannot reasonably be said that the defendant was negligent towards the plaintiff. The placing of the boards where they were seems unquestionably to have been a proper act. The defendant had a right to assume that the defendant would himself be in the exercise of ordinary care. The barrier around blocks 3, 4 and 5 was a notice to all that repairs were being made, or that something out of the ordinary was being done. That should have attracted the attention of the plaintiff, and had he been attentive and careful, it is hardly possible that he would have failed to notice the boards. All this the defendant had a right to assume. And under the circumstances, we are of opinion that the defendant used reasonable care so far as the plaintiff was concerned.

Moreover, as already indicated, we think the plaintiff was guilty of contributory negligence. We need not repeat the reasons. It may be said, too, that there is much reason for thinking that the plaintiff did notice the barrier around blocks 3, 4 and 5, because to reach the passageway over the boards, he had swerved several feet to the left from the direct course from the point where he left the street to the gate to the train shed.

We are of opinion that the verdict is unmistakably wrong, and should not be allowed to stand.

Motion sustained.

FRANKLIN W. SHERMAN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Lincoln. Opinion February 4, 1913.

Approaches. Exceptions. Invitation. Licensee. Lights. Negligence. Nonsuit. Platform. Reasonably safe platform.

October 29, 1907, the plaintiff went to the defendant's station in Wiscasset to see if any freight had arrived, which the lady by whom he was employed, was expecting. When he arrived at the station, the last train for the day had left the station and the station was in "utter darkness." In leaving the station, he stepped off the walk connected with the station and was injured.

Held:

1. While it was the duty of the defendant to furnish a reasonably safe platform and approaches to its station and maintain them in a suitable condition for the use of people having business at the station, and for the use of passengers going to and coming from the station, it was not bound to maintain the station and its approaches so that they would be safe after business hours for people who might go upon them in the expectation of seeing some one connected with the railroad after business hours and after the station was closed, if they had knowledge that the station was closed for business.
2. There was an implied invitation by the defendant to so much of the public as wished to take its trains and to passengers leaving its trains to use the station and its approaches.
3. It was the duty of the defendant to keep its station and approaches safe for its passengers.
4. That this implied invitation by the defendant extended to friends who wished to visit the station to see their friends off, or to welcome them upon their arrival, and to persons having business to transact with the defendant at its station.
5. The putting out of the lights in the station after the departure of the last train for the day at the time of night shown in the case and the closing of the station was notice to every one that business for the day had ceased, and when that notice was given, the implied invitation to people having business with the defendant, or at the station, was withdrawn.

On exceptions by plaintiff. Overruled.

This is an action on the case to recover damages for personal injuries occasioned by the alleged negligence of the defendant, at

its station in Wiscasset, on the 29th day of October, 1907. Plea, the general issue. At the close of the plaintiff's evidence, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

C. L. Macurda, and A. S. Littlefield, for plaintiff.

White & Carter, for defendant.

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

HALEY, J. This is an action on the case, in which the plaintiff seeks to recover damages for injuries sustained by him, at defendant's station at Wiscasset, by reason of the alleged negligence of the defendant. At the close of the testimony the presiding Justice ordered a nonsuit, and the case comes before this court on exceptions to that ruling.

October 29, 1907, the plaintiff, who had recently moved to Wiscasset, attended an evening session of the court at that place. The court adjourned before the arrival of the evening train, which was due to arrive at 7.15 P. M., and which was the last passenger train that night. The plaintiff, after leaving the court room, heard the engine whistle, and thought he would go to the railroad station, and ascertain if certain goods, that the lady who employed him was expecting by freight, had arrived. It was a dark, misty night. The plaintiff saw the train pass over the Main street crossing when he was from a third to a quarter of a mile, the way he was traveling, from the railroad station. At that time the train was 834 feet from the station. The plaintiff passed down the sidewalk on Main street, turned and walked up Water street to a cross street leading to the station, then down the cross street to the railroad station. While on the cross street he was on the side of a hill and the railroad buildings were directly in front of him. There were no lights in the station, the plaintiff testified that the station was in utter darkness, and the freight office was closed, and that he met no teams or people coming from the station. He approached the station on the side farthest from the railroad track, that is, on the back side of the station. The platform, or walk around the station, at the point where he approached it, was three feet above the ground. At the point where

the plaintiff reached the platform there were stairs from the ground to the platform; and he went up the stairs on to the platform, walked nearly the length of the building, on the back side, then went through the passageway between the waiting room and the baggage room, then down in front of the building to the baggage room door, which was locked, as were the other doors of the buildings. He then turned and walked back the same way he came, and, when he arrived at the point where he thought the stairs were, he stepped off the platform, fell to the ground and fractured the fibula and the internal malleolus of his left leg, which are the injuries for which he claims damages in this case.

It is the claim of the plaintiff that it was the duty of the defendant to have its platform from which he stepped railed or lighted, and, that if it had done either, he would not have stepped off the platform, and sustained the injuries complained of.

It is not questioned but that there was an implied invitation by the defendant to so much of the public as wished to take its trains, and to passengers leaving its trains, to use the station and its approaches, and that it was its duty to keep its stations and approaches safe for its passengers, and this implied invitation was extended to friends who wished to visit the station to see their friends off, or to welcome them upon their arrival, and to persons having business to transact with the defendant at its stations. The defendant owed a duty to all such persons, by reason of this implied invitation. But while it was the duty of the defendant to furnish a reasonably safe platform and approaches to its station, and to maintain them in a suitable condition for the use of people having business at the station, and for the use of passengers, going to and coming from the station, it was not bound to maintain the station, and its approaches, so that they would be safe after business hours for people who might go upon them in the expectation of seeing some one connected with the railroad after the station was closed, if they had knowledge that the station was closed for business. The putting out of the lights after the departure of the last train for the day, at the time of night shown by the evidence in this case, and the closing of the station, was notice to every one that business for the day had ceased, and, when that notice was given,

the implied invitation to people having business with the defendant, or at the station, was withdrawn, and it was not the duty of the defendant to keep its platform and the approaches thereto safe for those who then chose to go upon them. The plaintiff knew the conditions, for after seeing the last train of the evening cross Main street, he walked in the dark from one-quarter to a third of a mile to the station, which must have taken him at least fifteen minutes when the train would ordinarily have left the station in five minutes from the time he saw it and he knew it was the last train for that day, and before he got to the cross street leading to the station, all passengers and teams had left the station, and he testified that the station was in utter darkness, but that he thought he might find the station agent in his private room. But, with the station in utter darkness, he should have known that business for the day was over, and the invitation to use the platform and its approaches was withdrawn. When he went upon the platform under those conditions, it was without invitation, and he had, at the most, no more than the rights of a mere licensee, and the defendant was not obliged to furnish lights and railings to guide and protect him, for the defendant owed him no duty except the negative one of not doing anything to injure him, if it knew of his presence there, for a bare licensee must take the premises as he finds them, and the owner is not liable for a danger that is only concealed by the darkness of night. *Reardon* v. *Thompson,* 149 Mass., 267.

Exceptions overruled.

SAMUEL K. WHITING, Appellant,
From the decree of the Judge of Probate.

Hancock. Opinion February 15, 1913.

Appeal. Attending Physician. Conversations. Evidence. Exceptions. Expert. Guardian. Mental Capacity. Legal Fiction. Waiver.

1. It is the rule of law in this State that attending physicians of skill and good repute, who are not experts in mental diseases, may testify as to the mental condition of their patients and that their opinions as to such condition are admissible when the facts upon which they base their opinions are detailed to the jury, although they may not give their opinion as to the direct question to be determined.
2. The right of privileged communications is a personal privilege and can be invoked only by him who makes it and is to be strictly construed.
3. That the right may be waived is equally clear, not only expressly, but also by inference from acts and conduct as by failure to object to the evidence when offered by the adverse party.

On exceptions by the appellant. Sustained.

This is a petition to the Probate Court of Hancock County for the appointment of a guardian of George W. Whiting, under paragraph II, Section 4 of Chapter 69, Revised Statutes. Upon a hearing, the petition was dismissed by the Probate Court and on appeal was dismissed by the Supreme Court of Probate. At the hearing in the Supreme Court of Probate certain evidence was offered by the appellant, and excluded by the presiding Justice and the appellant excepted to such exclusion.

The case is stated in the opinion.

Peters & Knowlton, for appellant.

Daniel E. Hurley, for appellee.

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

BIRD, J. This is a petition to the Probate Court of Hancock County for the appointment of a guardian of George W. Whiting

under paragraph II, Section 4 of Chapter 69, R. S. The petition was dismissed, after hearing, by the Probate Court and, on appeal, by the Supreme Court of Probate. At the hearing in the latter court, certain evidence was offered by the appellant which was excluded by the presiding Justice and the case is before us upon exceptions to his rulings.

1. The appellant called one McDonald, claimed to be the attending physician of George W. Whiting, and offered to introduce his opinion as to the mental capacity of George W. Whiting. The bill of exception, alleges that this evidence so offered was excluded on the ground that no evidence had been produced that Dr. McDonald was an expert in mental diseases.

It is undoubtedly the rule of law of this State that attending physicians, of skill and good repute, who are not experts in mental diseases, may testify as to the mental condition of their patients and that their opinions as to such condition are admissible, when the facts upon which they base their opinions are detailed to the jury, although they may not give opinions as to the direct question to be determined. *Fayette* v. *Chesterville,* 77 Maine, 28, 33; *Hall* v. *Perry,* 87 Maine, 569, 577; *Ireland* v. *White,* 102 Me., 233, 238, 239; *Hathorn* v. *King,* 8 Mass., 370; *Dickens* v. *Barber,* 9 Mass., 225; *Lewis* v. *Mason,* 109 Mass., 169. Tried by this rule, we are of the opinion that part at least of the questions excluded were admissible and that the exception must be sustained.

2. An attorney at law was called by the appellant and asked to give testimony of conversations between him and George W. Whiting in relation to matters of business for the purpose of showing that the latter had become incapable of managing his own affairs. The testimony was excluded upon the ground of privileged communication. The appellant sought to show that the privilege, if ever it existed, had been waived, and offered to prove that the same parties were present in the Probate Court as in the appellate court and that the testimony offered was given in the Probate Court without objection.

The right of privileged communication is a personal privilege and can be invoked only by him who makes it. *LeProhon,* Appellant, 102 Maine, 455. The rule of privilege is to be strictly construed; *Foster* v. *Hall,* 12 Pick., 89, 98; *Hatton* v. *Robinson,* 14

Pick., 416, 422. That the right may be waived is equally clear, not only expressly but also by inference from acts and conduct. *Stewart* v. *Leonard,* 103 Maine, 128, 132, 133; *Phillips* v. *Chase,* 201 Mass., 444, 449, as by failure to object to the evidence when offered by the adverse party. See *Clifford* v. *Denver, etc. R. R. Co.,* 188 N. Y., 349, 354, 357.

Whether the right of privilege, once waived, can be again asserted with effect upon a subsequent trial or appeal of the same case, is a question upon which reported cases are at variance. Those holding the negative base the conclusion upon the proposition that, when the privileged communication is once made public, the reason for its exclusion thereafter fails and the privacy between the parties to it then exists in legal fiction only. See *Green* v. *Crapo,* 181 Mass., 55, 62; *McKenney* v. *Grand Street, etc. Co.,* 104 N. Y., 352. See also *People* v. *Bloom,* 193 N. Y., 1; *Elliott* v. *Kansas City,* 198 Mo., 593. We think the cases holding otherwise not convincing and that appellant should have been permitted to introduce the evidence offered.

Exceptions sustained.
Case remanded to Supreme Court of Probate for re-hearing.

HERBERT L. BLAIR, Adm'r.

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Kennebec. Opinion February 17, 1913.

Accident. Contributory Negligence. Damages. Due care. Evidence. Exceptions. Instantly killed. Negligence. Nonsuit. Passenger. Question for Jury.

1. The contention of the defendant that Blair's act in leaving the position he had taken back against the rear railing of the car and beside the controller and stepping out upon the open platform between the gateway, a negligent act contributing to the accident is not maintainable.
2. When passengers are permitted to ride on the platform of electric cars, it is the duty of the company to take into account that they are thereby subjected to greater risks and to observe a high degree of care in the running of the cars at points where there is danger that the passengers may be thrown off.
3. When a passenger voluntarily chooses to ride on the platform of a car, he is to be held to the exercise of a high degree of care to avoid the dangers and perils of his position, that are known to him or which are reasonably to be apprehended.
4. Whether a person was negligent in a given case is a question for the jury when the facts are in dispute or are to be determined from conflicting testimony.
5. When a person is required to act in an emergency and under circumstances of suddenly impending personal peril, the law will not declare that reasonable care demands that he must choose any particular one of the alternatives presented and hold him guilty of contributory negligence as a a matter of law for not doing so.

On exceptions by plaintiff. Exceptions sustained. Case remanded for the assessment of damages only, as per stipulation.

This is an action on the case to recover damages for the immediate death of the plaintiff's intestate, Thomas Blair, who was a passenger on one of the defendants' electric cars and alleged to

have been caused by the negligence of the defendant. Plea, the general issue. At the conclusion of the evidence for the plaintiff, the presiding Justice ordered a nonsuit with the stipulation that if the nonsuit is overruled by the Law Court, the case to be remanded for the assessment of damages only.

The case is stated in the opinion.

B. F. Maher, for plaintiff.

G. W. Heselton, and Philbrook & Andrews, for defendant.

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

KING, J. Action to recover damages for the immediate death of the plaintiff's intestate, Thomas Blair, alleged to have been caused by the defendant's negligence. A nonsuit was ordered with a stipulation that if it is not sustainable the cause is to be remanded for the assessment of damages only.

Blair was a passenger on defendant's car which left Augusta for Gardiner and Lewiston at 5 P. M., November 25, 1909. He boarded the car at Bradstreet's platform, a point between Hallowell and Gardiner, and at Grant's crossing, 2239 feet from Bradstreet's platform, as the car made a sharp curve or cross-over at a high rate of speed, he was thrown from the rear platform against a pole by the side of the track and instantly killed.

The evidence is plenary that the car was being driven at an unreasonable and negligent rate of speed at the time of the accident. The defendant does not question that, but contends that the nonsuit is sustainable on the ground of want of due care on the part of Blair.

The car may be thus briefly described: In the front is the vestibule room, occupied by the motorman, with a partition separating it from the smoking compartment in which there are double seats on the sides at right angles with the sides of the car, and an aisle between, with a partition separating the smoking room from the main room. The seats in the main room are arranged substantially as in the smoking room. Unlike most cars the main room stops with a partition about six feet from the extreme rear of the car, leaving an open platform with canopy overhead running as far as the end of the car. Upon each side of this observation platform is

a seat, designed for two passengers, running lengthwise of the car from the main room partition part way to the end of the car, and leaving an open space or gateway on each side for the use of passengers in getting on and off the car. Two steps are constructed at each opening, the upper one being set into the platform its apparent width. On each side of the car at the inside rear corner of the upper step is an iron gate post, and on the outside rear corner of the same step is an iron rod extending from the platform to the canopy which it supports, and the distance from the iron canopy rod to the gate post is about 9 inches, that being substantially the width of the upper step as let into the platform. The width of the platform between the upper steps is 6 feet and 3 inches. The extreme rear end of the car is an iron railing or fence, curved in line with the rear lines of the car, supported by rods and standards, and extending from the canopy post at the outside rear corner of the upper step on one side around to the corresponding post on the other side. At each opening there is a folding gate hung to the gate post, and so constructed that it can be completely shut up upon itself by being pushed back towards the curved railing. At the time of the accident the gateways were both open, the gates being folded back.

Situated at the extreme rear of the platform, and a little to the right of the center as you face the front of the car, is the controller mechanism, being, apparently, a steel cylinder about 15 inches in diameter and extending from the platform to the top of the railing; and on the very back of the car, a little below the top of the railing, and to the right of the center of the controller, is a device called the retriever, from which the trolley rope runs to the trolley arm, and which is designed to keep that rope taut.

The car was behind time and went by Bradstreet's platform some distance before stopping for Blair, it then backed towards him, while he in turn ran forward and boarded it on the right hand side of the rear platform. There were no vacant seats in the main room of the car or on the rear platform, but it appears that there was one or two vacant seats in the smoking apartment forward. As Blair boarded the car it started quickly and rapidly, and he stepped back against the rear railing of the car, on the right hand side of the controller, grasping with his right hand the upright canopy rod and taking hold of the railing with his left hand near

the controller. The space where he stood was small, but large enough for him to stand therein, the distance from the canopy pole in a straight line to the edge of the controller on the back side being 1 foot and 9 inches, and the distance from the gate post to the nearest point on the controller being about a foot.

There were two conductors on the car, both on the rear platform, but Blair was not notified that there was a vacant seat in the smoking apartment, nor told to take any other position on the car. There is a drop of 63.2 feet in the distance of 2230 feet from the place where Blair boarded the car to the curve at Grant's Crossing where the accident occurred.

The evidence discloses, that the car came down the grade to the curve at a very rapid rate of speed, slatting the passengers back and forth so much that they kept their seats with difficulty; that just as the car approached the sharp curve or cross-over the trolley arm was thrown off "with a bang;" that one conductor, Keene, grabbed the trolley rope, which was connected with the retriever, in an effort to control the trolley arm, and the other conductor, La Pointe, standing near the center of the platform, grasped and pulled the bell rope to stop the car; that simultaneously with these almost instantaneous happenings Blair moved quickly from his position beside the controller and stepped forward up behind La Pointe taking hold of his arms or shoulders in an effort to steady himself; and that as the car crossed the road and slued into the straight track with a violent lurch he was thrown clear of the car and against the pole with the fatal result mentioned.

The speed of the car as it made the curve or cross-over will be more readily appreciated, perhaps, from the fact that the Goodrich house is 248 feet beyond the pole where the accident occurred, and Mr. Goodrich testified that when he heard the trolley come off he went into the front part of his house and then outside of the house and saw the car go by without any light, except the tail light behind, and that the car went by the house and down over the hill out of sight. Presently he saw the car come back by his house to the crossing and pick up the body of Blair.

Blair was not negligent per se in riding upon the platform of the car. "Riding upon the platforms of such cars is too much encouraged by transportation companies and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding

upon the platform of such a car is conclusive evidence of negligence, or is negligence per se, or is negligence in law." *Watson* v. *Railway Co.*, 91 Maine, 584.

Neither was it claimed that Blair was negligent in fact in taking the position he did on the platform. And if that question had been involved, it is clearly one that should have been submitted to the jury.

But the defendant contends that Blair's act in leaving the position he had taken, back against the rear railing of the car and beside the controller, and stepping out upon the open platform between the gateways, "in view of all the perils of that particular moment," was so manifestly a negligent act contributing to the accident that the nonsuit was properly ordered. We do not think that contention is maintainable.

When passengers are permitted to ride on the platforms of electric cars it is the duty of the company to take into account that they are thereby subjected to greater risks, and to observe a high degree of care in the running of the cars at points where there is danger that such passengers may be thrown off. And likewise when a passenger voluntarily chooses to ride on the platform of a car he is to be held to the exercise of a high degree of care to avoid the dangers and perils of his position that are known to him or which are reasonably to be apprehended. Failing to exercise such a degree of care is negligence. But whether a person was negligent in a given case, in other words, whether he failed to exercise such care as reasonable and prudent men would have exercised under like circumstances, is generally, and almost invariably, a question for the jury; and it is always so, when the facts are in dispute, or are to be determined from conflicting testimony, and also when the facts are not in dispute, if intelligent and fair-minded men may reasonably differ as to the conclusions and inference to be drawn from such facts.

While the facts as to what Blair did, and the existing circumstances and conditions under which he acted, are, in a sense, not really disputed, nevertheless it cannot be said that they are disclosed with unmistakable accuracy, for they are to be discovered in the somewhat varying statements, naturally so, of the eye-witnesses as to the various and sudden happenings involved in the sad accident. Therefore we think that it cannot be properly held in this case that

the facts and circumstances from which the question of Blair's negligence is to be determined are undisputed and certain. What he did, when and how he did it, and the circumstances and conditions under which he acted were matters for the jury to determine from all the evidence.

But assuming that there is no dispute or uncertainty as to what Blair did, or as to the existing circumstances, conditions, and influences under which he acted, it cannot be said that the only reasonable conclusion to be drawn therefrom is that he acted negligently. He was in a position of apparent personal danger. The banging of the trolley arm above him, the noise of the retriever behind him, the controller beside him, the flashings of electricity as the trolley wheel struck the wire, and the onward rushing of the car into the curve, all these are facts and circumstances to be considered in deciding the question whether he was negligent, acting in those circumstances, in suddenly stepping forward as he did away from the retriever and controller. Might not men of equal intelligence and impartiality honestly differ in their conclusions upon the question whether Blair acted under those circumstances and in that emergency with reasonable care? We think so. Moreover, when a person is required to act in an emergency and under circumstances of suddenly impending personal peril, the law will not declare that reasonable care demands that he must choose any particular one of the alternatives presented, and hold him guilty of contributory negligence as a matter of law for not doing so. In such cases the law invokes the judgment of a jury upon the question of contributory negligence. *Larrabee* v. *Sewall,* 66 Maine, 376, 381. *Shannon* v. *B. & A. R. R. Co.,* 78 Maine, 52, 61.

It is also suggested that there was some evidence introduced tending to show that Blair may have been somewhat under the influence of liquor at the time of the accident. But, if that was so, then it was a question for the jury to determine to what extent, if at all, that may have contributed to the accident.

It is therefore the opinion of the court that the question of the contributory negligence of the plaintiff's intestate should have been submitted to the jury with proper instructions.

Exceptions sustained. Case remanded for the assessment of damages only, as per stipulation.

RALPH M. LUNN et als., In Equity, *vs.* THE CITY OF AUBURN et als.

Androscoggin. Opinion February 17, 1913.

Approval. Bill in Equity. City Charter. City Council. Demurrer. Injunction. Public Laws of 1909, Chapter 88. Superintending School Committee. Schoolhouse.

1. The city council of the city of Auburn is in no sense a school committee and can perform none of the functions of that body, except by special grant of the Legislature.
2. The provisions of Section 2, Chapter 88 of Public Laws of 1909 does not enlarge the powers and duties of the city council, but does confer upon the school committee all the additional powers and duties prescribed therein.
3. That the words "care and management," as used in the city charter of the city of Auburn, continued in the superintending school committee of the city of Auburn the power and duty of approving the plans and specifications for any schoolhouse to be erected in that city.

On appeal. Bill sustained with costs. Temporary injunction made permanent.

This is a bill in equity brought by certain taxpayers of the city of Auburn, in which the complainants seek to restrain the defendants from erecting a schoolhouse in said city without the approval of the plans therefor by the superintending school committee of said city of Auburn. The respondents filed a demurrer to the bill, which the presiding Justice overruled and issued a temporary injunction restraining the respondents from proceeding in the erection of said schoolhouse. From the decree overruling the demurrer and issuing a temporary injunction, the plaintiffs appealed to the Law Court.

The opinion is stated in the opinion.

Henry W. Oakes, and Enoch Foster, for plaintiffs.

Seth May, for defendants.

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

SPEAR, J. This is a bill in equity brought by the taxpayers of the defendant city to restrain the defendants from erecting a schoolhouse without the approval of the plans by the superintending school committee of the city. A demurrer to the bill was filed, the demurrer overruled and an injunction issued. The case comes here on appeal from this decree.

As stated by defendants' counsel: "The fundamental issue in this case is, whether the city council of the city of Auburn may lawfully proceed to erect a schoolhouse in said Auburn and whether the city through its treasurer may lawfully pay out public money for the purpose, the plans for said schoolhouse not having been approved by the superintending school committee of the city of Auburn." This issue is to be solved by an interpretation of certain sections of the charter of the city of Auburn, with reference to what extent these sections were intended to reserve to the city council the powers and duties which would otherwise belong to the superintending school committee of that city; and also with reference to the effect of Chapter 88, Public Laws, 1909, upon the reservation in the city charter, even upon the assumption that the theory of the defendants is right. It may be more consistent with orderly arrangement to consider the last proposition first. Section 1, Chapter 88, Public Laws, 1909, imposes upon the state superintendent of public schools the duty of procuring plans to be loaned to the local school committee, for proposed school buildings not exceeding four rooms. Section 2 provides what shall be done when the State plans and specifications are not used, and applies to a house of any number of rooms. It reads as follows: "Sec. 2. Where the plans and specifications prepared by the state superintendent are not used, all superintending school committees of towns in which new schoolhouses are to be erected, shall make suitable provision for the heating, lighting, ventilating and hygienic conditions of such buildings, and all plans and specifications for any such proposed school building shall be submitted to and approved by the state superintendent of public schools and the state board of health before the same shall be accepted by the superintending school committee or school building committee of the town in which it is proposed to erect such building." Hereafter allusion to Section 2 means this section.

In applying Section 2, it is important to note that the Auburn school committee, in all respects not modified by the city charter, which was granted in 1883, are affected in precisely the same way by the public statutes, as are all the other municipal school boards in the State; that is, outside the charter, the general laws impose upon the Auburn school board the same duties, and confer upon them the same powers, as if no charter existed. If, then, the duties and powers prescribed by Section 2 are embraced in the terms of the charter and lodged in the city council, they are withheld from the Auburn school committee; if not, this section vests in the latter board all the powers and duties therein enumerated. What does the charter reserve? Section 6 provides: "Said committee shall have all the powers and perform all the duties in regard to the care and management of the public schools of said Auburn which are now conferred and imposed upon superintending school committees by the laws of this state, except as otherwise provided in this act." By Section 7, "All powers, obligations and duties in regard to said public schools not conferred and imposed upon said committee by the provisions of this act, shall be and are hereby vested in the city council of said city." The defendants' broad interpretation of these sections is found in the following paragraph of their brief: "As a whole this act while creating the superintending school committee contains two specific grants of power; the first, the care and management of schools as contained in the general laws at that time is to the school committee; the second, all powers and duties other than those denoted by the terms, care and management of schools are vested in the city council."

The general law upon this point in 1883, when the Auburn charter was granted, was as follows: "A plan for the erection or reconstruction of a schoolhouse voted by a town or district, shall first be approved by the superintending school committee."

It will be conceded that the city council is in no sense a school committee, and can perform none of the functions of that body, except by special grant of the Legislature. Accordingly any new powers or duties bestowed upon the city council must be by amendment of the charter by special act, while new powers and duties are conferred upon the school committees by public acts. It therefore follows that the provisions of Section 2 apply to the superin-

tending school committee of Auburn, a public body, but not to the city council, a chartered body. Their powers and duties are not in the least enlarged by this section, while upon the school committee of Auburn is conferred all the additional powers and duties prescribed therein. In other words, the city charter of 1883 had to do only with the powers the Legislature had seen fit to confer up to that time. The Legislature still had the right to confer such additional powers as it might see fit, at any time, and upon such board as it might see fit. The act of 1909 did confer additional powers upon the school board, and not upon the city council.

But what is the construction of the act of 1909 respecting the present issue, assuming that the charter in 1883 then reserved the power of approval to the city council? Where the plans and specifications prepared by the state superintendent are not used, the school committee, when new schoolhouses are to be erected, shall make suitable provision for the "heating, lighting, ventilating and hygienic conditions of such buildings." An analysis of these four requirements of Section 2, emphasizes their paramount importance in the composition of any plan for the erection of a modern schoolhouse. Before Section 2 was enacted, the statute, for over fifty years, had required the approval of plans by the school committee. This was undoubtedly based upon the presumption that approval would embrace these important features. But the presumption became a myth in the progress of sanitation, consequently Section 2 was enacted to make imperative what before was presumed. "Hygienic conditions," have become, under modern requirements of sanitation, vital and indispensable features of plans and specifications intended for the erection of a schoolhouse at the present time. The Legislature insisted, by the language used, that they should. The word "hygienic" takes the work of the committee into the domain of medical science. Hygiene is defined: "A system of principles or rules designed for the promotion of health." Hygienic: Pertaining to health or the science of health. Century Dic. To insure efficient action the plans must be approved not only by the state superintendent but by the board of health, composed partly of medical men. Thus important did the Legislature wisely regard the care and health of our school children.

None of these powers and duties can be exercised in the first instance, by the city council, state superintendent or board of health. But they must be exercised by the superintending school committee before any schoolhouse can be built. The statute so provides. Hence a reasonable and consistent interpretation of Section 2 requires that the plans should contain these provisions, before their submission to the State departments. Otherwise the plans would go to the departments with the most essential features left out. This is the only practical, logical thing to be done, so that when the plans go to the departments, they may contain, as fully as possible, all the details of these imperative requirements, and when returned be in form to enable immediate progress upon the work. Otherwise any plan first approved by these departments would then have to be submitted to the school committee, as to the requirements of Section 2. If they disapproved, or saw fit to make changes, as they have the unquestioned right to do, then the plans must again go to the State departments; if not approved by them, or changed, then back to the school committee again, and so on. We cannot believe the Legislature ever intended to make any such shuttlecock of the law. A mutual agreement between the school committee and the State departments is contemplated at some time, before a plan can be used, and practical common sense, if not strict construction, requires approval in the first instance by the committee.

It may be suggested that Section 2 does not apply until the schoolhouse is completed. But the language "to be erected" seems to have been employed to meet the very objection, that a completed house might be so constructed as to prevent any effective application of this section. Upon this interpretation of Section 2 it then follows, whatever the order of approval by the different departments, that before any school house can be erected, its plans, in the particulars named in Section 2, must first be approved by the superintending school committee. And as none of the powers and duties in Section 2, in these particulars, have ever been conferred upon the city council of the city of Auburn, but have been conferred upon the superintending school committee of that city, it equally follows that the city cannot erect a schoolhouse without their approval in these respects, which, as we have seen, now constitute the vital requirements of a plan. With this interpretation of the laws of 1909, it

would hardly seem possible that there could be left enough substance in the contention of the city council to warrant the continuation of a controversy which may do harm to the public wellfare.

For the purpose of construing section 2 as to its effect upon the charter we have proceeded upon the assumption that the right to approve the plan, required in 1883, was reserved to the city council. But this assumption is by no means conceded. The defendants, in the able and exhaustive argument of their council, contend that the reservation in the city charter contravenes the general laws of the State upon this subject. The plaintiffs contend that the scheme of the laws, giving the superintending school committee the control, care and management of the public schools, including the approval of plans for the erection of schoolhouses, has been the consistent and unvarying policy of the State for more than half a century. The defendants concede this, but assert that the language of the city charter must be so construed as to eliminate the purpose and intent of the general statutes, in their application to the city of Auburn with respect to the approval of plans.

We are of the opinion that this contention cannot prevail.

Before proceeding to a comparison of the various statutes, touching the matters under consideration, it may be observed that the city charter provides for a superintending school committee of ten besides the mayor, as ex-officio chairman, instead of three as specified in the general law. In all other respects, except as modified by the charter, this committee comes within the provisions of the general law. The general scheme is found in the following statutes: R. S., 1841, Section 4, Par. 3 invested the school committee with authority "to direct the general course of instruction, and what books shall be used in the respective schools." These were then the broadest powers conferred upon the committee. In 1857 this paragraph is still found, in addition to which specifically appears Section 30 of Chapter 11. "A plan for the erection or reconstruction of a schoolhouse voted by a district, shall first be approved by the superintending school committee." In 1871 this section appears unchanged. In 1883 it is found in the same language, except the omission "voted by a school district." Other statutes all calculated to augment the efficiency of our schools, have been enacted since 1883 to the present time. Without further allusion to the statutes,

it is not difficult to perceive that it is the settled policy of the State, as manifested by the progressive scheme of its laws, that the school committee were intended to be invested with the amplest powers concerning schools.

As before said, the functions of the city council are in no way related to those of the superintending school committee. Nor are the functions, which it is claimed the council are authorized to perform, conferred upon them in express words. They are reserved in general terms only as a supplement to the powers and duties, conferred in express terms, and by the general law, upon the committee. The reservation in the city charter, as well as the section relating to the school committee, has already been quoted. We think it important to now discover the intention of the Legislature, for the intent of the Legislature is the law. *Carrigan* v. *Stillwell,* 99 Maine, 434; *Orono* v. *B. R. & E. Co.,* 105 Maine, 428. To do this these two sections must be considered together. What did the Legislature intend by the reservation? We have seen that the policy of legislation has been to place increased power in the hands of the school committee. This is in harmony with wise practice and long experience. The common schools are our most cherished institutions. Our people, through their representatives, have recognized this fact by generous and progressive laws. No department of our State government requires officials to be selected with greater care. It is the purpose of the laws, and has been from our earliest history, to place in office, competent officials for the management of our schools. These officials are presumed to be chosen for their peculiar qualifications.

In view, not only of this long settled policy but demanded fitness of school officials, can it be contended that the Legislature, in 1883, intended to deprive the city of Auburn of the services of a specially selected board, and confer their duties upon a promiscuous board? Can it be that it intended to constitute a regular school committee, and confer its important functions upon the city council? Can it be presumed that they intended to confer dual powers? If so, it was an inconsistent act, and sooner or later was almost certain to result in a conflict of authority; and what should have been anticipated has actually happened. But it cannot for a moment be conceded

that the Legislature ever intended to divide these powers and duties between two incongruous boards.

It is accordingly evident, that the reservation, in the city charter, was intended to authorize the council to supplement the committee, in any unimportant matters that might have been inadvertantly left out, in enumerating the powers and duties of the committee. Further, if the Legislature had intended to confer upon the city council the power it now claims, it certainly would have done so by express grant and not by inference from general terms. The intention of the Legislature being established, will the language of the statute, creating the school committee, permit it to be carried into effect? The committee shall "have all the powers and perform all the duties in regard to the care and management of the public schools of said Auburn which are now conferred and imposed upon superintending school committees by the laws of this State, except as otherwise provided in this act."

It is contended by the defendants that the words "care and management" do not confer upon the committee the right to insist upon the approval of plans. If these words were used only in this section, without reference to other statutes, this contention would be entitled to but little weight. The word "management" would confer all the powers acceded to the committee by the defendants. The word "care" therefore must be accorded some meaning. It is a word of broad comprehension and, in the connection in which it is used, can be construed without violence to the language, to convey the power of approving of the plans. But statutes are always construed in pari materia. It is obvious that this must be done in order to give consistency of construction. Otherwise statutes would become felos de se. Accordingly, we must determine, not what the words "care and management" by themselves mean, but what the Legislature intended them to mean, when interpreted with reference to other statutes, relating to the same subject matter, and in view of the general scope, purpose and subject matter of the enactment. Construed by this general and universal rule, our conclusion is, that the words "care and management," as used in the city charter, continued, in the superintending school committee of the city of Auburn, the power and duty of approving the plans for any schoolhouse to be erected in that city.

It may be further observed that section 2 already construed, is in harmony with this interpretation. And while a subsequent expression of the Legislature may not be final as to the construction of an earlier one, it is yet entitled to much respect when consistent with the object and intent of the earlier legislation.

Bill sustained with costs.

Temporary injunction made permanent.

ORMAN P. DOW *vs.* RALPH BRADLEY.

Piscataquis. Opinion February 22, 1913.

Bankruptcy. Equitable Interest. Equity of Redemption. Extension of Redemption. Forclosure. Innocent Third Party. Mortgage. Parol Agreement to Extend. Right to Redeem. Statute of Frauds. Trustee.

1. An action for money had and received is maintainable when the defendant has in his possession money which in equity and good conscience belongs to the plaintiff.
2. The right to redeem mortgaged real estate may be kept open by the express agreement of the parties, or by facts and circumstances from which an agreement may be satisfactorily inferred when it would be foreclosed were it not for such agreement.
3. It is undoubtedly the law that an agreement between mortgagee and mortgagor, or those holding their respective interests to extend the time of redemption, although not in writing, nor supported by any other consideration than the promise of the redemptioner, when such an agreement has been acted upon so far that the parties cannot be placed in statu quo is not within the statute of frauds and is binding upon the parties.
4. A verbal contract to extend the equity of redemption of a mortgage of real estate, entered into by the mortgagee with one who, at the time has no legal or equitable interest in that equity of redemption, would be within the statute of frauds and not enforceable unless in writing and supported

by a valuable consideration.

5. Under the provisions of the bankrupt act, the trustee thereunder is vested in a qualified sense, with all the assets of the bankrupt, yet it is the well recognized doctrine that he may decline to take such property as he deems burdensome and worthless.
6. Such items of estate, corporeal or incorporeal, as the assignee declines to appropriate or utilize, remains the property of the bankrupt, subject always to the superior right and title of the assignee.

On report. Judgment for plaintiff. Damages to be assessed at nisi prius.

This is an action of assumpsit with two counts in special assumpsit and a count for money had and received to recover the sum of five hundred dollars. The defendant held a mortgage on the plaintiff's farm, situated in Sangerville, in the county of Piscataquis, to secure the payment of nine hundred dollars, dated November 16, 1903. On the 30th day of June, 1910, defendant commenced proceedings to foreclose said mortgage, the equity of redemption of which would expire on June 30, 1911. In April, 1911, the plaintiff claims that the defendant verbally agreed with the plaintiff to give him a reasonable time, after the date when the equity of redemption would otherwise expire to pay the amount due on the mortgage. The defendant sold the farm on July 1, 1911, for $1500, and the plaintiff sues to recover the difference between the amount due on the mortgage and the fifteen hundred dollars which defendant received for said farm. Plea, the general issue. At the conclusion of evidence, the case was reported to the Law Court for determination.

The case is stated in the opinion.

Hudson & Hudson, for plaintiff.

C. W. Hayes, for defendant.

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

KING, J. This case comes up on report. On June 30, 1910, the defendant began foreclosure proceedings, by publication, of a real estate mortgage given to him by the plaintiff, the equity of redemption of which would expire on June 30, 1911. In April, 1911, the

plaintiff solicited of the defendant an extension of the equity of redemption, and we think the evidence fully justifies the conclusion that the defendant then verbally agreed with the plaintiff to give him a reasonable time, after the date when the equity of redemption would otherwise expire, to pay the amount due under the mortgage. That agreement, however, the defendant violated by a sale and conveyance of the property to an innocent third party on the morning of July 1st, 1911. The Plaintiff claims that the defendant sold the property for five hundred dollars in excess of the amount then due under the mortgage, and this action of assumpsit, containing a count for money had and received, is brought to recover such excess.

In the very recent case, *Dresser* v. *Kronberg,* 108 Maine, 423, this court again stated the well established doctrine, that the action for money had and received "is comprehensive in its reach and scope," and "though the form of the procedure is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored of the courts." And it is familiar law that an action for money had and received is maintainable when the defendant has in his possession money which in equity and good conscience belongs to the plaintiff. *Dresser* v. *Kronberg,* supra; *Pease* v. *Bamford,* 96 Maine, 23. The fundamental question, therefore, here presented is, whether this doctrine is applicable in the case at bar? Is it satisfactorily established that the defendant has in his possession money which in equity and good conscience belongs to the plaintiff?

If at the time the defendant sold the property, the right to redeem the same belonged to the plaintiff, then it would seem to follow as a logical conclusion that so much of the proceeds of the sale as is shown to be in excess of the defendant's mortgage claim, and his expenses, is money in his hands which in equity and good conscience belongs to the plaintiff, because it was received for his interest in the property which the defendant wrongfully sold.

The right to redeem mortgaged real estate may be kept open by the express agreement of the parties, or by facts and circumstances from which an agreement may be satisfactorily inferred, when it would be foreclosed were it not for such agreement. *Fisher* v.

Shaw, 42 Maine, 32, 39; *Chase* v. *McLellan,* 49 Maine, 375; *Stetson* v. *Everett,* 59 Maine, 376; *Brown* v. *Lawton,* 87 Maine, 83.

And it is undoubtedly the law that an agreement between mortgagee and mortgagor, or those holding their respective interests to extend the time of redemption, although not in writing, nor supported by any other consideration than the promise of the redemptioner, when such an agreement has been acted upon so far that the parties cannot be placed in statu quo, is not within the statute of frauds, and is binding upon the parties. If within the period of extension the mortgage debt is paid, or tendered, it has the same effect as if done prior to the time the equity would have otherwise expired. *Brown* v. *Lawton,* supra.

In *Schroeder* v. *Young,* 161 U. S., 334, 344, the Supreme Court of the United States, speaking by Mr. Justice Brown, say: "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unaminity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security."

The learned counsel for the defendant does not question this principle, that a verbal agreement to extend the time for the redemption of a mortgage is not within the statute of frauds, but he contends that if such a verbal contract is made between the mortgagee and one at the time is not the owner of the equity of redemption, such contract is within the statute, and is not enforceable unless in writing and supported by a valuable consideration. And he claims that at the time the defendant agreed with the plaintiff to extend the equity, the plaintiff had no right or title in the mortgaged premises, having been divested thereof by his bankruptcy proceedings instituted in 1910, under which a trustee was chosen and settled his estate.

We think the proposition of law which the defendant invokes is correct. We have no doubt that a verbal contract to extend the equity of redemption of a mortgage of real estate, entered into by the mortgagee with one who at the time has no legal or equitable interest in that equity of redemption, would be within the statute of frauds, and not enforceable unless in writing and supported by a valuable consideration. But we do not think that the defendant's contention, that the plaintiff had no such interest in this equity of redemption at the time the agreement for its extension was made with him, is tenable under the facts disclosed in this case.

While, under the provisions of the bankrupt act the trustee thereunder is undoubtedly vested, in a qualified sense, with all the assets of the bankrupt, yet it is the well recognized doctrine that he may decline to take such property as he deems burdensome and worthless. This doctrine was fully discussed and laid down in *Lancey* v. *Foss,* 88 Maine, 215, 218. It was there said:

"The assignee of a living bankrupt, however, may decline to take or interfere with such property as he deems onerous or worthless. The property so rejected by the assignee does not thereby become derelict, to vest in the first appropriator. The rights and obligations which the assignee declines to enforce, or notice, do not thereby vanish into nothingness.

"Such items of estate, corporeal or incorporeal, as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject always to the superior right and title of the assignee. Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors. These may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt. The title does not fall to the ground between the two. If the assignee or creditors will not take it, no one else can appropriate it. The bankrupt can defend or enforce it against all others." See also *Fleming* v. *Courtenay,* 98 Maine, 401.

In the case at bar it conclusively appears that the trustee, after making an unsuccessful effort to find some available value in the bankrupt's equity to redeem this real estate, decided that it was worthless and elected not to take it. In his petition to have his

final account allowed, and to be discharged, filed June 20, 1911, he alleged that he "was unable to obtain an offer for the equity" in the real estate, and asked authority to disclaim it. Such authority was not a pre-requisite to his election to abandon it; it was rather a precautionary matter of practice, so that he might have a formal ratification by the court of his election not to take it. He evidently found that it was worthless as an asset soon after he began the settlement of the estate, for it appears that in November, 1910, he wrote the defendant in a futile effort to get an offer for this equity from him, and stated in that letter that the party who held the second mortgage on the same property did not want anything to do with it. It may be a reasonable and fair inference that the trustee decided not to take this equity of redemption as an asset of the bankrupt's estate as soon as he found it to be worthless to him, which was doubtless prior to April, 1911. But whether his decision not to take it was made before or after the agreement for extension was made, is of no material consequence. This right of redemption, notwithstanding the bankruptcy proceedings, remained the property of the bankrupt, the plaintiff, subject always to the superior right and title of the trustee to take it. The plaintiff's title to it was good against all the world except his trustee and creditors. *Lancey* v. *Foss,* supra. And in fact the trustee expressly elected not to take it, because it was worthless to him, and did not take it. The plaintiff, therefore, was not a stranger to the title to the equity or redemption at the time the defendant agreed with him to extend it; on the other hand, he was the owner of it, subject only to the superior right in his trustee in bankruptcy to take and appropriate it as an asset of his estate, which right, however, the trustee abandoned.

It is further contended by the defendant that the plaintiff's only remedy, if he has any, is in equity. He claims that if a valid contract to extend the time of redemption was made, then the plaintiff's right to redeem still existed notwithstanding the defendant had sold the property. It may be conceded that the plaintiff might have brought a bill in equity to redeem, under which, the property having been previously sold by the defendant, the only judgment recoverable would have been for damages. But why should he be limited to an equity proceeding? The procedure in equity would have

afforded him no more efficient remedy than this action at law. He seeks only a judgment against the defendant for the payment of money. The right he contends for will be fully secured to him by such judgment. He does not ask for, and does not need, such peculiar and special relief as a court of equity can only afford.

We think the plaintiff's action at law, for money had and received, is appropriate and maintainable under the facts of this case. We have found that the plaintiff was the owner of the equity of redemption at the time the defendant sold the mortgaged property. It was therefore the defendant's duty, after deducting from the proceeds of the sale the amount of his mortgage debt, with the costs and expenses of the sale, to pay the surplus remaining in his hands to the plaintiff. Such surplus belonged to the plaintiff as the proceeds of the sale of his interest in the property, and the defendant is liable to him for it in the ordinary action for money had and received. *Cook* v. *Basley,* 123 Mass., 396; *Mattel* v. *Conant,* 156 Mass., 418; *Knowles* v. *Sullivan,* 182 Mass., 318.

The only remaining question to be determined is the amount of the surplus of the proceeds of the sale remaining in the defendant's hands, after the payment of his mortgage debt and his expenses of the sale. From a careful examination of the evidence contained in the report we are of the opinion that there is not sufficient data presented from which the court can safely determine this question, and that the case should be remanded to nisi prius for the determination of the amount of the damages only. Accordingly the entry will be,

Judgment for the plaintiff.
Damages to be assessed at nisi prius.

INHABITANTS OF STRONG, In Equity, *vs.* STRONG WATER COMPANY.

Franklin. Opinion March 1, 1913.

Agreement to convey. Assessment. Bill in Equity. Committee. Constitutional provision. Contract. Convey. Debt limit. Promissory note. Purchase. Specific performance. Taxation. Temporary loans. Town. Vote. Water company. Water works.

The plaintiff town at a town meeting duly called voted to purchase the entire water plant of the defendant company in accordance with the terms and conditions of a contract then existing between the town and the company, wherein the company had agreed to convey the same within a limited period, on tender of the amount of the cost of constructing the works with accrued interest, less net income. At the same time the town voted to issue its promissory note for such amount as might be necessary to provide the funds to pay for the plant. No other means of payment was provided. No provision was made for the assessment of a tax to pay the note. It appearing that the purchase price of the works, under the terms of the contract, must in any event exceed the constitutional debt limit of the town, *it is held,*

1. That the vote to purchase was nugatory and invalid, in that it exceeded the constitutional power of the town.
2. That the vote was not such a "vote to purchase" as was contemplated by the contract.
3. That as the defendant's contract duty of making conveyance was conditional upon the town's first legally voting to purchase, the bill for specific performance cannot be maintained.

On report. Bill dismissed with costs.

This is a bill in equity in which the plaintiffs seek a conveyance of all the title and interest which the defendant company have in and to the water works owned and operated by said company in the town of Strong, in the county of Franklin, in accordance with a contract or agreement entered into by the town of Strong and said water company on June 27, 1904. An answer to said bill was filed by the defendant and replication by the plaintiffs. At the conclusion of the testimony, by agreement of the parties, the cause was reported to the Law Court. If, upon so much of the evidence and

admissions as is relevant and material the court is of the opinion that the bill is maintainable, the case is to be remanded for the appointment of a master and further proceedings under the bill otherwise to be dismissed with costs.

The case is stated in the opinion.

Frank W. Butler, for plaintiffs.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SAVAGE, J. There is now in force a contract between the parties, dated June 27, 1904, which provides, among other things, "That should the said town at a meeting duly called for that purpose vote to purchase the water works of said company, at any time within ten years of the completion of said works, then and in that case the said company on tender of the amount of the cost of constructing the said works with accrued interest at five per cent less net income will convey and make over to said town the said water works in their entirety as they then exist."

On February 3, 1912, at a town meeting duly called for that purpose, the plaintiff town voted (1) "that the town purchase the entire water plant of the Strong Water Company in accordance with the terms and conditions of the contract existing between said town and said water company;" (2) "to choose a committee to ascertain the cost of the water works," which committee was appointed, (3) "to authorize and empower the committee to employ counsel and commence either legal or equitable proceedings to ascertain the cost of said water company's plant and the sum the town will be required to pay therefor in accordance with the terms of the contract between said town and said water company," and (4) "that the town issue its promissory note for such an amount on such time and at such rate of interest as may be necessary to provide the funds to pay for said water plant in accordance with the terms and conditions of the existing contract between said town and said water company."

In the pending bill it is alleged, and in the answer admitted, that the parties are unable to agree upon the amount of the cost of con-

struction of the water works under the terms of the contract. The bill prays for the appointment of a master to ascertain the cost of construction, and, that cost being ascertained, for a specific performance of the defendant's agreement to convey.

The cause came on to be heard upon a motion for the appointment of a master, to which the defendant objected, in limine, on the ground that the vote of the town which we have recited was ineffective and void, because it provided for the creation of a debt in excess of its constitutional debt limit of five per cent of its valuation, Constitution of Maine, Art. XXII, and that the town, under that vote, could not constitutionally raise the money proposed to be raised to pay for the defendant's works.

Thereupon, after taking out evidence relative to that issue, the cause was reported to the Law Court with the stipulation that if the bill is maintainable upon the relevant and material evidence, it is to be remanded for the appointment of a master, and further proceedings; otherwise the bill is to be dismissed with costs.

The only question presented is whether the bill is maintainable in view of the effect of the debt limit provision of the Constitution. The case shows that the constitutional debt limit of the town of Strong, at the time of the vote referred to, did not exceed $11,000, and that the indebtedness then existing was $4,000 or more. The evidence seems to warrant the conclusion that the cost of the construction of the water works when ascertained will not be less than $20,000 or $25,000. But it is conceded that in any event it must be in excess of the $11,000 limit.

It is plain then that the town then had no constitutional authority to incur an indebtedness by borrowing, as proposed in the vote, sufficient money to pay for the defendant's water works. The plaintiff town, however, says that even granting this to be true, it ought not to prevent the relief sought. It is contended in its behalf that the only thing required of it under the contract was to "vote to purchase." This is not accurate. We think the vote cannot be considered piecemeal. It must be taken as a whole. The town must tender the price before it is entitled to a conveyance. But, it is said, until the price is determined it is impossible to tell whether the debt limit will be exceeded or not. And it is said further that the town may still raise the necessary money by "temporary loans to be paid

out of money raised by taxation during the year in which they are made," such loans being excepted in the Constitution from the five per cent limit. And it is suggested that a water district may then be formed to take over the property, and that the proceeds of water district bonds will pay the town debt. Then the tax can be abated. These latter propositions are not only conjectural, but as bearing upon the power of the town to incur the indebtedness, they are extra-constitutional, and cannot receive the sanction of the court.

As to the primary proposition, it is sufficient to say, as we have already said, that it was conceded at the hearing that there was no question but that the purchase price in any event must exceed the town's present limit, and its present limit is all that we have to consider in this case. And as to the proposition for "temporary loans" to be repaid out of money raised by taxation during the year in which they are made, that is not this case. No such loans were made, and no tax was levied out of which the money authorized to be borrowed could have been repaid. The vote of the town was a straight vote to purchase, and to borrow money to pay. And even if it were relevant to the discussion, it cannot be assumed that because the town then voted to borrow money, it would have voted then, or will vote now, to assess the tax necessary to pay it, as the Constitution provides.

But we think the inherent infirmity of the plaintiff's case lies in the beginning of its proceedings. It voted to purchase. To purchase involved an obligation to pay. It could not purchase without paying. It could not pay without exceeding its debt limit. In that situation the Constitution forbade it to pay, or to borrow the money with which to pay, unless it raised a tax to be levied that year, to provide for the repayment. This it did not do. The town, then, attempted to do something which it could not do. It attempted to purchase, to borrow the means of payment, and not to provide taxation for its repayment. The vote of the town to purchase was nugatory and invalid. It was not such a "vote to purchase" as the contract must be understood to have contemplated.

The plaintiff cites and relies upon *Farmington Village Corporation v. Farmington Water Company,* 93 Maine, 192. But that case is not like the one at bar. In that case, the contract provided that the village corporation should *"have the right to purchase"* the com-

pany's works at an appraisal, and further, that the "appraisal shall be the sum at which said corporation *shall have the right to buy* said works and for which said company *agree to sell* the works." The question in that case was whether the village corporation could move for an appraisal before it voted to purchase. And under the language of the contract, it was held that it could. But in the case before us the contract did not give the plaintiff town merely a right to buy at an appraisal first had. It made a valid vote by the plaintiff to purchase a prerequisite to any obligation on the part of the defendant to convey. The distinction is manifest.

As the defendant's contract duty of making conveyance was conditional upon the town's first legally voting to purchase, and as the town's vote was unauthorized and invalid, it is clear that no award of specific performance can be made. In accordance with the stipulation the certificate will be,

Bill dismissed with costs.

STATE OF MAINE *vs.* INTOXICATING LIQUORS.
Boston & Portland Despatch Express Company, Claimant.

Oxford. Opinion February 29, 1913.

Allegation. Arrest. Complaint. Fictitious name. Identification. Intoxicating liquors. Legal seizure. Magistrate. Name of person keeping liquors. Person unknown. Search and seizure process. Void. Voidable. Warrant.

1. In proceedings for the forfeiture of intoxicating liquors seized under a search and seizure process, it is essential to the validity of a complaint and warrant, or indictment, that the party against whom it is issued should be described therein sufficiently so that he may be thereby identified as the person on whom it is to be served. If his name is not known, he must be otherwise sufficiently described.

2. A warrant to arrest a person described fictitiously as John Doe, without any further description or means of identification of the person to be arrested is void.
3. Search and seizure process should strictly follow the express requirements of the statute authorizing it.
4. If there is no legal seizure of the liquors in question, then there can be no judgment of forfeiture.

On exceptions by the claimant. Exceptions sustained.

On the 29th day of May, A. D. 1912, L. L. Niles made complaint to the Rumford Falls Municipal Court that intoxicating liquors were on said day unlawfully kept and deposited by John Doe, of Roxbury, in the county of Oxford, in the Maine Central freight station, situated at Frye station, and that said liquors were intended for sale by said John Doe in violation of law. That in accordance with said complaint, a warrant to search the described premises was issued by the Judge of the said Rumford Falls Municipal Court. That upon said warrant certain described intoxicating liquors were seized in the premises described and the usual proceedings had. The Boston and Portland Despatch Express Company, on the 24th day of June, 1912, filed in said court a claim for said liquors. Upon a hearing in said court, the Judge thereof determined that said liquors were forfeited, from which judgment the said claimant appealed to the Supreme Judicial Court for said county. In the Supreme Judicial Court, the presiding Justice found as a fact that said liquors were intoxicating and were intended for illegal sale, and ruled pro forma that said liquors should be declared forfeited. To this ruling the claimant excepted.

The case is stated in the opinion.

R. T. Parker, county attorney, for State.

Wm. C. Eaton, for claimant.

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

KING, J. Proceedings for the forfeiture of intoxicating liquors seized under a search and seizure process. The Boston and Portland Despatch Express Company appeared as claimant of the liquors, and contended, (1) that the complaint and warrant under which they were seized did not conform to the express requirements

of the statute, and were accordingly illegal, and (2) that the liquors were in transit as interstate commerce.

Section 49, C. 29, Revised Statutes provides:

"If any person competent to be a witness in civil suits, makes sworn complaint before any judge of a municipal or police court or trial justice, that he believes that intoxicating liquors are unlawfully kept or deposited in any place in the state by any person, and that the same are intended for sale within the state in violation of law, such magistrate shall issue his warrant, directed to any officer having power to serve criminal process, commanding him to search the premises described and specially designated in such complaint and warrant, and if said liquors are there found, to seize the same, with the vessels in which they are contained, and them safely keep until final action thereon, and make immediate return on said warrant. The name of the person so keeping said liquors as aforesaid, if known to the complainant, shall be stated in such complaint, and the officer shall be commanded by said warrant, if he finds said liquors to arrest said person and hold him to answer as keeping said liquors intended for unlawful sale. . . . If the name of the person keeping such liquors is unknown to the complainant, he shall so allege in his complaint, and the magistrate shall thereupon issue his warrant as provided in the first sentence of this section." Etc.

The claimant contends that the statutory requirments, that the name of the person keeping the liquors "if known to the complainant shall be stated in such complaint," and if not known to him that "he shall so allege in his complaint," were not complied with in this case, and, therefore, that the seizure was illegal and void.

In the complaint the name *John Doe* is stated as the person keeping the liquors, and the warrant commands the arrest of said John Doe if liquors are there found. It is not contended in behalf of the state that the name John Doe was stated in the complaint and warrant as designating any real person.

It is essential to the validity of a complaint and warrant, or indictment, that the party against whom it is issued should be described therein sufficiently so that he may be thereby indentified as the person on whom it is to be served. If his name is not known he must be otherwise sufficiently described. And when a precept

contains a sufficient description of the real person against whom it is issued, the fact that he is also referred to therein by a fictitious name, or that his name is stated to be unknown, is harmless. But a warrant to arrest a person described fictitiously as John Doe, without any further description or means of identification of the person to be arrested, is void. *Commonwealth* v. *Crotty* et als., 10 Allen, 403. Unless there is some description or other means of identification contained in the warrant it would be as applicable to one person as to another.

The complainant testified that he did not know by whom the liquors were kept. This, then, is not a case where the fictitious name was intended to designate a real person whose name was unknown. The name John Doe was not intended to stand for the name of anyone. It was used as a mere fiction. And there was no other description or means of identification of a real person, as the keeper of the liquors, contained in the complaint and warrant. Although the warrant contained a command to arrest John Doe no one could have been arrested thereon. We do not perceive wherein the effect of the complaint with the name John Doe therein is different from what it would have been if no keeper's name had been inserted therein. It must be conceded that the name of the person keeping the liquor was not stated in this complaint; moreover, according to the evidence of the State, it was not known to the complainant.

But the statute expressly declares that "if the name of the person keeping the liquors is unknown to the complainant he shall so allege in his complaint, and the magistrate shall thereupon issue his warrant." Etc. This provision of the statute was not complied with. The statement of a fictitious name is not the equivalent of an allegation under oath that the real name of the keeper of the liquors is unknown to the complainant.

The search and seizure process should strictly follow the express requirements of the statute authorizing it. "It has been repeatedly held by this court, and in this class of cases, that a failure to follow the requirements of the statute renders the warrant not merely voidable, but absolutely void." *State* v. *Whalen,* 85 Maine, 467, 472, and cases cited.

If there was no legal seizure, then there could be no judgment of forfeiture. "The very foundation of the judgment of forfeiture is a legal seizure, until this is had no further proceedings are authorized." *Guptill* v. *Richardson,* 62 Maine, 257, 265. *State* v. *Riley,* 86 Maine, 144, 146. See *State* v. *Intox. Liquors,* (Iowa) 20 N. W., 445.

In the case at bar the court is of the opinion that the liquors in question were not legally seized because the complaint and warrant did not conform to the express requirements of the statute authorizing the search and seizure process. Accordingly the exceptions must be sustained.

This conclusion renders a consideration of the other contention of the defendant unnecessary.

Exceptions sustained.

STATE OF MAINE *vs.* NICHOLAS STAPLES.

York. Opinion March 3, 1913.

Application. Complaint. Fines. License. Intent. Nursery Stock. Offering for sale. Penal statute. Punishable. Public Laws, 1907, Chapter 15, Section 6. Public Laws, 1911, Chapter 84, Section 3. Public Laws, 1911, Chapter 84, Section 1, Chapter 176, Section 3. Selling. Violation.

1. Under Section 6 of Chapter 15 of the Public Laws of 1907, as amended by Section 3 of Chapter 176 of the Public Laws of 1911, which forbids the sale of nursery stock, without a license, by agents or other parties, except growers, the act of soliciting and taking an order for nursery stock by an agent to be filled by the principal at his option is not a sale.
2. The act of selling, or offering for sale is not in terms prohibited.
3. A wish to sell may or may not rise to the grade of an intent, but an intent harbored in the mind is not punishable, and, even if expressed, unless the words employed are libelous, seditious, obscene or provocative of breaches of the peace is not the subject of penal judicial action.

4. The agent having no nursery stock with him, there could be no change of property from respondents principal to the person giving the order.

On report. Complaint dismissed.

This was a complaint and warrant against the respondent Nicholas Staples, of Kennebunk, in the county of York, before the municipal court of the city of Biddeford, in said county, for selling certain nursery stock, without a license, as agent, and not being then and there a grower of nursery stock. The respondent was duly arraigned before said court and pleaded that he was not guilty and thereupon was found guilty and fined ten dollars. The respondent appealed from said sentence to the Supreme Judicial Court then next to be holden at Alfred, in said county, on the third Tuesday of September, A. D. 1912. At said term of the Supreme Judicial Court, the case was reported upon an agreed statement of facts to the Law Court for decision.

The case is stated in the opinion.

Nathaniel B. Walker, county attorney, for the State.

F. Thaxter, Roscoe T. Holt, and McGuire & Wood, for defendant.

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

BIRD, J. The complaint in this case charges respondent with selling nursery stock at, and to an inhabitant of, Kennebunk in York County, the respondent not being at the time of the sale either a grower of, or licensed to sell, such stock. The complaint is brought under C. 15, Sec. 6 of the Public Laws of 1907, as amended by Public Laws, 1909, C. 34, Sec. 3 and 1911, C. 84, Sec. 1 and C. 176, Sec. 3. The respondent, pleading not guilty and waiving hearing, was found guilty and sentenced to pay a fine by the municipal court of Biddeford. From this judgment he duly appealed to the Supreme Judicial Court for the county and the case is now here upon report on agreed statement of facts.

The last amendment of Section 6 of Chapter 15 of the Public Laws of 1907, is as follows:

"Section 3. Section six of said chapter fifteen of the public laws of nineteen hundred and seven, as amended by section three of the public laws of nineteen hundred and nine is hereby amended by striking out the word 'entomologist," in the third and fifth lines of the first paragraph of said section, and substituting therefor the word 'horticulturist,' so that said paragraph shall read as follows:

"'Section 6. Agents or other parties excepting growers who wish to sell nursery stock shall make an application for an agent's license and shall file with the state horticulturist the names and addresses of nurseries or parties from which they purchase their stock. On receipt of such application the state horticulturist shall issue an agent's license valid for one year in such form and with such provisions as the commissioner of agriculture may prescribe. Such license may be revoked at any time for failure to report names and addresses of nurseries from which stock is purchased or for such other causes as may in the opinion of the commissioner of agriculture be deemed sufficient. Any violation of this requirement shall be fined not less than ten nor more than fifty dollars for such offence.'" Public Laws, 1911, C. 176.

It is difficult to ascertain what act, done by others than those who have applied for or obtained a license, is denounced by this section as amended, for the violation of which the sanction of a fine is annexed. The act of selling, or offering for sale, is not in terms prohibited. A wish to sell may or may not rise to the grade of an intent, but an intent harbored in the mind is not punishable and, even if expressed, unless the words employed are libellous, seditious, obscene or provocative of breaches of the peace, is not the subject of penal judicial action: *U. S.* v. *Riddle,* 5 Cranch 311, 312; 1 Whart. Cr. Law, Sec. 174. It is only by inference or implication that it can be pretended that the act of selling, without a license with which respondent is charged in the complaint, was intended to be forbidden by the Legislature. *State* v. *Bunker,* 98 Maine, 387, 389. As a penal statute, the section must be strictly construed.

But even, if it be assumed that the selling of nursery stock without a license is made penal by the section in question, we think the facts agreed do not render the respondent amenable. He at most made an offer to take, or solicited, and received, an order for nursery stock. It is clear that he had no nursery stock with him.

It cannot be contended that here was a transmutation of property from respondent's principal to the person giving the order. 2 Bl. Comm., 446; see *Com.* v. *Farnum,* 114 Mass., 267, 271; *State* v. *Wells,* 69 N. H., 424, 425. In *State* v. *Montgomery,* a prosecution under a former Hawkers' and Peddlers' Act, the court says: "Unless he had the goods with him, he cannot expose them for sale; he cannot sell them within the meaning of the statute." 92 Maine, 433, 439, 440. If this construction of Section 6, as amended, needs further support, it is found in its provision requiring the filing of the names and addresses of the nurseries or parties from whom the "agent or other parties" . . . "purchase their stock," the stock for which the order was taken in the case under consideration being the property of the principal to which respondent had no title by purchase or otherwise.

Complaint dismissed.

JOHN E. FICKETT

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Cumberland. Opinion March 4, 1913.

Collision. Damages. Duty of those managing cars. Electric cars. Highway. Injuries. Looking. Motor-man. Negligence. Teams.

1. The contention of the defendant that the injury was caused solely by the plaintiff because, before coming in contact with the car, having an opportunity to look both ways of the track, he did not do so, and that had he done so he could have avoided the accident, is not sustained by the decisions, either ancient or modern.

2. The duty of the defendant to the plaintiff in the situation in which the evidence shows the parties to have been at the time of the accident was to use all possible efforts by slackening the speed of the car or stopping it altogether to avoid injury.
3. Street railroads are granted very great privileges out of the public right and their treatment of the public must be reasonable in return.
4. For a street railway to run into a wagon from behind without special circumstances to justify it is evidence of negligence on the part of the street railway company.
5. A driver of a team is not bound to keep a lookout behind his team for a car.
6. If the motorman could have avoided the accident by the exercise of ordinary care and skill and failed to do so, the defendant is liable for injuries caused by that neglect.

On motion for new trial by defendant. Motion overruled.

This is an action on the case to recover damages alleged to have been received by the plaintiff on the 7th day of October, 1911, at Brunswick, occasioned by the negligence of a motorman in charge of and operating a certain express car belonging to the defendant. The plaintiff alleges that while he was driving on and along Main street in said Brunswick with his team consisting of two horses and a dump cart, said car, which was approaching him from the rear, ran into his team and caused the injury complained of. Plea, the general issue. The jury returned a verdict for the plaintiff for $2750, and the defendant filed a motion to set the verdict aside.

The case is stated in the opinion.

Wheeler & Howe, for plaintiff.

Newell & Skelton, for defendant.

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

HALEY, J. This is an action on the case, brought to recover damages for injuries alleged to have been received by the plaintiff October 7, 1911, by reason of the negligence of a motorman in the employ of the defendant, while operating an express car of the defendant upon its street railway, in Brunswick. The case was tried at the April term of the Supreme Judicial Court at Portland, the jury returned a verdict for the plaintiff, and the case is before

this court upon a motion to set aside the verdict, as against law and evidence.

The plaintiff, on the seventh day of October, 1911, was driving a span of horses attached to a dump cart down Main street, Brunswick, on that part of the street known as Mill Hill. The railroad tracks of the defendant are located in said street, and a portion of the highway between the rails was used by teams passing up and down the street and hill. As the plaintiff was driving down the hill he turned to the right to pass a team coming up the hill, which brought him close to the defendant's track in the street. There were three other teams standing in the highway on the plaintiff's left hand side. After the plaintiff had turned to the right to avoid the passing team, he continued down the hill close to the defendant's track. The defendant's express car was following the plaintiff's team down the street, and the motorman had a plain view of the plaintiff's team for 350 feet before the accident, the last 20 feet of which at least the car was close to the cart, and following it down the hill, while the plaintiff's horses were walking. When near the bottom of the hill the car and the plaintiff's team collided, the plaintiff was thrown to the ground and received injuries for which he claims damages. The motorman testified he sounded his gong repeatedly, to warn the plaintiff to move away from the track. The plaintiff and his witnesses testified that they did not hear the gong. The only other dispute of fact in the case is, how did plaintiff's team and defendant's car collide?

The plaintiff claims that he did not know the defendant's car was behind him, and that he did not look back to see if a car was coming up behind him, but was looking ahead to see that no car approached him in front, and that the first he knew of the car in the rear was when the car struck the back of his cart, pushing forward and upward the pole between the heads of the horses, at which time he was thrown from his seat on the cart and received the injuries complained of.

The defendant claimed that the motorman had the car under perfect control, and the motorman so testified, and that the plaintiff was driving along with clearance enough, but that in swinging his horses away from the track, it brought the hind wheels of the cart against the side of the car, and that, by the noise or impact, the

horses became frightened, and the plaintiff slipped from the seat astride the tongue and received the injuries from which he is now suffering, and that the plaintiff should have looked for a car in the rear as well as in front.

The defendant, to prove its contention, relied upon the testimony of the motorman and a man in charge of the freight in the car, who did not see the accident but heard a scraping against the side of the car, and there were marks on the side of the car as if a wheel had scraped against it. This was attempted to be explained by the plaintiff, by testimony that there were other marks of a similar character on the car, and testimony that frequently when teams backed up to unload freight from the car, the wheels, in turning, made the same marks on the car that the witness testified were on the car.

The plaintiff relied upon his own testimony and that of two witnesses who saw the car and team, as testified to by the plaintiff, immediately before they came together, and when they heard the crash they looked and the team and car were in the same position, the team ahead of the car. Another witness also testified to practically the same thing. The defendant's motorman and the man in charge of the freight were impeached by two witnesses beside the plaintiff, who testified that both the expressman, called by some the conductor, and the motorman said, immediately after the accident, that the motorman thought he had room to go by and ran into the back of the team.

From the evidence the jury must have found either that the plaintiff's version was the true one, or that the motorman was guilty of negligence in attempting to pass the plaintiff's team when it was so dangerously near the railroad track that a slight turn of the horses would throw the plaintiff's cart against the car. Under either finding the defendant is liable.

The defendant contends that the injury was caused solely through the neglect of the plaintiff, in this; that before coming in contact with the car he had every opportunity to look both ways of the track, that he did not, and that, had he done so, he could have avoided the accident. This doctrine would authorize a motorman, who had his car under perfect control, to run it against any one who might be upon the track, and by his neglect to stop his car

when he could, to kill whoever might be upon the track. The rule contended for by the defendant is not sustained by the decisions, either ancient or modern.

The duty of the defendant to the plaintiff in the situation in which the evidence shows the parties to have been at the time of the accident, was clearly stated in *Flewelling* v. *Horse Railroad,* 89 Maine, 594, as follows: "That Street Railroads are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or team, through accident or misjudgment or for any cause, be caught in a position of any peril of coming in collision or close contact with the cars, it is the duty of those who are managing the cars, to use all possible effort, by slackening the speed of a car or stopping it altogether to avoid injury."

This decision is in accordance with decisions both ancient and modern. *Butterfield* v. *Forester,* 11 East., 61; *Davies* v. *Mann,* 10 M. & W., 545. "For a street railway to run into a wagon from behind without special circumstances to justify it is evidence of negligence or wilful wrong on the part of the street railway company." *Vincent* v. *Norton & Taunton St. Ry. Co.,* 180 Mass., 104.

"If the motorman did see or could have seen that the wheels were dangerously near the track and run into the wagon then the company would be liable." *Higgin* v. *Wilmington City Railway Co.,* 1 Marvel, (Del.) 353. A driver of a team is not bound to keep a lookout behind his team for a car. *Vincent* v. *Norton & Taunton St. Ry. Co.,* supra; *Devine* v. *Brooklyn H. R. Co.,* 34 App. Div., (N. Y.) 248; *Tenison* v. *Weadock,* 89 (Mich.) N. W., 703.

The motorman could have avoided the accident by the exercise of ordinary care and skill, having failed to do so, the defendant is liable for injuries caused by that neglect. *Excelsior Co.* v. *Railroad Co.,* 93 Maine, 70.

Motion overruled.

CITY OF ROCKLAND *vs.* JOHN W. ANDERSON.

Knox. Opinion March 4, 1913.

Consideration. Contract. Fraud. Municipal officers. Replevin. Repudiation of Contract. Right of Public Officers. Title.

1. The city of Rockland owned the horse in question and had a right to sell the same on the conditions named in the contract to the defendant and the defendant would thereby obtain a good title thereto, if the transaction was without fraud.
2. The defendants agreement as to the care and treatment to be given the horse by him was a sufficient consideration for the sale.
3. If the defendant performed the conditions of the contract of sale, the city could not repudiate the same.

On report. Judgment for defendant and return of property replevied; damages to be assessed at nisi prius.

This is an action of replevin to obtain possession of the horse called "Winona." This horse, prior to January 17, 1906, was the property of the city of Rockland, on which day the city, by its committee on city property, sold said horse to the defendant. The consideration being that said defendant should keep said horse during the rest of its life, give her a good home, avoid overworking her and, when her usefulness is over, put her out of the way and bury her. The defendant pleaded title to said horse in himself. The case was reported upon the agreed statement to the Law Court for determination.

The case is stated in the opinion.

Edward K. Gould, for plaintiff.

Arthur S. Littlefield, for defendant.

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

HALEY, J. This is an action of replevin, brought to obtain possession of the horse called in the writ "Winona," and is before this court on report.

The defendant pleaded title in himself. Prior to the 17th day of January, 1906, the city of Rockland was the owner of a sick horse, presumably used by the city for municipal purposes. The horse was coughing and discharging from the nose. The board of mayor and aldermen discussed the question of disposing of her. The chairman of the committee on city property stated that she was not worth more than $20. The aldermen discussed chloroforming, and some one suggested that somebody might be found who would take her and give her a home. The committee on city property was instructed to look into the matter.

The defendant offered to give $20 for the horse, but the committee wished to make a contract fixing the manner of use and burial of the horse at her death, and made a contract in writing with the defendant to take the horse, keep her during the rest of her life, give her a good home, avoid overworking her, and, when her usefulness was over, to put her out of the way and bury her, and sold her to him upon those conditions, to which he agreed. On February 5th the city government approved and ratified the contract, and the defendant took the horse upon those terms. The defendant doctored the horse, and she improved to the extent that she could do the work of an old horse. This action was brought by another city government to obtain the horse.

The horse being the property of the city, could be sold by the city, and the purchaser obtain a good title, if the transaction was without fraud. There is nothing in the agreed statement to raise a suspicion of fraud. The city was the owner of what was apparently a worthless horse, probably grown so in the service of the city. It was a question of whether the city would go to the expense of feeding and doctoring her, or of putting her out of the way and burying her, or, by placing her where she would have a good home and be properly used, avoid expense. As public officers it was their duty to deal with the city's property as prudent men would deal with their own property. It is true that the city could have gotten $20 for her in her disabled condition; but an ordinary man, who had a horse that had grown old and disabled in his service, would not sell that horse for the paltry sum of $20, to be traded about and abused for the rest of her life. It would not be humane to do so, and the municipal officers had the right to treat the city's animals in

a humane manner. The defendant's agreement as to the care and the treatment to be given the horse by him was a sufficient consideration for the sale, in the condition in which the horse was turned over to him. The city and the defendant made the contract; the defendant took the horse by virtue of that contract and was bound by its terms, and, by giving the horse proper care and medical treatment, the amount of which does not appear in the case, got her so he could use her, and, after his expenditure for the horse's benefit, the city had no right to repudiate its contract, made in good faith, and a contract that the law would uphold if made between individuals. The title to the horse passed to the defendant when she was delivered to him under the agreement, and, according to the stipulation, the mandate should be,

Judgment for the defendant, and return of property replevied, damages to be assessed at nisi prius.

HENRY M. GAGE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion March 4, 1913.

Accident. Assumption of risk. Claim. Damages. Due care. Fright. Motion. Notice. Shifting of cars.

1. The plaintiff, having been directed by the defendant's servants to unload the potatoes into the car, had the right to back his cart up to the car for the purpose of unloading them into the car, and the defendant should have known that he would naturally back close to the car, and that if they backed an engine against the train of which the car that the plaintiff was directed to unload into was one that the shock might throw an inexperienced man from his feet and move the car so that the horses might be startled or frightened.
2. The defendant owed him the duty, while he was lawfully in the car, to do no act that might cause him injury without sufficient notice to him to enable him to guard against injury.

3. The plaintiff was lawfully in the car by the defendant's direction and in the exercise of due care and the defendant, by backing its engine against the car, without warning him, was not exercising due care toward him and for damages sustained by him to his person, or property, by reason of the defendant's want of due care, the defendant is liable in this action.

On motion for new trial by defendant. If the plaintiff within thirty days after the certificate is filed remits all of the verdict in excess of $337.50, motion overruled; otherwise motion sustained.

This is an action on the case to recover damages for an injury sustained to plaintiff's person and property, by reason of the negligence of the defendant. The plaintiff had hauled a load of potatoes to Unity railroad station with his team, consisting of a pair of colts four and five years old and a cart. He was instructed by the defendant's servants to unload the potatoes into a certain car and he backed his cart against the car. He unloaded the bags of potatoes into the car and then went into the car, leaving his horses unhitched and unattended, to help carry the bags to the end of the car and empty them. While so occupied in the car, a shifting engine hitched on to the string of cars, of which the car the plaintiff was in was one, forcing the car back and throwing him upon the scales and injuring him and frightening his horses, causing them to run away and injuring them also. Plea, the general issue. The jury returned a verdict for the plaintiff for $500. The jury also found specially, at the request of counsel and direction of the court, that the damages for plaintiff's personal injuries were $337.50, and damages to the disposition of the horse were $162.50. The defendant filed a motion for a new trial.

The case is stated in the opinion.

Martin & Cook, for plaintiff.

Forrest Goodwin, and John Wilson, for defendant.

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

HALEY, J. The 4th day of May, 1911, the plaintiff hauled a load of potatoes to Unity station, and backed his cart up against a freight car in the defendant's yard for the purpose of unloading

them. Before backing his cart up to the car he was instructed to unload into the car that he backed against. The horses the plaintiff was using at the time were a pair of colts, four and five years old. The plaintiff had used them together only two weeks at the time of the accident. He unloaded the bags of potatoes into the car, and then entered the car to help carry the bags to the end of the car and empty them. The team was left backed against the car, the horses unhitched and unattended. While plaintiff was in the car, carrying the potatoes to the rear end, the shifting engine of the defendant made a hitch to the string of cars, one of which was the car the plaintiff was in, and the plaintiff claimed at the trial that, when the engine came in contact with the car, the car he was in was forced violently back, that his foot caught under the scales, and he was thrown over the scales and upon them, and received injuries which consisted of a bad spot on his hip, that his knee was twisted, which caused him to be lame, and that he had not recovered from the injury to his knee at the time of the trial. The horses were startled by the movement of the car against which the cart was resting, and ran or trotted about twenty rods; the plaintiff got up from the floor of the car, jumped from the car, and started after the horses; the horses ran or trotted about eight rods, and then turned and ran on another street about twelve rods; the plaintiff ran across the triangular shaped lot between the two roads the horses passed over, and was near to the horses when they stopped.

The plaintiff claims damages for injuries received by reason of his fall in the car, although his attorney, when he made the claim upon the defendant for damages, in June after the accident, did not claim any injury to the plaintiff, and for injuries to the disposition of the four year old colt, which he claims has become unsafe to use by reason of the fright received and by the fact that he had run away.

The ad damnum of the writ was $500, and the jury found for the plaintiff with damages assessed at $500. At the request of counsel, the court directed special findings as to the damages, and the jury assessed damages for the plaintiff's personal injuries at $337.50, and damages to the disposition of the horse at $162.50.

The case is before this court upon a motion for a new trial, and it is claimed that the plaintiff assumed the risk of injury arising

from the ordinary shifting of the cars; that he knew, or ought to have known, that the cars were liable to be shifted; that there was no rough handling of the cars and nothing out of the ordinary, usual and proper method of shifting cars; that if he was injured, as he claims he was, that by voluntarily going into the car he assumed the risk of ordinary handling of the car, and was guilty of contributory negligence in not guarding against the result of the ordinary shifting, and was guilty of contributory negligence in leaving his horses unhitched and unattended, and also because he backed his cart solidly against the freight car, and should have known any movement of the car would have had a tendency to frighten them; that the horses were not frightened to any unusual extent, that they merely trotted a short distance and stopped of their own accord, and that the damages for the injury to the disposition of the four year old colt was unwarranted.

The plaintiff, having been directed by the defendant's servants to unload the potatoes in the car, had the right to back his cart up to the car for the purpose of unloading them into the car, and the defendant should have known that he would naturally back close to the car to unload, and that, if they backed an engine against the train, of which the car that plaintiff was directed to unload into was one, the shock might throw an inexperienced man from his feet, and move the car so that the horses might be startled or frightened.

They owed him the duty, while he was lawfully in the car, to do no act that might cause him injury, without sufficient notice to him to enable him to guard against injury.

The plaintiff was lawfully in the car by the defendant's direction, and in the exercise of due care, and the defendant, by backing its engine against the string of cars without warning to him, was not exercising due care toward him, and for damages sustained by him to his person, or property, by reason of the defendant's want of due care, the defendant is liable in this action.

From a reading of the evidence it seems improbable that the plaintiff was injured by the fall in the car to the amount awarded by the jury; but it was a question of fact for them, and if they believed the plaintiff's testimony, the damages awarded by them were authorized.

What evidence was there to support the plaintiff's contention that the disposition of the four year old colt was injured at that time? He was a spirited animal on the road, according to the testimony, and before the trouble at the car he "was a little nervous," and "wanted to go along." At the station he was undoubtedly the same, and started with his mate when the car pushed the cart. If they had been frightened they would have run more than from 300 to 325 feet with blankets fastened around their necks and dragging on the ground under their feet before stopping of their own accord. It does not seem possible that what took place at the railroad station could have so injured the horse's disposition that he became unsafe to use by reason of the fright and running 300 feet, and, if there has been any injury of the kind complained of, it is more than probable that it was caused the Sunday after, when the horse ran away.

The only evidence that the horse was uneasy when anything came up behind him or unsafe to use is that of his conduct after the following Sunday.

The accident was Thursday, May 4, 1911. There is no evidence that the colt was used again until Sunday, May 6th, when he was driven to the residence of Mr. Cook, a witness called by the plaintiff, who testified as follows: "Q. What do you know about the horse since the accident, have you observed him? A. I saw him run away one Sunday. Q. About what time was this? A. Well, I couldn't say for positive, but I think it was the first Sunday after the accident; I think it was; I couldn't —— Q. Where was this? Tell the circumstances. A. Mr. Gage came out to my place and wanted to know if I would go up and finish grafting. I live about two miles —— Q. I want to know about the horse running away, or anything on that day? A. We done our business, were talking, what we had to do, and he started for home, and I live at the top of quite a steep little hill, and the horse started. I think the *rattle of the wagon* made him nervous, and he went down the hill and kicked several times down the hill, and broke the harness, and Mr. Gage and the horses and the wagon landed out in the side of the road among some trees at the foot of the hill."

There was testimony that the horse was uneasy and restless when anything came up behind him, but all of the testimony of that

nature was after the runaway testified to by Mr. Cook, and if the change in the conduct of the horse was caused by his being frightened and running away, it is impossible to find from the evidence that it was caused by the fright at the railroad station; but if true that his disposition has been changed, all of the probabilities bear out the position of the defense that it was caused by the runaway Sunday, as detailed by the witness Cook. The evidence and probabilities did not authorize the finding that, if there was any change in the disposition of the colt, it was caused by the fright Thursday at the station instead of by his running away on the following Sunday. Whether the finding of the jury was the result of prejudice or bias and a desire to give the plaintiff the amount of the ad damnum of the writ, or a failure to properly weigh the evidence, we cannot tell; but there is no evidence that justifies the award for injury to the disposition of the horse, and the mandate should be,

If the plaintiff, within thirty days after the certificate is filed, remits all of the verdict in excess of $337.50, motion overruled; otherwise motion sustained.

ADA F. BROWN, Libelant, *vs.* DAVID BROWN.

Androscoggin. Opinion March 12, 1913.

Abatement. Action. Attachment. Discontinuance. Divorce. Discharge. Libel. Notice. Pleading. Practice. Vexing. Writ.

1. A plea of the pendency of another action is a dilatory one, technical in its nature, and a person interposing it should clearly show himself within reason for its enforcement.
2. The principle on which the plea is allowed is that a person should be protected from being harassed and vexed by the pendency of two actions at the same time to recover the same demand.
3. At common law and in the earlier practice of the courts, the rule allowing this plea was applied with strictness, but the later decisions are more liberal.
4. The modern doctrine, supported by a great weight of judicial precedent, is that the rule allowing this plea is not one of unbending rigor or of universal application, but rather one to be applied to promote justice and equity.
5. That it should not be allowed where justice to the defendant does not reasonably require it and when to allow it would work manifest injustice to the plaintiff.
6. That class of cases which hold that the mere fact that another suit was pending when the second suit was begun does not of itself show that the second suit is necessarily vexatious.

On report. Plea adjudged bad. Respondent ouster.

The question at issue in this case is whether the plea in abatement filed by the defendant shall be sustained. May 18, 1912, the plaintiff began a libel for divorce against the defendant, which was inserted in a writ of attachment, returnable to the Supreme Judicial Court in Androscoggin County at the September term, 1912, on which writ the real estate of the defendant was attached for $10,000. This writ was duly served on the defendant, August 17, 1912, the plaintiff caused said attachment to be discharged of record, and on said 17th day of August, 1912, commenced another libel for divorce against the defendant, inserted in a writ of attachment on which the real estate of the defendant was attached for

$25,000. This second libel was duly served on the defendant and was entered in court at the September term of said court, but the first libel was not entered in court. The defendant's attorneys appeared specially for the defendant and seasonably filed a plea in abatement to the second suit on the ground of the pendency of another action when the second suit was begun. To the plea, the plaintiff replied denying that another action was pending when the second suit was begun. September 25, 1912, the first day of the term being September 17, 1912, the plaintiff caused a written notice directed to defendant to be delivered to Oakes, Pulsifer & Ludden, defendant's attorneys, that the first libel was discontinued by a discharge of the attachment. The case is reported to the Law Court upon the libel, plea in abatement and answer thereto, notice to counsel of the discontinuance of the former libel and the reply thereto and the agreed statement of facts. The court to render such judgment in the case as the law and the evidence require.

The case is stated in the opinion.

Newell & Skelton, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

KING, J. May 18, 1912, the plaintiff began a libel for divorce against the defendant which was inserted in a writ of attachment, returnable to the September Term, 1912, of the Supreme Judicial Court for Androscoggin County, Maine, on which writ real estate was attached to the amount of $10,000, and the same duly served on the defendant. Thereafter, on August 17, 1912, the plaintiff caused said real estate attachment to be discharged of record in the Registry of Deeds where the same was recorded, and then began another libel for divorce against the defendant, in all respects the same as the first libel except the date, which was inserted in a writ of attachment returnable to the same term of court, and on which real estate was attached to the amount of $25,000, and the writ duly served on the defendant. The first action was not entered at said term of court, but the second action was, when and where Messrs. Oakes, Pulsifer & Ludden entered their appearance, speci-

ally, for the defendant and seasonably filed a plea in abatement on the ground of the pendency of another action between the same parties for the same cause. To that plea the plaintiff replied denying that another action was pending when the second suit was begun. September 25, 1912, after the first day of said term which was the 17th day of September, 1912, the plaintiff caused a written notice directed to the defendant to be delivered to Messrs. Oakes, Pulsifer & Ludden, in which notice she stated that the first libel "was discontinued by a discharge of said proceedings prior to the service of the libel dated August 17, 1912, and returnable to said court, which is now pending therein, and that said first libel is now and hereby discontinued." To that notice Messrs. Oakes, Pulsifer & Ludden replied to the plaintiff's attorney the same day acknowledging receipt of the notice, but stating that "we are not now and never have been attorneys of record of said David Brown respecting said suit. Neither are we attorneys in fact for said Brown respecting said suit. We therefore assume no obligation or responsibility in respect to said notice. In regard to a later suit, being a libel for divorce between the same parties issuing from your office on August 17, 1912, will say that we are not attorneys of record of said Brown, further than may be indicated by a special appearance made by us and the filing of a plea in abatement."

The case is reported to the Law Court upon the libel, plea in abatement, answer thereto, notice to counsel of the discontinuance of the former libel, the reply thereto, and an agreed statement of facts, which merely confirms the foregoing recitals.

The plea of the pendency of another action is a dilatory one, technical in its nature, and a person interposing it should clearly show himself within the reason for its enforcement. The principle on which the plea is allowed is that a person should be protected from being harassed and vexed by the pendency of two actions at the same time to recover the same demand. At common law and in the earlier practice of the courts the rule allowing this plea was applied with strictness, as shown in *Com.* v. *Churchill,* 5 Mass., 174; *Gamsby* v. *Ray,* 52 N. H., 513.

But later decisions are more liberal, and while the authorities are not now wholly in accord as to its application, we think it is the modern doctrine, supported by a great weight of judicial pre-

cedent, that the rule allowing this plea is not one of unbending rigor or of universal application, but rather one to be applied to promote justice and equity, and that it should not be allowed where justice to the defendant does not reasonably require it, and where to allow it would work manifest injustice to the plaintiff.

Hence that class of cases which hold that the mere fact that another suit was pending when the second suit was begun does not of itself show that the second suit is necessarily vexatious, and that an inquiry may be had as to whether it is in fact so, and whether the second suit was not necessary in order to protect and secure the plaintiff's full rights. The following cases are of that class: *Quinebaug Bank* v. *Tarbox,* 20 Conn., 510; *Downer* v. *Garland,* 21 Vt., 362; *Blackwood* v. *Brown,* 34 Mich., 4; *State* v. *Dougherty,* 45 Mo., 294; *Griffin* v. *Levee Commissioners,* 71 Miss., 767; *Norfolk & Western Railroad* v. *Nunnally,* 88 Va., 546; *Rogers* v. *Hoskins,* 15 Ga., 270; *Gilmore* v. *Georgia Railroad & Banking Co.,* 83 Ga., 482; *National Express & Transportation Co.* v. *Burdette,* 7 App. Cas. (D. C.), 551; *Phillips* v. *Quick,* 68 Ill., 324; *Byne* v. *Byne,* 1 Rich. (S. C.), 438; *Langham* v. *Thomason,* 5 Texas, 127.

And, as showing still more clearly a purpose to be liberal in favor of plaintiffs who have brought a second suit during the pendency of the first, there are those cases holding that a plea in abatement, founded upon the pendency of a former action may be avoided by the discontinuance or other termination of the former action after the plea is filed. *Banigan* v. *Woonsocket Rubber Co.,* 22 R. I., 93; *Wilson* v. *Milliken,* 103 Ky., 165; *Warder* v. *Henry,* 117 Mo., 530; *Page* v. *Mitchell,* 37 Minn., 368; *Nichols* v. *State Bank,* 45 Minn., 102; *Moorman* v. *Gibbs,* 75 Iowa, 537; *Trawick* v. *Martin Brown Co.,* 74 Texas, 522; *Grider* v. *Appersen Co.,* 32 Ark., 332; *Chamberlain* v. *Eckert,* 2 Biss., 124; *Moore* v. *Hopkins,* 83 Cal., 270; *Dyer* v. *Scalmanini,* 69 Cal., 637; *Porter* v. *Kingsbury,* 77 N. Y., 164, 167; *Crossman* v. *Universal Rubber Co.,* 127 N. Y., 34, 39; *Toland* v. *Tichenor,* 3 Rawle, 320, 324; *Findlay* v. *Keim,* 62 Penn. St., 112, 117, 118; *Winner* v. *Kuehan,* 97 Wis., 394, 397, 398; *Farris* v. *Hayes,* 9 Ore., 81, 87; *Ostmann* v. *Frey,* 128 S. W., 250. See also the very recent case *Mfrs.' Bottle Co.* v. *Taylor-Stites Glass Co.,* 208 Mass., 593.

We favor the more liberal doctrine and rules of practice of the later adjudications. Accordingly we are of opinion that, where a plea in abatement is filed setting up in defense the pendency of a former suit for the same cause, if it appears that the second suit was not brought to harass or vex the defendant, and is not in fact vexatious, it is more equitable to allow the second suit to stand and the first to be discontinued upon proper terms, if not already discontinued, than to order an abatement of the second suit, and thereby subject the plaintiff to the possible loss of substantial rights, and in any event to the expense and delay of beginning anew.

In the present case it may be conceded, perhaps, that the first suit was pending, in the technical sense, when the second suit was begun, and when the plea in abatement was filed. But the conclusion is inevitable that the plaintiff intended that it was in fact discontinued when the real estate attachment made therein was discharged. From that time there was no purpose on her part to enter the first suit in court. She had fully given up that suit in order to begin the second and make a larger attachment of real estate, presumably believing that it was necessary for her to do that in order to protect and secure her rights in her divorce proceedings against the defendant. It must be conceded, therefore, we think, under the circumstances disclosed, that the second suit was not brought for the purpose of vexing the defendant, and we do not perceive wherein it was in fact vexatious to him because of the technical pendency of the first suit. There was but one existing attachment against his property, and but one suit was actually entered in court. True, he was commanded to appear at court and answer to the first suit as well as to the second, but even that can not be regarded as very materially vexatious in view of the fact that both appearances were to be made at one and the same time, and only the second suit was in fact entered. Further, by complaint the defendant could have recovered his costs for appearing at court to answer to the first suit.

On the other hand, if the plaintiff's suit, now pending in court, is abated she will thereby be driven out of court empty handed and compelled to submit to the expense and delay of beginning anew, and perhaps to suffer the loss of substantial rights. Such conse-

quences ought not to be permitted as the result of a technical error in legal procedure.

Moreover, we find that the first suit has been fully and effectually discontinued before the determination of this plea in abatement, and that is a sufficient reason, according to the authorities cited, why the plea should not be sustained.

Plea adjudged bad.
Respondent ouster.

CRAWFORD ELECTRIC COMPANY, In Equity,

vs.

KNOX COUNTY POWER COMPANY AND HOLLIS M. SHAW.

STATE OF MAINE,
By Information of Attorney General of the State of Maine,

vs.

HOLLIS M. SHAW.

Knox. Opinion March 17, 1913.

Electricity. Equity. Franchise. Information. Injunction. Highways. License. Municipal Officers. Permit. Quo Warranto. Revised Statutes, Chapter 47. Revised Statutes, Chapter 55, Section 1. Revised Statutes, Chapter 51, Section 1. Public Laws of 1885, Chapter 378.

1. That authority in one corporation to supply gas or electricity or both, in a certain territory is, under R. S., Chap. 55, Sec. 1, prohibitive of the

right of another corporation to supply either in the same territory, unless by consent or by special legislative authority.

2. That this prohibition is confined to corporations subsequently organized under the general laws of the State, and does not extend to a private individual.
3. A private individual, without special legislative authority, has a legal right to generate and sell electricity for public and private purposes and to light the streets of a town, provided he has a legal permit from the municipal officers of the town to erect and maintain his system of poles and wires along the public highways.
4. That in so doing, he is not usurping a public franchise, strictly speaking, and quo warranto proceedings will not lie against him.
5. That there is a marked distinction between a franchise which is essential to the creation and continued existence of a corporation, a right to exist as an artificial being, and which must be conferred by the sovereignty of the State, and those rights and powers which are subsidiary in their nature, and which, though often conferred upon corporations, are held and enjoyed by private individuals without any grant from the Legislature.
6. That a franchise is a privilege or immunity of a public nature which cannot be exercised without the express permission of the sovereign power, that is, without legislative grant.
7. That the right to furnish electric light and power, aside from the right of eminent domain, is not strictly speaking a franchise, but a privilege or power which may be granted to a corporation by the Legislature, but is open to any individual without such grant. There is nothing pertaining solely to sovereignty in the selling of electricity for lighting purposes. Though differently measured, it is as much a commodity as kerosene, and natural as well as artificial persons should be allowed to deal in it.
8. That the Legislature, by virtue of its control over the public roads of the State, may expressly grant to a person or corporation authority to erect his or its lines along and upon such roads and ways or it may delegate that power to the municipal officers of the various cities and towns as has been done by R. S., Chap. 55, Secs. 16-24. That however is a power and not a franchise and can be exercised by an individual as well as by a corporation.

On report. Bill in equity dismissed with costs for each defendant. Information dismissed without costs. So ordered.

This bill in equity was brought by the *Crawford Electric Company* v. *Knox County Power Company and Hollis M. Shaw,* asking that the respondents be enjoined from making, generating, selling, distributing or supplying electricity for lighting, heating, manufacturing, etc., in the towns mentioned in the counties of Knox and

Waldo. In the quo warranto proceedings, charging the defendant Shaw with usurping two public franchises, the same facts and the same propositions of law are involved as are involved in the bill in equity; they were argued together and are decided and disposed of in the same opinion. Answers and replications were filed to the bill in equity, and by agreement, said answers were adopted as the pleadings in the quo warranto.

The foregoing bill in equity and quo warranto are reported upon the following stipulation:

The above entitled matters having come on to be heard and the undersigned Justice being of the opinion that questions of law are involved, of sufficient importance, or doubt, to justify the same, and the parties agreeing thereto, the same are reported to the next term of the Law Court, for determination, in accordance with the foregoing stipulation and agreement.

The case is stated in the opinion.

A. S. Littlefield, for Crawford Electric Company.

W. R. Pattangall, Attorney General, for the State.

Samuel Titcomb, for Knox County Power Company.

Benedict F. Maher, for Hollis M. Shaw.

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

CORNISH, J. These cases were reported and argued together because they involve the same facts and the same propositions of law, and differ only in the form of the desired remedy.

The following facts appear in the agreed statement:

The Crawford Electric Company was organized under the general laws of the State on February 20, 1897, for the purpose of making, generating, selling, distributing and supplying gas or electricity, or both, for lighting, heating, manufacturing and mechanical purposes in various towns in Knox and Waldo counties, including the town of Union. It is the owner of buildings and water power in South Union purchased with a view to carrying out its chartered purposes, but has neither furnished electricity nor installed apparatus for that purpose.

In 1911 the Knox County Power Company was also organized under the general law for the same general purposes in the same towns, but has taken no steps to carry the same into effect, and in its answer denies that it intends in any way to perform any of the purposes of its incorporation.

On November 8, 1911, Hollis M. Shaw, the other defendant, was granted, by the municipal officers of the town of Union, a permit to erect poles and string wires in all the streets and highways of the town for the purpose of lighting streets, ways and buildings and selling electricity for any and all purposes; and, being the owner of a water power, has since constructed an electrical plant and system, is occupying some of the public ways with his poles and wires, is "holding himself out as conducting an electric light and power plant and business in the town of Union, for supplying all who may wish to purchase the same, as any corporation organized for that purpose might do, and is supplying the public and individuals with electricity for lighting at a fixed tariff."

Neither the Crawford Electric Company, nor the Knox County Power Company, nor Hollis M. Shaw, has any rights granted specially by the Legislature.

Under the answer of the Knox County Power Company disclaiming all intention to carry out its chartered purposes, and in the absence of any evidence to the contrary, it is not seriously contended by the plaintiff that an injunction should issue against that corporation. The bill should therefore be dismissed as to the Knox County Power Company.

But upon the foregoing statement of facts, the plaintiff claims that both the bill and the quo warranto proceedings should be sustained against Hollis M. Shaw.

This sharply raises the question whether a corporation, organized under the general law, and having by its charter the right to supply electricity in a town, but never having exercised that right although existing for a period of fifteen years, can prevent an individual, who has a permit from the municipal officers, from maintaining his system in the public ways of the town and carrying on the general business of furnishing electricity for lighting, heating and mechanical purposes.

It is our opinion that this question must be answered in the negative, and that the injunction prayed for should not be granted.

As between two corporations, the vested rights of the one first authorized are protected to a certain extent by statute. R. S., Chap. 55, Sec. 1, provides that "corporations for the purpose of making, generating, selling, distributing and supplying gas or electricity or both for lighting, manufacturing or mechanical purposes" . . . may be organized under the general law. "But no corporation, so organized, shall have authority, without special act of the Legislature, to make, generate, sell, distribute or supply gas or electricity, or both, for any purpose, in or to any city or town, in or to which another company, person or firm are making, generating, selling, distributing or supplying, or are authorized to make, generate, sell, distribute or supply gas or electricity or both."

To illustrate: Had the Knox County Power Company attempted to exercise its chartered purposes in the town of Union, without authority therefor conferred by a special act of the Legislature, the plaintiff corporation as the one already authorized to carry on the same business, could have successfully asked for an injunction, even though it had not itself actually been engaged in the business. Authority in one company to supply gas or electricity, or both, in a certain territory, is prohibitive of the right of another company to supply either in the same territory unless by consent or by special legislative authority. *Twin Village Water Co.* v. *Damariscotta Gas Light Co.,* 98 Maine, 325.

But such a prohibition does not extend to an individual. The statute is confined to corporations subsequently organized under the general law and without express legislative authority.

It is just at this point, however, that the plaintiff invokes the remedy of quo warranto in the name of the State, on the ground that Mr. Shaw is usurping two public franchises, one in supplying a public utility, and the other in occupying the public streets and ways of Union with his poles and wires. On the same grounds and independent of any statutory prohibition, the plaintiff insists upon its remedy by injunction.

These contentions on the part of the plaintiff raise the issue whether a private individual, without special legislative authority, has the legal right to generate and sell electricity for public and

private purposes and to light the streets of a town provided he has a legal permit from the municipal officers to erect and maintain his system of poles and wires along the public highways.

The plaintiff's position, reduced to a syllogism, is this:

(1). An individual has no legal right, without special permission or authority, to exercise any privileges or functions belonging solely to sovereignty and which are usually called franchises.

(2). To supply electricity for public and private purposes, charging therefor, and to occupy the streets of a town with poles and wires is a privilege belonging solely to sovereignty.

(3). The defendant Shaw is so supplying and occupying and therefore is usurping a public franchise and has no right to continue in the usurpation.

The fallacy lies in the minor premise. The word "franchise" has been defined in various terms, and with greater or less precision. Not infrequently, the courts have differed in their views of what a franchise, speaking discriminatingly, is, and have confused mere rights and powers, which belong to corporations and individuals alike, with franchises which inhere in and must emanate from sovereignty alone.

For instance, the corporation itself is often termed a franchise. "A corporation is itself a franchise belonging to the members of the corporation, and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation." *Pierce* v. *Emery,* 32 N. H., 484, 507. "The right to be and to do business as a corporation is a franchise. The power to exercise such a franchise is one of the most important a corporation can acquire." *Iron Silver Min. Co.* v. *Cowie,* 31 Colo., 450; 72 Pac., 1067. The same definition is applied in *Cedar Rapids Water Co.* v. *Cedar Rapids,* 118 Iowa, 234; 91 N. W., 1081.

On the other hand, in Wood on Railroads, 2nd Ed., Vol. 1, Sec. 13, the learned author says: "The corporation itself is not a franchise, but it is the attributes of the corporation which comprise the franchises thereof, its special powers and rights." This definition is adopted in *Young* v. *R. R. Co.,* 75 Iowa, 140; 39 N. W., 234. "The right of forming a corporation and of acting in a corporate capacity under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partner-

ship, or of executing a conveyance of land by deed, is a franchise." 2 Mor. Priv. Corp., Sec. 923; *State* v. *Canal Co.*, 40 Kans., 96, 19 Pac., 349.

The conflict, however, may be one of terms rather than of essence, and more apparent than real. A satisfactory reconciliation may be found in *State* v. *Topeka Water Co.*, 91 Kans., 547, 60 Pac., 337, 341, where the court notes the distinction as follows: "There is a marked distinction between a franchise which is essential to the creation and continued existence of a corporation, a right to exist as an artificial being, a right conferred by the sovereignty of the State, and those rights, subsidiary in their nature, by which the corporation obtains privileges of more or less value, to the enjoyment of which corporate existence is not a prerequisite. . . . The rule is that the primary franchise of being a corporation vests in the individuals who compose it and not in the corporation itself, while the secondary franchises, such as the right of a railway to construct and operate its road, or the right to operate a water plant and collect water rates, are vested in the corporation." The same important distinction is expressed in *Central Trust Co.* v. *Western N. C. R. Co.*, 89 Fed. Rep., 24, in these words: "This sovereign power made of several persons an entity and conferred on them the franchise of acting as one person. This new person, creature of the law and existing through the grace and at the will of the sovereign, was then clothed with certain powers and granted certain privileges. These are its franchises: First, the franchise of existence as a corporation,—its life and being. This is inseparable from it. When it parts with it, with this franchise, it parts with its life. But with respect to the other franchises with which it has been clothed, the right and privilege to act as a common carrier, to carry passengers and goods, to charge tolls, to operate a railroad, these it enjoys as an individual could and they are not inseparable from its existence. They are its property. A franchise to be a corporation is distinct from a franchise as a corporation to maintain and operate a railroad."

This distinction between the primary and the secondary franchise, or as it might with greater accuracy be termed, between a franchise and a power, should be kept clearly in mind. The creation of the corporation is a franchise. Once created, it exists as an

entity along side natural persons. But without being granted additional powers, the corporation cannot exercise the rights of natural persons, for it can exercise no powers that have not been conferred upon it. It is purely the creature of statute. These additional rights are often called franchises, but they should more properly be termed powers; and when conferred, the corporation has in many cases the same powers possessed by the natural person without a special grant,—no more, and no higher.

Our own court has marked the distinction clearly and emphatically. "A distinction between franchises and powers should not be overlooked. A 'franchise,' given by Finch, adopted by Blackstone, and accepted by every authority since, is 'a royal privilege or branch of the King's prerogative existing in the hands of a subject.' To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power,—a privilege or immunity of a public nature which cannot legally be exercised without legislative grant. It follows that the right, whether existing in a natural or artificial person, to carry on any particular business, is not necessarily or usually a franchise. The right given to this corporation to furnish electric light and power, aside from the right of eminent domain, authorized a business which was open to any individual, without special legislative grant, and falls within the definition of powers." *State* v. *Twin Village Water Co.*, 98 Maine, 214, 230. See also *State* v. *Minn. Thresher Mfg. Co.*, 40 Minn., 213; 3 L. R. A., 510.

This language is most significant, and pricks the fallacy in the minor premise of the plaintiff's argument. The right to furnish electric light and power is not a sovereign privilege but a business, which is "open to any individual without special legislative grant."

The learned counsel for the plaintiff contends that the right to do a business of a public service corporation, whether done by a corporation or by an individual, is a franchise. This definition we cannot adopt. The mere fact that an individual is exercising a power that is often conferred upon a public service corporation to exercise does not raise that power to a franchise and make it an essence of sovereignty. The right that must be expressly conferred upon an artificial person may be and often is but the inherent right of a natural person.

Thus, R. S., Chap. 47, provides for the organization of corporations to carry on, broadly speaking, any lawful business, excepting banking, insurance and railroads. Under these provisions, a great variety of business corporations have been organized with such chartered rights and powers as were deemed necessary to carry out their purposes. But the fact that a corporation has been formed to carry on the wholesale or retail grocery business does not convert that power into a franchise so that an individual may not engage in the same business without any legislative grant.

Transportation is more commonly carried on by corporations with chartered powers, but the field is open to individuals if they see fit to engage in the business of a common carrier, with all its attendant duties and liabilities. Thus, individual proprietors of a stage coach, as in *Bean* v. *Greene,* 12 Maine, 422; *Keith* v. *Pinkham,* 47 Maine, 501; *Edwards* v. *Lord,* 49 Maine, 279; or of a steamboat, as in *Abbot* v. *Bradstreet,* 55 Maine, 530.

In like manner, R. S., Chap. 55 provides that telegraph, telephone, gas and electric light and power companies may be organized like business corporations under the provisions of Chap. 47, and when so organized may construct and maintain their lines along and upon the roads and streets of the various towns covered by their charter, after obtaining a permit therefor from the municipal officers.

But, adopting the same analogy, this does not convert the powers so granted into a franchise, so that no private individual can exercise the same, provided he secures a permit from the municipal officers. There is nothing pertaining solely to sovereignty in the selling of electricity for lighting purposes. Though differently measured, it is as much a commodity as kerosene, and we can see no reason why natural as well as artificial persons should not be allowed to deal in it.

In *Jersey City Gas Co.* v. *Dwight et als.,* 29 N. J. Eq., 242, an injunction was granted against the defendants, not on the ground that they were individuals engaged in the gas business, but because they had failed to secure any permit from the proper authorities for the use of the streets. Upon the former point, the court say, "The business of manufacturing and selling illuminating gas is not a prerogative of government; like the manufacture and sale of any

other ordinary article of traffic, it is open to all and may be carried on by any person without legislative authority. Any one of the defendants, in point of right and privilege, is the equal of the complainants in this respect."

In *Norwich Gas Light Co.* v. *The Norwich City Gas Co.*, 26 Conn., 18, the same idea is expressed as follows, "The business of manufacturing and selling gas is an ordinary business, like the manufacture of leather or any other article of trade, in respect to which the government has no exclusive prerogative."

See also, *Purnell* v. *McLane*, 98 Md., 589; 56 Atl., 830.

In recognition of this right in individuals to engage in the business of selling and distributing gas or electricity or water or transportation, a permit to an individual to use the streets of a city for the construction and operation of a street railway was held valid in *Watson* v. *Fairmont Ry. Co.*, 49 W. Va., 528, 39 S. E., 193, approved in *Hardman* v. *Cabot*, 69 W. Va., 664, 9 Am. & Eng. Ann. Cases, 1030.

The statutes of this State, under which the defendant Shaw is proceeding, expressly recognize the right against which the plaintiff is contending.

In 1885, by Chap. 378 of the Public Laws, the Legislature regulated the erection of poles and wires which act has become R. S., Chap. 55, Sec. 16-24. Section 16 reads, "Every company incorporated for the transmission of intelligence, heat, light or power by electricity, and all persons and associations engaged in such business, shall be subject to the duties, restrictions and liabilities prescribed in the following sections." Then follow the provisions relating to obtaining a written permit from the municipal officers, and in each section the words "persons" and "associations" are coupled with the word "company;" and persons and associations are given precisely the same rights, so far as permits are concerned, as are conferred on incorporated companies.

The Legislature, by virtue of its control over the public roads and ways of the State, may expressly grant to a person or corporation authority to erect its lines along and upon such roads and ways, or it may delegate that power to the municipal officers of the several towns, as has been done by the act of 1885, just referred to. *Readfield Telephone Co.* v. *Cyr*, 95 Maine, 287. That, however, is,

strictly speaking, a power and not a franchise, and can be exercised as well by an individual as by a corporation. This statute expressly confers the powers upon both through the medium of the municipal officers, and in the case at bar such a permit was granted to the defendant Shaw by the municipal officers of Union.

Te case of *Haines, Atty. Gen'l* v. *Crosby,* 94 Maine, 212, involved practically the same elements as are present here. The plaintiff corporation had been organized under the general laws of the State, and was carrying on a public telephone business in the western part of Kennebec County. The defendant built at first a private telephone line for his own convenience, but finally extended it so as to carry on a general public telephone business in a portion of the territory covered by the plaintiff, practically duplicating a portion of the plaintiff's line. The plaintiff sought to enjoin the defendant from operating his line, relying upon the same anti-competition statute of 1895 which is invoked here, and which at that time applied to telephone companies. The court held that the statutory prohibition did not extend to the individual action of the defendant, and refused the injunction. There, as here, the defendant was a private person; there he was engaged in the public service of the telephone, here of electric lighting. Neither had any grant from the Legislature; both had permits from the municipal officers. If Shaw is usurping a public franchise in the case at bar, Crosby was guilty of the same usurpation in the case cited. This court, in the former case, left the defendant Crosby undisturbed in the exercise of his natural and legal rights; and in the case at bar, it is our opinion that neither the plaintiff by injunction nor the State by quo warranto can prevail against the defendant Shaw.

The entries must therefore be,

Bill in equity dismissed with costs for each defendant.

Information dismissed without costs.

So ordered.

REUBEN HENRY LOTHROP

vs.

ROCKLAND & ROCKPORT LIME COMPANY.

Knox. Opinion March 18, 1913.

Appointment. Assumpsit. Fees. Inspector. Lime. Revised Statutes, Chapter 2, Section 37. Revised Statutes, Chapter 117, Section 21. Revised Statutes, Chapter 40, Section 2. Removal. Tenure of Office.

1. An inspector of lime casks is a civil officer, appointed by the Governor, whose term of office is not fixed or limited by law and who is subject to removal at any time by the Governor and Council.
2. The plaintiff is entitled to receive for inspecting lime casks the fees fixed by Revised Statutes, Chapter 117, Section 21, but is not entitled to fees for lime shipped in bulk.
3. The appointment of the plaintiff as inspector of lime casks of the City of Rockland was a removal of Mr. Crockett, and when the plaintiff qualified, he became inspector of lime casks.

On report. Judgment for the plaintiff for $111.03 and interest from the date of the writ.

This is an action of assumpsit to recover of the defendant fees claimed to be due him as inspector of lime casks of the city of Rockland, as provided in Revised Statutes, Chapter 117, Section 21. Plea, general issue and brief statement, under which it is claimed that the plaintiff was not inspector of lime casks during the period covered by the account annexed. The case is reported upon an agreed statement of facts to the Law Court for determination.

The case is stated in the opinion.

Philip Howard, for plaintiff.

Arthur S. Littlefield, for defendant.

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

HALEY, J. This is an action of assumpsit, brought by the plaintiff to recover of the defendant fees claimed by the plaintiff to be due him as inspector of lime casks of the city of Rockland, for the months of June, July and August, 1911, and is before this court upon an agreed statement of facts.

It is claimed by the defendant that the plaintiff was not an inspector of lime casks during the months of June, July and August, 1911. Mr. A. B. Crockett, of Rockland, was appointed inspector of lime casks for the city of Rockland under Section 2, Chapter 40, Revised Statutes, August 13, 1907, and duly qualified August 20th, 1907. The plaintiff was appointed inspector of lime casks for the city of Rockland under the same section, by commission dated May 17, 1911, took the oath of office on May 27th, and filed his bond June 13, 1911.

The amount of lime put up in bags and casks and shipped in bulk by defendant during the months of June, July and August, upon which the plaintiff claims fees, are agreed upon, and only two questions of law are involved, viz.:

First. Was the plaintiff the inspector of lime casks for the city of Rockland during the three months for which he claims the fees of that office from the defendant? Mr. Crockett's appointment was made by the Governor, with the advice and consent of the Council, for four years, and until his successor was appointed and qualified, unless sooner removed, as provided by the statute under which he was appointed. Section 37, Chapter 2, Revised Statutes provides that civil officers appointed by the Governor and Council, whose term of office is not fixed by law, or limited by law, are subject to removal at any time within such time by the Governor and Council. Mr. Crockett was a civil officer, appointed by the Governor, with the advice and consent of the Council, whose term of office was not fixed by law, or limited by law, because, by the above section, he was subject to removal at any time by the Governor and Council. The appointment and qualification of the plaintiff was a removal of Mr. Crockett, and when the plaintiff qualified he became the inspec-

tor of lime casks for the city of Rockland. Opinion of the Justices, 72 Maine, 550.

Second. It is admitted that, during the months of June, July and August, the plaintiff, if lime cask inspector, as we hold he was, was entitled to the fees which were by law payable to the inspector of lime casks during that period, and that the defendant put up in different sizes and styles various packages which would make 204,478 casks of 200 lbs. each; also manufactured lime put up in bags which would have made 17,590 casks of 200 lbs. each; in addition manufactured and shipped in bulk 20,584,600 lbs., which would have made 102,923 casks of 200 lbs. each.

The plaintiff is entitled to receive the fees fixed by Section 21, Chapter 117, Revised Statutes, viz.: "For every ordinary cask of lime, and every two hundred pounds of lime put up in barrels and packages other than ordinary casks the manufacturer shall pay to the inspector of lime casks in his town at the time the return thereof is required to be made, one-half of one mill." The statute does not provide any fees for lime shipped in bulk. The plaintiff was inspector of lime casks during the period stated, not an inspector of lime, and he is entitled to the fees for lime shipped in casks and packages, and not entitled to fees for lime shipped in bulk. During the period mentioned the defendant put up in barrels and packages what, by the statute, was equal to 222,068 casks of lime of 200 lbs. each, and the plaintiff is entitled to one-half of one mill for each cask or package so measured.

Judgment for plaintiff for $111.03, and interest from the date of the writ.

LESLIE F. SIMPSON *vs.* THOMAS A. RITCHIE.

Waldo. Opinion March 18, 1913.

Association. Assumpsit. Contract. Co-partners. Consideration. Abandonment. Declaration. Delivery. Intention. Property. Recission. Seal. To Save Harmless. Sale. Unincorporated Association.

1. Partners can, any time they see fit, sever their interest by contract and hold each other to strictly common law liability.
2. In this case, the rights of the parties are not governed by the rules of law applicable to co-partnership.
3. The written instrument on which the action was brought shows that, although the property sold was partnership property, it was the intention of the parties to treat it as separate from other partnership matters; to sever the partnership interest in it and by agreement to hold each other to their common law liabilities, which they had a right to do.

On report. Judgment for the plaintiff for $31 and interest from the date of the writ.

This is an action of assumpsit to recover the sum of $31.00, being the amount paid by the plaintiff as his part of the amount which the Waldo and Penobscot Coach Horse Company, of which the plaintiff was a member owed to Fred Coffin for taking care of the horse "Fernando," owned by said association. On the 7th day of March, 1911, the association, by an agreement in writing, sold and delivered said horse to the defendant, the consideration being that the defendant was to pay Fred Coffin his bill for care of the horse, discharge his own bill for care of the horse, etc.

The defendant did not pay Coffin's bill and the plaintiff paid his share thereof, being $31.00, and this suit is to recover that amount. Plea, the general issue, and brief statement that plaintiff was one of a voluntary association and the defendant was also a member of said association.

At the conclusion of the evidence, the case was reported to the Law Court for decision. Upon so much of the evidence as is

legally admissible, the court is to render such judgment as the legal rights of the parties require.

The case is stated in the opinion.

Thompson & Blanchard, for plaintiff.

Arthur Ritchie, for defendant.

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

HALEY, J. This is an action of assumpsit, brought by the plaintiff, who, on the seventh day of March, 1911, and prior thereto, was one of twelve members of an association known as the Waldo and Penobscot Coach Horse Company, against another member of the association, to recover the amount paid by the plaintiff to the association, to settle a claim of Fred Coffin against the association.

The declaration contains but one count, brought upon the following writing, viz.:

"Know all men by these presents, that I, Thomas A. Ritchie of Winterport, Waldo Co., for and in consideration of the sale and delivery to me of the horse Fernando by the Waldo and Penobscot Coach Horse Co., hereby agree to pay Fred Coffin any and all bills, demands, accounts and debts he has against said Waldo and Penobscot Coach Horse Co. or any member of that Co. for care, board, feed or any way or any account against said Company or any individual member of said Company by reason of his keeping said horse Fernando, and agree to save harmless said company and each member thereof by reason of said debt in account or claim of each and every kind as herein stated. I am on my own account fully satisfied and paid for any claim or demand I have against said Co. or any member thereof in connection with my keeping said horse Fernando and am to pay D. L. Dyer twenty-nine dollars in cash on March 8, 1911, all of which is for and in consideration of the sale and delivery to me of said horse Fernando.

"Witness my hand and seal this 7th day of March, 1911.

(Signed) T. A. Ritchie.

Witness Ellery Bowden."

The case is before this court upon report for the court to render such judgment as the *legal rights* of the parties require. It is not

questioned that the plaintiff paid the amount as claimed by him, and that it was paid by the association, with assessments of other members of the association, to settle the debt due Fred Coffin, named in the above agreement.

By the wording of the agreement it would seem that the parties intended to enter into a contract under seal, but no seal was affixed, and the agreement must be treated as a simple contract between them. If the contract had been a sealed instrument, this action of assumpsit could not be maintained. *Hinkley* v. *Fowler,* 15 Maine, 289; *Porter et als.* v. *Railroad,* 37 Maine, 349; *Packard* v. *Brewster,* 59 Maine, 404; *Varney* v. *Bradford,* 86 Maine, 514; *Baldwin* v. *Emery,* 89 Maine, 497.

It is objected that this action cannot be maintained because the plaintiff and defendant are members of an unincorporated association, and that they, and their associates, are co-partners, and that one member of the co-partnership cannot sue the other members of the co-partnership for transactions growing out of the partnership business. We do not think the rights of the parties are governed by the rules of law applicable to co-partnerships. "Partners can, any time they see fit, sever their interest by contract and hold each other to strictly common law liability." *Davies* v. *Skinner,* 58 Wis., 638. The written instrument shows that, although the property sold was partnership property, it was the intention of the parties to treat it as separate from other partnership matters; to sever the partnership interest in it and, by the agreement, to hold each other to their common law liabilities, which they had a right to do. *Davies* v. *Skinner,* supra; *Burns* v. *Scott,* 117 U. S., 582; Lindley on Partnerships, Sec. 563; Dicey on Parties to Actions, page 178; *Chamberlin* v. *Walker,* 92 Mass., 429. (10 A 429).

It is also objected that it was represented to the defendant at the time of the purchase of the horse "Fernando" that the plaintiff was to have the horse, his earnings and the harness, and that he believed that the bill of sale of the horse so stated, and that it was so read to him, and that, as the association refused to transfer the harness and the earnings of the horse, he rescinded the contract and notified the association March 9th to that effect, and that he held the horse at their expense. The evidence shows that, if the defendant did attempt to rescind the contract, he abandoned the attempt as after-

wards he issued and mailed cards advertising the horse for the season of 1911, stating therein that the horse was owned by T. A. Ritchie, giving his post office address and telephone connection; and we are not satisfied that the defendant has proved that the harness and earnings were sold with the horse. The testimony and conversation connected with the transaction proved, at least by a preponderance of testimony, that they were not included in the sale.

As the defendant agreed, for a good and sufficient consideration, to hold each member of the association harmless from the bill of Fred Coffin, and as he has not held the plaintiff harmless, as the plaintiff has been obliged to pay on the bill of Fred Coffin $31, the defendant is bound to make him whole, and this action of assumpsit can be maintained for the amount paid by the plaintiff to obtain his discharge from liability upon the bill of said Coffin.

Judgment for the plaintiff for $31 and interest from the date of the writ.

MARGARET M. SPILLER *vs.* FREDERICK J. CLOSE.

Cumberland. Opinion, March 29, 1913.

Action. Gambling. Married Women. Money Lost by Gambling. Person. Property. Recovery. Revised Statutes, Chapter 63, Section 5. Revised Statutes, Chapter 126, Section 8. Wife.

1. It is one of the elementary rules of the common law that husband and wife were to be deemed one person, and that during the existence of the marriage relation, the legal identity of the wife was suspended, or merged in that of the husband.
2. It is an established rule of the common law that a married woman could not sue, or be sued, without the joinder of her husband, unless the husband was an alien who had always resided abroad, or was regarded as civilly dead.

3. This common law rule has been modified and the right conferred upon the wife by legislation to prosecute and to defend suits at law or in equity in her own name, without the joinder of her husband in certain classes of suits and for certain specified purposes.
4. Section 8 of Chapter 126 of the Revised Statutes, authorizing "any other person" to bring the action at bar was obviously not enacted for the purpose of removing the disabilities of married women. It does attempt to prescribe the competency of the "other person" who was empowered to prosecute the suit.
5. An action brought by a married woman to recover of the winner treble the amount of money lost by her husband by gambling is not a "suit for the preservation and protection of her property or her personal rights or the redress of her injuries."
6. The legal disability of a married woman, existing at common law, was not removed by Section 5 of Chapter 63 of the Revised Statutes.

On report. Plaintiff nonsuit.

This is an action on the case by the plaintiff, a married woman, to recover treble the value of money alleged to have been lost and paid to the defendant by her husband by gambling and is based on Section 8 of Chapter 126 of the Revised Statutes. Plea, general issue. The case was reported to the Law Court upon an agreed statement of facts, with the stipulation that if the Law Court determines that the suit is maintainable, it is to be remanded for trial; otherwise the plaintiff is to be nonsuited.

The case is stated in the opinion.

I. L. Elder, and E. O. Greenleaf, for plaintiff.

Elmer Perry, and Connellan & Connellan, for defendant.

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

WHITEHOUSE, C. J. This is an action brought by the plaintiff, a married woman, to recover "treble the value" of money alleged to have been lost and paid to the defendant by her husband by gambling. It is based on the following provision of Section 8 of Chapter 126, R. S., viz.:

"Whoever, by gambling, or betting on persons gambling, loses to any person so gambling or betting, any money or goods, and pays or delivers any part thereof, may sue for and recover the same of

the winner, in an action on the case, brought within three months thereafter; and if the loser does not, without covin or collusion, within said time prosecute therefor with effect, any other person may sue for and recover of the winner treble the value of the same in such action, half to his own use, and half to the town."

It appears from the agreed statement of facts, upon which the case comes to the Law Court, that money was lost to the defendant by the plaintiff's husband by gambling; and that he neglected and refused to prosecute the defendant therefor within three months thereafter. It is stipulated that if the action is maintainable in the name of the present plaintiff, it is to be remanded for trial, otherwise, a nonsuit is to be entered.

It is contended in behalf of the defendant that the plaintiff, being a married woman, was not authorized by the common law, and has never been qualified by any statute of this State, to maintain such an action as the one at bar. On the other hand, the plaintiff contends that since the statute confers the right to maintain the action upon "any other person," and the lexical meaning of the word "person" is a "living human being," the language must be deemed sufficiently comprehensive to include a married woman. But, obviously, it would not be claimed that it was the intention of the Legislature to use the word in such a literal and unrestricted sense as to include minors and persons of unsound mind. The phrase "any other person" must therefore be interpreted to signify any other person who is legally competent to institute such an action.

It is one of the elementary rules of the common law that husband and wife were to be deemed one person, and that during the existence of the marriage relation the legal identity of the wife was suspended, or merged in that of the husband. Hence, it became an established rule of the common law that a married woman could not sue or be sued without the joinder of her husband, unless the husband was an alien who had always resided abroad, or was regarded as civilly dead.

It is familiar knowledge, however, that this common law rule has been greatly modified in modern times, and the right conferred upon the wife by legislation to prosecute and defend suits at law or in equity in her own name without the joinder of her husband in certain classes of suits and for certain specified purposes. The

statute in question authorizing "any other person" to bring the action at bar was obviously not enacted for the purpose of removing the disabilities of married women. It discloses no indication of such an intention. It does not attempt to prescibe the competency of the "other person" who was empowered to prosecute the suit. The question to be determined, therefore, is whether the right to prosecute such an action has been conferred upon married women by any other legislation existing in this State at the time of the commencement of the action.

Section 5 of Chap. 63 of the Revised Statutes, relating to married women, is as follows:

"She may prosecute and defend suits at law or in equity, either of tort or contract, in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights, or for the redress of her injuries, as if unmarried, or may prosecute such suits jointly with her husband, and the husband shall not settle or discharge any such action or cause of action without the written consent of the wife. Neither of them can be arrested on such writ or execution, nor can he alone maintain an action respecting his wife's property."

But an action brought by a married woman to recover of the winner treble the amount of money lost to him by her husband in gambling, is not a "suit for the preservation and protection of her property or personal rights, or the redress of her injuries." The legal disability of married women, existing at common law, was not removed by this statute, and the attention of the court has not been called to any other statute in this State which can reasonably be construed to have that effect.

In harmony with this view, it was held by the court in *Moore* v. *Little,* 82 Ky., 187 (56 Am. Rep. 889), that a statute nearly identical in terms with our own, authorizing the loser to recover money lost at gambling, and in event of his failure to prosecute, giving to "any other person" the right to sue for treble the amount lost, did not confer upon the loser's wife the right to prosecute the suit for treble the amount.

It is accordingly the opinion of the court that the action at bar is not maintainable in the name of this plaintiff, the wife of the loser. If deemed consistent with sound reason, domestic peace and

a wise public policy to confer upon married women generally, or the wife of the loser in particular, the right to prosecute such an action, that result can be appropriately accomplished by an express legislative enactment for that purpose.

Plaintiff nonsuit.

NED HAROLD MILLIKEN,

By Joseph L. Milliken, next friend,

vs.

G. HAROLD FENDERSON.

York. Opinion March 29, 1913.

Action. Burden of Proof. Compensation. Damages. Discretion. Dog. Due Care. Fault. Forfeits. Judgment. Keeper. Motion. Owner.

1. The primary lexical meaning of the word "fault" is defect or failing, and in the language of the law and in the interpretation of Statutes, it is held to signify a failure of duty and deemed to be the equivalent of negligence.
2. It was incumbent on the plaintiff to prove that the injuries received by him from the bite of the dog was not occasioned by his own fault.
3. That burden is necessarily implied in the obligation to prove that the act of the dog was the cause of the injury, for if it was occasioned by his own fault, it was not, in a legal sense, caused by the act of the dog.
4. In the case of children, who have not arrived at the years of discretion, the exercise of due care does not require the thoughtfulness and judgment of persons of mature years.

On motion for new trial by the defendant. Motion overruled.

This is an action on the case to recover damages for an injury to the plaintiff, a boy fourteen years of age, occasioned from a bite

of the defendant's dog. The action is based on Section 52 of Chapter 4 of the Revised Statutes. The plea is the general issue and brief statement as follows: That said plaintiff in the matters in his said declaration alleged, wilfully meddled with the dog in question, with full knowledge of the probable consequences thereof. The jury returned a verdict for the plaintiff for $470 and the defendant filed a motion to set the verdict aside.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

James O. Bradbury, for defendant.

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

WHITEHOUSE, C. J. The plaintiff, a boy fourteen years of age, recovered a verdict of $470 as compensation for an injury received from the bite of the defendant's dog. The case comes to the Law Court on the defendant's motion to set aside the verdict as against the law and the evidence.

The action is based on Sec. 52 of Chap. 4, R. S., which declares that, "When a dog does damage to a person or his property, his owner or keeper . . . forfeits to the person injured the amount of damage done, provided said damage was not occasioned through the fault of the person injured."

The primary lexical meaning of the word "fault" is defect or failing. Hence, in the language of the law and in the interpretation of statutes, it is held to signify a failure of duty, and deemed to be equivalent of negligence, 19 Cyc., 460; 12 Am. & Eng. Enc. Law, 886. It was accordingly incumbent on the plaintiff to prove that the injury received by him from the bite of the dog was not occasioned by any want of due care on his own part. It was not necessary, however, that the statute should expressly impose upon the plaintiff the burden of proving that the injury was not occasioned by his own fault. That burden was necessarily implied in the obligation to prove that the act of the dog was the cause of the injury. If it was occasioned by his own fault, it was not, in a legal sense, caused by the act of the dog.

In the construction of a similar statute in Massachusetts, which however contained no express provision in regard to the fault of the person injured, it has uniformly been held by the courts of that state that to entitle the injured person to recover, it was essential for him to allege and prove that he was in the exercise of ordinary care himself. *Munn* v. *Reed,* 4 Allen, 431; *Hathaway* v. *Tinkham,* 148 Mass., 85.

But in the case of children who have not arrived at years of discretion, the exercise of due care does not require the thoughtfulness and judgment of persons of mature years. In *Plumly* v. *Birge,* 124 Mass., 57, it appeared that a boy thirteen years old endeavored to prevent a dog from crossing a narrow bridge, which he had a right to cross unmolested, by striking at him with a stick about three feet long, and as the dog came within reach for the purpose of crossing, he struck him over the back with the stick, and thereupon the dog snapped at and bit the plaintiff on the leg as he passed him. But in consideration of the thoughtlessness and heedlessness natural to boyhood, the court refused to disturb a verdict of the jury in favor of the injured boy. In the opinion, it is said, "The plaintiff may have been old enough to know, if he had stopped to reflect, that striking a dog would be likely to provoke him to bite and yet, in striking him, he may have been acting as a boy of his age would ordinarily act under the same circumstances."

In the case at bar, the plaintiff was a boy fourteen years of age. His home was about an eighth of a mile from the residence of the defendant; and for three years he had been going there every evening to obtain milk. He had also been in the habit of playing on the premises with the defendant's sons, one of whom was about his own age. The dog in question had been there during all that time, but the plaintiff had not been accustomed to play with him, although it does not appear that he had ever heard that the dog had bitten any one, or been warned that he was vicious.

It appears that the dog was generally kept in the defendant's barn. On the evening of the injury, after playing together for a while on the lawn, the boys all went into the barn and stood near the barn door.

With respect to his own movements and the action and appearance of the dog immediately preceding and at the time of the attack

upon him, the plaintiff testifies as follows: "Well, the two boys and I were standing in the barn, talking, and the dog was in about a couple of rods from me. I went to the dog, straddled him and walked over him and then I circled round and came back near the boys and went back where the dog was, just bowed to speak to him and says, 'Hello, Hilo,'—that was the dog's name. I simply spoke to him pleasantly and he jumped and grabbed me. . . . His teeth struck me in the mouth. At the time I felt as if he had taken my whole lip. . . . I did not say anything to him when I straddled him and did not rest my weight on him any way. . . . If he was moving he would have walked between my legs. . . . When I went back and said, 'Hello, Hilo,' I did not put my hand on the dog; I never touched him . . . He was quiet and did not growl or bark."

The plaintiff's testimony on this point is corroborated by the defendant's son, the only person besides the plaintiff who saw the occurrence, who testifies as follows: "He stooped over to him and was talking to him and he was down so low that he bit him." This witness does not claim that he saw the plaintiff touch the dog at any time; but he testifies that after the plaintiff went into the house, he heard him say that he patted the dog when he said "Hello" to him.

But the surgeon who dressed the wound says: "The boy's face was wrapped up, and when the bandage was taken off, his lip on his right side was torn down clear to the gum, and laid right over. . . . There was a little piece gone near the center of the lip, and that flap was turned right over here, and of course the support being taken away from that corner, the rest of the lip dropped down. Of course there was a good deal of hemorrhage." It was necessary to take eight stitches to give the wound proper surgical dressing. It is contended for the plaintiff that it is wholly improbable that the boy, with his mouth in the condition described, attempted to make any statement in regard to the occurrence.

But upon the facts of this case it is immaterial whether the plaintiff was patting the dog or not at the time he was bitten. According to the rule laid down in the Massachusetts cases above cited, and adopted by this court in *Garland* v. *Hewes,* 101 Maine, 549, the plaintiff was held only to the exercise of such thoughtful-

ness, prudence and care as boys of his age and intelligence might ordinarly be expected to exercise under like circumstances. In returning a verdict for the plaintiff, the jury must have found that when his conduct was subjected to this test, it met all the requirements of due care on the part of a boy of his age and experience and that the injury was not occasioned, in a legal sense, by the fault of the plaintiff. It is the opinion of the court that there was sufficient evidence to support that conclusion.

Motion overruled.

CHARLES H. GARDINER *vs.* WALTER G. DAVIS et als.

Somerset. Opinion March 29, 1913.

Acceptance. Breach of Contract. Canning. Corn. Damages. Delivery. Degrees. Effect of Frost on Corn. Fact. Frost. High Land. Low Land. Time. Unsuitable for Use.

1. In this action to recover damages for breach of contract in refusing to accept a quantity of sweet corn grown by the plaintiff for the defendants, the burden was on the plaintiff to prove that his corn was suitable for canning purposes.
2. Upon the evidence in the case, it is held that a breach of the contract on the part of the defendants is not shown.

On motion by the defendants. Motion sustained. New trial granted.

This is an action of assumpsit to recover damages on account of a refusal of the defendants to accept sweet corn planted by the plaintiff for the defendants in accordance with a contract in writing between the parties for the season of 1911. The corn was to be delivered by plaintiff to defendants at their canning plant in Skowhegan. The defendants refused to accept the corn on the ground

that it was not suitable for canning purposes. Plea, the general issue and brief statement. The jury returned a verdict for the plaintiff for $101.17, and the defendants filed a general motion for a new trial.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

W. M. Bradley, and Forrest Goodwin, for defendants.

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

WHITEHOUSE, C. J. In this action the plaintiff seeks to recover damages for an alleged breach of contract on the part of the defendants in refusing to accept and pay for a quantity of sweet corn grown by the plaintiff for the defendants, who were co-partners doing business under the firm name of the Portland Packing Company. The contract between the parties is in writing and contains the following provisions:

"Each of said subscribers will, during the season of 1911, plant with sweet corn raised from seed to be furnished by said Portland Packing Company, at $4.00 per bushel, and properly cultivate the quantity of land set against his name, and no more, and will, when the corn is in a green state, and in a suitable condition for canning, or at any time when ordered so to do, gather and deliver the corn at the Company's cannery at Skowhegan.

"Each of said subscribers hereto agrees to deliver the CORN at the said cannery in a perfectly tender condition, free from dry, tough, or hard ears, and if such ears are delivered, the Portland Canning Co. shall not be liable for the rejection of the entire load of which these ears are a part.

"Each of said subscribers hereby agrees that if he is once notified by man in charge to so deliver his corn, he is to assume all risks and deliver ALL his corn in the condition above specified without further notification."

The quantity of land cultivated by the plaintiff in pursuance of the contract was four acres.

It is not in controversy that prior to September 19, 1911, the defendants accepted 394 bushels of corn delivered by the plaintiff

at their cannery in Skowhegan, and paid for the same according to the contract; and it is not denied by the defendants that they refused to accept the balance of 285 bushels raised by the plaintiff on the land in question. In their brief statement of special matters of defence, they state that "on the 14th day of September, 1911, there was an unusual, severe and unseasonable frost, whereby the corn of the plaintiff was frozen and rendered unsuitable for canning purposes." They accordingly claim that by the terms of their contract, they were under no obligation to accept corn which was not "in a suitable condition for canning."

The jury rendered a verdict for the plaintiff for $101.17, and the case comes to this court on the defendants' motion to set aside the verdict as against the evidence. There are no exceptions pending, and there is no dispute between the counsel of the respective parties in relation to the law applicable to the case. The sole question before the court is one of fact, and that is whether the plaintiff's corn in question, at the time the defendants refused to accept it, "was in a suitable condition for canning," having reference to the nature and purpose of the defendants' whole enterprise and the manner in which their canning business was necessarily conducted.

The defendants maintain fourteen canning factories throughout the corn belt of the State, and have been engaged in the packing of corn for more than thirty years. It is not in controversy that on the night of the 13th, or the morning of the 14th of September, there was an unusually severe frost which affected the growing corn to a greater or less extent throughout the State. But whether the corn grown on land in a given locality was frost-bitten to a degree that rendered it unsuitable for canning, was a question to be determined upon the facts of that particular case; for it is obvious that there may be as many different degrees of frost and qualities and conditions of corn as there are tracts of land. It is therefore necessary to take into consideration, not only the direct testimony relating to the effect of the frost upon the leaves and spindles of corn and the apparent condition of the kernels of corn, during the two or three days after the frost, but the knowledge derived from long experience respecting the chemical changes that take place in corn that has been frost-bitten in different degrees, and canned at varying periods of time after it is struck by the frost. As bearing

upon the probabilities of the severity of the frost and its effect upon the corn, in a given case, it is also important to consider whether the corn was grown on high or low land, and if the weather was clear and cool or cloudy, and warm immediately after the frost; for it is an elementary principle in the science of physics that the atmosphere, rarified and made lighter by warmth, has a universal tendency to rise, while the colder and heavier air takes the lower position to which gravitation entitles it. Hence, it is a matter of familiar experience that the early frosts of autumn are more severe upon the low grounds than upon the neighboring hills, which are not only covered with warmer air, but are more exposed to the winds which prevent its stagnation.

Furthermore, it might not be, and ordinarily would not be possible for the defendants, with the factory operated to its full capacity, to can, in a single day, or in two or three days after a frost, all of the frost-bitten corn that might be offered by the contracting parties.

The plaintiff's corn was growing on low land, about $2\frac{1}{2}$ miles below the village of Skowhegan. In his testimony, he says "It was planted on the intervale, on what is called the Lowe farm by the river. . . . The next morning after the frost I went down to the piece of corn, the first thing, about six o'clock, and examined it. The spindles and the leaves and the outer husks were chilled. I stripped some of the corn down and the inner leaves of the ears weren't frozen any, and the corn apparently was all right. I couldn't see where it had touched the corn. . . . The stalks were all right at that time. . . . The spindles and leaves, as I say, were frozen." On cross examination, he says, "It was a severe frost;" and in answer to the question, "Did you ever know of a frost as heavy as this at that time in the season in your experience," he says, "Well, I don't know as I ever did." He also admits that between Thursday, the morning of the frost, and the Saturday following "there had been some change in the appearance of the leaves and spindles." "They were all bleached," so that the entire field of corn looked whiter. But he says they continued to eat the corn in the family for a week or ten days after the frost as they had before, and "couldn't see any difference." He admits, how-

ever, that he never had any experience in packing corn, and had no knowledge in regard to the effect of frost upon growing corn as far as suitability for canning was concerned.

The plaintiff's testimony in regard to the bleaching of the leaves and husks of the corn, and the use of it on the table after the frost as well as before, was corroborated by his hired man, and by the testimony of a neighbor that the outside of the plaintiff's corn looked white in the field, but "the stalks were straight and green."

No other witnesses were called by the plaintiff. No evidence was offered by him in relation to the chemical change in the corn caused by the action of the frost on the husks of the ear, or the suitability of the corn for canning purposes after it is frost-bitten. The burden was on the plaintiff to prove that his corn was suitable for canning. But he introduced no witness who had ever had experience in packing corn, or had ever tested the quality or condition of frost-bitten corn after it had been canned.

The testimony in behalf of the defendants, in the first place, confirmed that of the plaintiff himself in regard to the severity of the frost Thursday morning, September 14th, showing that water standing in vessels out of doors at the Skowhegan factory was frozen over and the water frozen in the pipes and faucets; and four of the defendants' witnesses testified in substance that the plaintiff's corn turned white within two or three days after the frost struck it.

In regard to the effect of frost on corn used for canning purposes, the defendant Baxter testifies that he has been engaged in the packing business for thirty years, with experience in all departments of the work, and oversight of all the factories in the State; that at the time of the frost he had his headquarters at Newport, and five factories under his immediate supervision; that if mature enough, frost-bitten corn can be packed for 48 and sometimes for 72 hours after a frost; that if the weather was hot, it would have to be packed sooner than if it was lowery and cold; that in his experience three days had been found to be the limit in which frost-bitten corn would be suitable for canning. He also testifies that "You can't tell from the looks of that corn where the frost has hit it,—you can't tell it from any other corn, except from the taste; and

when corn has been struck by frost so that the outer husks turn white and the inner husk is green, the kernel becomes bitter and flavorless, and when put into cans it has a watery, flat appearance, and often turns sour."

Mr. Atwood has been in the employment of the defendants continuously for 23 years; and although he has studied chemistry, he does not claim to be an expert chemist, but testifies from his knowledge derived from his own experience of 23 years. He states that a chemical change begins to take place in the corn at once after it has been struck; but it can be used for a length of time, varying, according to the weather conditions, from 48 to 72 hours,—"usually about 48 hours with safety. Then the sugar in the corn changes to starch, and it becomes flat and tasteless, loses its sweetness, and then from that it becomes bitter." He also states that he never knew any corn that showed frost on the husks that would not turn bitter within from two to four days; that he never saw corn hit so hard by frost in the canning season as to show it on the inner husk; that when it turns bitter in the can it is spoiled for merchantable purposes; that sometimes the acid fermentation will cause a flat sourness in the taste of the corn, when the cans do not swell, and at other times there is a putrid fermentation in which a gas is generated, and the cans swell.

Mr. Chute, foreman of the factory at Skowhegan, has had twenty years' experience in packing corn; and he testifies that he knew the effect of frost upon corn when packed; and he should say that the corn brought in by the plaintiff on the Monday next following the frost on Wednesday night had turned very fast. It had gone bitter and flat, and was unsuitable for canning.

Mr. Eastman has been engaged in canning corn for 25 years, most of the time in factories of his own, and has had experience in canning corn that was frost-bitten. He states that after corn had been struck by a frost it is tasteless, especially if it is a hard frost; and if it is cold enough to freeze the husks, the outside husks and the flags, it would spoil the corn, for him, for canning, even if the frost hadn't gone through the husks, "and the kernel wasn't frozen a mite."

Mr. Grant, a farmer, who has also been engaged in the canning business for seven years, has had experience in canning frost-bitten

corn, as customwork, for other people; but he would never can any of his own to sell. The appearance of good corn in the can should be creamy, nice color and flavor; but frosted corn comes out watery. The sugar separates from the corn in some way and the starch turns to water, and leaves a kind of a hull that doesn't have any taste to it.

Prof. Nehls, chief chemist of the National Canners' Laboratory, testifies that frosted corn, after it is in the can, is unsuitable for use; "it is what we call sloppy, that is, the water tends to separate and it isn't creamy like good corn, and it is extremely bitter;" he would describe it by saying that in contradistinction from being sour, it is bitter, so much as to make it unfit for use. Mr. Pearl, the biologist of the Maine Experiment Station, states that the effect of the frost is to cause the sugar in the corn to turn to starch.

Finally, the defendants introduced testimony from commission merchants to show the reputation for the highest standard of excellence which Maine sweet corn has sustained in the trade, and to explain the effect which the discovery of even a few cans of frost-bitten and inedible corn inevitably has in depreciating the market value of that brand of corn and impairing confidence in the subsequent products of the packer.

In rebuttal, it is insisted that the plaintiff's corn, rejected by the defendants, had all the appearance and characteristics of corn admitted to be suitable for canning, and was in as good condition for canning as the other loads accepted by the defendants at the time they refused to take the balance. It is also suggested by the plaintiff that if any of the frost-bitten corn canned by the defendants fermented and became tasteless or bitter and unfit for food, it was in the power of the defendants to produce a can of it at the trial, as the best evidence of their contention that the corn was not suitable for packing. But there is testimony from the defendants' witnesses showing the ordinary course of business in placing the product of a cannery on the market, and the number of dealers who handle the corn before it reaches the consumer; and it appears from the evidence that a can of frost-bitten corn might not become sour or bitter "for many months" after it is canned, and obviously might not be discovered by the consumer for many months more, and might not be returned to the packer, or a complaint made in regard

to it, for a year or more and sometimes two years after the corn was shipped from the factory. It is not claimed that any cans of defective corn had been returned to the defendants at the time of the trial in March, 1912, and it is insisted that sufficient time had not elapsed after the shipment the autumn before to justify any expectation that such return or complaints would have been made before the trial.

There is no evidence tending to show that in rejecting the plaintiff's corn in question, the defendants were actuated by any other motive than a belief that it was unsuitable for canning. It appears that orders were given by the defendants to accept all corn that was not frost-bitten. They needed the corn contracted for to fill their orders, and there is no evidence that there had been any fall in the market price.

After a careful consideration of all the evidence and arguments of counsel, it is the opinion of the court that there was not sufficient evidence to warrant the conclusion reached by the jury that the corn rejected was suitable for canning at that time. It is the opinion of the court that the evidence fails to show that there was a breach of the contract on the part of the defendants.

The certificate must therefore be,

Motion sustained.
New trial granted.

L. G. TRAFTON *vs.* WALTER G. DAVIS et als.

Somerset. Opinion March 29, 1913.

Acceptance. Breach of Contract. Canning. Corn. Damages. Delivery. Degrees. Effect of Frost on Corn. Fact. Frost. High Land. Low Land. Time. Unsuitable for Use.

1. In this action to recover damages for breach of contract in refusing to accept a quantity of sweet corn grown by the plaintiff for the defendant, the burden was on the plaintiff to prove that his corn was suitable for canning purposes.
2. Upon the evidence in the case, the jury were not warranted in finding that the corn raised on the plaintiff's ten acre field was suitable for canning purposes.
3. With respect to the four-acre piece, which was on higher ground than the ten-acre lot, the evidence justifies the finding by the jury that the corn grown on that lot was suitable for canning purposes.

On motion by defendant. If plaintiff shall remit all of verdict above $251.28 within thirty days from the receipt of the certificate of this decision by the Clerk of Courts of Somerset County, motion for new trial, is overruled. If he does not so remit, the motion for a new trial is sustained and a new trial granted.

This is an action on the case to recover damages for breach of a contract, in refusing to accept a quantity of sweet corn planted by the plaintiff for the defendants, in accordance with a contract, in writing, between the parties for the season of 1911. The defendants based their refusal to accept said corn on the ground that it was unsuitable for canning purposes. The plea was the general issue and brief statement setting forth the written contract between the parties. The jury rendered a verdict for the plaintiff for $879, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

W. M. Bradley, and Forrest Goodwin, for defendants.

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

WHITEHOUSE, C. J. In this case, the plaintiff recovered a verdict of $879, as damages for an alleged breach of contract in refusing to accept a quantity of sweet corn grown by the plaintiff for the defendants, who were co-partners under the firm name of the Portland Packing Company. The case comes to the Law Court on a motion to set aside the verdict as against the evidence and because the damages are excessive.

The contract between the parties is in writing and of precisely the same tenor as the contract in the case of *Gardiner* v. *Davis* et als., supra. It was for the season of 1911, and by its terms the defendants agreed to accept and pay for all the corn grown by the plaintiff on fifteen acres of land, and "delivered at the defendants' cannery at Skowhegan in a green state, and in a suitable condition for canning, or at any time when ordered so to do." The plaintiff cultivated fifteen acres of corn, but made no claim on account of the corn grown on one acre that was "planted later than the rest, and didn't make a good stand." The corn in controversy here was raised on two fields, one of ten acres and one of four acres, situated on the elevation known as Bigelow Hill, about 2½ miles below the village of Skowhegan.

The defendants contend, in this case as in the Gardiner case, supra, that the severe frost of September 13 and 14, 1911, injured the plaintiff's corn to such a degree as to render it "unsuitable for canning purposes;" while the plaintiff contends that the injury to the corn was so slight that the corn was still suitable for canning at the time it was offered and rejected; and the only question for the consideration of the court is whether the defendants, by the terms of the contract, were under obligation to accept the corn, in the condition in which it is shown to have been at the time it was rejected, having reference to the capacity of the factory, the character and purpose of the entire enterprise and the manner in which the canning business was necessarily conducted in that factory to the knowledge of all the contracting parties.

The defendants' inspector did not examine the corn on the four-acre piece, after the frost, and they introduce no evidence in regard

tc its condition,—relying solely upon the plaintiff's testimony as to the effect of the frost on that piece. The evidence relating to the severity of the frost, and the extent of the injury to the corn on the ten-acre lot, will be first considered.

It is not in controversy that on the night of the 13th of September, 1911, there was a frost throughout the State unequalled in severity, for that early date in the season, since the heavy frost of 1888. But it is contended in behalf of the plaintiff that, by reason of the fact that his corn was growing on a high elevation of land and the further fact that a portion of his ten-acre lot was exceptionally thick and heavy growth, affording better protection against the action of the frost, the probability of any serious injury to his corn was much less than it would be to ordinary crops growing on the lower grounds.

It is not in controversy that on Monday, September 18th, the defendants rejected the plaintiff's corn because they deemed it unsuitable for canning on account of the injury which it suffered from the frost. There is no evidence, or reason to believe, that they were actuated by any other motive in refusing to accept it. They were engaged in the canning business, and the Skowhegan factory was then in operation. They had large orders to fill, and had all the men and machinery required to turn out a product sufficient to fill them. They needed all the corn contracted for, that was suitable to can, to supply their customers; and their instructions to the foreman and field-inspector accordingly were to "get in all the corn that was not frost-bitten, but not to accept any more frost-bitten corn after Monday." It is obvious, therefore, that if any corn suitable for canning was rejected by the defendants, it was solely the result of an error of judgment on their part.

It is undoubtedly a fair inference from all the evidence that not so large a proportion of the plaintiff's corn was injured by the frost, and generally not so severely injured, as a majority of the crops on the lower lands. But it appears in evidence that it is impracticable to separate the good ears from the bad in the loads of corn that are brought in; and if only a comparatively small quantity of damaged corn is mingled with the good in the process of canning, some of the cans will be found unmerchantable.

With respect to the apparent effect of the frost upon the corn on the ten-acre lot, the testimony of the plaintiff is to the effect that the next day after the frost the field had the general appearance of having been struck by a light frost; that the flags or "top-most leaves" on a part of the stalks were frost-bitten and after the sun came out they turned a lighter color; that the rest of the leaves so bitten at the top eventually died; that the husks of the ears on a part of the hills were frosted on the ends and one or two inches down on the ears; that they continued to eat the corn on the table for two weeks after the frost and found "no indication of bitterness or anything of the kind;" and that he examined and tasted it before it was cooked and found it "full of milk and with no watery condition."

Mrs. Trafton, the plaintiff's wife, testifies that she had a telephone call from Mr. Hill, the defendants' field-inspector, the morning of the frost, inquiring if they had a heavy frost up there; and she told him she didn't think they did; and he told her to "tell Mr. Trafton to wait a few days, they wanted to get their corn from the low lands first." She further testifies as follows, "I heard the men talking it over at the breakfast table, and heard them say there had been a heavy frost, and spoke of the corn, the two Tracy boys . . . I heard them talking about it, and I could tell by the looks of things that there had been a frost of course, but the extent of it I didn't know anything about."

Irving Tracy, one of the "Tracy boys" who was working for the plaintiff and slept at the Trafton house, testifies that early in the morning there was "heavy frost;" he should say that it was "kind of a black frost;" that the frost was on the grass-ground and that the grass was slippery; that the ends of the flags on the corn were frosted a little, and at noon the flags that were chilled by the frost began to turn lighter color; and the next Friday it had commenced to turn lighter color "all over the tops of the field." The other "Tracy boy" testifies to the same effect in regard to the appearance of the corn after the first frost. He says he ate corn on the table there from that field, as he supposed, until Saturday night and found it good.

Three residents of Norridgewock also testify that a week after the frost they inspected and tasted some ears of corn in a small

basket brought over there by the plaintiff, and found them "sweet and good." The plaintiff had testified that he picked this corn from the field in question "just as it came," and he thought two or three of the ears showed frost.

As in the Gardiner case, supra, no evidence was introduced by the plaintiff in regard to the chemical changes that take place in the ear of corn resulting from the action of the frost on the husks of the ear, or the suitability of the corn for canning purposes at different points of time after it has been struck by the frost. The burden was upon him to prove that his corn was suitable for canning. But he offered no witness who had ever had any experience in canning corn, or engaged in any employment which imposed upon him the duty and responsibility of deciding whether, in a given case, frost-bitten corn was or not suitable for canning purposes.

The defendants introduced the same class of testimony that was heard in *Gardiner* v. *Davis* et als., supra; and they confidently claim to have proved by the testimony of packers of long experience and sound judgment in canning sweet corn, as well as by the evidence of expert chemists, that corn, frost-bitten as the pllaintiff's corn was according to his own testimony, is not suitable for canning purposes.

The defendants' field-inspector, Mr. Hill, testifies as to a conversation he had with the plaintiff on Monday after the frost, when the plaintiff endeavored to explain how much his corn was frost-bitten. He said "it was struck lightly, struck the leaves some . . . and he wanted to know when we wanted it hauled, and I told him we didn't want it before Wednesday anyway, and that before that time I would come down there and see his corn. . . . The next day I went over to Mr. Trafton's. We went through that piece. . . . It had the general appearance of corn that had been struck by the frost. . . . In some cases there were leaves that were merely killed at the end, others half-way, and others clear down to the stalk, and even traces, marks of frost, down on the stalks. . . . And in cases like that where the frost reaches down in that way, it strikes the ear also. I found the ears marked more or less." He further states that he had received orders from

Mr. Chute, the foreman of the Skowhegan factory, not to take any more frost-bitten corn after Monday; and after going over the plaintiff's field and inspecting the corn, he informed Mr. Trafton that under the orders he had received he "had got to reject his piece of corn."

The defendant Clinton L. Baxter testifies that he had experience in packing fields of corn that were slightly touched by the frost, so that the flags were frosted and some of the ears of the corn frosted one or two inches down on the husks, when he had kept the light-frosted corn separate from that which was more heavily frosted; and the result was the corn "ran very uneven." While all of it was not the same, some of it would be flat and tasteless, and had a very uneven appearance on opening the cans; one can would open very good and another can indifferent. If a dozen cans were opened, the corn would be found to run in different ways; and it caused them a great deal of trouble. He further testifies as follows, "after we shipped it to market, we had to take it back. The most marked complaints came the following summer around July; and some of it we didn't get back until nearly two years afterward. When it came back, some of it was sour and it was so inferior that we had to dump a great part of it, and we lost practically all of it . . . Some of it looks curdly, but not like the hard-frosted corn where practically all of it is the same, but this would be only a few cans mixed in which caused the trouble in each case. Some of it would be sloppy and taste flat,—it wouldn't be sweet." From his experience in packing corn from fields that were touched with frost so that the flags over a portion of the field are frost-bitten one or two inches down on the husks, and the tassels frost-bitten to such an extent that the general appearance of the field changes when the sun strikes it, he should say such corn was not suitable for canning, four or five days, or three or four days after the frost. He states that he had special experience with different fields of frost-bitten corn at North Anson in 1888, when there was a heavy frost, the severity of which was not equalled in succeeding years until 1911; that they kept the corn that came from the fields that were touched lightly by the frost separate and in different grades from the corn that came from the fields that were struck heavily by frost; and

that to his knowledge the lightly frosted corn from fields that had been kept separate came back to them in the condition described by him as unmerchantable corn.

Thomas W. Atwood, who had been in the employment of the defendants continuously for 23 years, testifies that the frost of 1911 was the most severe that they had ever experienced in his recollection; that he had examined, in the cans, corn from fields that had been struck by the frost, so that the ends of the flags and the tassels have been struck and some of the ears of corn frosted down one or two inches, and the general appearance of the field changed after the frost, and he should say that such corn is unsuitable and unsafe for canning purposes five or six days after the frost; some of the cans might show a change of consistency and some not; some of the cans would be found sweet and some flat and tasteless, and unsalable,—but they do not hear from it until it gets onto the market and into the hands of the consumer and back again, usually not for six months at least.

Mr. Chute, foreman of the factory, who had been engaged in the corn-packing business for more than twenty years, speaking of the severity of the frost says the water in the cans on the stoop of the factory was frozen on the morning of the 14th; that they closed operations at the factory that fall on the 20th, but took the corn from three fields after Monday, the 18th, including Mr. Palmer's; that on account of the favorable location and nature of the growth on one of Palmer's fields the corn brought to the factory from that field showed no indications of frost whatever; that Palmer had also planted a field of corn for the North Fairfield factory as well as for that at Skowhegan, and as he was unable to deliver all of the corn from the Skowhegan field in season for that factory to close on the 20th and had four or five loads picked for the Fairfield cannery. Chute arranged with Palmer to make an exchange and take the corn already picked for the Fairfield creamery, which was to run a week longer, in lieu of that in the Skowhegan field.

In relation to this transaction, Mr. Palmer called in rebuttal admits that when this exchange was effected for their mutual accomodation, he said nothing to Mr. Chute "about the North Fairfield corn being hit by the frost;" and as far as he knew, Chute was

swapping his good corn for the North Fairfield corn in order to close his factory the next day. He didn't consider it any of his business what they wanted it for,—he was willing to swap with them.

But whether the defendants' foreman was deceived or acted under a misapprehension or otherwise in exchanging good corn for that which was frost-bitten, is of very little importance. Even if he was induced to accept a few loads of corn no better than Trafton's, that fact has no necessary tendency to prove that the Trafton corn was suitable for canning. The defendant's evidence that it was unsuitable was further corroborated by the testimony of Mr. Webb of Portland, who has been engaged in the canning business for 32 years, by Mr. Grant of Unity, who has been engaged in canning corn for seven years in connection with his work as a farmer, by Mr. Eastman of Fryeburg, and Mr. Fernald of Poland, who have been engaged in the canning business for 25 years each; and also by the testimony of the chief chemist of the National Canners' Laboratory. None of these five witnesses last named have any connection whatever with the Portland Packing Company.

In order to give their brand of corn a legitimate status in the market, every can must be guaranteed under the Pure Food Act of Congress of 1906. Dealers who sell to their customers a high grade of goods, packed and inspected in accordance with approved methods, and expressly guaranteed under the Pure Food Act, with no defect discoverable by the exercise of the sense of sight, smell or taste, and hotel keepers and victualers who furnish such goods to their guests for food, are not liable for injuries to such customers or guests caused by eating such food, though it is in fact found to be poisonous. *Bigelow* v. *Maine Central R. R. Co.*, 109 Maine; 85 Atl., 396. Whatever liability for damages there may be in such a case, must rest solely upon the packer who cans the goods. In view of these rules of liability for injuries, and the beneficent legislation both Federal and State, designed to protect the people against the dangers of impure and unwholesome food, it is incumbent upon packers to exercise great vigilance and precaution in their endeavors to select for canning only such products as are entirely suitable for that purpose; and when they have manifestly acted in

good faith in rejecting any product offered under a contract which requires it to be suitable for packing, their conduct should be reviewed by the court with every consideration consistent with the rights of others.

In the case at bar, it is the conclusion of the court that the evidence did not warrant the jury in finding that the corn raised on the plaintiff's ten-acre field was suitable for packing, and that the verdict against the defendants for rejecting the corn from that field cannot be sustained.

But with respect to the four-acre piece, which was on still higher ground than the ten-acre lot, the evidence seems to justify a different result. As hereinbefore stated, the defendants introduced no evidence in relation to the effect of the frost upon the corn from that field, but relied solely upon the evidence introduced by the plaintiff, and the probabilities suggested by all the evidence in the case. The plaintiff testifies that he thought there were very slight indications of frost on that field, and upon examination he "saw that the frost hadn't injured it a particle;" and he so informed the defendants' inspector, Mr. Hill, but Hill said "it was no use to go near it," and he never did.

Irving Tracy, one of the plaintiff's workmen, who examined this field says he never saw a flag on that piece that was hit by the frost. Mr. Russell also testifies that he examined the corn in that field and found the flags, stalks and ears all green and in nice condition, and the kernels of corn sweet and juicy and in a milky condition. In the absence of anything to the contrary, aside from the presumption arising from the severity of the frost in that vicinity, the jury were warranted in finding the corn from this piece suitable for canning.

The jury appear to have assessed the damages at $62.82 per acre, or $251.28 for four acres. If, therefore, the plaintiff shall remit all of the verdict above $251.28 within thirty days from the receipt of the certificate of this decision by the Clerk of Courts of Somerset County, the motion for a new trial is overruled. If he does not so remit, the motion for a new trial is sustained and a new trial granted.

FRANK E. BORDEN

vs.

SANDY RIVER AND RANGELEY LAKES R. R. CO.

Franklin. Opinion March 29, 1913.

Action. Burden of Proof. Damages. Fraud. Injuries. Misrepresentation. Receipt. Release. Verdict.

1. The burden resting on the plaintiff to escape the effect of a written release is a heavy one, because written documents duly signed are not to be lightly disregarded and set aside. In the absence of fraud, or unconscionable advantage or mental incapacity, such settlements should stand.
2. When the settlement was made, both parties were of the opinion that the injury was not so serious as it proved to be.
3. The settlement was honestly made and must stand. The mere fact that subsequent recovery was not so rapid as plaintiff expected affords no ground for annulling the settlement.

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

This is an action on the case to recover damages for personal injuries alleged to have been received in consequence of the negligence of the defendant while he was transferring freight from a car on the defendants' narrow guage line to a car of the Maine Central Railroad Company on the adjoining track in the yard at Farmington. While so employed, the defendant alleges that a timber or bar fell from a raised door of the Maine Central car, striking him on the shoulder and causing the injuries complained of. The plea is the general issue and brief statement that the plaintiff, before the commencement of this action, in consideration of thirty-five dollars paid to him by the defendant, in a writing by him signed, released and discharged the defendant from all claims for damages to him in person and property, including all expense of

medical attendance and nursing, as set forth in his writ. The jury returned a verdict for the plaintiff for $2000 and the defendant filed a general motion to set said verdict aside.

The case is stated in the opinion.

Sumner P. Mills, for plaintiff.

Frank W. Butler, and Elmer E. Richards, for defendant.

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

CORNISH, J. Assuming that the plaintiff originally had a valid cause of action against the defendant, to recover damages for injuries received on October 21, 1911, he voluntarily released the same on November 3, 1911, and is thereby debarred from recovering in this suit. The evidence fails to disclose any valid ground upon which the settlement then made, and the written release then given, can be set aside.

While transferring freight from a car on the defendant's narrow guage line to a car of the Maine Central R. R. Co. on the adjoining track, in the yard at Farmington, a timber or bar fell from the raised door of the Maine Central car striking the plaintiff upon the shoulder and causing the injuries complained of.

Evidently the injury was not at the time deemed serious. No bones were broken or dislocated. When asked by the foreman immediately after the accident, "if it hurt him much," the plaintiff replied that "he couldn't tell; that his arm was numb." He continued to work during the remainder of the day and did not seek medical assistance until two days after, when he consulted Dr. Linscott, who gave him some salve and recommended hot packs. On the next day, Dr. Pratt was called, under whose advice he went to a hospital in Lewiston, where he remained three or four days and then returned home, where the same treatment of electrical massage was given him. The plaintiff's arm has been kept in a sling except when it was being treated, and this continued disuse may account in a large measure for the present loss of action and feeling.

On October 27, 1911, the plaintiff wrote to the Maine Central R. R. Co., as follows: "I am writing to see if you are willing to help me by giving me my time. I was hurt by a timber falling on my shoulder and it laid me up and the doctors say it will be some time before I can work again. . . . I have a wife and two children to support and I can't give them a living. The blow it gave me dropped my arm down useless," etc.

In response to this request, Mr. Ireland, the claim agent of the Maine Central R. R. Co., went to Farmington and met the plaintiff at the hotel on the evening of November 3. After some conversation as to the extent of the injury and the plaintiff's claim, during which the plaintiff testifies that he said he wanted his wages until he could work again, and Mr. Ireland says he wanted forty or fifty dollars, Ireland consulted the general manager's office in Portland by telephone, and then made a counter offer of thirty-five dollars in full settlement, which the plaintiff finally accepted, although as Ireland testified, the plaintiff said it was not enough as he thought he would be laid up another week. Thereupon, Ireland made out a check for thirty-five dollars which he gave to the plaintiff, and wrote out a receipt and release discharging the Maine Central R. R. Co. and the Sandy River & Rangeley Lakes R. R. Co. from all claims and demands of every kind growing out of the accident, and the plaintiff signed it, the names of both railroad companies being inserted, because there was some doubt as to which one was legally liable, a fact that was explained to the plaintiff at the time.

The burden resting upon the plaintiff, to escape the legal effect of a release such as this, is a heavy one. Written documents duly signed are not to be lightly disregarded and set aside. Unless fraud exists, or such misrepresentations or suppression of truth as amount to fraud, or unless the parties are so situated that an unconscionable advantage is taken through lack of mental appreciation of the nature of the transaction or otherwise, such settlements stand; and they should stand. The law favors settlements, and, in the absence of the elements above stated, will enforce them. The fact that subsequent recovery is not so rapid as the injured party may have expected, affords no reason for annulling them. If they are entered into freely, fairly, and with a full knowledge of their purport, the future must take care of itself.

In the case at bar, not one of the destructive elements is present. The plaintiff and not the defendant took the initial step. He wrote to the Company, not the Company to him. At the time of the conference, the two parties met on an equality. The plaintiff, as the evidence discloses, was a man thirty-three years old, in excellent health except for his arm, intelligent and capable of securing his rights. No unfair advantage was sought to be taken of him, and none was taken. No misrepresentations were made. The only statement which the plaintiff asserts Ireland made approaching such fraud was to the effect that he claimed to have letters from Dr. Linscott and Dr. Pratt stating that the plaintiff's disability would be of only about three weeks' duration. Mr. Ireland emphatically denies this, and all the circumstances corroborate his testimony.

The plaintiff further attempts to show that he was unaware of the fact that he was making a final settlement, and supposed that he was receiving thirty-five dollars on account of lost time, and would receive more if further time were lost. To combat the signed release, he says that he signed it without reading it himself, and that Ireland misread it to him. This is a serious charge, and should be substantiated by "trustworthy evidence consistent with undisputed circumstances."

But a careful study of the testimony, taken in connection with the circumstances, refutes all these charges. Mr. Ireland denies them, and says that he handed the release to the plaintiff who took it and apparently read it; and Ireland's whole testimony bears the impress of truth. Moreover, it is well-nigh incredible that a man, who had himself sought the settlement and who was so careful in his business transactions as to keep a carbon copy of all the letters he wrote to the Company, as this man did, should sign a receipt without knowing its contents. That he did know them is proved by the fact that on November 16th, he wrote to the General Manager of the Maine Central R. R. Co., stating that his arm was not improving fast, that he had as yet no use of it, that it would probably be six weeks before he could work, expressed his thanks for what the Company had already done, and asked further help,—"enough more to bridge me over till I go to work." Then he adds these significant words, "Now if you can and are willing I will pay

back what you loan me this time by working for the Company when I get able." This statement, true when written, is utterly inconsistent with the plaintiff's contention at the trial.

When the settlement was made, the plaintiff undoubtedly thought he would soon recover. The event proved otherwise, either because the injury was more serious than he supposed or because he has allowed his arm to remain too long unused.

But the settlement itself was honestly effected on both sides, and must stand. This conclusion is in harmony with recent decisions of this court. *Valley* v. *B. & M. R. R.,* 103 Maine, 106; *Barrett* v. *L. A. & W. St. Ry. Co.,* 104 Maine, 479; *Same* v. *Same,* not yet reported.

From the verdict for the plaintiff, we must assume that the jury found the plaintiff's testimony true; but a careful study of the evidence convinces us that the improbability and unreasonableness of the story were overshadowed by sympathy for one whose injury, as the result proved, did not seem to be fully compensated by the amount received. "Settlements are favored by the law, but if they are to be set aside upon the uncorroborated testimony of the claimant, though made in writing and signed by him, there will be little use in making settlements." *Valley* v. *B. & M. R. R.,* supra.

Motion sustained.
Verdict set aside.

ALBERT L. MANNING *vs.* WILLIAM H. SHERMAN.

Hancock. Opinion March 31, 1913.

Accident. Agent. Condition. Contributory Negligence. Contract. Defective. Invitation. Injuries. Knowledge. Lessee. Lessor. Negligence. Occupancy. Premises. Proximate Cause. Reasonable Care. Scope of Agency.

On November 13, 1911, the plaintiff was injured while in the Rodick Block, so called, in Bar Harbor. The defendant was lessee of said premises and had full charge and control thereof. In an action of tort against the defendant, *Held:*

1. That it was the duty of the defendant to use reasonable and ordinary care in keeping the premises safe for the access of all persons who might have occasion to come upon them by his invitation, either express or implied, in providing a safe and suitable entrance to the stores and offices, and in having the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by means of misleading doors and deceptive landings.
2. That the leaving of the cellar door unlocked was the proximate cause of the injury, and for that the defendant was not legally responsible.
3. That an owner of premises, which are not in a defective or dangerous condition, is not liable for injuries caused by acts of third persons, which were unauthorized or which he had no reason to anticipate, and of which he had no knowledge.

On report. Judgment for defendant.

This is an action on the case to recover damages for personal injuries sustained by reason of the negligence of the defendant. The plaintiff, on the 13th day of November, 1911, while in the Rodick Block, so called, in Bar Harbor, for the purpose of transacting some business opened an unlocked door at the end of a recess in the building and walked into a floorless area, and fell into the cellar sustaining the injuries complained of. At the conclusion of the evidence, by agreement of the parties and the consent of the court, the case was reported to the Law Court on so much of the evidence as is legally admissible, the Law Court to determine all

questions of law and fact, and, if it finds the plaintiff entitled to recover, to assess the damages.

The case is stated in the opinion.

Edward S. Clark, for plaintiff.

H. L. Graham, and Peters & Knowlton, for defendant.

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

CORNISH, J. On November 13, 1911, the plaintiff was injured while in the Rodick block, so called, in Bar Harbor, of which the defendant was lessee under a fifteen-year lease, dated March 1, 1907. It is conceded that, as lessee, the defendant had full charge and control of the premises and stood in the place of the lessor, the owner.

The plaintiff on the day in question had stepped from the sidewalk on Cottage Street into the open recess in the building from which on the right was an entrance into the store occupied by Walls and Brewer, and on the left an entrance into the fire insurance agency of Frank E. Walls & Co. This recess, or hallway, was five feet and one-half wide at the street, seven feet four inches long, and a little over three feet wide at the inner end. At this narrow inner end was a door opening into a cellarway eight feet deep, without stairs, an open area. This door was equipped with a Yale lock, and was intended and supposed to be kept locked at all times, but was unlocked at the time of the accident. The building had been reconstructed by the defendant during the season of 1911 and the recess, as well as the doors leading therefrom, had been changed.

On the day in question, the plaintiff entered the building for the purpose of transacting some business in the fire insurance office. Instead of opening the door at the left, as he should, he pushed the unlocked door at the end and, stepping into the floorless area, fell into the cellar beneath and sustained serious injuries, to recover for which this action was brought.

It is not seriously contended that the leaving of this cellar door unlocked was not a negligent act. That was the proximate cause of the accident; and the single question that needs to be considered

is, whether, under the evidence in this case, the defendant was legally liable therefor.

It is the opinion of the court that he was not.

The facts connected with the unlocked cellar door are these:

When the defendant reconstructed the Rodick building, he left the cellarway incomplete, and nonusable, until such time as he might put in a cement floor and a heating plant. He therefore had a door constructed without any latch or knob on the outside, but with a Yale lock, which on the completion of the work was securely locked and remained so until about the time of the plaintiff's accident. The defendant did not himself occupy any portion of the Rodick block, but had a store in an adjoining building. This Yale lock had two keys, and the defendant, when the work was finished about June 15, 1911, took them and placed them in the drawer of the cash register in his own store, where they remained until within a week of this accident.

About a week previous to this accident, Mr. Brewer of the firm of Walls & Brewer, one of the tenants of the Rodick block, having occasion to have some plumbing done in the cellar, went to Miss Paine, a clerk in the defendant's store and asked for the key to the cellar door. She took it from the cash register and gave it to him. He carried it to Mr. Carter, the plumber who had charge of the work and whose two employees actually did the work. One of the three plumbers unlocked the door, put down some sort of a ladder, and a portion of the work was done within a day or two. Then, on the day of the accident, one of the plumbers returned to complete the job, and opened the door again, the key having in the meantime remained in the possession of the plumbers, went down into the cellar, neglected to lock the door behind him, although he says he thought he had fastened it, and while there for a short time, this accident happened.

Under these facts, we fail to see in what respect the defendant was negligent.

He was responsible only for neglect of duty, and that duty was to use reasonable and ordinary care in keeping the premises safe for the access of all persons who might have occasion to come upon them by his invitation, either express or implied, in providing a safe

and suitable entrance to the stores and offices and in having the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors and deceptive landings. *Foren* v. *Rodick*, 90 Maine, 276.

This measure of duty the defendant fully met. He had constructed a proper door to this open area, had securely locked it and had taken the key into his own possession and deposited it in a place of safe keeping. Up to this point surely, no negligence could be attributed to him. He had done all that reason or the law could require of him, and at this point the defendant's connection with the transaction ceased. Of the subsequent steps he had no knowledge whatever. Nor had he any reason to anticipate them. The work to be done was not for him, and he had no knowledge that Brewer contemplated doing it. He did not know that the key had been taken away and given to Brewer or to the plumbers until after the accident. He continued to believe and had reason to believe that the door remained as he had left it, securely fastened. He had given to Miss Paine no authority or permission to deliver the key to Brewer, or to any one else, and no such authority could be implied from the nature of her employment. She was simply a sales-clerk in the defendant's store. She did not even have charge of the books. She had no more to do with the key to the Rodick block than to the key to her employer's house or garage. In delivering the key to Brewer, without authority from the defendant, she was entirely outside the scope of her employment or agency. Her act was not the defendant's act; and the law does not hold one responsible for the unauthorized acts of third persons who stand in no relation of agency to him.

This principle is well stated in these words: "When the injury is the result solely of the negligent act of a third person, who does not stand in such a relation to the defendant as to render the doctrine of respondeat superior applicable, no liability attaches to defendant. The fact that the negligent act which caused the injury was done on a person's land or property will not render him liable, where he had no control over the persons committing such act, and the act was not committed on his account, nor where the third per-

son, whose negligence caused the injury, assumes control of the owner's property without authority. An owner or occupant of premises, not in a defective or dangerous condition, is not liable for injuries caused by acts of third persons, which were unauthorized, or which he had no reason to anticipate and of which he had no knowledge." Cyc., Vol. 29, pp. 477-8.

See also *Clapp* v. *LaGrill,* 103 Tenn., 164, 52 S. W., 134; *Mahoney* v. *Libbey,* 123 Mass., 20.

In *Handyside* v. *Powers,* 145 Mass., 123, the plaintiff was injured by falling down an elevator well. The door to the well had been provided with a lock, had been locked and the key deposited in the defendant's office. There was evidence that a key had been obtained by the plaintiff's employer and used, but without the knowledge or consent of the defendant or his agent. In sustaining a verdict which had been ordered for the defendant by the presiding Justice, the court say:

"The door to the elevator had been provided with a lock, had been locked, and the key deposited in the defendant's office. This was the only key known by the defendant or his agent to exist, and it was found in its place in the defendant's office after the accident. There was evidence that a key had been procured by King and used, but without the consent or knowledge of the defendant or his agent, and that the neglect of King in unlocking the door and in leaving it unlocked had been the cause of the injury. But the act of King in obtaining a key without the knowledge of the defendant, and his subsequent carelessness, cannot be attributed to the defendant."

This case is directly in point, because in principle the defendant was no more liable for the use of the key procured from Miss Paine than for the use of one procured from any other third party.

The chain of causal connection was broken, the act of one or more third parties intervened, *Maddox* v. *Brown,* 71 Maine, 432; and without considering the question of contributory negligence which was argued by counsel, it is sufficient for the purposes of this case to hold, as we must, that no liability attached to the defendant.

Judgment for defendant.

CHARLES E. EDGELEY, Admr., *vs.* ADDIE A. APPLEYARD.

Piscataquis. Opinion March 31, 1913.

Admissibility. Civil Cases. Coroner's Inquest. Cross-examination. Criminal Cases. Common Law Rule. Error. Ex parte. Negligence. Nonsuit. Privies. Testimony. Witness.

1. The testimony of a witness since deceased, given at a previous trial, may be received in evidence at a subsequent trial of the same case.
2. The testimony of a witness given at a coroner's inquest, upon the death of the plaintiff's intestate, is inadmissible, the witness having deceased after the inquest and before the trial.
3. The coroner's inquest was not a former trial of the present case, nor a former action involving substantially the same issues, and was not between the same parties, nor parties and privies substantially identified with the defendant.

On exceptions by plaintiff. Overruled. Plaintiff nonsuit.

This is an action on the case to recover damages of the defendant for causing the death of Laura A. Cates, by drowning, through the wrongful act, neglect or default of said defendant, and is based on Sections 9 and 10 of Chapter 89 of the Revised Statutes. The plaintiff claims that his intestate, while crossing the river in a team where a ford had been provided below the mill dam controlled by the defendant, the wagon in which she was riding was struck by a flood of water, overturned, and she was drowned. It is alleged that the defendant hoisted the gates in the dam and the flood was the consequence. In the course of the trial, the plaintiff offered the testimony of Samuel W. Cates, taken at a coroner's inquest upon the death of Laura A. Cates, the plaintiff's intestate, and the Justice presiding excluded it, to the exclusion of which plaintiff excepted. Plea, general issue. At the conclusion of plaintiff's evidence, the Justice presiding ordered a nonsuit and the plaintiff excepted. It was stipulated that if the Law Court decided that said testimony is admissible, the case is to be remanded for trial at nisi prius.

The case is stated in the opinion.

John S. Williams, for plaintiff.

Hudson & Hudson, for defendant.

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

CORNISH, J. The single question argued and presented in this case is whether the testimony of a witness given at a coroner's inquest upon the death of the plaintiff's intestate was admissible in this action, when offered by the plaintiff, the witness having deceased after the inquest and before the trial. If not, the nonsuit ordered by the court is to stand.

We think it was inadmissible, and that its exclusion by the presiding Justice was without error.

The common law rule is well settled in this State that the testimony of a witness, since deceased, given at a previous trial may be received in evidence at a subsequent trial of the same case. *Watson* v. *Props. of Lisbon Bridge,* 14 Maine, 201; and the precise words are not required, but the substance of the whole testimony, *Emery* v. *Fowles,* 39 Maine, 326; *Lime Rock Bank* v. *Hewett,* 52 Maine, 531. This rule is applicable in criminal as well as civil cases, if the previous testimony was given, as in a civil case, at a trial in which the witness was cross-examined by the opposite party, or where there was an opportunity for such cross-examination. *State* v. *Herlihy,* 102 Maine, 310. Under the existing system of stenographic reporting, the exact words can be reproduced and the certified copy of the stenographer's notes is made admissible by R. S., Chap. 84, Sec. 162. *State* v. *Frederick,* 69 Maine, 400.

This is as far as the decisions have gone in this State; but in well-considered cases in other jurisdictions, and in the view of learned text writers, the scope of the rule has been somewhat broadened, so as to include the evidence of a deceased witness given, not only on a former trial of the same action, but in a former action involving substantially the same issues between the same parties, and a mere nominal change of parties is of no consequence, provided the parties in the second action are so privy in interest with those in the former trial that the same motive and need for cross-examination

existed. *Orr* v. *Hadley,* 36 N. H., 375; *Yale* v. *Comstock,* 112 Mass., 267; *McIntorff* v. *Ins. Co.,* 248 Ill., 92, 93 N. E., 369; *Smith* v. *Kezear,* 115 Ala., 455, 22 So., 149. Green on Ev. 16th ed. (enlarged and annoted by Prof. Wigmore) Sec. 163; Chamberlayne Modern Law of Ev., Vol. 2, Sec. 1652, et seq.

"The rules regulating the admissibility of this species of evidence are careful to provide that the party against whom the evidence is now offered, or some one sufficiently identified with his interest to make these rights effective, should on the former trial have confronted the witness whose testimony is now offered and have had an adequate opportunity for an efficient cross-examination upon the point covered by the testimony which it is now sought to prove by secondary evidence." Chamberlayne, Vol. 2, Sec. 1656.

Whether the issue in the two cases is the same or substantially the same, is a preliminary question to be decided by the presiding Justice, and his ruling thereon is conclusive unless it is based upon some error in law, or is deemed to be an abuse of judicial discretion. *Chase* v. *Springvale Mills Co.,* 75 Maine, 156.

Applying the broadest test above given, we have no hesitation in saying that the testimony of the plaintiffs intestate given at the coroner's inquest was not admissible in the present action, brought against the defendant for alleged negligence.

R. S. Chap. 140 provides for the holding of coroner's inquests "on dead bodies of such persons only as appear or are supposed to have come to their death by violence, and not when it is believed that their death was caused by casualty" (Sec. 1); and then follow the steps to be taken. These proceedings are designed primarily to aid in the detection of crime. The inquest is ordinarily held immediately after the event has happened, and oftentimes before the perpetrator is known or even suspected. They are initiated by a public officer, there is no party defendant, and the county attorney, as the public prosecutor, usually elicits the evidence.

The action under consideration is based upon a casualty, but a casualty alleged to have been brought about by the negligence of the defendant. It might well be doubted whether, under the strict terms of the statute, a coronor's inquest should have been held at all. But waiving that point, it was, at best, an investigation concerning which this defendant had no notice and with which she had no legal

connection. The record contains an admission to the effect that "the defendant was not present by herself or counsel, when the testimony was given at the inquest and was not notified to be present." As to her, it was purely ex parte, and the testimony then given could no more be used against her in this action than could a deposition, of the taking of which she had received neither notice nor knowledge.

The counsel for the plaintiff relies somewhat upon the fact that Mr. Hayes appeared as an attorney at the inquest and cross-examined the witness. But the admission proves that he was not acting as attorney for the defendant, and from the nature of the interrogatories, it might perhaps be inferred that he was acting as attorney for the town, which at that time may have anticipated that a suit would be brought against it.

The learned counsel further contends that because Sec. 13 of Chap. 140 provides that the evidence of all the witnesses taken at a coroner's inquest "shall be filed with the Clerk of Courts and there remain open for inspection," such evidence is rendered admissible in subsequent court proceedings. Far from it. This section is in harmony with the general purpose of the chapter. It perpetuates the testimony and renders it accessible as an aid in further investigation. Had the Legislature intended to make such testimony admissible in all future cases of every sort, that might grow out of the accident, it could and would have said so.

No one of the elements is present here that the rule of admissibility requires. The inquest was not a former trial of the present action, nor a former action involving substantially the same issues. It was not between the same parties, nor between parties and privies sufficiently identified with the defendant; the defendant did not confront the witness and she neither cross-examined nor had any opportunity to cross-examine him upon the points at issue here.

These are insuperable barriers to the admission of the testimony.

Many authorities are in harmony with the conclusion here reached. Prof. Wigmore, after a discussion of the subject, says that in the United States "the proper conclusion has been reached that the lack of cross-examination, as an element in coroner's pro-

cedure, makes such testimony inadmissible." 2 Wigmore Ev., Sec. 1374. To the same effect are, *State* v. *Houser,* 26 Mo., 436; *Jackson* v. *Crilly,* 16 Colo., 103, 26 Pac., 331; *Petrie* v. *Ry. Co.,* 29 S. C., 363; 7 S. E., 515; *Pittsburg C. & St. L. Ry. Co.* v. *McGrath, Admr.,* 115 Ill., 172, 3 N. E., 439.

The entry must accordingly be,

Plaintiff nonsuit.

SARAH H. GLEDHILL *vs.* ALICE W. MCCOOMBS.

Somerset. Opinion March 31, 1913.

Administrator. Assignment. Assumpsit. Executors. Equitable Interest. Evidence. Gift. Life Insurance. Money had and Received. Nominal Party. Party. Parties. Policy. Revised Statutes, Chapter 84, Section 112. Title.

1. A policy of life insurance, payable to the legal representatives of the assured, may be the subject of gift.
2. Such gift may be effected by mere delivery, without assignment of the instrument.
3. Such gift must be accompanied by such words or acts on the part of the donor as to indicate a clear intention to give, coupled with the subsequent retention by the donee.
4. To establish a gift of this nature, where the donor has deceased, and the opportunity for fraud is great, the evidence should be full, clear and convincing.
5. This action was properly brought against the defendant personally, instead of against her as administratrix of this estate, because the policy did not belong to the estate and the defendant as administratrix had no rights in it.
6. The action being against the defendant individually, the plaintiff was a competent witness.

On report. Judgment for the plaintiff for $9,907.40 with interest from February 24, 1912, the date of admitted demand.

This is an action of assumpsit for money had and received, brought by the mother of Edwin Gledhill, deceased, against his wife to recover the sum of $9,907.40, being the proceeds of a policy of life insurance taken out by said Gledhill for the sum of $10,000 and made payable, in the event of his death, to his executors, administrators or assigns. This policy, the plaintiff claims, was given to her by Edwin Gledhill prior to his marriage, which she accepted, kept and retained as her own. Plea, the general issue. A brief statement by defendant and a counter brief statement by plaintiff were filed. At 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.

The case is stated in the opinion.

George W. Gower, for plaintiff.

Butler & Butler, for defendant.

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

CORNISH, J. This is an action of assumpsit for money had and received, brought by the mother of Edwin Gledhill against his wife to recover the sum of $9,907.40, the proceeds of a policy of life insurance taken out by said Gledhill in the Union Mutual Life Insurance Company of Portland, Maine, on November 5, 1901, for the sum of $10,000 and payable in the event of his death to his executors, administrators or assigns.

The plaintiff claims that prior to her son's marriage to the defendant he gave the plaintiff a life insurance policy which she accepted and kept as her own. To quote her own words: "He says, 'Here is an insurance policy on my life, mother. It is for you, mother, and take care of it, and if anything happens to me, it will be some help to you. . . . Take it and put it away;' and I locked it up." After his marriage to the defendant in January, 1903, at her son's request and upon his promise to return to her the same or another policy within a few days, she delivered to him the first policy, and within three or four days he brought to her the policy in suit. Whether it is the same one as the first, or another,

the plaintiff does not know; and the fact is immaterial to the issue. His words, on returning the policy, were these: "Here is your policy, mother, for $10,000. Take care of it." She accepted it, and heeded his injunction, keeping it in her exclusive possession until after his decease.

The policy was then sent by the plaintiff to the defendant after she was appointed administratrix, was collected by her, as administratrix, and is now claimed by her as alleged in her pleadings "as widow of said Edwin Gledhill in accordance with the law of descent and that it came from the estate of said Edwin Gledhill and the payment thereof made a part of the account of the administratrix of said estate, and that no objection was ever made to the allowance of said account and no appeal was ever taken therefrom by the plaintiff."

In view of the overwhelming authority that a policy of life insurance payable to the legal representatives of the assured may be made the subject of gift, in the same manner as other choses in action, and that such gift may be effected by the mere delivery, without assignment of the instrument, if accompanied by such words or acts on the part of the donor as indicate a clear intention to give, coupled with the subsequent retention by the donee, it cannot be seriously contended here that, if the necessary elements of fact are proved, the gift was not consummated.

Thus, a valid gift of a negotiable promissory note may be made without indorsement or other writing. *Grow* v. *Grow*, 24 Pick., 261; *Borneman* v. *Sidlinger*, 15 Maine, 429; *Wing* v. *Merchant*, 57 Maine 383; of a savings bank book unaccompanied by an assignment, *Pierce* v. *Savings Bank*, 129 Mass., 425; *Hill* v. *Stevenson*, 63 Maine, 364; of unindorsed certificates of stock, *Reed* v. *Copeland*, 50 Conn., 472; and of an unassigned life insurance policy, *Chapman* v. *McIlraith*, 77 Mo., 38, 46 Am. Rep., 1; *Hane* v. *Germania Life Ins. Co.*, 197 Pa. St., 276, 47 At., 200; *Travelers Ins. Co.* v. *Grant*, 54 N. J. Eq., 208, 33 At., 1060; *Knowles* v. *Knowles*, 205 Mass., 290; *Opitz* v. *Karel*, 118 Wis., 527, 62 L. R. A., 982; *Lord* v. *N. Y. Life Ins. Co.*, 27 Tex. Civ. App., 139, 65 S. W., 699. This rule of law is recognized by this court in *Brown* v. *Crafts*, 98 Maine, 40, as follows: "The delivery of this property

was not incomplete by reason of the lack of formal indorsement or assignment of certificates of stock, bonds or notes. The gift of these choses in action could have been completely executed by simple delivery with the intent at once to pass the title. Delivery with intent to pass the title irrevocably is sufficient." In such case, of course, it is the equitable or beneficial interest that passes, while the mere naked legal title remains in the donor.

The right and power to give in this manner being established, the next question is, did Edwin Gledhill in fact give this policy to his mother, with the full intent of transferring all rights thereunder to her?

The measure of proof in this class of cases should be ample. It should be full, clear and convincing, because the opportunity for fraud is so great. Oftentimes, the circumstances are such as to oblige the court to look with suspicion upon the claim of the alleged donee. But the case at bar is free from all such suspicion.

The uncontradicted evidence shows that Edwin Gledhill was the prop and stay of his mother after his father's death. She was left practically without means and he, as the oldest child, largely supported her. He paid her rent and gave her money with which to maintain her home. He paid all the expenses connected with a serious surgical operation, and sent her twice to Europe. The relations between mother and son were so close and tender as to render this gift most natural. The mother's testimony, already quoted, as to what was said and done when Edwin handed her the policy leaves nothing wanting to make it a completed gift. From that time he never exercised the slightest authority or claim over the policy, but it remained continuously in her exclusive possession until after his death, a fact which is of great weight when we consider that he had taken out $27,000 in addition to the policy in suit, $10,000 of which ran to his wife as beneficiary and the balance, $17,000, to his estate. All these policies he evidently kept himself; but what he had termed his mother's policy, she kept; and it was in her possession when he died.

The learned counsel for the defendant interposes an objection to the admissibility of the plaintiff's testimony on the ground that "this action must be deemed to be against the defendant in her capacity as administratrix." This assumption is wrong. The suit

is against the defendant individually, and therefore the provisions of R. S., Chap. 84, Sec. 112 have no application. *Wentworth* v. *Wentworth,* 71 Maine, 72; *Goulding* v. *Horbury,* 85 Maine, 227; *Golder* v. *Golder,* 95 Maine, 259.

Moreover, the plaintiff's evidence as to the perfected gift is corroborated by that of other members of the family, and especially by the son's business associates and closest personal friends, to whom he had stated in varying expressions, and often, that he had provided for his mother, or had given her a $10,000 policy. Only a day or two before his death, he told Mr. Stewart, his companion on the ill-fated journey that resulted in his accidental drowning, that "he had a certain amount of insurance that ran to Alice; and a certain amount that ran to his mother, he had given to his mother."

The evidence of these eight associates and friends comes free from any selfish bias, and is absolutely convincing.

That Edwin Gledhill intended to give, did give, and subsequently acknowledged the gift on many occasions, is proved conclusively.

So much for the merits of the case.

The defendant, however, interposes the further objection that this action should have been brought against the defendant as administratrix and not against her personally. This point if sustained would work a substantial defence because the plaintiff would be thereby left remediless, as the time for bringing an action against the estate has long since expired. She rests this contention upon the claim that the policy, in terms, was payable to the estate, that it could have been collected only by the administratrix, that it was so collected in fact and turned into the estate, being accounted for in the Probate Court, citing *Lee* v. *Chase,* 58 Maine, 432, and *Woodward* v. *Perry,* 85 Maine, 440. These cases, however, can be readily distinguished from the case at bar.

Lee v. *Chase,* supra, holds that a widow cannot maintain assumpsit to recover the one-third of the proceeds of a life insurance policy to which she would be entitled by descent, if the estate were the beneficiary, against a person to whom the policy had been assigned as trustee for the children, and who as trustee had collected it, and was holding it in trust. Her avenue of relief is the Probate Court, because under the statute if the policy belonged to

the estate, its proceeds were there to be distributed, and to quote the language of the opinion, "The policy belonged to the estate or it did not. If it did not belong to the estate, but had been previously assigned in good faith, neither the administrator nor the plaintiff had any claim upon the money collected by the assignee."

In *Woodward* v. *Perry,* supra, the controversy arose over war premiums recovered in the Court of Commissioners of Alabama Claims by the defendant as administrator of the estate of one Given. The funds admittedly belonged to the estate, and therefore it was held that the defendant was liable in his representative capacity only.

The distinction between these cases and that at bar is apparent. In the case at bar, the policy did not belong to the estate; and the defendant as administratrix had no rights in it. It is true that, as the naked legal title remained in the estate, it must be collected in her name. But, she was simply the agency therefor, the conduit through which the proceeds were to pass to their true owner. Her position was nominal merely. The plaintiff could doubtless have maintained an action against the insurance company, if necessary, in the name of the equitable assignor, that is, in the name of the defendant as administratrix, *Borneman* v. *Sidlinger,* 15 Maine, 429, and even against the protest of such administratrix, *Bates* v. *Kempton,* 7 Gray, 382; *Pierce* v. *Savings Bank,* 129 Mass., 425. The defendant's refusal to sue or to have her name used could not destroy the plaintiff's rights under the policy. The proceeds, when collected, belonged to the plaintiff and not to the estate. The defendant had neither the right nor the power to treat the proceeds as a part of the estate, thus rendering the last three years, premiums subject to the claims of the creditors, and reducing her liability under the statute of limitations from a period of six years to eighteen months.

Her attempt to make the proceeds a part of the estate and then to withdraw them as widow under a claim of distribution was futile and the plaintiff was not bound thereby. The plaintiff was not a creditor of her son before, nor of his estate after his decease. It is not a case where new assets have come into the estate, as in *Thurston* v. *Lowder,* 40 Maine, 197, and *Thurston* v. *Doane,* 47 Maine,

79, cited by the defendant; but these funds have never properly come into the estate at all because they were the property of the plaintiff.

The same point was raised in *Goulding* v. *Horbury*, 85 Maine, 227, where the administrator of a donor wrongfully converted property of the donee to the use of the estate of the donor upon the belief that the property was not legally given by the donor to the donee; and was answered by Chief Justice Peters in the course of the opinion as follows, "Another question arose at the trial, the defendant contending that the action should, even if the gift is to be regarded as proved, be brought against him in his representative capacity as administrator of the donor instead of against him personally. This position cannot be safely admitted. The consequences would in many cases be harsh and unjust were that principle to prevail. The defendant must administer upon the donor's property, not upon the donee's. Your executor or administrator is entitled to the possession of your and not my property."

Our conclusion, therefore, is that this policy of insurance was given to the plaintiff, that its proceeds are wrongfully withheld from her by the defendant, and this action for money had and received lies to recover it.

Judgment for plaintiff for $9,907.40, with interest from February 24, 1912, the date of admitted demand.

TABER D. BAILEY, Admr.,

vs.

MERCHANTS' INSURANCE COMPANY, METROPOLITAN NATIONAL BANK, AND CHARLES SARGENT.

Penobscot. Opinion April 5, 1913.

Administrator de bonis non. Administrator. Assignment. Bill in Equity. Certificate of Stock. Collateral Security. Cancellation. Equitable Relief. Executor. Fraud. Good Faith. Interpleader. Jurisdiction. Knowledge. Loan. New Certificate. Pledge. Party. Pro Confesso. Representative of Estate. Redeem. Review. Trustee.

1. When one purchases of an executor stocks or other securities bearing on their face the revelation of a trust, he may safely do so in the absence of notice or knowledge of any intended breach of trust on the part of the executor.
2. If he purchases like property of an ordinary trustee, the law imposes upon him the duty of inquiring into the right of the trustee to change the securities.
3. An executor has an absolute control over all the personal effects of his testator, but he has no power of charging the effects in his hands to be administered by any contract originating with himself.
4. It is a general rule in chancery practice that a decree signed and entered cannot be impeached or vacated, except by a bill of review or by an original bill for fraud.
5. There are exceptions to this general rule in general chancery practice as well as under our statutes.
6. In cases not heard on the merits, a decree obtained through surprise, accident or mistake may be impeached by an original bill for that purpose in general chancery practice.

On report. Bill sustained. Decree in accordance with opinion

This is a bill in equity by the plaintiff as administrator de bonis non of the estate of Ignatius Sargent against the Merchants' Insurance Company of Bangor, the Metropolitan National Bank of Boston and Charles Sargent of Boston, in which he prays that the

Insurance Company may be ordered to cancel the certificate of stock issued to the Metropolitan Bank and issue a new one to the estate of Ignatius Sargent, and to pay the plaintiff the dividends accrued thereon. This stock, it is claimed, belonged to the estate of Ignatius Sargent and was transferred by Charles Sargent to himself, without legal authority. To this bill, the Metropolitan National Bank filed a demurrer and answer and the Merchants' Insurance Company filed an answer and the plaintiff filed replications. At 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 is to render such judgment as the law and equity require.

The case is stated in the opinion.

Taber D. Bailey, for plaintiff.

E. C. Ryder, for Merchants' Fire Insurance Co.

Philbrook & Andrews, for Metropolitan National Bank.

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

WHITEHOUSE, C. J. This is a bill in equity brought by the plaintiff as admr. de bonis non of the estate of Ignatius Sargent of Machias, Maine, against the Merchants' Insurance Company of Bangor, the Metropolitan National Bank, and Charles Sargent, of Boston.

The following allegations are made in the several paragraphs of the bill:

1. Ignatius Sargent died intestate in 1887, and August 2nd of that year his son, the defendant Charles Sargent, was appointed administrator of the estate. Among the assets of the estate was a certificate of twenty shares of the defendant Insurance Company issued to the intestate Ignatius Sargent the year before he died.

2. In September, 1900, Charles Sargent transferred this certificate of stock to himself personally, without the order of the Probate Court and without the knowledge or consent of the other heirs; and in July, 1904, delivered the certificate to the defendant National Bank as collateral security for a loan of $1,600, for which

he gave his note to the bank with a power of attorney authorizing a transfer of the stock.

3. In January, 1905, he gave to the bank a renewal note for the loan of $1,600, stating that the stock was held by the bank as collateral security.

4. No part of the principal of this loan or of the interest thereon has ever been paid by Charles Sargent or any one in his behalf.

5. September 9, 1902, by order of the Probate Court, Charles Sargent was removed as administrator, and there was no administrator of the estate until the appointment of the plaintiff in May, 1909.

6. In May, 1908, the Metropolitan Bank brought a bill in equity against the Merchants' Insurance Company, asking that a new certificate of the 20 shares of stock be issued to the bank upon the surrender of the old one held by it.

In August, 1908, the Insurance Company brought a bill in the nature of an interpleader against the Metropolitan Bank, Charles Sargent of Boston, Ignatius M. Sargent of Machias and Lincoln H. Newcomb of Eastport, who was represented to be admr. de bonis non of the estate of Ignatius Sargent.

January 15, 1909, a final decree was signed and filed in the case, whereby the Insurance Company was ordered to issue to the Metropolitan Bank a new certificate for the 20 shares of stock in question, upon surrender of the old certificate, and it was declared that neither Ignatius M. Sargent, nor Lincoln H. Newcomb, either personally or as admr. de bonis non, had any right or title to the stock.

7. In pursuance of this decree, the Insurance Company issued a new certificate to the bank and paid to the bank the accumulated dividends on the stock amounting to $619.92.

8. The plaintiff further says that Lincoln H. Newcomb was never admr. de bonis non of the estate of Ignatius Sargent, that there was no legal representative of the estate in said equity suit, that the estate was not made a party to it, that the court had no jurisdiction over it, and that the decree entered in that suit was without legal force or effect upon the estate.

9. The plaintiff alleges that Charles Sargent, as administrator, had no authority to transfer said certificate of stock to himself per-

sonally and pledge the same for his personal debt, that the Metropolitan Bank had notice of that fact, that it was a fraud upon the estate for the administrator so to transfer and pledge the stock, and that the estate of Ignatius Sargent is the rightful owner of the stock.

10. Finally, the plaintiff states that the stock in question has a market value of $175 per share, that it is pledged for only $80 per share, that the dividends are more than sufficient to pay the interest on the loan, and even if the transaction of pledging the stock to the bank is valid, that it is inequitable for the bank to retain the whole of the stock for a debt amounting to only one-half of it.

The plaintiff accordingly prays that the Insurance Company may be ordered to cancel the certificate of stock issued to the Metropolitan Bank and issue a new one to the estate of Ignatius Sargent and pay to the plaintiff the dividends accrued thereon. But if the transfer of stock by Charles Sargent to the bank is valid, then upon the payment by the estate to the bank of the amount of the loan with interest, less the dividends received by the bank, that the bank be ordered to transfer the certificate of stock to the estate, and the Insurance Company ordered to record such transfer upon the books of the company.

There is also a prayer for general relief.

The Metropolitan Bank filed a demurrer to the plaintiff's bill, and both the bank and the insurance company have filed answers, but the bill has been taken pro confesso against Charles Sargent. The case is reported to the Law Court on bill, demurrer, answers and proof.

The causes of demurrer assigned by the bank are; first, that the matters set out in the bill are insufficient to entitle the plaintiff to equitable relief; second, that the plaintiff is not entitled to the relief prayed for because the decree in the bill of interpleader filed by the bank, a copy of which is annexed to the bill, is still in full force; and because the plaintiff has an adequate remedy at law.

For the purpose of considering the sufficiency of the plaintiff's bill, the demurrer admits all allegations of fact well pleaded. As above shown, the bill now before the court alleges that Lincoln H. Newcomb was never admr. de bonis non of the estate of Ignatius Sargent; that he never represented the estate in any capacity; that

there was no legal representative of the estate in court in the interpleader suit; and that the estate was not a party to that suit. These allegations of fact are admitted by the demurrer.

It is also alleged in the bill, and admitted by the demurrer, that upon the record of the bill of interpleader Lincoln H. Newcomb was made a party to that suit "under the name and style of administrator de bonis non of the estate of Ignatius Sargent and that the bill of interpleader was taken pro confesso as to him in that capacity. Thus, from an examination of the bill and demurrer in this suit, it satisfactorily appears that the decree in this interpleader case was erroneous, that it was entered through mistake, but that the error is not apparent upon the face of the record.

In support of the demurrer, it is contended by counsel for the bank that inasmuch as the prayer in the present bill asks for a cancellation of the certificate of stock issued to the bank and the issuance of a new certificate to the estate of Ignatius Sargent, it is equivalent to a prayer for the revocation of the decree in the interpleader suit, and that the only method by which the plaintiff could attack that decree was by a strict bill of review.

On the other hand, the plaintiff contends that inasmuch as the want of a necessary party in the former suit is not an error or defect apparent on the record, the decree cannot be attacked by the ordinary bill of review, and admits that his bill is not strictly a bill of review, but an original bill brought by the plaintiff as administrator of the estate, primarily to obtain affirmative relief for the benefit of the heirs, and incidentally to impeach the decree in the former suit, so far as that decree, void against the estate of Ignatius Sargent, has interfered with the property and impaired the rights of the estate.

It is undoubtedly a general rule in chancery practice that a decree signed and entered cannot be impeached or vacated except by a bill of review, or by an original bill for fraud. But there are exceptions to this general rule in general chancery practice as well as under our statutes. Thus, in cases not heard on the merits, a decree obtained through surprise, accident or mistake may be impeached by an original bill for that purpose in general chancery practice. *Herberts* v. *Rowles,* 30 Md., 278; *Bank* v. *Eccleston,* 48 Md., 145; *Cawley* v. *Leonard,* 28 N. J. Eq., 467; Whitehouse Eq. Prac., 302.

In *Arnold* v. *Moyes,* 1 Led. (Tenn.), 308, a decree had been entered apparently binding upon the estate of a deceased person at a time when, by reason of his death and of the failure to bring in the administrator, the estate was without representation in court; and it was held that it was not "error apparent" because the defect was not apparent on the records, and that it did not furnish the basis for an ordinary bill of review.

Furthermore, it is said to be the prevailing rule that when the return or record shows the service of a bill to have been made upon the proper person or official, this can be contradicted in a collateral proceeding so as to show the judgment void. *Raymond* v. *Rockland Co.,* 40 Conn., 401; *State Ins. Co.,* v. *Waterhouse,* 78 Iowa, 674; *Jones* v. *Ore Co.,* 41 N. J. Eq. (3 Atl. 517); Vanfleet's Collateral Attack, 462.

The plaintiff's present bill substantially meets all of the requirements of an original bill in the nature of a bill to impeach a decree. It not only states the decree complained of, but annexes a copy of it to the bill. It sufficiently alleges the entire failure of any representation of the estate in the former suit as the ground upon which the incidental impeachment of the decree is sought, and states the facts and circumstances by which it is made apparent that but for the mistake in serving the bill upon L. H. Newcomb as admr. of the estate there would have been no decree pro confesso against the estate.

Nor does the present bill disclose any want of necessary parties. It appears from the bill and demurrer to be admitted that L. H. Newcomb was not a necessary party and not even a proper party to the original bill, and he is obviously not a necessary or proper party to this bill. It appears from the evidence in the case that Ignatius M. Sargent was one of the heirs of the intestate. His rights and interests in the estate and the matters in controversy are sufficiently represented by the present plaintiff, the admr. de bonis non. *Strout* v. *Lord,* 103 Maine, 410.

The special prayer of this bill is entirely sufficient to authorize the court to grant the specific relief sought by the plaintiff, viz., the cancellation of the certificate of stock issued to the bank, and the issue of a new certificate to the plaintiff; and there is also an alternative prayer for such relief as the plaintiff might be found

entitled to, if the court should hold that the bank acquired a good title to the stock, as collateral security, by means of the transfer and pledge of the same from Charles Sargent. The prayer for general relief also serves to aid and supplement the special prayer by expanding the special relief sought with further relief of the same nature, or supplying the place of the special prayer by giving other relief of a different nature. *McKim* v. *Odom,* 12 Maine, 106; *Burleigh* v. *White,* 70 Maine, 130; *Miller* v. *Jamieson,* 24 N. J. Eq., 43. If, therefore, as a preliminary to the granting of the special prayers, it is necessary that there should be a formal decree in this suit, vacating the decree in the former suit, it will be relief in furtherance of the special relief sought in this bill.

The bill is properly brought in the name of this plaintiff as admr. de bonis non. The case is clearly distinguishable from *Waterman* v. *Dockray,* 78 Maine, 139, and *Hodge* v. *Hodge,* 90 Maine, 505. Here, the suit is to recover and restore to the representative of the estate certain shares of stock which remain in specie, or in the alternative, to redeem them from the bank to which they are assigned and pledged. *Stevens* v. *Goodell,* 44 Maine, 34.

It is accordingly the opinion of the court that the demurrer should be overruled. The case comes to the Law Court on report, and the questions raised upon the plaintiff's bill, the answer filed by the Metropolitan Bank and the evidence introduced on both sides must therefore be now examined.

It is alleged in the answer of the bank that Charles Sargent had full right and authority to transfer the stock to himself personally and to pledge the same for his personal debt; that the bank made the loan and took the certificate of stock as collateral security in the regular course of business and in good faith, without notice or knowledge of any facts which in any way affected the validity of Charles Sargent's title to the certificate or his right or authority to pledge the same; that the Merchants' Insurance Company issued the new certificate of stock to the bank by virtue of the decree in the suit of interpleader; and that the estate of Ignatius Sargent has no title to the stock or the dividends thereon.

It is therefore earnestly contended that the bank is an innocent holder for value and should be fully protected.

In addition to the facts alleged in the bill and admitted by the demurrer, the following facts appear in evidence:

The bond of Charles Sargent as administrator of the estate of Ignatius Sargent was duly filed and approved August 2, 1887. September 9, 1902, he was removed from office for neglecting and refusing to render an account of his administration to the Probate Court; and July 9, 1907, there was a decree for the appointment of Lincoln H. Newcomb as administrator de bonis non, but no bond was ever filed by him, letters of administration were never issued to him, his appointment was never perfected, and he was never qualified to enter upon the administration of the estate. There is nothing in the case showing that any inventory of the estate was ever filed in the Probate Court; but according to a certificate signed by Ignatius M. Sargent and printed as a part of the report of the case, the value of the estate did not exceed $25,000, the value of the real estate having been estimated at $14,000, and the personal estate at $11,000.

With reference to the stock of the Merchants' Insurance Company in question, which was a part of the assets of the estate, Ignatius M. Sargent testifies that there were four brothers who were the heirs of the intestate Ignatius Sargent, viz., Charles, the administrator, Henry, Daniel and himself; that they had a conference and agreed that this stock should go to the highest bidder and that he, Ignatius M., was the highest bidder; that he paid no money for it, but it was understood that it was to be charged to him and accounted for in the distribution of the estate, and that Charles, as administrator, paid him one dividend on the stock in January, 1900. It does not appear, however, that there has ever been any order of the Probate Court for the distribution of the assets of the estate, or that Ignatius ever made any request that the old certificate be surrendered to the Insurance Company and a new certificate issued to him; but, as already shown, the old certificate remained in possession of Charles as administrator, and in September, 1900, was assigned by him as administrator to himself personally, and in July, 1904, assigned by him to the Metropolitan Bank as collateral security for the loan. But in a letter written by Charles to his brother Ingatius, in January, 1903, he states that he had written to the

Insurance Company that all persons in interest had agreed that a new certificate might be issued in the name of his brother Ignatius.

These facts, however, thus disclosed by the testimony of Ignatius, and the Probate records, were wholly unknown to the officers of the Metropolitan Bank at the time of the transfer of the certificate of stock to the bank in 1904. In relation to that transaction, Mr. Noyes, president of the bank, testifies that he knew Charles's uncle, John Sargent, who was doing business at their bank; that he "brought Charles into the bank and introduced him as his nephew and gave a very strong endorsement as to his integrity and business;" that Charles thereupon came with this original certificate of stock as an applicant for a loan of $1,600; that he had already used it as collateral to borrow at a bank in Quincy, and the cashier of that bank came in with him to the Metropolitan Bank in Boston where he also wished to do business; that he "did not have any fact of any kind whatever at that time to lead him to suspect or to believe that Charles Sargent, as heir, did not own that certificate of stock honestly and in good faith; that Charles affirmed his ownership and right to it, saying he was receiving dividends on it;" and the fact that it had been accepted at the bank in Quincy "helped confirm his statement." Mr. Noyes says he noticed that the certificate stood in the name of the deceased, Ignatius Sargent, and that it had been transferred by Charles as administrator to himself personally, and called Charles's attention to the fact; but Charles said, "That is all right, that is my stock; I am receiving dividends on it." The fact that the certificate had not been transferred on the books of the company did not raise any question in his mind as to the legality of the transaction; because, he says, they often accepted as collateral security stock with a transfer signed in blank. He further states that John Sargent told him Charles had practiced law but had gone into business, and he supposed that he knew what he was about and had a legal right to do what he was doing.

It is not in controversy that it was understood by the president of the bank that Charles Sargent was pledging that stock for a personal loan, and it cannot be doubted that it was accepted by Mr. Noyes in good faith in the ordinary course of business, in the confident belief that the stock had become the property of Charles Sargent, and that he had good right and lawful authority to use it

as security for his personal debt. The best evidence that Noyes acted in good faith is the fact itself that he actually loaned and delivered to the borrower $1,600 in money as an ordinary banking transaction on the strength of that security.

In *Carter* v. *National Bank,* 71 Maine, it is said by this court:

"The law recognizes a distinction between an ordinary trustee and an executor. The former has possession for custody and the latter for administration. The latter has a necessary incidental power of disposal which the former does not. And as a consequence when one purchases of the latter stocks or other securities bearing on their face the revelation of a trust, he may safely do so in the absence of notice or knowledge of any intended breach of trust on the part of the executor; but if he purchase like property of an ordinary trustee, the law imposes upon him the duty of inquiring into the right of the trustee to change the securities."

See also the authorities there cited in support of these statements.

In *Field* v. *Schieffelin,* 7 Johns, Ch. 150 (cited in *Carter* v. *Bank,* supra) Chancellor Kent says:

"The purchaser is safe, if he is no party to any fraud in the executor and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction applying them to the extinguishment of his own private debt. The great difficulty has been, to determine how far the purchaser dealt at his peril when he knew from the very face of the proceeding that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and better doctrine is, that in such a case, he does buy at his peril; but that if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry and he may safely repose on the general presumption that the executor is in the due execution of his trust."

See also 18 Cyc. L. & P., 289, where the general rule is thus stated:

"A third person who, in dealing with the representative, acted in good faith and without notice of the representative's bad faith, and parted with consideration, will be protected in the transaction."

While it is undoubtedly true that "no proposition of law is bet-

ter established than that an executor has an absolute control over all the personal effects of his testator" (*Peterson* v. *Bank,* 32 N. Y., 21; *Carter* v. *Bank,* supra); it is equally true that "an administrator has no power of charging the effects in his hands to be administered, by any contract originating with himself." *Sumner, Admr.* v. *Williams,* 8 Mass., 198. It is common experience, however, for the heirs to an estate, by virtue of a mutual agreement for that purpose, to divide among themselves specific items of the personal estate, and when these items thus assigned to each of the heirs are stated by the administrator in his account rendered to the Probate Court, and such conventional distribution is approved by the order of distribution and the settlement of the estate, it is undoubtedly conclusive upon all the parties interested. It is not in conflict with the statutory method recognized in *Hanscom* v. *Marston,* 82 Maine, 288.

In the case at bar, it has been seen that the heirs agreed to have the stock transferred to the highest bidder, and if Charles had been the highest bidder, and the agreement had been ratified in the settlement of the estate, a transfer of the certificate from Charles as administrator to himself personally, made in pursuance of such an agreement, would have been evidence of the transaction to accompany his application for the issuance of a new certificate in his own name, and not a badge of fraud to put the purchaser upon inquiry in regard to the "state of the trust." Charles Sargent had been highly commended by John Sargent, a business man who had the confidence of the bank. He was in possession of a certificate of stock which he asserted to be his property, and which had upon it a transfer to himself that was at least consistent with his good faith and claim of ownership. The president of the bank "had no proof or knowledge" and in fact no suspicion of any defect in the applicant's title to the stock, and "safely reposed" upon the presumption that the administrator had acquired title to the stock in the course of a due execution of his trust, considered in connection with the recommendation of the applicant and all the circumstances attending the loan. He was a bona fide holder for value who parted with the consideration without suspicion of any bad faith on the part of the borrowers, or any notice of a defect in his title to the stock. He is entitled to be protected in the transaction. The estate

was protected by the administrator's official bond duly filed and approved.

It has been seen that in the bill of interpleader instituted by the Merchants' Insurance Company, L. H. Newcomb was alleged to be administrator de bonis non of the estate of Ignatius Sargent, service of the bill was made upon him as a legal representative of the estate, and the bill was taken pro confesso as to him in his alleged capacity as administrator. But it appears from the records that L. H. Newcomb never filed any bond as administrator, letters of administration were never issued to him, he was never qualified to act as administrator, he never did act in that capacity, and never was administrator of that estate. Service of the bill upon him as administrator gave the court no jurisdiction over the estate, and the decree filed in that suit, though valid as to Ignatius Sargent and the Insurance Company, had no binding force or effect upon the estate of Ignatius Sargent, for the reason that the estate never was made a party to the suit and was never heard in court. If it were otherwise, in the absence of an administrator's official bond, there would be no adequate protection against fraudulent collusion between a claimant against an estate and a person falsely alleged to be administrator and wrongfully made a party to a suit.

The decree entered in the interpleader suit apparently declares that the estate of Ignatius Sargent had no right or title to the stock in question. It is the conclusion of the court, however, after a hearing upon the merits in the case at bar, that the estate of Ignatius Sargent then had, and by its legal representative here in court, now has, an equitable right to redeem the stock held by the bank as collateral security, and that upon payment to the bank of the amount of the debt and interest, less the dividends received by the bank, within sixty days from the time of the filing of the decree in this suit, the certificate of stock shall be assigned and delivered to the plaintiff, provided, however, that the bank may retain from the dividends received the sum of seventy-five dollars toward counsel fees and other expenses incurred in the defence of this suit. It is also the opinion of the court that the former decree as to the rights of the estate of Ignatius Sargent, and L. H. Newcomb alleged to be administrator de bonis non, was entered under misapprehension and mistake arising from the erroneous assumption

that L. H. Newcomb was legally authorized to represent the estate as administrator de bonis bon in the interpleader suit; and in order that there may not appear upon the records of this court two conflicting decrees in full force and effect relating to the same matter, that part of the former decree, which purports to declare that the estate of Ignatius Sargent had no right or title to the stock in question, is revoked and annulled, and a new decree is to be made in accordance with this opinion, respecting the rights of said estate and of this plaintiff as administrator thereof in and to the twenty shares of stock in question.

Bill sustained.
Decree in accordance with opinion.

ANDREW KELLEY et als. *vs.* FREELAND JONES.

Penobscot. Opinion April 5, 1913.

Assessment. Adverse Possession. Boundaries. Deed. Dedication Description. Measurements. Monuments. Plan. Public Use. Real Action. Revised Statutes, Chapter 9, Section 8. Tax Deed. Title. Wills.

In this action to recover one-fourth part in common and undivided of a triangular piece of land on the easterly corner of Hammond and Union Streets in Bangor, the plaintiffs claim to have derived title to the land in question by virtue of a warranty deed from Gideon Haines to their ancestor Andrew Kelley, dated August 26, 1870.

Held:

1. That the plaintiffs and their predecessors in title having been in uninterrupted possession of the premises for more than forty years prior to the commencement of this action, exercising dominion and control over the whole lot, would thereby acquire title to all of the land described in the deed, although a part was covered only by the clause of release and quitclaim.

2. A dedication of land to public uses must be accepted within a reasonable time.
3. Adverse possession of land by maintaining buildings thereon for forty years gives title to the occupants to the extent of such occupancy.
4. In the assessment of a tax which establishes the lien on land and forms the basis of all subsequent proceedings, there must be a definite and distinct description of the land upon which the tax is intended to be assessed.
5. That the description of the demanded property in the assessment and tax deed is not characterized by the certainty and plainness required by law and was not sufficient to create a lien on the property.

On report. Judgment for plaintiffs accordingly.

This is a real action to recover one-fourth part in common and undivided of a triangular piece of land, with the buildings thereon, situated on the easterly corner of Hammond and Union Streets in Bangor. Plea, the general issue. At 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 in the case as the legal rights of the parties may require.

The case is stated in the opinion.

Matthew Laughlin, for plaintiffs.

Lawrence V. Jones, for defendant.

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

WHITEHOUSE, C. J. This is a real action in which the plaintiffs seek to recover one-fourth part in common and undivided of a triangular piece of land with the buildings thereon situated on the easterly corner of Hammond and Union Streets in Bangor. The entire premises described in the writ occupy the angle made by the intersection of the two streets; the northerly line thereof, coincident with the southerly side line of Hammond Street, extending easterly 47 88-100 feet, and the southerly line thereof, coincident with the northerly side line of Union Street, extending southeasterly 61 64-100 feet, from an iron spike driven into the ground at the point of intersection of these two street lines. The easterly side line of the triangle, connecting the easterly ends of the two lines

above described, measures 38 82-100 feet. It thus appears that the triangle described in the writ measures 47 88-100 feet on the north side, 38 82-100 on the east side, and 61 64-100 feet on the southwesterly side. With the exception of the small heater piece west of the jewelry store, measuring 10 1-2 feet on Hammond Street, 11 1-2 feet on Union Street, and 8 feet across, the premises in controversy are substantially covered by buildings.

The plaintiffs claim to derive title by virtue of a warranty deed from Gideon Haines to their ancestor Andrew Kelley, dated August 26, 1870. The description of the land in that deed, including the quitclaim of "the point of land lying westerly and between Hammond and Union Streets," appears to comprise the entire premises now in question. The Andrew Kelley named as grantee in that deed died in 1897, leaving eight children, of whom two, Andrew, and Samuel H., were originally named as plaintiffs in this action. Andrew died after the action was commenced, and his devisees, of whom Andrew Kelley of the third generation was one, came in to prosecute the suit with Samuel H., the other original plaintiff. Thus the present plaintiffs, representing only two of the eight heirs of the first Andrew Kelley, only claim to recover two-eights in common and undivided of the entire premises described in the declaration in the plaintiffs' writ.

It appears from the warranty deed from Haines to Kelley above named, that there were buildings on the part warranted in 1870, the date of the deed; and it appears in evidence that there have been buildings on that land from that time to the time of the trial. Samuel H. Kelley, one of the original plaintiffs, testifies that he could remember back to 1875, "when the old Avenue House used to be there;" that he used to go out there quite often with his father; that his father always said he was going to build a larger store and build it out to the point where there was a stone; that when he first went there, the meat market and store, and the cellarway were there, but the jewelry store had only been built about eighteen years; that the land between the end of the jewelry store and the extreme point was at that time part of the sidewalk; that is to say, people were crossing there all the time; that during all those years, up to the time of his father's death in 1897, no one else had ever been in possession of the premises to his knowledge.

It is a satisfactory conclusion from all of the evidence that the plaintiffs and their predecessors in title had been in uninterrupted possession of the premises, described in the warranty deed from Haines to Kelley in 1870, for more than forty years prior to the commencement of this action. It has been noted that the point of land between Hammond and Union Streets, lying westerly of the premises specifically included in the deed of warranty, was covered only by the quitclaim clause; but after maintaining possession of the land by virtue of this deed for a period of forty years, exercising dominion and control over the whole of it, the plaintiffs would thereby acquire title to all of the land described in the deed, although a part was covered only by the clause of release and quitclaim. *Ripley* v. *Trask,* 106 Maine, 550; *Banton* v. *Herrick,* 101 Maine, 134; *Hornblower* v. *Banton,* 103 Maine, 375.

But the defendant contends that the plaintiffs have failed to prove title in themselves by reason of an alleged dedication to the public of the premises in a deed given in 1832 by Moses and Amos Patten to Josiah Deane, a predecessor in title of Gideon Haines from whom the plaintiffs derive title. The particular description of the premises conveyed in that deed is followed by a release in the following terms, "Also releasing for public uses only all our right and interest in and to the point of land lying west of said granted premises and between said Carmel and Union Streets." It is admitted that Carmel Street, mentioned in this release, is now Hammond Street; and that the "point of land" thereby released includes substantially all of the premises demanded in the plaintiffs' writ in this case. Hodgdon's plan referred to in that deed shows a vacant space west of the premises conveyed to the grantee therein named.

Assuming without deciding that this question is open to the defendant, it is the opinion of the court that the public have never acquired any rights in the premises in controversy under the release of the Pattens in 1832, excepting the small "heater-piece" at the extreme point, west of the jewelry store, measuring 10 1-2 feet on Hammond Street, 11 1-2 feet on Union Street and 8 feet across, which is said to have been constantly used as a part of the sidewalk.

The dedication in the Patten deed was never accepted by the public or the municipality. There is no evidence that, during this

entire period of eighty years, the public made any use whatever of the land in controversy, indicating an acceptance of a dedication. On the contrary, the evidence shows that substantial buildings had been erected upon it prior to 1870 by some of the plaintiffs' predecessors in the possession of it; and that the premises have been permanently occupied as private property and devoted to uses entirely inconsistent with the purposes of the alleged dedication to the present time. A dedication must be accepted within a reasonable time; and that time has long since elapsed. 9 Am. & Eng. Enc. of Law, 42, 50, 78; 13 Cyc. of L. & P., 463-466. See also, *Northport W. G. Campmeeting Assn.* v. *Andrew,* 104 Maine, 542; *Brown* v. *Duckey,* 106 Maine, 102; and *Bartlett* v. *Harmon,* 107 Maine, 451.

Furthermore, it is expressly provided by Sec. 90, Chap. 23, R. S., that, "When buildings or fences have existed more than twenty years fronting upon any way, street, lane or land appropriated to public use," and the bounds of such street, etc., can be made certain, "no time less than forty years will justify their continuance thereon." Thus, the adverse possession of land by maintaining buildings thereon for forty years gives title to the occupants to the extent of such occupancy. *Stetson* v. *Bangor,* 73 Maine, 357; Dillon's Munc. Corp., 4th Ed., Sec. 675; 1 Am. & Eng. Enc. of Law, 878.

But the defendant claims title in himself by virtue of a tax deed dated December 7, 1900. It is admitted that no taxes assessed on this property were ever paid by any one, except by sale of the property, from 1899 to the time of the trial, for this action in 1912. In 1899, the tax upon it was assessed to George Kelley as resident owner, and the property sold to the defendant in 1900 for non-payment of this tax. George Kelley was the son of Andrew Kelley, and acquired a life estate in this property by virtue of a devise in the will of his father, who was the grantee in the deed from Gideon Haines under which the plaintiffs claim title. In 1902, after the property had been sold for three years in succession, George Kelley's interest as life tenant was sold and conveyed to Lydia H. Jones, the mother of the defendant, for $400. Thereafter, she collected the rents of the property, but it was sold each year for the non-payment of taxes, and purchased by the defendant. The tax

deed of 1900, however, based on the sale for non-payment of the tax assessed to George Kelley as resident owner, in 1899, is the one upon which the defendant relies.

It appears from an inspection of the copy of the deed introduced in evidence that the property is therein described as follows, "Store and tenement over same and N. W. part lot No. 16, corner of Hammond and Union Streets of Andrew Kelley heirs." It is contended in behalf of the plaintiffs, that there are three defects in these proceedings for the sale of the land for taxes, each one of which is fatal. It is argued, first, that the property was not taxed to the owner, second that the property was not sufficiently and correctly described, and third, that the property described in the tax deed is not the property described in the writ and shown by the evidence to be the property of the plaintiffs.

The first objection is not a valid one. Sec. 8 of Chap. 9, R. S., 1903 (Sec. 9, Chap. 6, R. S., 1883) provides that "taxes on real estate shall be assessed . . . to the owner or person in possession thereof on the first day of each April." It has been seen that George Kelley, to whom the tax was assessed in 1899, was the owner in possession of a life estate in the property. It was his duty to pay all taxes assessed upon the property during his life tenancy, (*Garland* v. *Garland,* 73 Maine, 97; *Varney* v. *Stevens,* 22 Maine, 334), and the tax was properly assessed to him as the owner.

But the questions raised by the second and third objections present more serious difficulties. With respect to the second objection, it is provided by Sec. 73 of Chap. 10, R. S., that the description of the property assessed should designate the "name of the owner, if known, the right, lot and range, the number of acres as nearly as may be, the amount of tax due, and such other short description as is necessary to render its identification certain and plain." It is deemed essential to the validity of a tax sale of lands that there shall be a strict compliance with all the directions of the statute. "To prevent forfeiture, strict constructions are not unreasonable," *Baker* v. *Webber,* 102 Maine, 414; *Cressey* v. *Parks,* 76 Maine, 532. In the assessment which establishes the lien on land and forms the basis of all subsequent proceedings, there must be a definite and distinct description of the land upon which the tax is intended to be assessed. *Burgess* v. *Robinson,* 95 Maine, 120; *Green* v. *Alden,* 92

Maine, 177; *Greene* v. *Walker,* 63 Maine, 311; *Greene* v. *Lunt,* 58 Maine, 518. The description in the deed must correspond substantially with that employed in the antecedent proceedings and locate the land with such reasonable certainty as to identify it without the aid of extrinsic facts. *Hill* v. *Mowry,* 6 Gray, 552; *Annan* v. *Baker,* 49 N. H., 173.

In the case at bar, the property is described as consisting of a "store and tenement over same and N. W. part of lot No. 16, corner Hammond and Union Streets, of Andrew Kelley heirs." It appears from the evidence, however, that there are buildings at three of the corners of Hammond and Union Streets; and that at the corner immediately opposite the property in question, there is a building used as a store and dwelling-house belonging to another owner. It has also been seen that George Kelley's title to his life estate did not come by inheritance from the "Kelley heirs," but by devise from his father. Thus far the description is ambiguous and obviously not such as to render the identification of the property "certain and plain." But it is contended that the reference to "N. W. part lot No. 16" indicates a definite location. If it be assumed that the property in question is a part of lot No. 16, such a description of it as a part of another lot without defining specifically what part, and without giving boundaries or information by which it could be definitely located, would be insufficient according to numerous authorities in this State. In *Greene* v. *Walker,* 63 Maine, 311, the description of the fourth parcel as "the northwesterly part of lot 6, range 5, 25 acres, on which Aaron P. Cox resides," was held insufficient, although much more definite and certain than in the case at bar. See also the other descriptions held insufficient in *Greene* v. *Walker,* and *Greene* v. *Lunt,* supra. See also *Griffin* v. *Creppin,* 60 *Maine,* 270, and *Bank* v. *Parsons,* 86 *Maine,* 514.

But the plaintiffs insist that their third objection to the sufficiency of the description is insuperable; and that is, that no part of the demanded premises is in lot 16, and that the land described in the assessment and tax deed is not the same property described in their writ and in the deed from Haines to Kelley given in 1870.

It is important to note, in the first place, that Moses Hodsdon's original plan, made prior to 1832, and referred to in the deed from the Pattens to Deane above examined, left all of the premises in

controversy as an unmarked and vacant lot entirely westerly of lot 16. In his testimony, civil engineer Nason, after giving the several measurements of the premises in controversy, hereinbefore stated, according to the Deane plan referred to in the deed from Haines to Kelley, given in 1870, further states with reference to Hodsdon's plan, a copy of which is in evidence, that he finds upon it a lot numbered 16; that working from both plans and verifying his work by actual measurements on the surface of the earth, he was able to locate lot 16 with reference to the premises in question; and that lot 16 does not touch the premises in question at any point; that measured on Union Street, it is about four feet distant, and measured on Hammond Street, it is about two feet distant from the demanded premises. He also states that he made a verification of this work by measuring on the face of the earth from a monument in the line of Clinton Street, called Pearl Street on Hodsdon's plan, and found the distances between Clinton Street and the two corners of lot 16 coincided with his other measurements and the plan; that the westerly line of lot 16, as delineated on Hodsdon's plan is forty-one feet in length, and as he measured that same line on the face of the earth, it was 41 1-2 feet; that according to the measurement appearing on the original plan in the Registry of Deeds, lot No. 16 would be about six inches nearer the property claimed by the plaintiffs, that is to say, it would be 3 1-2 feet at Union Street and one foot and six inches at Hammond Street; that he assumed that the monuments for Clinton Street were the same as for Pearl Street, and he had no hesitation in saying that if a line is drawn 41 feet in length on the westerly side of lot 16, it cannot possibly reach the land claimed by the plaintiffs. He had before testified, as above shown, that the easterly line of the Kelley lot in question measures 38 82-100 feet and although this line and the west line of lot 16 are not precisely parallel, he insists that they could not possibly meet.

On the other hand, Mr. Jones, a civil engineer called by the defendant, testifies that "in looking over Hodsdon's plan Pearl Street and Clinton Street are what are supposed to be the same streets now; but that he was unable to find anything on the records to show whether they were the same or not. He states that in the absence of any common starting point on the face of the earth, the question whether any part of the Kelley property is in lot 16 could

only be determined by the use of Hodsdon's plan without reference to any monuments on the face of the earth; that he took the westerly line of lot 16 as shown on that plan, as the base of the triangle and extended the line of Hammond and Union Streets to a point of intersection for the two sides of it, and then obtained the base angles, and by the aid of these, the angle at the intersection of the street lines; that he then solved the simple geometrical problem of finding the two sides of a triangle when its base and three angles are given, with the result that the Kelley property appeared to extend into lot 16 about four feet. He admits that he made no measurements on the face of the earth, such as Mr. Nason made, from the monuments on Pearl Street, now Clinton Street, to verify the results of his work performed by means of the plan alone, and no actual survey of any kind on the face of the earth for the purpose of testing the accuracy of any of the lines in question. It is not claimed that Hodsdon's plan was actually run by courses and distances so as to represent accurate angles. Hence monuments, which have actually been in existence on the surface of the earth for more than forty years, would control the results deduced from the angles delineated on the plan without any reference to such measurements.

The name of Pearl Street, which is represented on Hodsdon's plan made in 1832, appears to have been changed to Clinton Street; but there is no evidence of any change in the location or width of the street itself, although an examination of the records appears to have been made by engineer Jones. In the absence of any such evidence, there is an inference of fact that the established location and boundary lines continued unchanged. Chamberlayne's Mod. Law of Ev., Vol. 2, Sec. 1036. And in view of the testimony of the plaintiffs' engineer that his location of the property claimed by the plaintiffs, made by actual survey on the face of the earth, corresponds with the situation of the buildings and the property lines in that vicinity, and that his result was verified by actual measurement from Pearl Street, it is the opinion of the Court that the weight of evidence tends to show that no part of the demanded premises is in lot 16, and that the description of the demanded property in the assessment and tax deed is not characterized by the "certainty and plainness" required by the law, and was not sufficient

to create a lien on the property. The plaintiffs have a better title than the defendant, and are entitled to judgment for two-eighths in common and undivided of the premises demanded, excepting the "point of land" lying west of the jewelry store, measuring 11 1-2 feet on Union Street, 10 1-2 feet on Hammond Street and 8 feet across.

Judgment for plaintiffs accordingly.

LILLA A. HUTCHINS

vs.

PENOBSCOT BAY & RIVER STEAMBOAT COMPANY.

Hancock. Opinion April 3, 1913.

Accident. Care. Common Carrier. Defect. Duty. Gangway. Knowledge of Defect. Lights. Negligence. Passengers. Ordinary Care. Personal Injuries. Thoughtless Inattention. Trespasser.

1. The defendant company owed the plaintiff the same duty respecting the condition of the wharf that it owed the daughter who actually became a passenger.
2. In the discharge of this duty to a passenger, the carrier is bound to exercise all ordinary care to maintain its wharf in such a reasonably safe and suitable condition, that the passenger, himself in the exercise of due care, can pass over it in safety.
3. In going upon the defendant's wharf as an escort for her daughter in the case at bar, the plaintiff was not a trespasser, nor a mere licensee to whom the defendant owed no duty.
4. There was a tacit invitation to her, implied by the established custom uniformly recognized and approved by carriers of passengers, as necessarily incidental to the conduct of the business.

5. If she was injured by reason of the negligent failure of the defendant to maintain its wharf in a reasonably safe condition, being herself in the exercise of ordinary care, she is entitled to recover.

On motion by the defendant. Motion overruled. Judgment on the verdict.

This action is to recover damages for personal injuries which the plaintiff sustained by stepping into and through a hole in the defendant's wharf. Plea, general issue. The jury returned a verdict for the plaintiff for $556 and the defendant filed a motion for a new trial.

The case is stated in the opinion.

W. C. Conary, for plaintiff.

Fellows & Fellows, for defendant.

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

WHITEHOUSE, C. J. The plaintiff recovered a verdict of $556 for personal injuries received by stepping through a hole in the defendant's wharf at Bucksport. The case comes to this court on a motion to set aside this verdict as against the law and the evidence.

It was not in controversy that on the 24th day of August, 1911, the defendant company was a common carrier of freight and passengers, had the exclusive control of the wharf in question, and occupied it as a regular landing place for its steamboats.

There was evidence in the case, which, if believed, was sufficient to authorize the jury to find the following facts:

About seven o'clock in the evening of August 24, 1911, the plaintiff and her daughter, Mrs. Orcutt, walked out upon the defendant's wharf, the daughter intending to take passage on the defendant's steamer Rockland which was not expected that night until seven o'clock on account of the Bangor fair. The plaintiff was not intending to become a passenger on the boat herself, but accompanied her daughter to the wharf and carried in her hand a bag of apples which she had given to her to take with her on the boat. The daughter carried a suit case in her hand. There was no wait-

ing room at this landing for the accommodation of passengers, and the plaintiff and her daughter walked out across the wharf and stopped a few feet at the right of the front gangway to await the arrival of the boat. The daughter set her suit case down on the wharf, and the plaintiff turned around to set the bag of apples down, when her left foot went through a hole in the planking of the wharf. The defendant's evidence tended to show that this hole was two and one-half inches wide and eighteen inches long, and partially covered by a heavy joist; but the aperture appears to have been wide enough to allow the plaintiff's foot and knee to go down through it. When the accident happened, "It was real dusk," in the language of the plaintiff: "The lights were up in the stores" and the boat was lighted up when it came in; but there were no lights on the wharf. The plaintiff's daughter, Mrs. Orcutt, took passage on the boat, in accordance with her intention when she came down to the wharf, and the plaintiff was taken back to her home in Bucksport in a carriage, accompanied by another daughter.

But it was claimed by the defendant that the place where the accident happened was not designed for the accommodation of passengers. It was contended that the section of the wharf immediately north of the front gangway was intended to be used exclusively as a landing place for freight, and that the waiting place for passengers was on the southerly side of the gangway. It appeared, however, that it was customary for waiting passengers to stand on the north as well as on the south side of this gangway; that the plaintiff had been to the wharf, either as an escort for her daughter or to take passage on the boat herself, as often as once a week, during the entire summer preceding the accident, and that she always went on the north side of the gangway, and saw others waiting there to take passage; that there were no signs directing passengers to go to the southerly side of the gangway; that she never received any intimation from the managers that the northerly side was not a safe and proper waiting place for passengers, although she was personally known to the manager and the captains of the boats; and that at the time of the accident there was, in fact, no freight deposited there which rendered it an unsuitable place for passengers.

Under these circumstances, the defendant company owed this plaintiff the same duty respecting the condition of the wharf that it owed the daughter who actually became a passenger; and in the discharge of this duty to a passenger, the carrier is bound to exercise all ordinary care to maintain its wharf in such a reasonably safe and suitable condition that if the passenger is himself in the exercise of due care he can pass over it in safety. *Bacon* v. *Steamboat Co.*, 90 Maine, 46; *Maxfield* v. *M. C. R. R. Co.*, 100 Maine, 79.

The doctrine contended for by the plaintiff is not only consonant with reason and justice, but is supported by a substantially uniform line of judicial authority. In *Tobin* v. *Railroad Co.*, 59 Maine, 187, it was held that a railroad company is liable to a hackman for an injury received while carrying a passenger to the station by stepping into a cavity in the defendant's platform. In the opinion, the court say: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other. The hackman is there in the course of his business; but it is a business important to and for the convenience and profit of the defendants."

In *McKone* v. *Railroad Co.*, 51 Mich., 601 (17 N. W. 74), the plaintiff went to the railroad station to meet his wife, who was expected to arrive on a night train, and received an injury by falling into a deep hole on a section of the defendant's premises that was used by the company and its patrons as a part of the station grounds. It was held that the plaintiff was entitled to recover. In the opinion of the court, it is said, "The plaintiff was not a trespasser. He was a customer within the meaning of the rule just mentioned. The company was bringing his wife to him and he went to receive and protect her. Had his errand been to receive a bale of goods or a horse, no one would doubt that he had all the rights of a customer, and it seems little less than preposterous to contend that the right was not simply different or inferior, but absolutely wanting, because it was his wife that he went for."

In *Mushrush* v. *Railroad Co.*, 11 Ind. App., 192 (37 N. E., 954), the plaintiff's son, 12 years of age, was sent to the railroad station to meet his sister, and while walking along the platform stumbled

and fell over some obstructions thereon, and was thrown under the wheels of the car and killed. It was held that the defendant was answerable in damages. In the opinion, it is said, "It was the duty of the appellant to keep its station platform in a reasonably safe condition, and to have it reasonably well lighted. For a negligent failure to do this, it was answerable to passengers . . . Nor is this duty limited to actual passengers only, but it includes those who come to meet friends or see them safely off, or, as aptly expressed, to 'Welcome the coming or speed the parting guest.'"

The same rule was also applied in *Doss* v. *Railroad Co.*, 59 Mo., 27; *Atchison R. Co.* v. *Johns,* 36 Kans., 769 (14 Pac. 237); *Hamilton* v. *Railroad Co.,* 64 Texas, 251 (53 Am. Rep. 756); *Izlar* v. *Railroad Co.,* 57 S. C., 332 (35 S. E. 583); and *Esrey* v. *So. Pac. Co.,* 88 Cal., 399. See also 6 Cyc., page 610.

In going upon the defendant's wharf as an escort for her daughter in the case at bar, the plaintiff was not a trespasser, nor a mere licensee to whom the defendant owed no duty. She went there by virtue of a tacit invitation implied by the established custom uniformly recognized and approved by carriers of passengers as necessarily incident to the conduct of the business, and mutually convenient and advantageous to both carrier and passenger; and if injured by reason of the negligent failure of the defendant to maintain its wharf in a reasonably safe condition, while she herself was in the exercise of ordinary care, she is entitled to recover of the defendant appropriate damages for such injury.

The defendant further contends that neither the defendant's negligence nor the plaintiff's care is satisfactorily established by the evidence.

But there was sufficient evidence to support the conclusion of the jury that the defendant's wharf was not reasonably safe at the point where the accident happened, and that the defendant's manager either knew of the existence of the hole through the planking, or by the exercise of reasonable care and diligence might have known it, a sufficient length of time before the accident to have made the necessary repairs.

The plaintiff's testimony respecting the manner in which the accident happened, considered in connection with all the attending circumstances, was sufficient affirmative evidence to authorize the

jury to draw the inference that she conducted herself as ordinarily careful and prudent persons usually do in like situations, and that she was not guilty of "thoughtless inattention."

The damages do not appear to be excessive.

Motion overruled.
Judgment on the verdict.

JOHN DIRKEN *vs.* GREAT NORTHERN PAPER COMPANY.

Penobscot. Opinion April 5, 1913.

Appreciated Danger. Assumption of Risk. Compensator. Constitution. Defect. Due Care. Electricity. Injuries. Knowledge of Danger. Machinery. Master and Servant. Negligence. Police Power. Public Laws of 1909, Chapter 258. Safe Place. Superintendent. Vice Principal.

The negligence relied upon is that the plaintiff was set to work by the defendant in a place which was not reasonably safe, without warning or instructing him as to the danger he would encounter in painting over or around the compensator.

Held:

1. That the duty imposed upon a master to warn his servant of dangers attendant upon the place of employment of which the master has knowledge, and which are unknown to the servant, is a personal duty.
2. The servant has the right to look to his master for the discharge of that duty.
3. If, instead of discharging it himself, the master employs another to do so, then that other stands in the place of the master and becomes a substitute for him, a vice principal in respect to the discharge of that duty.
4. The master then becomes liable for the acts and negligence of such other person in the premises to the same extent as if he had performed these acts and was guilty of negligence personally.
5. That the servant assumes the ordinary, apparent risks of his employment, he does not assume the risks from defects not apparent, of which he has

no knowledge in the plant and which the master is bound to make and keep reasonably safe.

6. That the fact that a person takes voluntarily some risk is not conclusive evidence that he is not using due care, nor is the knowledge of a danger, not fully appreciated, conclusive that the risk is his.

7. That the State, in the exercise of its police power, may enact such laws for the safety and protection of its citizens as the circumstances and necessities of a particular class may require without violating any constitutional guaranty.

On motion and exceptions by the defendant. Motion and exceptions overruled.

This is an action on the case by John Dirken against the Great Northern Paper Company to recover damages for personal injuries sustained on the 7th day of July, 1911, on account of the negligence of the defendant. The action is brought under Chapter 258 of the Public Laws of 1909, otherwise known as the "Employers' Liability Act." Plea, the general issue. In the course of the trial, the defendant's counsel requested the presiding Justice to instruct the jury that there is no evidence that Dickinson was employed as a superintendent, whose sole, or principal duty, was that of superintendent, so that the defendant can be held liable for the negligence of Dickinson under Chapter 258 of Public Laws of 1909.

That Chapter 258 of the Public Laws of 1909 is regugnant to and in conflict with the Constitution of the United States and the Constitution of Maine. Plea general issue.

That the jury be instructed to return a verdict for the defendant, which instructions the presiding Justice declined to give. To which refusal to so instruct, the defendant excepted. The jury returned a verdict for the plaintiff for $4,000 and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Hersey & Barnes, for plaintiff.

E. C. Ryder, for defendant.

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

HANSON, J. This is an action for personal injuries sustained by the plaintiff while employed as a painter in the paper mill of the

defendant company at Millinocket, and is brought under Chapter 258, Public Laws of 1909, entitled, "An Act relating to the employment of Labor."

The plaintiff obtained a verdict for $4,000. The case comes before this court on general motion to set aside the verdict, and on exceptions to the ruling of the presiding Justice, involving, among other things, the constitutionality of the before mentioned Act.

The following are the material provisions:

Sec. 1. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of:

First, a defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or

Second, that the negligence of a person in the service of an employer who was intrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer.

Sec. 8. The provisions of the seven preceding sections shall not apply to injuries caused to domestic servants or farm laborers by fellow employees, or to those engaged in cutting, hauling or driving logs.

The plaintiff was injured on the seventh day of July, 1911, while engaged in the service of the defendant as painter in a crew of painters, employed in and about the defendant's pulp and paper mill. He had been employed at various times during a period of twelve years and had worked in all the rooms of the mill, and once before in the room where the injury occurred. This room is known as the wet room, its dimensions, 60 feet by 200 feet. In that room was installed a motor, a switch-board, and connecting compensator, also called a step-down transformer. The motor is 3½ feet from the case of the compensator; the switch-board, 4 feet 6 inches from the compensator, which is 19 inches wide, 31 inches high, and 13 inches deep; the three pieces being located in the northeast corner of the room, the compensator standing a few inches from the wall,

its top being 5 feet, 5¼ inches above the floor. There are six wires running up to the compensator; three of these come from the electrical plant, or switch, and the other three run from the compensator to the motor. The wires running to the compensator under the floor, built especially to protect them, pass through porcelain tubes, up the sides of the wall, behind the compensator, and at the top of the compensator turn and enter the terminal blocks, so called, which are screwed on to the top connection of the compensator. The wires terminate there in a flat connection with the terminals, so called; the terminals being 1¼ inches by 3 inches, the wires are soldered to the terminals and these are clamped down to the top of the compensator by two bolts. There are two rows of these, with two bolts to each terminal, making twelve bolts altogether, six in each row, the terminals, bolts and nuts are not insulated.

For several days prior to the accident the plaintiff had been employed with others in painting the wall of that room. They were under the immediate control of one Rankin Dickinson, foreman of the crew, whose duty as described by himself, was to look after the painting. On the morning of the injury the plaintiff was ordered by the foreman to repaint a portion of the wall above the compensator, and in following the instructions of Mr. Dickinson, he claims the injury occurred.

The plaintiff's account is this:—he had worked for some years for the defendant, and on one occasion, painted in the same room, but had not worked on or about the compensator, and had received no warning as to any danger attending the work. On the day of the accident he was painting in the wet room, when Mr. Dickinson came to him and said, "John, I want you to go back and paint over that transformer and in the corner." . . . "I went and did the work. My ladder went up against the wall . . . and there was nothing over the transformer. . . . The paint pail was hooked on the first round of the ladder and hung below the second round. It was secured to the ladder by a short rope with a hook on each end, one on the bail, the other on the first round of the ladder, permitting the pail to hang down."

He continues, "I got up on my ladder and after putting my pail there, some fellow hollered over on some of the machines. I

turned around and looked. I saw it was some of the fellows,—I didn't bother my head about it. I thought it was Dick, first, hollering, and I went to put my brush into the pail and I looked down. I don't know what drew my attention to look down, but my brush was held like that (illustrating). I can't say what was the cause of it, but there was a kind of blue haze come up all at once. When it did I took a kind of a jump, like that, on the ladder. That is all I remember; I don't know what happened." Q. After the blue blaze, did you see any other flash? A. I didn't have time to see nothing. Q. Did you hear any noise? A. I was knocked from my ladder back into a blaze of fire.

As a result of the accident, the plaintiff was burned about the face, neck, arms and hands, and has lost the use of his hands.

THE MOTION. It is contended for the plaintiff that there was actionable negligence on the part of the defendant company in two particulars at least: 1. The use of a compensator without adequate protection or shield, while the plaintiff, who was unacquainted with its use, was painting over the compensator when it was in operation. 2. That the defendant did not warn the plaintiff of the danger of painting over or near the compensator while thus in use.

There was evidence tending to show that the plaintiff had painted in the same room once before without injury, or apparent knowledge of danger; that at the time of the accident he had no knowledge or appreciation of the peril involved. It is conceded that he had been warned to avoid contact with wires, and the evidence tends to show that he heeded that warning, but he contends that here there were no live wires, or wires of any kind to remind him of the warning or prompt him to use the caution so necessary to avoid injury, that on receiving the order to paint above the compensator he at once obeyed and made such preparations as were necessary. He raised the only available ladder to position, a ladder furnished by the master, and in the only position suitable for painting the wall pointed out to him by the foreman, and ascended the ladder to the point where his judgment dictated the paint pail should be attached, and there attached it to the first round of the ladder.

The plaintiff claims that while on the ladder above the compensator and in the act of painting, and in the exercise of due care, an explosion occurred. While he is not able to explain the cause of the explosion, his testimony indicates, and it is conceded, that contact, either directly or indirectly, with the exposed, uninsulated portion of the top of the compensator caused the fire and explosion, resulting in his injury. The plaintiff claims that the compensator was not furnished with an adequate covering to protect or warn the workmen. A few days before the accident the electrician in charge had caused a covering of canvas to be made and nailed to a frame 22 inches square, to protect the compensator from falling dust or paint, and moisture, but at the time of the accident the testimony is overwhelming that there was no covering over the compensator.

So far as the case discloses, no covering had been used on the compensator until a few days before the accident, and its use for the intervening days was irregular. The testimony shows that there was burning paint on the top of the compensator and on the floor after the explosion, while the covering was found afterward, standing against the wall, untouched by fire or paint. The theory of the plaintiff is that the paint from the plaintiff's brush dropped on the compensator, and coming in contact with the exposed parts of the nuts, bolts and terminals, caused first the flash of fire, and then an explosion, burning the arms, hands and body of the plaintiff, enveloping him "in a blaze of fire."

The plaintiff was a common laborer and was so employed on this occasion. He knew that electricity was being used as a motive power and had a general knowledge of the dangers of coming in contact with live wires, but had no information as to the particular danger of working over the compensator, or of its construction, or of any means to be adopted to avoid danger. He was not informed of any danger from contact with any part of the top of the compensator, and was not instructed in regard to the care to be observed by him and had received no warning and did not appreciate the danger.

The defendant's counsel contends, that at the time of the accident the plaintiff was in charge of Rankin S. Dickinson, a head-painter, that Dickinson had no authority to hire or discharge men

and was himself under the direct supervision of one Thorndike, who was a superintendent in the immediate charge of the painting crew; that the plaintiff had worked in and about the defendant's mill for many years, and knew, or ought to have known, the dangers attending the work, that he had been warned to look out for the wires and was familiar with the conditions existing in the room in question; that on a certain occasion on being cautioned to look out for wires, he had stated, in substance, that he could take care of himself, and that he knew "most as much about electricity as any of the electricians around there." And defendant contends, 1. "That the plaintiff assumed the risks and dangers incident to his employment, if he knew and appreciated them, and the evidence shows he must have known and appreciated them, for the risks and dangers were such that a person of his capacity and intelligence ought to have known and appreciated them." 2. "That the accident was caused by the negligence of the plaintiff." 3. "That there was due care on its part, that there was sufficient protection over and above the compensator, that a few days before the accident a shield was placed over the compensator to protect it from falling paint and dust." In effect, that it had done all that was necessary to be done under the circumstances, that the shield was sufficient protection, and that the plaintiff assumed the risk.

Rankin S. Dickinson, called by the defence, testified that his business was that of "a head-painter," that he had been in the employ of the defendant in that capacity for about one year, that his duties were to look after the painting, that he helped to shift the staging, and did some painting with the crew. This is the only testimony as to the scope of his work, except that he added, "We most generally painted the most dangerous places on Sunday, when the machine was shut down." Mr. Dickinson testified that he saw the covering over the compensator about twenty minutes before the accident. He was coming from the blowpit room at the time of the accident. He was asked, Q. What was the first thing you saw? A. I saw fire fly out. I heard the explosion, and then I saw Dirken come out from around underneath the rope-drive. Q. What instructions did you give Mr. Dirken in regard to painting that morning? A. I was coming down the floor and I met Mr. Dirken,—I think he was just coming over from getting a pail

of paint; I met him on the floor and I asked, I says, "Jack, will you give some of those dark spots a second coat?" and he nodded his head and walked on. Q. And those are all the instructions you gave him in regard to painting that morning? A. Yes, sir. . . . I warned him to look out for the wires. There were bare wires in there, and they had to paint around there, and I warned him to be careful around them, and if he saw any bare wires to report to me or any of the electricians, and they would have them covered. . . . Q. Did you warn John Dirken of the danger that might arise from contact with the transformer? A. No, sir. Q. Or the compensator? A. No, sir. . . . Q. Could you tell whether or not, if the painters were painting on the ceiling of that basement room in the beater room, directly over the compensator,—whether or not there is a platform built right there for protection? A. I believe there is, that covers the motor; I don't know whether it covers the compensator or not. Q. You don't know now, what the compensator is, do you? A. No, I don't know exactly what it is; I have seen what they call one."

The negligence relied upon in this case is that the plaintiff was set to work by the defendant in a place which was not reasonably safe, without warning or instructing him as to the danger he would encounter in painting over or around a compensator.

The duty imposed upon the master in such a case has been defined in successive cases in this State, constituting an unbroken and harmonious line, and hold substantially as in the recent case, *Hume* v. *Power Co.*, 106 Maine, 78. "The duty imposed upon a master to warn his servant of dangers attendant upon the place of the employment, of which the master has knowledge, and which are unknown to the servant, is a personal duty. The servant has the right to look to his master for the discharge of it. If, instead of discharging it himself, the master employs another to do so, then that other stands in the place of the master, becomes a substitute for him, a vice-principal, in respect to the discharge of that duty, and the master then becomes liable for the acts and negligences of such other person in the premises to the same extent as if he had performed those acts and was guilty of the negligence personally."

Welch v. *Bath Iron Works,* 98 Maine, 366. See also *Small* v. *Manufacturing Company,* 94 Maine, 551; *Sawyer* v. *Paper Company,* 90 Maine, 354; *Cowett* v. *Woolen Co.,* 97 Maine, 543.

While it is settled law that a servant assumes the ordinary apparent risks of his employment, he does not assume the risk from defects not apparent, of which he has no knowledge in the plant itself which the master is bound to make and keep reasonably safe. *McCafferty* v. *Maine Central R. R. Co.,* 106 Maine, 284.

The fact that a person takes voluntarily some risk is not conclusive evidence, under all the circumstances, that he is not using due care. Nor is the knowledge of a danger, not fully appreciated, conclusive that the risk is his.

Frye v. *Bath Gas & Electric Light Co.,* 94 Maine, 16.

The burden is on the plaintiff to show affirmatively that no want of due care on his part contributed to the injury.

McLane v. *Perkins,* 92 Maine, 39; *Day* v. *Boston & Maine R. R.,* 96 Maine, 207; *Fournier* v. *Mfg. Co.,* 108 Maine, 357; *Donaldson* v. *New York, N. H. & H. R. R.,* 188 Mass., 484.

These questions are for the jury.

Glass v. *Hazen Confectionery Co.,* 211 Mass., 99; *Holder* v. *Massachusetts Horticultural Society,* 211 Mass., 370.

It is the theory of the defendant that the plaintiff, on preparing to paint, deliberately set his pail on the top of the compensator, or hung it so close that it came in contact with the compensator, and thus caused the accident, and that this conclusion is inevitable because there are three holes in the bottom of the pail which fit closely over three bolt-heads to be found on the top of the compensator; and they were noticed in the bottom of the pail immediately after the accident. And the defendant says that it is conclusive evidence of the carelessness of the plaintiff and negligence on his part, which entirely excuses the defendant, because the plaintiff knew, or ought to have known, that placing his pail on the top of the compensator would be followed by an explosion which might injure him, and that it is not liable because the plaintiff ought to have known of the dangers lurking in the compensator, and that the careless act of plaintiff was the proximate cause of the injury—and further, that in the event the plaintiff did not know or appre-

ciate the danger, that his injuries were due to the negligence of a fellow-servant and consequently not the fault of the defendant. The plaintiff's counsel in reply to this says that, if it is true that the plaintiff deliberately set his pail on the top of the compensator, as claimed by the defendant, it is conclusive evidence in itself that he did not appreciate the danger, and that it is immaterial whether Dickinson was a fellow-servant or not so long as he was entrusted with a duty by the master, which he neglected to perform, or could not perform. The neglect of that duty by Dickinson was the neglect of the defendant. *Frye* v. *Electric Co.*, 94 Maine, 16.

It is not denied that there was a special latent danger attending the work over and about the compensator, and it is apparent that the plaintiff did not know of the special risk and danger, and had not been warned or instructed by the defendant, or any of its servants or agents. Not having such knowledge, or warning, he did not assume the risk and dangers incident to his employment. Neither can it be held that he ought to have known and appreciated them, or that the accident was due to his own negligence.

There is nothing in the case to support the claim that he knew, or ought to have known, of the danger; on the contrary it is incredible that, knowing of such danger, or having reason to know, he should either deliberately place his paint pail on the compensator, or place it on the ladder in such position that it would come in contact with it. This conclusion is justified by his own testimony and the testimony of Mr. Dickinson, who testified in effect that he did not know about the dangerous character of the compensator himself, and therefore could not instruct another, and did not instruct the plaintiff.

These questions, together with the question whether the risk of the injury which the plaintiff suffered was so obvious or known to him as to have been assumed by him, and whether the plaintiff when injured was in the exercise of due care, and whether the defendant had failed in the duties of furnishing a reasonably safe place, and properly instructing and warning the plaintiff as to hidden dangers and defects in the compensator, were submitted to the jury under clear and appropriate instructions. A careful examination of the testimony discloses that the claims of the plain-

tiff are supported by the weight of evidence and fully justify the verdict of the jury, and entitle the plaintiff to judgment unless the defendant's exceptions require a different conclusion.

That the jury erred in the amount of damages awarded is not urged.

THE EXCEPTIONS are to the refusal of the presiding Justice to instruct the jury:

1. That "there is no evidence that Dickinson was employed as a superintendent, whose sole or principal duty was that of superintendence, so that the defendant can be held liable for the negligence of Dickinson in the premises."

2. That "Chapter 258 of the Public Laws of 1909, entitled 'An Act relating to the employment of Labor,' is repugnant to, and in conflict with, the Constitution of the United States, and the Constitution of the State of Maine."

3. "To return a verdict for the defendant."

1. As to the first exception, we find no difficulty in holding the ruling to be correct. A careful reading of the testimony will disclose that Mr. Dickinson's principal duty was that of superintendence. The evidence shows that he did not work with his hands the greater portion of the time, and for the time being at least was not "a mere laborer in charge of a gang of men." See *Gardner* v. *Telephone Co.,* 170 Mass., 156. Counsel have cited many cases from the Massachusetts court as to who may be a superintendent, and are not in disagreement as to the law. We think the evidence sustains the ruling that Mr. Dickinson did measure up to the requirement of section two of that Act.

2. It is conceded by counsel for the defendant that the question of the constitutionality of Chapter 258 of the Public Laws of 1909, or an act similar thereto, has never been raised, and his chief objection is that the exemption clause includes those engaged in cutting, hauling and driving logs,—that such classification is wholly arbitrary, unjust and an unreasonable discrimination against all such persons. He contends further that it imposes burdens upon one class of employers not imposed upon employers conducting a *like hazardous business.* That this violates the equality clause of the Fourteenth Amendment, and is as well a violation of Sec. 19 of the Declaration of Rights of the Constitution of Maine.

Counsel urges that the business is substantially the same, "a like hazardous business," and that no valid reason can be found for exempting from the provisions of the statute that great class of employees engaged in cutting, hauling and driving logs.

In support of his contention defendant's counsel cites and relies upon *Gulf, Colorado, and Santa Fe Ry.* v. *Ellis,* 165 U. S., 150, and quotes from the opinion by Mr. Justice Brewer, this sentence: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the XIV Amendment, and in all cases it must appear not only that a classification has been made but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." In that case the court passed upon an Act of the Legislature of the State of Texas, which provided that any person having certain valid claims against any railway company pursuing the method prescribed in the statute as to presentation and demand, should upon finally establishing his claim be entitled to recover, "in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue." Mr. Justice Brewer in delivering the opinion of the court declaring against the constitutionality of the statute, said further:

"Considered as such" (as a whole) "it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and

pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

Enough has been quoted to demonstrate that *Gulf, Colorado & S. Fe Ry.* v. *Ellis,* supra is not in point, but is in entire harmony with the cases following, which support the contention of the plaintiff, that the State in the exercise of its police power may enact such laws for the safety and protection of its citizens as the circumstances and necessities of a particular class may require without violating any constitutional guaranty.

State v. *Montgomery,* 94 Maine, 192; *Pierce* v. *Kimball,* 9 Maine, 54; *Holden* v. *Hardy,* 169 U. S., 366, 392; *Leavitt* v. *Canadian Pacific Railway Company,* 90 Maine, 153; *State* v. *Mayo,* 106 Maine, 62; *State* v. *Phillips,* 107 Maine, 249.

"The specific regulations for one kind of business which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." *Soon Hing* v. *Crowley,* 113 U. S., 703; *Barbier* v. *Connolly,* 113 U. S., 27.

A state may classify the objects of legislation so long as its attempted classification is not clearly arbitrary and unreasonable. *Clark* v. *Kansas City,* 176 U. S., 114, 20 Sup. Ct. Rep., 284, affirming 59 Kan., 427, 53 Pacific, 468.

And so the Federal Supreme Court has held that the test is that the statute be general, embracing all persons under substantially like circumstances, and not an arbitrary exercise of power. *Delaware, L. & W. R. Co.* v. *Board of Public Utilities Commission,* New Jersey Supreme Court, 84 Atl. Rep., 704, citing among other cases *Lowe* v. *Kansas,* 163 U. S., 81; *Duncan* v. *Missouri,* 152 U. S., 337; *Hayes* v. *Missouri,* 120 U. S., 68. See *Garrett* v. *Turner,* Pennsylvania Supreme Court, 84 Atl. Rep., 354, a case involving the

constitutionality of a statute providing that "in actions for damages against the owners of automobiles for injuries sustained in the operation thereof, service may be had in another county than that where the accident occurred, and the suit is brought is not objectionable for inequality, since persons who own automobiles form a proper basis for classification."

In *Dartmouth College* v. *Woodward,* 17 U. S., 4 Wheat., 629, Chief Justice Marshall, in delivering the opinion of the court, said: "that in no doubtful case would it (the court) pronounce a legislative act to be contrary to the Constitution." In the Sinking Fund cases the court said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." 99 U. S., 700, 25 L. ed., 496, *Powell* v. *Pennsylvania,* 127 U. S., 678. Lunt's Case, 6 Maine, 412.

In *Leavitt* v. *Canadian Pacific Railway Co.,* 90 Maine, 153, this court in passing upon an amendment involving a question under the equality clause of the Fourteenth Amendment, said: "This clause merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

The Fourteenth Amendment does not take from the states police powers reserved to them at the time of the adoption of the Constitution. See Slaughter House Cases, 16 Wall., 36; *Barbier* v. *Connolly,* 113 U. S., 27; *Mugler* v. *Kansas,* 123 U. S., 623; Cooley's Cons't. Limitations, 7th ed., 11. "It is sufficient for us to have pointed out that, in addition to the power to punish felonies and misdemeanors, the state has also the authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights, or private property." Cooley's Cons't. Lim., 890, and cases cited, including *Pierce* v. *Kimball,* 9 Maine, 54 supra. See also *Minneapolis Railway Co.* v. *Beckwith,* 129 U. S., 26, 29.

A state, under its police power, has the same power to provide for the public safety and convenience as to protect the public health and morals. A state cannot divest itself of its right and duty in respect to full exercise of the police power. *Sabre* v. *Rutland R. Co.,* Supreme Court of Vermont, January 21, 1913, 85 Atl. Rep., 693.

In *Holden* v. *Hardy,* 169 U. S., 366, the court had under consideration a statute limiting hours of labor in certain mines to eight hours a day except in cases of emergency when life or property is in imminent danger, and the court say, "the cases arising under the Fourteenth Amendment are examined in detail and are held to demonstrate that, in passing upon the validity of State legislation under it, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some states methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals or classes had proved detrimental to their interests; and other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection.

The opinion quotes similar views expressed in *Missouri* v. *Lewis,* 101 U. S., 23, 31. The same subject was elaborately discussed by Mr. Justice Matthews, delivering the opinion in *Hurtado* v. *California,* 110 U. S., 516, who said, among other things: "This flexibility and capacity for growth or adaptation is the peculiar boast and excellence of the common law. . . . The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues." Again; "In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, and for the guarding of well-holes, stairways, elevator shafts, and for the employment of sanitary appliances." The court, in further alluding to the statutes relating

to such protection, say, "these statutes have been repeatedly enforced by the courts of the several states; their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional."

In *State* v. *Mayo,* 106 Maine, 63, this court has held: "It is a fundamental law that no constitutional guaranty is violated by an exercise of the police power of the State when manifestly necessary and tending to secure general and public benefits." A law is not to be regarded as class legislation simply because it affects one class and not another, provided it affects all members of that same class alike, and the classification involved is founded upon a reasonable basis. Such a law is general and not special.

When the Legislature has constitutional authority to enact a law to promote the public safety, and does enact it, the expediency of its enactment is not to be passed upon by the court. In such case the Legislature determines by the enactment that the law is reasonable and necessary." See *Lowe* v. *Kansas,* 163 U. S., 81, 88; *Duncan* v. *Missouri,* 152 U. S., 377; *Moor* v. *Veazie,* 32 Maine, page 360; *Jacobson* v. *Massachusetts,* 197 U. S., page 11.

In *State* v. *Mitchell,* 97 Maine, 66, cited by the defendant as bearing upon the case at bar, where the court passed upon the Hawkers' and Peddlers' Act, Laws of 1901, there was sought to be made a discrimination between those who own and pay taxes on a stock in trade to the amount of $25.00, and those who pay a less tax on their stock in trade (exempting the former from paying license fees, while requiring the latter to pay them); and there the court held, that it was a mere arbitrary discrimination, not based on any inherent difference in kind, and offends against that equality of right established by the fundamental law." The court added: "The scope of the clause cited from the 14th Amendment, that 'No State shall deny any person within its jurisdiction the equal protection of the laws,' has often been considered by the Federal and State courts, and more or less conflict of opinion has developed. . . . No one now questions that these constitutional provisions prevent a state making discriminations as to their legal rights and duties between persons on account of their nativity, their ancestry, their race, their creed, their previous condition, their color of skin, or eyes, or hair, their height, weight, physical or mental strength,

their wealth or poverty, or other personal characteristics or attributes, or the amount of business they do. It must be conceded, on the other hand, that these constitutional provisions do not prevent a state from diversifying its legislation or other action to meet diversities in situations and conditions within its borders. There is no inhibition against a state making different regulations in different localities, for different kinds of business and occupations, for different rates and modes of taxation upon different kinds of occupations, and generally for different matters affecting differently the welfare of the people. See *Leavitt* v. *Canadian Pacific Railway Co.*, 90 Maine, 153, 38 L. R. A., 152, for a full and clear exposition of this doctrine."

The business of cutting, hauling and driving logs, differs in kind from the business here in question. Defendant's business is a pulp and paper business with electricity as a motive power, and the use of electricity for power purposes introduced an entirely new element of danger for all persons employed where such power is used. While there has been development in the manner of hauling and driving logs by introducing power and power appliances in moving them, the appliances and power are well known and their dangers obvious. The lumber business is as old as our government, and many of its features are familiar to employees before entering therein. There has been no radical change of detail to authorize a change of classification. The pulp and paper business is a new business. Electricity for power purposes has been introduced therein, making necessary certain regulations as to its use, which must be new, and which are in no way similar to the lumber business in any of its forms or detail as known and conducted before the introduction of electricity for power purposes, or the making of paper by present methods. We are living in a time of profound changes, socially and in the mechanic arts. Science has improved old methods and has created new, has discovered and set in motion new energies, and perfected mechanical appliances to meet the requirements of new forces now being used to supply the imperative demands of industrial expansion. There has been a revolution in business and business methods since the adoption of the Fourteenth Amendment. The legislators adopting that amendment represented thirty million people, and had in view the then known and under-

stood trades and occupations to be affected by the equality clause of that amendment. They did not foresee, nor could they have had in contemplation, the marvellous changes to be made in the forces and appliances then in use to those now in use, answering the requirements of nearly one hundred million people.

It is the opinion of the court that Chapter 258 of the Public Laws of 1909, approved April 2, 1909, entitled "An Act relating to the Employment of Labor," is a valid exercise of the police power of the State, and it is therefore, not repugnant to, or in conflict with, the Constitution of the United States or the Constitution of the State of Maine.

The refusal to instruct the jury to return a verdict for the defendant was correct.

The entry will be,

Motion and exceptions overruled.

CITY OF BATH *vs.* INHABITANTS OF HARPSWELL.

Sagadahoc. Opinion April 5, 1913.

Assumpsit. Board of Distribution. Christian Burial. Overseers of Poor. Pauper. Settlement. Revised Statutes, Chapter 17, Section 3. Revised Statutes, Chapter 27, Section 17.

1. That R. S., Chap. 17, Sec. 3, as to the disposal of dead bodies required to be buried at public expense, should be construed in connection with R. S., Chap. 27, Sec. 37, which authorizes and directs overseers of the poor to relieve persons destitute found in their towns and having no settlement therein, and to decently bury them, or dispose of their bodies according to R. S., Chap. 17, Sec. 3.
2. That the overseers of the city of Bath had authority in this case either to give the body a Christian burial, or to deliver it to the Board of Distribution, if no member of the family had claimed it.

3. That they were acting within the scope of their authority in preparing the body for burial and the expenses so incurred were properly chargeable against the defendant town.

On report. Judgment for plaintiff for $36.

This is an action of assumpsit to recover the sum of thirty-six dollars, the price of a casket and robe furnished and for services rendered in preparing for burial the body of Rose Alexander, whose pauper settlement was in the defendant town. The pauper fell into distress in the city of Bath and was sent to the city hospital where she died. The overseers of the poor of the city of Bath directed the undertaker to prepare the body for burial, which was done, and then appeared the husband and the body was surrendered to him for burial. Plea, general issue with brief statement as follows:

That it is not liable for the undertaker's bill in preparing the body of this pauper for burial, because said body was disposed of in accordance with Section 3 of Chapter 17 of the Revised Statutes of Maine. The case was reported upon an agreed statement of facts to the Law Court, with the agreement that the court shall render such judgment as the statement of facts will warrant. If judgment is rendered for the plaintiff, it shall be in the sum of thirty-six dollars.

The case is stated in the opinion.

Frank L. Staples, for plaintiff.

Emory G. Wilson, for defendants.

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

CORNISH, J. This action was brought to recover thirty-six dollars, the price of a casket and robe furnished and services rendered by an undertaker in preparing the body of Rose Alexander for burial. From the agreed statement, on which the case comes to the Law Court, the following facts appear:

"Rose Alexander, wife of John Alexander, who then had his pauper settlement in Harpswell, fell into distress in Bath, on November 15, 1911, and was sent to the city hospital by the overseers of the poor of Bath. She died at the hospital November 18,

1911, and her body, in accordance with a rule of the institution, was removed from the hospital that night, by a local undertaker, upon the order of the overseers of the poor of Bath.

"On the following morning, the chairman of the overseers of the poor of Bath directed the undertaker to prepare the body for burial, and also directed him not to exceed $25 for a casket and $5 for a robe. At this time the chairman did not know what disposition would finally be made of the body.

"A little later in the day the husband appeared, claimed the body for burial, and by the verbal order of the chairman of the overseers of the poor of Bath the body was surrendered to him for interment. Nothing was said as to who should bear the expense previously authorized. The husband directed the undertaker to prepare the body for shipment by train, which the undertaker did, and at the husband's direction placed it on the train bound for Brunswick. Upon its arrival at Brunswick, the husband took charge of the body and had it conveyed to the place of interment.

"No claim for reimbursement for the expense incurred in the preparation of the body for shipment by rail, or the subsequent expense of interment, is made by the plaintiff."

The question presented in this case involves the construction of R. S., Chap. 17, Sec. 3, which reads as follows:

"Sec. 3. All public officers, agents and servants of any and every county, city, town and other municipality, and of any and every almshouse, prison, morgue, hospital or any other public institution having charge or control over dead human bodies required to be buried at the public expense, are hereby required to notify immediately the said board of distribution, or such person or persons as may from time to time be designated by said board, or its duly authorized officer or agent, whenever any such body or bodies come into his or their possession, charge or control, and shall, without fee or reward, deliver such body or bodies to said board, or its duly authorized officer or agent, and permit and suffer the said board or its agents, or the physicians and surgeons from time to time designated by it or them, who comply with the provisions of this chapter, to take and remove any and all such bodies to be used within the state for the advancement of medical education; but no such notice

need be given and no such body shall be delivered, if any person, satisfying the authorities in charge of said body that he or she is a member of the family of or next of kin to the deceased, shall claim the body for burial, but it shall be surrendered to him or her for interment, and no notice shall be given and no body delivered to said board or its agents, if such deceased person was a traveler and not a vagabond, who died suddenly, in which case the said body shall be buried."

The contention of the defendants is that under this section, the overseers of the poor of Bath had authority neither to bury the body of the pauper, nor to prepare it for burial, and therefore could incur no expense in such preparation, which would be legally chargeable to the defendants; that said Section 3 is mandatory and compels such officers either to notify the State board of distribution, created by Section 2 of the same chapter, that a body was ready for delivery, or to surrender the body to some member of the family of or to the next of kin to the deceased.

If this contention is upheld, the Legislature has taken away from the public officials the humane right to decently bury deceased paupers at public expense, and has made pauperism a disgrace instead of a misfortune.

It cannot be that the defendants' contention is correct, and in our opinion it is not, as a careful examination of all the statutes pertaining to the subject renders certain, and in making such examination we must consider the other statutory provisions relating to the care of paupers by overseers of the poor. In other words, R. S., Chap. 17, must be construed along with Chapter 27. They are not stray enactments passed in disregard of each other, but each is to be construed in the light of the other.

Considered historically, the situation is this:

Under R. S., 1883, Chap. 24, Sec. 35, it was provided that "overseers shall relieve persons destitute, found in their towns and having no settlement therein, and in case of death, decently bury them or dispose of their bodies according to Section 3 of Chapter 13." This latter section provided that unclaimed bodies should be subject to the use of the Medical School of Maine for anatomical purposes. At that time, overseers clearly had the right to either inter deceased

paupers or to deliver the bodies to the Maine Medical School, as they might decide. They could exercise the option.

In 1897, by Chap. 315 of the Public Laws, the Legislature passed an act, entitled "An act for the promotion of medical education and the prevention of unauthorized uses of and traffic in dead human bodies," which repealed seven of the nine sections of Chap. 13 of the R. S. of 1883, including Sec. 3, above referred to, and substituted other sections in their place, which with the two unrepealed sections of Chap. 13, have become Chap. 17 of the Revision of 1903, the chapter under discussion.

Sec. 2 of this act of 1897, prescribed in substance that the board of distribution, and also the family of the deceased, be notified by public officials of deaths occurring in almshouses, prisons, hospitals and other public institutions having control and charge of dead human bodies, and if the body was not claimed for burial, it should be delivered over to the board, but if claimed "it shall be surrendered to him or her for interment or buried at public expense." The right to bury at public expense was expressly reserved.

In 1901, by Chap. 276 of the Public Laws, this section was in terms amended in only one particular, namely, by inserting after the words "dead human bodies" in the fourth line the words "required to be buried at public expense;" but in reciting and re-enacting the entire section as amended, the words giving the officials the right to bury at public expense were omitted from the clause above quoted, so that it was left, "it shall be surrendered to him or her for interment." Whether this omission was by mistake, or design, it is impossible to determine; but in any event there was no amendment in the pauper law (Chap 24, Sec. 35), and under that section, overseers still retained the power and authority either to decently bury or to dispose of the bodies according to Section 3 of Chap. 13.

In the last revision, Sec. 3 of Chap. 315 of 1897, as amended by Chap. 276 of 1901, became the present R. S., Chap. 17, Sec. 3; and Sec. 35 of Chap. 24 of R. S., 1883, became the present R. S., Chap. 27, Sec. 37. This last section reads: "Overseers shall relieve persons destitute, found in their towns and having no settlement therein, and in case of death, decently bury them or dispose of their bodies according to Sec. 3 of Chap. 17."

It is clear, therefore, that overseers still have the authority either to bury such bodies, or, if the situation warrants, to deliver them to the board of distribution. Thus construing Chap. 17, in the light of Chap. 27, a reasonable and humane result is reached.

Applying this construction to the case at bar, it follows that the overseers of Bath acted within the scope of their authority, in preparing the body of Mrs. Alexander for burial, and that if it had not been claimed, they could have given it a Christian burial at the expense of the defendants. After it was prepared, the body was claimed by the husband, who himself performed the last offices. The expense, however, preliminary thereto, was properly incurred by the city of Bath, and legally chargeable against the defendants in this action.

The defendants raise the additional objection that having paid on January 11, 1912, the charge for medical services and hospital treatment which were rendered to the pauper after statutory notice given by the plaintiff to the defendants, they are not liable in this action for the undertaker's bill without receiving a new notice therefor before action brought. Such is not the rule in this State. The notice given is sufficient to authorize recovery for a period of time beginning three months before the date of the notice and ending at the date of the writ, the suit having been commenced within two years after the cause of action accrued. R. S., Chap. 27, Sec. 37. *Veazie* v. *Howland,* 53 Maine, 38; *Fayette* v. *Livermore,* 62 Maine, 229; *Rockport* v. *Searsmont,* 103 Maine, 495. The fact that a bill for a portion of the expenses was first presented and paid, and then another bill for the balance, does not change the rule, so long as no suit was brought prior to the pending one. The cases cited by the defendants are not in point.

Judgment for plaintiff for $36.

ABBIE CARLETON

vs.

ROCKLAND, THOMASTON AND CAMDEN STREET RAILWAY.

Knox. Opinion April 7, 1913.

Care. Damages. Due Care. Evidence. Injuries. Negligence. Ownership. Passengers. Platform. Responsibility. Road Commissioners. Superintendent. Tort. Reasonably Safe. Quasi Station.

1. That evidence of subsequent repairs was competent, not on the question of the defendant's prior negligence, but on the issue of fact whether it was the duty of the defendant to make the repairs. It was in the nature of an admission on that issue.
2. That whether the defendant actually constructed and maintained the platform and steps or not, it had adopted them as a means of ingress to and egress from its cars and had by implication invited its passengers to use them in passing from the cars to the sidewalk and from the sidewalk to the cars, and had sanctioned such use.
3. That the service for which the plaintiff paid the defendant included not only transportation in its cars to the point of destination, but if that point was a station either built and maintained, or adopted by the defendant, it also included the furnishing of a reasonably safe way by which she could leave that station.
4. That the ownership of the steps cannot be the sole test. That is a fact which the traveling public cannot know and cannot be bound by. The true test is whether the carrier invited its patrons to use the steps; and if so, a liability existed until the steps were passed.
5. That the same degree of vigilance is not required of the defendant during the exit from the grounds as during the transportation, the amount of care varying with the exigencies of the situation.
6. That under the evidence in this case, the measure of care required of the defendant was not met, the steps being in an admittedly defective condition.

On report. Judgment for plaintiff for $500.

This is an action of tort, to recover damages for personal injuries sustained by the plaintiff on October 1, 1911, upon alighting from

one of the defendant's cars, upon a platform and attempting to walk up a flight of three steps connecting the car track with the sidewalk in front of the Baptist church on Commercial Street in Rockport. The ownership of the steps was contested. The church, the town of Rockport and the railroad all deny responsibility for their maintenance. 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, the Law Court to determine all questions of law and fact. If the court finds the plaintiff is entitled to recover, it is to assess the damages.

The case is stated in the opinion.

H. L. Withee, for plaintiff.

A. S. Littlefield, for defendant.

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

CORNISH, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff, on October 1, 1911, upon alighting from one of the defendant's cars upon a platform and attempting to walk up a flight of three steps, connecting the car track with the sidewalk in front of the Baptist Church on Commercial Street in Rockport.

The general situation was this: In front of the church, the street car line runs along the side of the street nearest the church and upon a level considerably below that of the sidewalk. The bank slopes down to the street and between the foot of this bank and the defendant's roadbed is the side ditch of the highway.

A platform rests at one end on the railroad bed and extends across the ditch to the bank and connected with it is a flight of three steps leading up to the sidewalk, that passes by the front of the church. This platform is five feet five inches long and the distance from the nearest rail, against which it is placed, to the lowest step is four feet, the steps being nailed to the platform, or "toe nailed" as one of the witnesses described it.

On this Sunday morning the plaintiff, a woman seventy-eight years old, was a passenger on one of the defendant's cars riding

from her house to the church, where she was a regular attendant. She requested the conductor to stop at the Baptist church, and he stopped the car at the platform. Mrs. Carleton, a companion, left the car first and the plaintiff followed. The plaintiff thinks that she, herself, stepped from the lowest step of the car, across to the lowest step of the flight, a distance of twenty-seven inches, that Mrs. Carleton placed her foot on the first step of the flight at about the same time, that the flight of steps being insecurely fastened tipped towards her, throwing her back against the car and causing the injuries complained of.

The defendant contends, that the plaintiff could not have stepped from the car directly upon the steps, but must have first alighted upon the platform. We are of the opinion that this contention is supported by the evidence and the circumstances and that in this respect the plaintiff is mistaken.

We will, therefore, consider the case on the assumption that the plaintiff had safely alighted on the platform and as she placed her foot on the first step, the entire flight tipped and caused her to fall.

The ownership of the steps is left somewhat in doubt. The treasurer of the church says that the church did not build them, and has never repaired them. The road commissioner of the town, says that during his term of service from 1908 to 1912, the town had made no repairs upon them and had not attempted to maintain them. The officers of the railroad deny all knowledge of their construction and disclaim all responsibility for their maintenance. It appears, however, that one end of the platform rests on the electric road-bed and close up to the rail, a condition that must exist by permission of the defendant. It further appears from the testimony of the road commissioner that at about the time of the accident employes of the defendant were lowering the grade of the track and excavating the ditch at and near these steps, and that during the progress of the work the steps themselves were taken out of place and set across the track. It is also in evidence that the defendant sent workmen to repair the steps within a half hour after the accident, and when the superintendent's attention was called to that fact in the course of a conversation with the plaintiff, his reply was, "That is where we were lame."

Such evidence of subsequent repairs was competent, not on the question of negligence, but on the issue of fact whether it was the duty of the defendant or of some one else to make the repairs. It was in the nature of an admission on that issue: *Readman* v. *Conway,* 126 Mass., 374; *Poor* v. *Sears,* 154 Mass., 539; *Skottowe* v. *Ry. Co., 22* Or., 430, 30 Pac., *222.*

On the whole evidence we think it might fairly be inferred either that the defendant maintained the steps or had negligently weakened their support during the progress of its repairs on the road-bed and ditch, but the decision of this case does not necessarily turn upon either of these findings of facts. The law takes a broader view and asks whether by its own conduct, independent of original ownership or even of subsequent maintenance, the railroad company has, expressly or impliedly, invited the patrons of the road to use the structure as a means of ingress to and egress from its cars, has sanctioned such use and thereby has adopted the structure as a quasi station with approaches.

It is conceded that the platform and steps had existed in the same location ever since the electric railroad had been built, a period of nearly twenty years, and probably had been constructed at about this same time, because their chief purpose was to convene the passengers coming to or going from the church by rail. Other persons may have occasionally made use of them in crossing the street, but practically their sole use was in connection with the railroad. It was in fact a regular stopping place, a quasi station for that public building. The defendant was not obliged to stop its cars at that point unless it wished to, because there was a cross street on either side of the church and the cars could have been halted at the intersection of those streets with Commercial Street instead of at this platform if the defendant had seen fit to do so, but all parties agree that both the traveling public and the defendant understood that this was the regular station for the Baptist church, and a request to stop at the church was always construed by the employes to mean, as in the present instance, a stop at this platform.

Under these circumstances what duty did the defendant owe to its passengers and especially to this plaintiff? The condition of the steps being defective, a point not controverted, was the defendant chargeable with such defect, or did its liability cease, as its learned counsel contends, when the plaintiff had alighted safely on the platform and was the next step at her own peril? These are the vital questions to be answered.

The plaintiff, being a passenger, the service for which she paid the defendant included not only transportation in its cars to the point of destination but if that point of destination was a station either built and maintained or adopted by the defendant, it also included the furnishing of a reasonably safe way by which she could leave that station, and reach the sidewalk. Or, stating it more specifically the defendant's liability did not cease when it had deposited this passenger on the platform, resting on the side of the embankment and several feet below the sidewalk, but included a reasonably safe exit from that platform to the sidewalk above. For that exit one way, and only one, had been provided, it matters not by whom, and the defendant was bound to see that that exit was reasonably safe and convenient. The ownership of the steps cannot be the sole test. That is a fact which the traveling public cannot know and cannot be bound by. The true test is whether the carrier invited its patrons to use the steps. If so a liability existed until the steps were passed.

We do not mean by this that the same degree of vigilance that attaches during transportation is required until the exit from the station or grounds is completed. The degree of care demanded varies with the exigencies of the situation. This distinction is drawn in *Maxfield* v. *Maine Central Railroad Co.*, 100 Maine, 79; *Rodick* v. *Same,* recently decided, 85 Atl., 41.

Nor are we to be understood as holding that the carrier is responsible for accidents happening to the passenger on the public street after she has safely alighted. Public streets are in no sense passenger stations. The electric railroad has no control over them, and hence it has been held that if the company has exercised proper care in its selection of a place for a passenger to alight in a public street, it is not in fault if the place proves in fact to be unsafe. *Conway* v. *L. & A. Horse R. R. Co.,* 87 Maine, 283; or if the plaintiff

stepped upon a rolling stone in passing between the car and the sidewalk, *Same* v. *Same,* 90 Maine, 199, or fell into a trench while on the way to the sidewalk, *Lee* v. *Boston Elevated Ry.,* 182 Mass., 454. These are the authorities relied upon by the defendant in this case, but they are clearly not in point. As applied to passengers alighting from a car upon the public highway they are authorities, but not to passengers alighting upon a platform at a regular stopping place. So in *White* v. *L. A. & W. R. R. Co.,* 107 Maine, 412, it was held that while a passenger upon a street railway car ordinarily terminates the relation on alighting upon the public street, it is otherwise when the carrier has the duty to keep in repair the portion of the street upon which he alights—in that case a siding constructed by the railroad.

To say then, as is often said, "having alighted from the car, she was no longer a passenger," may be accurate when applied to a public street over which the carrier has no control, but should be qualified by adding that if the passenger alights upon a portion of the street over which the company exercises control, or upon a platform or station constructed and maintained, or adopted and used by the company and its patrons, all liability has not ceased, but the company is still bound to keep the station platform, or station and the exits therefrom, in a reasonably safe and suitable condition.

This question has often been before the courts and, so far as we have been able to investigate, the authorities are uniform.

Steam Railroad cases where liability has been held to attach:

Where a portion of the station platform was so arranged as to invite passengers to use it, although the proper mode of egress from the station to the nearest highway was in an opposite direction to that in which the passenger was going. *Keefe* v. *B. & A. R. R.,* 142 Mass., 251.

Where private parties had been permitted to construct and maintain a stairway leading from the public highway to the station grounds, although the company maintained another approach which was safe and convenient, *D. L. & W. R. R. Co.* v. *Trautwein,* 52 N. J. L., 169, 19 At 178.

Where there was a continuous platform joining the defendant's station with that of another road, which was used and intended to

be used for the transfer of passengers from one road to the other, the company was held liable for the safe condition of such platform, through its entire length, even upon the land owned by the other company. *L. N. A. & C. Ry. Co.* v. *Lucas,* 119 Ind., 338, 21 N. E., 968.

In *Chance* v. *St. Louis, I. M. & S. R. Co.,* 10 Mo. App., 351, the court held that passengers have a right to assume that a way to and from a train, it matters not by whom provided, is safe for ordinary transit. In *Collins* v. *Toledo, etc. R. R. Co.,* 80 Mich., 390, 45 N. W., 178, the company was held liable where the plaintiff in ascending the platform to the depot was injured by the falling of an unfastened plank, extending from the platform to the ground. This plank had not been placed there by the defendant but it had been adopted by the public as well as by the station agent because the company had provided no other step.

See also note to *Skottowe* v. *Oregon Short Line,* 22 Oregon, 430, 16 L. R. A., 593, and note to *Legge* v. *N. Y., N. H. & H. R. R.,* 197 Mass., 88, 23 L. R. A., N. S., 633.

Street Railway cases. Similar duties and responsibilities attach, and to the same extent:

In *Haselton* v. *Portsmouth, K. & Y. St. Ry.,* 71 N. H., 589, it did not appear by whom the platform upon which the accident happened was constructed or maintained but the court held that its adoption by the railroad and the invitation to the public to use it were sufficient to create legal responsibility.

In *Cotant* v. *Boone Sub. Ry. Co.,* 125 Iowa, 46, 69 L. R. A., 982, 99 N. W., 115, it was held that a railway which expressly or by implication invited its passengers to use a stile over a wire fence in leaving its grounds, was bound to use ordinary care in seeing that it was properly constructed and in good repair, although it was not erected by the company, and the defective part was not on its property but on the property of another, where it had no right to go to make inspection or repairs.

The basis of the decision is found in the following extracts from the opinion, which bear closely upon the case at bar: "This contrivance, while partly on or over the land of the Chicago and Northwestern Railroad Company, was a single complete device and

formed a continuous passage way over the fence; and if the defendant invited its passengers to use it, either expressly or by implication, it was bound to at least ordinary care in seeing that it was fit for the purpose intended.

"That it had no right to go upon the grounds of the Chicago & Northwestern R. R. Co. to make inspection or repairs is not controlling. Its passengers were not bound to ascertain at their peril what part of this stile was on the premises owned by another company, and what right defendant had to use it. Defendant undoubtedly had the right to make arrangements with this other company to cross its right of way; and, having invited the traveling public to use the device, it will not be permitted to say that it had no right to erect part of the contrivance upon grounds of another company. It will not do to say that the traveling public must inquire in such case as to the right the carrier had to pass upon the grounds of another company to make repairs. . . . Here there was no liability on the part of the steam railway company, but the situation was such as to make it natural for a person alighting from defendant's train as plaintiff did, intending to go to the bridge or to the pleasure grounds, to use the stile in passing over the fence. Defendant was bound to know that persons alighting from its trains would likely use this device in passing to their destination, and it was its duty to use at least ordinary care in seeing that it was properly constructed and in good repair."

Another very recent and strikingly parallel case is *Carter* v. *Rockford & I. Ry. Co.* (Wisc., 1911), 132 N. W., 598, where the facts were as follows: The plaintiff, a passenger on one of the defendant's cars, after alighting therefrom and while walking down a flight of steps leading from its right of way to a public street, was injured as a result of the breaking of one of the steps. Defendant's roadbed was elevated about four feet above the street. Eight years previous to the accident, with the consent of the company, one Townsend had placed a platform on the right of way, resting partly on the ties of the roadbed and running out almost to the street line and attached steps thereto. The top step was partly on the right of way and partly in the street. The remaining two or three steps were wholly in the street. Defendant had never made any repairs either on the platform or the steps. But other parties, with its

knowledge and consent had from time to time repaired them. The cars stopped there regularly to take on or let off passengers. The only way to reach the street from the platform was by these steps or by going down a steep bank.

There, as here, the defendant sought to escape liability on two grounds; first, because it was in no way responsible for the condition of the steps, having neither built nor repaired them nor assumed any control over them; and second, because the plaintiff had ceased her relations with it as passenger when she had safely alighted upon the platform. In answering these contentions, and holding the defendant liable, the Supreme Court of Wisconsin declare the true rule in these words:

"Neither ground is well taken. In order to board a car at Everett's Landing, it was necessary to pass from the street up onto the defendant's right of way. This could be done by using the steps or by going up the bank along a steep path. The steps were placed there for the convenience of patrons of the defendant road and for no other purpose. The defendant permitted the use of its right of way for the platform and at least a portion of the steps. That the greater part of the steps was in the street is of no consequence, for they were not put there for street purposes. The defendant received the beneficial use of both the steps and platform and practically adopted them as its own. They were necessary to enable passengers of the defendant to get to and from the street and were so used with the knowledge and acquiescence of the defendant. That being so, the fact that it had neglected its duty to repair them cannot discharge it from liability. It owed the duty to its patrons to see that a necessary, convenient, and accustomed passage of egress and ingress from and to its right of way, where it stopped to take on and let off passengers, to the street, was kept in a reasonably safe state of repair. This duty it could not delegate to others either specifically or by permitting them to make repairs."

These underlying principles, so clearly stated in the above opinion, are applicable with equal aptness and force to the case at bar, the facts in the two cases being essentially the same, and it is unnecessary to discuss the question of defendant's liability further. It is completely established.

The amount of damages that should be awarded is the only question left, that also being submitted to this court by the terms of the report, in case of defendant's liability.

The injuries consisted of one fractured rib, another rib loosened from the cartilage in front, and the surrounding muscles rendered very sore and sensitive. The physician made twenty calls, within a period of two months. Recovery has been satisfactory, except that she complains of pleuritic pains that may or may not be the result of this accident. Her claim for expenses and loss of work aggregates one hundred dollars. Considering these facts the age of the party, and all the other circumstances, it is the opinion of the court that a fair compensation would be five hundred dollars.

The entry therefore should be,

Judgment for plaintiff for $500.

GRANVILLE C. SPINNEY et al. *vs.* DANIEL COOK.

York. Opinion April 18, 1913.

After Acquired Property. Chattels. Condition. Consideration. Foreclosure. Innocent Purchaser. Possession. Replevin.

The T. E. Wilson Company gave personal mortgage to plaintiffs of certain horses to secure debt of $2250. In the mortgage was written this clause: "Also any and all other property which said T. E. Wilson Company shall hereafter purchase with money of said T. E. Wilson Company." After this mortgage was given, the T. E. Wilson Company purshased a horse called "Harry," giving a note in payment, and later paid the note. The mortgagees never had the actual possession of said horse, but the condition of the mortgage was broken. Jacob Drinkwater, treasurer and manager of T. E. Wilson Company, sold said horse to the defendant and delivered him into his possession. The bill of sale of said horse purports to be the personal contract of said Drinkwater.

Held:

1. That as between the plaintiffs as mortgagees and the defendant as stranger, they were not entitled to possession of said horse and hence cannot maintain this action of replevin.
2. That the mortgagees never having had possession of the horse and the record of the mortgage containing no information whatever to the defendant of the identity of this horse, the plaintiff's had no color of title to said horse.
3. That the defendant was an innocent purchaser for full value, and as an innocent purchaser for full value under the facts in this case, he is not chargeable for after acquired property.

On report. Judgment for defendant for $350, the amount deposited with the officer as security or payment for the horse and interest thereon from the date of deposit, August 14, 1906.

This is an action of replevin for one roan colt named "Harry." The plaintiff held a mortgage on certain horses, given by T. E. Wilson Company to secure a balance due on a note of the said company. In the mortgage was this clause: "Also any and all other property which said T. E. Wilson Company (incorporated) shall hereafter purchase with money of said T. E. Wilson Company." After this mortgage was given, the T. E. Wilson Company purchased a horse called "Harry," the same replevied in this suit. The said company gave for this horse its note, which was subsequently paid with its money. February 27, 1906, Jacob Drinkwater, the treasurer and manager of the T. E. Wilson Company, sold this horse to Daniel Cook, the defendant, and delivered him into his possession. The bill of sale evidencing the sale and transaction was a personal contract of Drinkwater and does not purport to be the contract of or authorized by the T. E. Wilson Company. It appears that the defendant deposited with the officer who served said replevin writ, three hundred and fifty dollars, and said horse remained in the defendant's possession pending the suit. Plea, general issue and brief statement. At the conclusion of the evidence, the case was reported to the Law Court for decision. Upon so much of the evidence as is legally admissible, the court is to enter such judgment as the legal rights of the parties require.

The case is stated in the opinion.

E. L. Guptill, and Cleaves, Waterhouse & Emery, for plaintiffs.

Aaron B. Cole, and Geo. F. and Leroy Haley, for defendant.

SITTING: WHITEHOUSE, C. S. SAVAGE, SPEAR, CORNISH, KING, BIRD, HANSON, JJ.

SPEAR, J. The plaintiffs held a personal mortgage of the T. E. Wilson Company to secure a balance of $2,250, due upon a note of the company. The chattels enumerated as security were horses. In the mortgage was written this clause: "Also any and all other property which said T. E. Wilson Company (incorporated) shall hereafter purchase with money of said T. E. Wilson Company (incorporated)." After this mortgage was given, the T. E. Wilson Company purchased a horse, the subject of this controversy, called "Harry," giving a note in payment, and later paying the note, so that this horse was purchased "with the money of said T. E. Wilson Company." When the mortgage was given to the plaintiffs, the horse was not owned by the mortgagors, but was afterwards acquired. The mortgagees never had the horse in actual possession, but the condition of the mortgage had been broken, and the right of foreclosure had accrued at the time of the defendant's purchase.

On the 27th of February, 1906, Jacob Drinkwater, the treasurer and manager of the T. E. Wilson Company, sold this horse "Harry" to the defendant and delivered him into his possession. The bill of sale showing the transaction was the personal contract of Drinkwater, and does not purport in any way to be a contract of or authorized by the T. E. Wilson Company. Under this state of facts, the plaintiffs claim, as between themselves as mortgagees and the defendant as a stranger or trespasser, they were entitled to possession of the horse, and hence entitled to maintain a replevin suit if possession was denied. It is the opinion of the court that this contention cannot prevail.

This horse was not in the possession of the T. E. Wilson Company when the mortgage was executed. He was not alluded to or described in the mortgage. The record of the mortgage gave no information whatever to the defendant of the identity of this horse. The mortgagees never having had possession, had no color of title. They left the horse in the hands of Drinkwater, a director and officer of the mortgagor company. From anything that appeared, or could by reasonable diligence be ascertained, the horse was the

personal property of Drinkwater. The conduct of the mortgagees enabled him to so appear in his hands. Drinkwater, under these circumstances, sold the horse, as his own, and took the defendant's money. The defendant was an innocent purchaser for full consideration. We know no case involving after-acquired property under a mortgage, that goes so far as to hold that an innocent purchaser for value of such property, under the conditions here revealed, has been made chargeable for such property. *Burrill* v. *Whitcomb,* 100 Maine, 256, a most progressive case upon the doctrine of after-acquired property, does not warrant the maintenance of such an action.

Our conclusion is that the plaintiffs, under the admitted facts of the case, cannot maintain the present action against the defendant. In accordance with the stipulation of the report, the entry must be,

Judgment for defendant for $350.00, the amount deposited with the officer as security or payment for the horse, and interest thereon from date of deposit, August 14, 1906.

W. G. MEANS *vs.* F. H. HOAR and Trustees.

Kennebec. Opinion May 5, 1913.

Agreement. Cause of Action. Default. Exceptions. Instructions. Neither Party. Nonsuit. Question of Fact. Settlement. Surety.

In an action of assumpsit to recover the sum of $112.50 the amount paid by the plaintiff as surety for the defendant, the defendant pleaded that the subject matter of the plaintiff's action had been settled by an entry of "Neither party, no further action for the same cause" in cross-actions between the same parties.

Held:

1. That the effect of the entry of "neither party" is that neither party appears further in the action, so that no judgment can be rendered by the court; and it does not bar the maintenance of another action for the same cause.
2. That when the words "no further action for the same cause" are added, the plaintiff's right of further action is barred, not because any judgment of the court follows, but because the plaintiff has entered into an agreement that he will bring no further suit, and he is bound by his agreement.
3. That this agreement, however, extinguishes only the plaintiff's cause of action, and not the defendant's, on the items which were inserted in the plaintiff's account as credits. The defendant thereby surrenders no cause of action against the plaintiff.
4. That if there was a settlement in fact made between the parties of all matters in controversy, including the $225 note, and this docket entry was in pursuance of that agreement, that question should have been submitted to the jury.

On motion and exceptions by plaintiff. Motion not considered. Exceptions sustained. New trial granted.

This is an action of assumpsit to recover of the defendant one hundred and twelve dollars and fifty cents, paid by the plaintiff as surety for the defendant. The plaintiff and another person had signed, as sureties, a promissory note for the defendant for two hundred and twenty-five dollars, which was paid at maturity by the plaintiff, and one-half thereof, or one hundred and twelve dollars and fifty cents was paid the plaintiff by his co-surety. This action is brought to recover of the defendant one-half of said note, and was entered and tried in the Superior Court for Kennebec County.

The plaintiff in this action also held another note for $30 against the defendant and brought an action against him on said note in said Superior Court. The defendant thereafter brought an action against the plaintiff for $315 for services and board, and in his account annexed gave the plaintiff in this action credit for the $30 note on which Means had brought action against him and for the $225 which had been paid by Means as surety, one-half of which is sued for in the case at bar. At the June term, 1911, of the Superior Court for Kennebec County, the action of Means against Hoar on the $30 note was entered "neither party" and at the same term and time the action of *Hoar* v. *Means* for $315 was also

entered "neither party; no further action for the same cause." The action at bar was commenced July 10, 1911. The defendant pleaded the general issue and by brief statement claimed that the subject matter of the plaintiff's action was settled by an entry in the cross-actions between the same parties, at a previous term of the same court. The plaintiff excepted to certain instructions and to refusal to instruct by the Justice presiding. The jury returned a verdict for the defendant and plaintiff filed exceptions and a general motion for a new trial.

The case is stated in the opinion.

W. C. Philbrook, and C. W. Hussey, for plaintiff.

F. W. Clair, for defendant.

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

CORNISH, J. This action is brought to recover the sum of one hundred twelve dollars and fifty cents, the amount paid by the plaintiff as surety for the defendant.

The plaintiff and another person had signed, as sureties for the defendant, a promissory note for two hundred twenty-five dollars. At maturity, the plaintiff paid the note, was re-imbursed for one-half by his co-survey, and now brings this suit to recover the balance from the defendant, the maker.

The defendant pleads the general issue, and by way of brief statement claims that "the subject matter of the plaintiff's action was settled by an entry in cross-actions between the same parties" at a previous term of the same court.

In substantiation of this claim, it appeared that the plaintiff Means had brought a previous suit against the defendant Hoar on a promissory note for thirty dollars; whereupon Hoar brought a cross-action against Means to recover the sum of three hundred fifteen dollars for services rendered and board furnished to Means, and in his account annexed in that suit entered, as items of credit, the thirty dollar note given by him to Means and the note for two hundred and twenty-five dollars which had been paid by Means as surety, and to collect one-half of which the case at bar was brought. Both actions were entered at the June term, 1911, of the Superior

Court and at that term the action of *Means* v. *Hoar* on the thirty-dollar note was entered "neither party" and that of *Hoar* v. *Means* for the three hundred fifteen dollar account, less credits, was entered "neither party; no further action for the same cause." It is agreed, however, that the full entry of "neither party; no further action for the same cause," should have been made in both cases; and no point is raised as to the difference in the effect of the two entries.

The question to be decided in the case at bar is the legal effect of that entry of "neither party; no further action for the same cause" in the $315 suit of *Hoar* v. *Means* (in which Means was given credit for the $225 note) upon the right of Means to maintain this subsequent suit against Hoar based on that same note. Were Means' rights extinguished thereby?

The only question of fact submitted by the presiding Judge to the jury was whether sufficient authority was given to make the entry, and the jury were instructed that if such authority was given and the entry was authoritatively made, then that entry was a bar to the maintenance of the present action. Counsel for Means requested an instruction to the effect that "by agreeing to the entry, 'neither party; no further action for the same cause,' the defendant in the former action, that is Mr. Means, surrendered no cause of action against the plaintiff, Mr. Hoar. This instruction was refused, and the case is before this court on exceptions to the instructions given and to the refusal to give the instructions requested; and also upon a general motion for new trial. But it is necessary to consider the exceptions alone.

The claim of Mr. Hoar in the present suit is, briefly stated, thus:

If A brings suit against B on an account annexed and in his declaration gives B credit for a certain sum which he admits he owes B, and then the entry is made "neither party; no further action for the same cause," not only A's claim against B, but also B's admitted claim against A, is extinguished.

We cannot accede to this contention.

The effect of the entry "neither party" alone is a dismissal of the action, neither party recovering costs of the other. Strictly speaking, it is an abbreviated averment of the fact that, on being called,

neither party appeared to answer; that is, that the plaintiff was non-suited and the defendant was defaulted, so that neither party could have a judgment for costs. *Coburn* v. *Whitely,* 8 Met., 272.

In earlier practice in Massachusetts, "neither party" was rarely used; but the docket entry was "non-suit" and "default," which more accurately described the situation. *Blanchard* v. *Ferdinand,* 132 Mass., 389. Such an entry, however, does not of itself bar the maintenance of another action for the same cause, because it is no evidence of the settlement of all matters involved in the action. It simply means that neither party appears further; therefore, no judgment can be rendered by the court. *Marsh* v. *Hammond,* 11 Allen, 484.

Such an entry, however, does not of itself bar the maintenance of another action for the same cause, because it is no evidence of the settlement of all matters involved in the action. It simply means that neither party appears further; therefore, no judgment can be rendered by the court. *Marsh* v. *Hammond,* 11 Allen, 484.

When, however, the words "no further action for the same cause" are added, as in the case at bar, the plaintiff's right of further action is barred, not because any judgment of the court follows, but because the plaintiff has entered into an agreement that he will bring no further suit; and he is bound by his agreement. *Blanchard* v. *Ferdinand,* supra; *Berry* v. *Somerset Ry.,* 89 Maine, 552.

The agreement, however, extinguishes only the plaintiff's cause of action. He is the only party who has a cause of action in court. He has brought his suit, and agreed to have it dismissed, and not to bring another. The mere fact that in his account annexed to the writ, he has seen fit to insert certain credits to be given the defendant, in no way converts the action into one brought by the defendant against him to recover those credits, with the result that those credits are extinguished as well as the charges, and the defendant's right to bring a subsequent action for those items due him is barred along the plaintiff's. If so, it might be an easy matter for a designing party to avoid the payment of his just debts by bringing a groundless suit against his debtor, give credit for what he actually owes the defendant, enter the case "neither party; no

further action for same cause," and leave the defendant without a remedy.

Such an unjust result is the logical conclusion of the contention.

In *Glendon* v. *Hovey,* 98 Maine, 139, it was held that bringing an action for abuse of legal process was not precluded by the entry of "neither party; no further action for same cause" in the original suit in which the present plaintiff, then defendant, was arrested. That was not precisely this case, but in the course of the opinion, the court stated the legal effect of the entry to be as follows:

"The entry of 'neither party; no further action, same cause,' means that by agreement neither party further appears in court in that suit, and it also involves a stipulation that the plaintiff shall maintain no further action for the same cause. The plaintiff's cause of action is extinguished. The suit is ended, and ended as favorably to the defendant as it would be by judgment in his favor, except that he consents to go out of court without costs. But by agreeing to the entry, the defendant surrenders no cause of action against the plaintiff. He does not agree that no action shall be maintained on his part, for any cause he may have, whether it grew out of the original action, or otherwise."

This, in our opinion, is an accurate statement of the law. The instructions to the jury, in the case at bar, were in conflict with these principles, and were prejudicial to the legal rights of the plaintiff in this action.

It should perhaps be added that if there was a settlement in fact, made between the parties, of all matters in controversy, including the $225 note, and this entry was in pursuance of that agreement, that question should have been submitted to the jury. But it was not. The only question which they were asked to pass upon was whether this entry was made by persons having authority so to make it; and if so, the court instructed the jury that the entry itself precluded the present action. This was prejudicial error.

Exceptions sustained.
New trial granted.

CHARLES L. CHAPIN *vs.* LITTLE BLUE SCHOOL.

Franklin. Opinion May 12, 1913.

Contract. Check. Tuition. Pupils. Registration. Catalogue. Accord and Satisfaction. Constitution. Notice. Payment.

1. If one makes an offer of a certain sum to settle an open and unliquidated account, and attaches to his offer the condition that it must be accepted, if at all, in full satisfaction of the claim in dispute, the party receiving the sum offered will be taken to have accepted it subject to the condition attached to it.
2. Such acceptance will operate as an accord and satisfaction, even though the party receiving it declares that he received it only in part payment of the debt.
3. When the fulfillment of a contract becomes impossible by reason of illness, the obligation to perform it is discharged.

On report. Judgment for plaintiff for $145.99.

This is an action of assumpsit in which the plaintiff seeks to recover the sum of one hundred and forty-two dollars and eighty-five cents, claimed to be due him as an unearned balance of an advance payment to Mr. Church, the manager of the defendant school for tuition and expenses of his minor son Charles, who was a pupil in said school for about five weeks in the fall of 1909. The pupil left the school at the suggestion of Mr. Church, on account of illness. The plaintiff had paid in advance $350 for tuition and expenses of his said son. The catalogue of said school contained the provision that pupils, by their presence in the school, are registered for the full school year and that no abatement is made from these terms for any reason other than that of illness, when an allowance of seven dollars a full week for board while absent will be made. It appears that the plaintiff's attention was not called to the catalogue regulations. The defendant pleaded the general issue, and filed a brief statement.

At the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

E. E. Richards, for plaintiff.

Frank W. Butler, for defendant.

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

WHITEHOUSE, C. J. In this action the plaintiff, a resident of Springfield, Mass., seeks to recover the sum of $142.85 alleged to be due him as an unearned balance of advance payments made by him to Mr. Church, the manager of the defendant school situated in Farmington, Maine, for tuition and expenses of his minor son Charles, who was a pupil in the school for about five weeks in the fall of 1909, but left at the suggestion of Mr. Church on account of illness manifested by epileptic convulsions. The case comes to the Law Court on report.

The school catalogue states that the expense for tuition and board for the two sessions of 16 weeks each, which constitute the school year, is $700, payable one-half at the opening of the school in September and one-half on the 15th of January. It also contains these provisions: "Pupils by their presence in the school are registered for the full school year. No abatement is made from these terms for any reason other than that of illness, when an allowance of seven dollars a full week for board while absent is made."

The plaintiff's contention is that in accordance with an oral agreement made between Mr. Church and himself before the application for enrollment was signed, but re-affirmed and adopted afterward, the boy was taken by the defendant on trial, and not for any specified time, and that he should be required to pay only a proportional amount for the time he was actually in attendance; while the defendant's contention is that the plaintiff should pay at least the full amount for the first session of 16 weeks, amounting with incidentals and a charge of $20 for tutoring, to $398, less $7.00 a week for eleven weeks' absence on account of illness.

Mr. Church admits that he had several times expressed a "great desire to get a hold in Springfield for the school," and that after

visiting Springfield he "saw that Mr. Chapin was one of the well reputed families there," and he "felt that the family influence would be of value to the school." In this attitude of mind he called at the plaintiff's residence in Springfield in the spring of 1909, and had an interview with the plaintiff and the boy's sister with reference to the advisability of his sending Charles to the Little Blue School, also known as the "Abbott" School. The plaintiff testifies that he described the boy to Mr. Church as follows: "I told him I didn't know that the boy could stand a regular school,—that he wasn't strong physically, and that he was very backward mentally, and I shouldn't want to put him anywhere where he was going to be subjected to trouble of any kind, and wanted him treated carefully and kindly. Mr. Church told me, his exact words as I remember, were that 'I will take him and try him out.' I think that is the very phrase he used,—try him out."

Miss Anne Chapin, sister of Charles, thus testifies in relation to that interview: "I told Mr. Church all that I could about my brother's condition and previous life and health. I stated that he had always been peculiar, was backward and particularly in arithmetic, very nervous, had never been able to stay in school with other children; had had very little schooling and that for nine or ten months past he had been in the school for backward children at Amherst. My father said, that under those conditions it would be hard to state how well Charles would get along in a regular boys school. He said, 'I cannot tell about him, you will have to take him and try him.' Mr. Church replied that he would take him and try him."

Miss Elizabeth Chapin was also present and confirms the statements of her father and sister that Mr. Church cheerfully consented to take Charles into his school on trial.

As the apparent result of this conference an application blank for the boy's enrollment was forwarded to the plaintiff by Mr. Church April 13, 1909, and signed and returned by the plaintiff with the prescribed registration fee of $25. This enrollment states that the plaintiff desires to enter his son Charles "as a pupil in the Abbott school for the session beginning September 22, 1909." This appears to have been accompanied by a letter from the plaintiff in which he

says, "I understand you do not make any promises, and I should not want you to. I am putting him into your hands unrestrainedly to start with and let you see what you think the particular trouble with him is, and what kind of a school he needs." Subsequently, after he had signed the application for enrollment, the plaintiff says he had a second conversation with Mr. Church in regard to the boy, either in July or September, and he distinctly remembers that Mr. Church then made the statement that he would "take him and try him out." There was nothing said in regard to the period of time he would take in "trying out" Charles. The plaintiff was absent from the country from September 15 until Thanksgiving.

The boy accordingly entered the school September 29, and the plaintiff paid in advance the required tuition of $350 for one-half of the year and a deposit of $50 for expenses, in addition to the registration fee and $10.70 for railroad fare; a total of $435.70. Under date of October 29, just thirty days after the admission of the boy to the school, Mr. Church wrote a letter to the boy's sister Anne, in which he says: "I would like to see you as early as possible next week to discuss the advisability of Charles remaining at the school. Last Sunday morning he had a slight attack which gave every symptom of epilepsy in a mild form. This morning at the breakfast table he was taken again more violently. He is very comfortable and not hurt in any way, but naturally the school is very much disturbed. Although he will be about again tomorrow, I cannot feel that it is right toward the other boys of the school to retain a pupil who is liable to such attacks; I would not have knowingly admitted him had conditions been so understood. . . . It is a disappointment to the school that we are not able to do for him in justice to the rest of our boys what both you and his father could well ask."

It is perfectly evident that Mr. Church intended by this letter to signify to Miss Chapin his understanding that the boy's illness was of such a character as to disqualify him from remaining in the school and his desire and expectation that she would promptly remove him. She states that she so understood the letter; and, acting upon the assumption that Charles' connection with the school was already severed, she promptly requested Mr. Church to have

the boy's things packed as she should take him away "the next day." She accordingly went to Farmington and, with the approval and consent of Mr. Church, Charles left the school and went home with his sister. It is obvious that his epilepsy was not the temporary illness on account of which an allowance of seven dollars a week is made by the terms of the defendant's catalogue while the pupil is absent. It was mutually recognized as a more serious malady, which rendered it unsuitable for him to continue his membership in the school. This precise contingency was one which was not anticipated by either party, and for which neither party was responsible.

In his testimony Mr. Church does not deny the substantial accuracy of the testimony for the plaintiff showing that it was understood and agreed that the boy was taken into his school on trial, "to see what kind of a school he needs;" but he claims in his correspondence with the plaintiff that he understood that he was to have the whole school year in which to make the trial. Upon this construction of the contract Mr. Church rendered to the plaintiff his first statement of the account after the boy ceased to be a pupil at the school, charging him with the full $700 for a year's tuition, but made a discount of $200 on account of board, leaving a balance of $89.92 that was due from the plaintiff. But after an extended correspondence between the parties and an intimation from the plaintiff that he proposed to commence a suit to recover the amount claimed to be due him, Mr. Church rendered a second and revised statement charging the plaintiff with tuition for only one-half of the year, or $350 for the "first session" of 16 weeks, showing a balance due from him to the plaintiff of $114.08. In his letter of February 10, enclosing his check of the same date, he says, "Please find check from the School amounting to $114.08 which, it is hoped, will be accepted by you as a just settlement of your son's account."

The reply to this letter was made February 12 by the plaintiff's attorney, Mr. Knight, who claimed that the boy was taken into the school conditionally, and that the plaintiff should only be required to pay a pro rata amount "while the boy was in attendance." The statement of the account made by Mr. Knight on this basis, showed a balance of $196.85 due the plaintiff, in addition to the check for $114.08 already received. No reply was received from Mr. Church

and, on April 13, another letter was sent by Mr. Knight by registered mail, but on account of an error in the address this letter was not received by Mr. Church until May 10. In this letter he says, "Not hearing from you to the contrary within the next few days, I shall assume that Mr. Chapin is at liberty to use your check for $114.08, dated February 10, 1910, and apply the proceeds thereof on your account." Although no protest was made by Mr. Church against the appropriation of this check by the plaintiff in part payment of the amount claimed, it was not used by the plaintiff until May 27, when it was presented for payment at the bank and the amount credited to Mr. Church.

Under these circumstances it is contended in behalf of the defendant that, whether the sum due the plaintiff was more or less than $114.08, the check must be deemed to have "been accepted upon the terms proposed, and held to be a full and final settlement of the account."

It is familiar law that if one makes an offer of a certain sum to settle an open and unliquidated account, and attaches to his offer the condition that it must be accepted, if at all, in full satisfaction of the claim in dispute, the party receiving the sum offered will be taken to have accepted it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party receiving it declares that he receives it only in part payment of the debt. *McDaniels* v. *Bank of Rutland,* 29 Vt., 230; *Same* v. *Lapham,* 21 Vt., 222; *Anderson* v. *Granite Co.,* 92 Maine, 430; *Fuller* v. *Smith,* 107 Maine, 161.

But in the case at bar it has been seen that Mr. Church's letter accompanying the check of $114.08 did not state or necessarily imply that it must be accepted, if at all, in full payment of the plaintiff's claim. It simply expressed the "hope" that it would be "accepted as a just settlement" of the account. In his letter two weeks before he says in relation to the boy, "I have no recollection of agreeing to take him for less than the full school year . . . I should certainly wish, however, to be holden to any verbal arrangement I made with you in conversation at Springfield." Under the circumstances this expression of a "hope" that the check might be accepted in full settlement was substantially equivalent to an inquiry if he would not

so accept it. But in reply, as above stated, the plaintiff, by his attorney, reiterated his contention that he should only be called upon to pay the pro rata amount for the time the boy was in attendance, and it has also been noted that the check was not used by the plaintiff until after the lapse of seventeen days from the delivery of his last letter notifying Mr. Church that "in the absence of anything to the contrary within the next few days" he should assume that he was at liberty to use the check. The plaintiff had been impliedly invited by the terms of the offer to make some response to Mr. Church, and he, in turn, was entitled to a reply to his letter and to be informed whether he was at liberty to appropriate the check in part payment of his claim. The evidence shows no agreement or intention on the part of the plaintiff to accept the check in full satisfaction. It shows no agreement to compromise and no "accord and satisfaction." *Tompkins* v. *Hill,* 145 Mass., 379. The plaintiff is entitled to have the account adjusted under the terms of the original contract between the parties without reference to this check.

The plaintiff's son was received as a pupil on trial for the purpose of testing his capacity to meet the requirements of the school. The plaintiff's attention was not called to the catalogue regulation by which the admission of a pupil to the school apparently binds his parent to pay a year's tuition, and he never agreed to be bound by the regulation. A different oral contract was made by the parties before the enrollment of the pupil in the school and expressly reaffirmed afterwards, and the contract actually made between the parties was terminated by the serious illness of the boy which disqualified him from remaining in the school and on account of which his removal was requested by the defendant. "When the fulfillment of a contract becomes impossible by reason of illness, the obligation to perform it is discharged." *Lakeman* v. *Pollard,* 43 Maine, 463; *Dickey* v. *Linscott,* 20 Maine, 455. Furthermore, as applied to the facts of this case, such a regulation would be unreasonable and inequitable. *Rockland Water Co.* v. *Adams,* 84 Maine, 474. The suggestion of the defendant that any other boy was prevented from becoming a pupil in the school at that session by the enrollment of the plaintiff's son is not supported by positive or satisfactory testimony.

It is accordingly the opinion of the court that the defendant is justly entitled only to a proportional part of the $700 charged for a full year, as compensation for the seven weeks during which, as admitted in the plaintiff's statement of the account, his son was a pupil of the school, or $21.87 per week, with the other items credited, and a further sum of $20 for special tutoring, and interest from February 12, 1910.

The certificate must accordingly be,

Judgment for the plaintiff for $145.99

WILLIAM T. HAINES et als *vs.* GREAT NORTHERN PAPER COMPANY.

Piscataquis. Opinion May 10, 1913.

Assessment. County Commissioners. Deed. Highway. Jurisdiction. Location. Notice. Petition. Revised Statutes. Chapter 18, Section 41. Revised Statutes of 1883, Chapter 6, Section 78. Sale for Non-payment of Tax. Title. Trespass Quare Clausum.

1. A general jurisdiction conferred upon the commissioners by statute over the subject matter is not sufficient. It must appear that they have jurisdiction of the particular case in which they are called upon to act by the existence of those preliminary facts which confer it upon them.
2. Their doings are ineffectual unless they have power to commence them, and may, in such cases, be avoided collaterally.
3. For want of notice to the owners of the land as required by statute, the county commissioners had no jurisdiction of the particular case in which they were called to act on the petition in question and that the assessment of the tax on the land in question and the plaintiffs' tax deed based upon it are not valid.

On report. Judgment for the defendant.

This is an action of trespass quare clausum to recover the value of certain spruce, pine and cedar trees cut by the defendant on

section 9, of township number 1, range 13, in the county of Piscataquis. The plaintiffs claim title to said section 9 under a deed from the County of Piscataquis, based upon a sale of the land for the non-payment of a tax assessed thereon for the purpose of building a highway through the adjoining township under the authority of Revised Statutes of 1883, Chapter 18, Section 41. The defendant claims notice and order of same fails to meet the requirements of the law, relating to a petition for the location of such a highway as that described in the petition and failed to confer jurisdiction upon the commissioners in this particular case.

Plea, the 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, the Law Court to render such judgment as the law and evidence require.

The case is stated in the opinion.

F. E. Guernsey, for plaintiffs.

Appleton & Chaplin, Hudson & Hudson, and Stearns & Stearns, for defendant.

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

WHITEHOUSE, C. J. This is an action of trespass quare clausum brought by the plaintiffs to recover the value of certain spruce, pine and cedar trees cut by the defendant on section 9 of township number 1, range 13, west of the east line of the State, in the County of Piscataquis. The defendant pleads the general issue, and the case involves the determination of the question of title to section 9 in the township above named. The case comes to this court on report.

The plaintiffs claim title to section 9 under a deed from the County of Piscataquis dated December 28, 1896. This deed was based upon a sale of the land for the non-payment of a tax assessed upon township No. 1, range 13, for the purpose of building a highway through the adjoining township A, range 13, and township A, range 14.

Sec. 41 of Chap. 18 of the R. S. of 1883 authorized the county commissioners to lay out . . . a highway on any tract of land

in their county not within any town or plantation required to raise money to make and repair highways, and provided that, "all expense for making and opening the same shall be paid by the owners thereof . . . in proportion to their interest in the lands over any part of which it is laid, except as provided in Chap. 6, Sec. 78, which authorized the commissioners, in such a case, to assess also upon "adjoining townships benefited thereby, such an amount as they adjudge necessary for making, opening and paying expenses attending it."

The amount assessed upon No. 1, range 13, containing 22,000 acres was $300. It appears from the deeds in evidence that sections 3 and 9 in No. 1, range 13, contain about 1,300 acres in the aggregate. Assuming that the two sections are equal, the tax assessed upon section 9 was $8.86.

The defendant derives title by deed dated November 16, 1901, through mesne conveyance from the State of Maine. And it is in evidence from the defendant's general manager who made the purchase for the Company, that he had no knowledge or information in regard to any sale of this land by the County of Piscataquis, or any outstanding claims upon it.

It is contended by the defendant that the plaintiffs acquired no title under the deed from the County of Piscataquis, for the reason that the road was not legally located, and that the assessment made upon that township was therefore void. It is claimed that the county commissioners had no jurisdiction to lay out the road or make the assessment, because no notice was given to the owners of the land of the pendency of the petition for the laying out of this road, and of the time and place appointed for a hearing thereon, as required by the statutes in existence at that time.

The petition for the location of the road bears date March 22, 1886, and is based upon Sec. 46 of Chap. 18 of the R. S. of 1883. In this petition, the county commissioners are asked to lay out a highway in a town required by law to raise money to make and repair highways, and in townships not incorporated; and upon such a petition it is provided in Sec. 46 of Chap. 18 that the time and place of hearing shall be according to Sec. 42, which declares that if the county commissioners "think there ought to be a hearing, they shall cause notice to be given of the time and place appointed there-

for, by service of an attested copy of the petition with their order thereon, upon the owners of such lands, if known, fourteen days before that time, and if unknown, by a publication thereof in the State paper for six successive weeks, the last 30 days before that time. No proceedings shall take place until it is proved that such notice has been given."

But instead of having notice ordered in accordance with the requirements of this section, it was ordered that the "commissioners meet at the hotel in Greenville on the 28th day of June, 1886, at one o'clock P. M., and thence proceed to view the route mentioned in such petition; immediately after which view a hearing of the parties and witnesses will be had at some convenient place in the vicinity. . . . And it is further ordered that notice of the time and place and purpose of the commissioners' meeting aforesaid be given to all persons and corporations interested by serving an attested copy of the petition and this order thereon upon the clerk of the town of Greenville and by posting up attested copies in three public places in said town . . . and also by publishing the petition in the Piscataquis Observer in said county, and six weeks successively in the Kennebec Journal, a newspaper printed at Augusta in the County of Kennebec by the printer to the State, the last publication to be thirty days at least before the time of said view." It is not stated in this notice that the owners of the land were unknown, and that notice by publication in the State paper was ordered for that reason; and with the exception of the requirement for publication in the Kennebec Journal, the order of notice was entirely in conformity with the provisions of Sections 2 and 4 of the same chapter, authorizing notice by posting copies in three public places and by publication in some newspaper in the county on a petition for the location of highways from town to town.

But it wholly fails to meet the requirements of Secs. 46 and 42, relating to a petition for the location of such a highway as that described in the petition in this case. The commissioners did not adjudge that there ought to be a hearing on the petititon; they did not appoint a time and place for a hearing, and order notice thereof to be given by service of an attested copy of the petition and order thereon, upon the owners of the lands to be assessed, fourteen days

before that time; and there is no evidence in the case that the owners of the land in question ever had any notice or knowledge of the pendency of the petition or of any hearing upon it.

The last clause of Sec. 42 above quoted declares that "no proceedings shall take place until it is proved that such notice has been given;" but inasmuch as no such notice was ever ordered or given, it was not capable of proof. It is accordingly contended that the commissioners had no authority to take any action upon the petition, and that all proceedings under it were void.

The precise question involved here came before the court in *Ware* v. *County Commissioners,* 38 Maine, 492, and was decided adversely to the commissioners. In the opinion, the court say:

"The original petition was for the location of a public highway across lands not situated within the limits of any organized plantation or incorporated town. In such cases, the statute of 1841, C. 11, P. 196, Sec. 1, requires that the county commissioners, 'upon being satisfied that the petitioners ought to be heard touching the matter set forth in their petition, shall, before having any further proceedings thereon, order the petitioners to give notice of the pendency of their petition, and of the time and place appointed to consider the same, and adjudicate thereon,' in the manner therein prescribed. But in the case presented by the petitioner, no such order was made and the notice required by law was not given. The proceedings, therefore, were defective, in limine."

A general jurisdiction conferred upon the commissioners by statute over the subject matter is not sufficient. It must appear that they have jurisdiction of the "particular case in which they are called upon to act by the existence of those preliminary facts which confer it upon them. Their doings are ineffectual unless they have power to commence them, and may in such cases be avoided collaterally." *Small* v. *Pennell,* 31 Maine, 270; *Longfellow* v. *Quimby,* 29 Maine, 196; *Philbrick* v *Kennebec Co.,* 17 Maine, 198; *Harlow* v. *Pike,* 3 Maine, 438; *Joy* v. *Oxford Co.,* 3 Maine, 134. See also *Hayford* v. *Co. Commrs.,* 78 Maine, 156; *Packard* v. *Co. Commrs.,* 80 Maine, 45; *Donnell* v. *Co. Commrs.,* 87 Maine, 225.

But it appears that in 1889, a petition for a writ of certiorari was filed in the Supreme Court by the owners of the land over which

the location was made, praying that the record of the proceedings of the county commissioners here in question be quashed for the reason that they had no jurisdiction under the original petition to locate the way. But the court properly held, under the established rule in this State (*Phillips* v. *Co. Commrs.*, 83 Maine, 541), that the writ of certiorari could not be granted, for the reason that "the question of jurisdiction was open to the petitioners before the commissioners, and in the Supreme Judicial Court when the appeal was taken and entered, and when the committee appointed made their return to the court, which was accepted." But it seems that these petitioners for certiorari, who were the owners of the land over which the way was located, had knowledge of the pendency of the original petition for laying out the road, and actually appeared and opposed the location of it before the commissioners, and on appeal, before the Supreme Court. They had an opportunity to be heard upon the question of jurisdiction both before the commissioners and in the Supreme Court after the appeal was entered.

But the owners of the land here in question, adjoining the township over which the road was located, never had any notice of the petition for its location or of any hearing upon it; and never appeared or had any opportunity to be heard upon the question of jurisdiction. They were not parties to that petition, and cannot be affected by the judgment of the court upon it. An indispensable element of the doctrine of res adjudicata is wanting. The defendant is not precluded from setting up in this case the defense of a want of notice of the petition and proceedings thereon to the owners of this land over which the road was not located.

Finally, it is contended by the plaintiffs that the defendant is prohibited from making any defense to this suit, because he has not complied with the provisions of Sec. 83 of Chap. 6 of the Revised Statutes of 1883. That statute declares that the amount of the taxes for which the land is sold, in cases like the one at bar, and any subsequent taxes legally assessed on it, shall be paid or tendered before any person can maintain or defend any suit at law or in equity involving the title to such lands under such sale or forfeiture. But this clause of the statute was repealed in 1903, four years before this action was commenced, and three years before the trespass alleged in the plaintiffs' writ was committed. The

provision in Sec. 205 of the same chapter relating to the sale of land for non-payment of taxes assessed to resident owners in incorporated places is precisely analogous to that in Sec. 83 above quoted, and this was declared unconstitutional in *Bennett* v. *Davis,* 90 Maine, 102. It has been questioned in *Dunn* v. *Snell,* 74 Maine, 22; and a few years afterward the clause invoked by the plaintiffs in Sec. 83 was repealed, presumably because this also was deemed unconstitutional. In any event, the right of the defendant to defend this suit is not affected by that statute.

It is the opinion of the court that the county commissioners had no jurisdiction of the particular case in which they were called to act on the petition in question for want of notice to the owners of the land as required by statute, and that the assessment of the tax on the land in question, and the plaintiffs' tax title based upon it, are not valid.

The certificate must be,

Judgment for the defendant.

JOHN H. CONNERS, in Equity, *vs.* CONNERS BROS. COMPANY, et als.

Kennebec. Opinion May 12, 1913.

Amendment. Appeal. Corporation. Corruption. Demand. Equity. Fraud. Salaries. Stockholders. Trust.

1. It is an elementary principle of equity jurisprudence that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine.
2. It is immaterial whether the payments made to Mr. Cutter were in accordance with approved business methods, was fraudulent in law or reprehensible in morals for the conclusion is irresistible that the payments were made with the knowledge and consent of the plaintiff.

3. A participant in injustice and wrong is not entitled to relief in a court in equity.
4. It is well settled law that the directors of a corporation cannot serve themselves and the corporation at the same time.
5. They have no authority to vote salaries to themselves, and if money has been paid on account of such votes, it may be recovered back.

On appeal by defendants, from decree of a single justice. Bill sustained with a single bill of costs as stated in the opinion. Decree in accordance with the opinion.

This is a bill in equity by a minority stockholder in the defendant corporation, in which he asks that an account of all transactions of Margaret V. Conners, Dennis E. Conners, and Edward F. Conners, as directors of said corporation, that an injunction, both temporary and permanent, be decreed restraining said corporation, its officers and agents, from recovering any moneys, paying any debts, or exercising any of its privileges or franchises, etc. These claims are based on the allegations of fraudulent acts of Dennis E. Conners and Edward F. Conners, acting as directors, in voting themselves salaries and in paying large sums of money to Olin W. Cutter and Frank E. Dunbar, for fraudulent purposes, without the knowledge, or consent of the plaintiff. Dennis E. Conners and Conners Brothers Company and Edward F. Conners filed answers and demurrers. Margaret V. Conners filed an answer, to which the usual replications were made.

The case is stated in the opinion.

Newell & Skelton, for plaintiff.

F. W. & S. E. Qua, and Philbrook & Andrews, for defendants.

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

WHITEHOUSE, C. J. This bill in equity comes to the Law Court on appeal from the decree of a single justice entered in the cause.

The plaintiff is a minority stockholder in the defendant corporation which was engaged in the business of general contractors and construction engineers. The entire capital stock of the corporation was owned in equal shares by three brothers, the plaintiff, and the

defendants, Dennis E. Conners and Edward F. Conners. The corporation was organized under the laws of Maine, but its principal place of business is at Lowell, Mass., where all of the partners reside except the plaintiff, who now lives in Eliot, Maine. At the time of the acts complained of, the three brothers above named constituted the board of directors of the corporation; Dennis E. Conners was president, Edward F. Conners, Secretary and the plaintiff, John H. Conners, treasurer.

The plaintiff's amended bill contains eleven paragraphs, but the grounds of complaint relied upon by the plaintiff are found in the second, third and eleventh paragraphs.

It is alleged in substance in the second paragraph that in the fall of 1908 the defendants, Dennis E. and Edward F. Conners, without the knowledge of the plaintiff, while directors, fraudulently and corruptly paid to one Frank E. Dunbar, from the funds of the corporation, the sum of $10,000; that this money was paid to Dunbar for the purpose of inducing him to influence the commission having in charge the proposed alterations and repairs on the Suffolk County court house to award the contract to the defendant Conners Brothers Company, Dunbar being a lawyer and a relative of one of the commission; that the defendant company did not obtain the contract and received no benefit whatever from the money thus paid to Dunbar.

The third paragraph sets forth that at different times, without the knowledge of the plaintiff, the defendants Dennis E. and Edward F. Conners, acting as directors of the company, paid $25,000 to Olin W. Cutter, an architect, for the purpose of corruptly inducing him to use his influence to procure the contract for the building of the Oneida County court house in New York, and for the further purpose of inducing Cutter to alter the plans and specifications of the court house and cheapen the construction of the building and thereby secure to the defendant Conners large profits in fraud of the owners of the building and the defendant corporation.

The eleventh paragraph alleges that the defendants, Dennis E. and Edward F. Conners, acting as directors, "fraudulently and in breach of their trust duties, voted to themselves, to be paid from the funds of the corporation, for their services as president and secretary respectively, salaries largely in excess of their value."

The prayers of the bill are: First, that an account be ordered of all the transactions of the defendants, Dennis E. and Edward F. Conners, and that they be decreed to be trustees for the defendant corporation "for all sums which they might and ought to have reckoned or accounted for to the corporation; and second, that an injunction be decreed restraining the corporation from transacting any business until further order of court, and that a receiver may be appointed to wind up the affairs of the corporation.

The defendants, Dennis E. and Edward F. Conners and Conners Brothers Company, filed both demurrer and answer to the bill. Margaret V. Conners also filed an answer. After an examination of the causes for demurrer assigned with respect to the paragraphs in the plaintiff's bill above specified, it is the opinion of the court that the allegations relied upon by the plaintiff are sufficient to entitle him to relief under the first prayer in the bill, by virtue of the general equity powers of the court. *Smith* v. *Poor et als,* 40 Maine, 415; *Pride* v. *Pride Lumber Company,* 109 Maine, 452; (84 Atl. Rep. 989). The demurrer must therefore be overruled and the case examined upon the amended bill answer and proof.

In the answer to the complaint in the second paragraph of the bill, the defendants admit that the sum of $10,000 was paid by the corporation to Frank E. Dunbar for services rendered by him to the corporation, but deny that it was paid fraudulently or corruptly and that the corporation received no benefit therefrom, and aver that the payment was made with the full knowledge and approval of all the directors and stockholders, including the plaintiff himself.

Fraud and corruption are not to be presumed, but must be proved by clear and convincing evidence. With respect to this ground of complaint, the testimony not only fails to afford satisfactory proof that Dunbar was employed to aid in the accomplishment of a corrupt or fraudulent purpose, but does conclusively prove that whatever may have been the purpose for which his services were obtained, he was employed and paid with the knowledge, consent and approval of this plaintiff. It is unnecessary to consider whether the contract to pay Dunbar $10,000 was financially an advantageous one for the defendants or not. His services were rendered for the benefit of the corporation, and of each member of it, including the plaintiff,

who made no complaint in relation to this matter until the general estrangement and dissension arose between him and his brothers. He has no equitable cause for complaint on account of this transaction.

With reference to the allegations contained in the third paragraph of the bill it is said in the answer that Olin W. Cutter holds the note of the defendant corporation for $25,000, indorsed by all of the stockholders of the company including the plaintiff; that there has been paid on the note approximately the sum of $18,000; and that the note was given to Cutter by the corporation with the full knowledge, consent and approval of the plaintiff. But the defendants deny that the note was given by the defendants Dennis E. and Edward F. Conners, fraudulently, corruptly and in breach of their trust duty and deny that no benefit was received by the corporation from the payment of the money.

The defendants admit that at different times between 1906 and 1910, they paid to the architect Cutter sums aggregating $21,800. With respect to the origin and character of his business relations with the three Conners brothers who are parties to this suit, and the circumstances under which these payments were made, Mr. Cutter testifies that he first came in contact with them some years before they organized the defendant corporation in 1905; that they were then engaged in the trucking and coal business,—"rather an uncouth set, but hard-working fellows, very active and energetic;" that Dennis Conners asked him at one time if he would be willing to help him towards being a contractor, saying that he had an ambition that way and that he didn't want to be in the coal or teaming business all his life; that he agreed to assist them and thereupon gave them some information in regard to the business of contractors, taught them how to ascertain quantities and estimate the cost of construction and become qualified to figure on jobs and make intelligent bids for work; that he aided them to procure jobs and they soon became competent to make successful bids for the construction of some public buildings; but they seemed conscious of their deficiencies and limitations for want of technical training in any branch of construction and "pressed him a number of times to go into partnership with them" and he declined; but for the

apparent purpose of showing their gratitude for the past and insuring the continuance of his valuable aid in the future, they drew up an agreement stating that if they got established in business as successful contractors they would pay him $10,000, and the paper was signed "Conners Bros" and given to him; that finally in 1905 they obtained the contract for building the court house at Utica, N. Y., the successful completion of which gave assurance of a very large profit, and they again invited him to come into their firm, but he declined; that they then said they had a good contract and they wanted to increase that agreement from $10,000 to $25,000, and gave him a note for $25,000 and the old agreement for $10,000 was surrendered. This testimony of Mr. Cutter is corroborated by the plaintiff himself who admits he had knowledge of the agreement to pay $10,000, admits that subsequently the note for $25,000 was substituted for the $10,000 agreement and that he signed the note himself as surety with his brother Dennis, and also took the responsibility of signing upon it the name of his brother Edward, who was not present. But he says when he signed the note he understood that it was given for money borrowed of Cutter to use on the Utica job. He fails to state, however, that any funds from such a loan were deposited on the bank account of the defendant corporation at that time, or entered upon its cash book, although he was then treasurer having access to both. Later he says he understood that there was an exchange of notes of $25,000 each between Cutter and the defendants, but it appears from undisputed evidence that Cutter never gave the Conners Brothers Company a note for $25,000. Mr. Cutter frankly admits that the $25,000 note was not given for borrowed money and that there was no exchange of notes, and that the only consideration for the note was the assistance he had rendered Conners Bros. in obtaining contracts for them at different times. Mr. Cutter also testifies that the alterations noted on the plans for the Utica court house were made properly and legitimately, with the knowledge and approval of the authorities having in charge the erection of the building, for the purpose of bringing the cost of it within the limits of the appropriation; and that neither he, nor Dennis or Edward Conners received any money or any profit in consequence of any changes made in the plans for the building.

The defendant, Dennis Conners, testifies that the plaintiff knew all about the payments made to Cutter, except the last one made after the plaintiff left, and insists that Cutter's assistance to the company was worth $25,000. The defendant, Edward Conners, testifies that the plaintiff never made any objection to the payments made either to Cutter or Dunbar.

The plaintiff's claim that the note to Cutter for $25,000 was corruptly given for the purpose of obtaining the Utica contract, appears to be entirely without foundation, for the evidence shows that the work on the Utica court house was commenced in 1904, and the note was not given until 1905.

But a further discussion of the evidence relating to the precise nature and purpose of the financial transactions between Mr. Cutter and the Conners Brothers, can serve no useful purpose in the decision of this cause. It is immaterial whether the payments made to Mr. Cutter were in accordance with approved business methods, or were effective in promoting the financial success of the company. It is unnecessary to determine whether the purpose for which those payments were made was fraudulent in law or reprehensible in morals; for the conclusion from all of the evidence is irresistible that the contracts with Cutter, and the expenditures in pursuance of them, were made with the knowledge and consent of the plaintiff, and if the purpose of them was contrary to the dictates of conscience and good faith, the plaintiff was a participant in such injustice and wrong, and is not entitled to relief in a court of equity. For it is an elementary principle of equity jurisprudence that "whenever a party, who as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right or to award him any remedy." 1 Pom. Eq. Sec. 397. This fundamental conception of equity has been crystalized in the familiar maxim. "He who comes into a court of equity must come with clean hands."

The transactions in question cannot be deemed fraudulent as to this plaintiff.

But it is further complained that the defendants, Dennis E. and Edward F. Conners, voted to themselves for their services as presi-

dent and secretary, respectively, salaries largely in excess of their value. It appears from the records that at a directors' meeting held at the office of the company, March 24, 1909, at which were present only Dennis E. and Edward F. Conners with their attorney, a salary of $5000 was voted to Dennis E. Conners for his services as president, and the same amount voted to Edward F. Conners for his services as secretary.

It is of course well-settled law that the directors of a corporation cannot serve themselves and the corporation at the same time. They have no authority to vote salaries to themselves, and if money has been paid on account of such votes it may be recovered back. *Land Co.* v. *Lewis,* 101 Maine, 78 and cases cited; *Pride* v. *Lumber Co.,* 109 Maine, supra.

The plaintiff does not now contend that there are any grounds of complaint in the bill, other than the three above considered, on account of which he is entitled to equitable relief.

The conclusion is accordingly as follows: The bill is dismissed as to Margaret V. Conners. The bill is sustained with a single bill of costs as to the other defendants. The second paragraph of the decree appealed from, ordering the defendants, Dennis E. Conners and Edward F. Conners, to pay into the treasury of the corporation the sum of $25,000 paid by them to Mr. Cutter, and the sum of $10,000 paid by them to Mr. Dunbar, is reversed; and will be omitted from the new decree.

The third paragraph of the decree appealed from ordering the defendant, Dennis E. Conners, to pay into the treasury of the corporation all sums received for his salary as president in excess of two thousand dollars per year, with interest thereon, is affirmed and will be incorporated in the new decree.

The fourth paragraph of the decree appealed from, requiring the defendant, Edward F. Conners, to pay into the treasury of the company all sums received by him for his salary as secretary in excess of one thousand dollars per year, with interest thereon, is affirmed and will be incorporated in the new decree.

The single Justice who settles the decree will determine what sums, if any, have been received by the defendants, Dennis E. and Edward F. Conners, on account of the salaries so voted to them respectively, and when any such sums were drawn by them. The

provision for the appointment of a master will be omitted from the new decree.

Inasmuch as the evidence does not present a case requiring or authorizing the appointment of a receiver, the provision in the decree appealed from, relating to a receiver, will be omitted from the new decree.

Bill sustained with a single bill of costs as stated in the opinion. Decree in accordance with the opinion.

FRED A. TARBOX, in Equity, *vs.* FRANCIS PALMER et als.

York. Opinion May 17, 1913.

Advancements. Appeal. Beneficiary. Cestui que Trust. Decree. Equity. Executors. Funds. Interest. Revised Statutes. Chapter 69, Section 6, Paragraph IX. Trust. Trustee. Will.

1. The court found, upon the evidence in this case, that six shares of Pepperell Manufacturing Company stock and ten shares of Pennsylvania Steel Company stock were set apart in 1908 by the executors of the will of Elizabeth C. Palmer as a portion of Clinton C. Palmer's residuary share to be held in trust by his trustee.
2. That the trust character thus impressed upon them still remains, notwithstanding the fact that the trustee has had the Pennsylvania Steel stock retransferred to the executors on the books of the company.
3. That the executors hold a bare legal title, the beneficial interest being in the trustee for the benefit of Clinton C. Palmer.
4. That the interest of Clinton C. Palmer can be reached by equitable trustee process under the rule of *Haley* v. *Palmer,* 107 Maine, 311.

On appeal by defendants other than Clinton C. Palmer who made no defense from decree by the sitting Justice. Decree below affirmed with additional costs.

This is a bill in equity brought as an equitable trustee process, under Revised Statutes, Chapter 69, Section 6 paragraph IX, to reach and apply to a debt due the plaintiff from Clinton C. Palmer certain money and other property in the hands of some of the defendants. Clinton C. Palmer, the debtor, was made a party, but made no defense. The other defendants are the executors of the will of Elizabeth C. Palmer; one of the executors, Francis Palmer, is trustee for Clinton C. Palmer, under the will. A decree having been entered by the sitting Justice, sustaining the will, the defendants appealed therefrom.

The case is stated in the opinion.

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

Cleaves, Waterhouse & Emery, and James O. Bradbury, for defendants.

SITTING: SAVAGE, C. J., CORNISH, KING, HANSON, JJ.

SPEAR, J., ruled; did not sit.

HALEY, J., having been of counsel, did not sit.

SAVAGE, C. J. This bill in equity is brought as an equitable trustee process under R. S., Chapter 69, Section 6, paragraph IX for the purpose of reaching and applying to a debt due to the plaintiff from Clinton C. Palmer, certain money and other property in the hands of some of the defendants. The debtor was made a party. The other defendants are the executors of the will of Elizabeth C. Palmer, one of whom, Francis Palmer, is also trustee for Clinton C. Palmer under the will. The defendant Clinton C. Palmer makes no defense. A decree having been entered by the sitting Justice, sustaining the bill, the defendants, other than Clinton C. Palmer, appealed, and their appeal is now before us for determination.

The will of Mrs. Palmer and the Clinton C. Palmer trust have been considered by the court in several prior cases. *Holcomb* v. *Palmer,* 106 Maine, 17; *Palmer* v. *Estate of Palmer,* 106 Maine, 25; *Haley* v. *Palmer,* 107 Maine, 311. The trust expressed in the will was in these words: "I give, bequeath and devise all the rest and remainder of my estate to such of my children as may outlive me, share and share alike, but I will that the portion which would fall to my son Clinton C. Palmer shall be held in trust for him by my son Francis to be used for his comfort and necessities according to the discretion of my said son."

In *Holcomb* v. *Palmer* it was held that Clinton C. Palmer received his share in equitable fee simple in trust, that the legal estate passed to the trustee, Francis Palmer, that the beneficiary interest passed to the cestui que trust, Clinton, and that the trust would terminate at the death of Clinton, when any portion of the trust estate remaining would pass by his will, if he died testate, or descend to his heirs, if he died intestate. But it was also held that Clinton's equitable interest could not be reached by trustee process in an action at law.

In *Haley* v. *Palmer,* the bill, like the present one, was brought to impress upon the funds in the hands of the executors and trustee an equitable liability for the payment of a debt of Clinton C. Palmer. It was held that the bill would lie, and the trustee was ordered to pay the debt out of the trust property or funds in his hands. The case of *Haley* v. *Palmer* differs from the present case in this respect. In that case, there was sufficient property actually in the hands of the trustee to satisfy the claim. In this case there is not, and the plaintiff asks to reach certain shares of stock and the dividends received thereon, or their market value, which he says were set apart as Clinton's share in the estate of his mother, and now equitably belong to him, but which the defendant's executors say still remain in the residuum of the estate and have never been distributed or assigned to Clinton's trustee. It may be added here that the trust estate, claimed to have been set apart for the benefit of Clinton, whether in the hands of the executors or of the trustee, or of both, less proper credits, is insufficient to pay the plaintiff's claim in full.

The case shows that defendant's executors, the trustee being one of them, filed, in September, 1908, in the probate court their first account in which they charged themselves for "dividend on Pepperell Manufacturing Co. (6 shares held for Clinton Palmer, $36," and for "dividend on Pennsylvania Steel (10 shares held for Clinton Palmer) $35. They asked to be allowed as paid or delivered to each of four of the residuary legatees, as follows, 6 shares of Pepperell stock and 10 shares of Pennsylvania steel stock, of the aggregate value of $2550 for each of these legatees. They then stated as showing the balance of the estate in their hands, cash in bank, $1220.62; railroad stock appraised at $425; furniture appraised at $553; 8 tons of coal; and

"Special fund held for trustee of Clinton Palmer,

Pepperell Mfg. Co. (6 shares appraised at	$1770
Dividend Pepperell Mfg. Co. paid Feb. 1, '08	36
Pennsylvania Steel (10 shares appraised	780
Dividend Steel paid May 1, '08	35
	$2621"

It will be noticed that the stock described in this "special fund" was valued in the aggregate at the appraisal, in the sum of $2550, the same amount for which they asked to be allowed as paid or distributed to each of the other residuary legatees.

It does not directly appear in the record whether this account was allowed by the Probate Court as stated, but the balance charged to the executors in their second account indicates that the distribution made by the executors to the residuary legatees, evidently as advancements, was not allowed in their first account, but was reserved, perhaps, to be covered later by an order of distribution.

The plaintiff contends not only that the statement by the executors in their first account as to the existence of a special fund held for Clinton's trustee, and made up of Pepperell stock and Pennsylvania steel stock with dividends thereon, is evidence that the stock had been set apart by the executors and distributed to the trustee, as a part of Clinton's residuary share under his mother's will, but that the executors, having made the statement in the account, are estopped now to deny the truth of it. But we think that this plaintiff's right to have the stock and the dividends thereon applied to the payment of his claim may fairly be asserted upon a broader ground.

The case shows that early in 1908, the executors divided the Pepperell stock and the Pennsylvania steel stock remaining in the residuum into five equal parts, and delivered one part, 6 shares of Pepperell and 10 shares of Pennsylvania steel, to each residuary legatee, including Francis Palmer trustee for Clinton C. Palmer. Both the Pepperell and the Pennsylvania stocks assigned to the trustee, were transferred to him on the books of the respective corporations. The Pepperell stock, except three shares sold to provide the means to pay the Haley judgment, still stands in his name.

Several months after the original distribution, the trustee retransferred the Pennsylvania steel stock, on the books of the corporation, to the executors, and it still stands in their names. The trustee has received all the dividends on the Pepperell stock, and the executors have paid to the trustee all dividends received by them on Pennsylvania steel stock. The fund made up of these stocks and their dividends has been kept separate and special on the books and accounts of the executors.

But the case also shows that when the original distribution of Pennsylvania steel stock was made each residuary legatee gave the executors what was called an indemnifying receipt, to the effect that if any part of the stock so delivered should be needed later for purposes of general administration so much at least should be restored to the executors. The trustee testified that the original distribution was merely conditional and tentative, and expressive only of an intention so to divide the stocks later, with the approval of the court, and further, in effect, that his retransfer of the Pennsylvania steel stock to the executors was made for the protection of the executors against such contingencies as the receipts above mentioned indemnified against. In view of the fact that the trustee was himself one of the executors the reason given for the retransfer does not seem substantial. Though several years have elapsed since the distribution, no claim has been made upon the residuary legatees for retransfer of stock, or for reimbursement. And although the trustee testified that he "thought" the legatees would have to restore some of the Pennsylvania steel stock, in order that the executors may settle the estate, he offered no sufficient evidence to substantiate his belief. The state of the executors' accounts, which are incorporated in the record before us, does not show that any part of the Clinton Palmer fund so set apart will be needed for purposes of general administration.

Upon the foregoing facts, we think that the only reasonable conclusion is that the 6 shares of Pepperell stock and the 10 shares of Pennsylvania steel stock were set apart in 1908 as a portion of Clinton C. Palmer's residuary share, and the trust character thus impressed upon them remains to the present time, notwithstanding the fact that the trustee has had the steel stock retransferred to the executors. The executors hold a bare legal title. The beneficial

interest is in the trustee for the benefit of Clinton, and can be reached in this proceeding.

In argument, the defendants express their belief that the plaintiff's claim of indebtedness from Clinton is unfounded, and that the proceeding is really in the interest of Clinton, to enable him to withdraw the funds in the trust for his own use, by the use of the plaintiff's name. If this were so, it would have been competent for them to raise that issue. An equitable trustee process lies only by a creditor. But neither in their answer, nor by evidence, have the defendants questioned that the indebtedness declared in the bill was bona fide. To do so now is fruitless. The note from Clinton C. Palmer to the plaintiff was expressed to be for "value received." and that is sufficient prima facie.

Decree below affirmed with additional costs.

CLINTON C. PALMER, Applt.
From Decree of Judge of Probate.

York. Opinion May 17, 1913.

Account. Appeal. Allowance. Counsel Fees. Creditors. Disbursements. Discretion. Exceptions. Executors. Limitations. Private Account. Probate Court. Statute of Limitations. Trust.

1. Under exceptions to the decision of the Supreme Court of Probate on a probate appeal, only questions of law are open for determination. The findings of the Justice presiding in matters of fact are conclusive, if there is any evidence to support them. When the law invests the Justice presiding with power to exercise his discretion, that exercise is not reviewable on exceptions.
2. After the settlement, on appeal, of the account of a testamentary trustee or an executor, in the decree for which no provision was made for the

payment of the expenses and counsel fees of the accountant in that proceeding, neither the Judge of Probate, nor the Supreme Court of Probate, has power, in the settlement of a subsequent account, to allow him credit for such expenses and counsel fees, either in connection with the hearing before the Judge of Probate, or on appeal. The rule is the same in equity.

3. When an executor is summoned in a suit at law as trustee of a legatee interested in the residuum of the estate, he may, in a proper case, contend against his liability, and may employ counsel for that purpose, and his expenses and counsel fees therein, may, in the discretion of the court, be allowed to him in the settlement of his account.
4. An appeal by executors from the disallowance of $437, being part of an attorney's bill paid by them, raises the questions of the legality and propriety of every item that made up the sum of $437. All the items having been disallowed, it was not necessary to state in particular the items disallowed, in the reasons for appeal.
5. The "private claim" of an executor is not barred by the statute of limitations relating to suits against executors and administrators, though not presented to the Probate Court for allowance until after the statutory limit for suits is passed.
6. The "private claim" of an executor stated in his account to be the "private claim of Francis Palmer, as executor, amount due on note signed by the deceased in favor of said Francis Palmer, $61.93," is not stated with sufficient particularity to comply with the statute requirements. Whether in this case the disallowance of this claim should be without prejudice to the right to present it properly in a further account is a question which must be determined in the Supreme Court of Probate.

On exceptions by Clinton C. Palmer, to the allowance of certain items in the second account of the executors of the will of Elizabeth C. Palmer. Three exceptions relating to expenditures in connection with the Holcomb case overruled. All other exceptions sustained.

From the allowance of the second account of Francis Palmer, Chase Palmer and Chase Eastman, executors of the last will and testament of Elizabeth C. Palmer, by the Judge of Probate, cross appeals were taken by the executors and by Clinton C. Palmer, beneficiary under a trust created by the will in the residuum of the estate. The appeals were heard in the Supreme Court of Probate and a decree made. The executors abide by this decree. Clinton C. Palmer excepted to the allowance of seven items by the Supreme Court of Probate.

The case is stated in the opinion.

Clinton C. Palmer, Pro Se.

Robert B. Seidel, for Bartlett Palmer.

Cleaves, Waterhouse & Emery, and James O. Bradbury, for Francis Palmer, et al.

SITTINGS SAVAGE, C. J., SPEAR, CORNISH, KING, JJ.

HALEY, J., having been of counsel, did not sit.

SAVAGE, C. J. These were cross appeals from the allowance of the second account of Francis Palmer, Chase Palmer and Chase Eastman, executors of the last will and testament of Elizabeth C. Palmer. In their account the executors charged themselves with balance of their former account and sundry items received since, amounting in the aggregate to $18,538.85, and asked to be allowed for sundry items of credit, amounting to $4,042.70. The Judge of Probate disallowed certain of the credit items, and modified others, and allowed credit in the whole for the amount of $2,490.01. Separate appeals from this decree were taken by the executors, and by Clinton C. Palmer, beneficiary under a trust created by the will, in the residuum of the estate.

The appeals were heard in the Supreme Court of Probate, and a decree made. The decree confirmed for the most part the allowance of credit items made by the Judge of Probate. Other items were modified and corrected. The amount of credits allowed by the Supreme Court of Probate was $2,394.22. The executors abide by this decree. But Clinton C. Palmer excepted to the allowance of seven items, and with these items alone are we now concerned. His bill of exceptions was allowed by the presiding Justice, "if allowable." Under these exceptions only questions of law are open for determination. The findings of the Justice presiding in the Supreme Court of Probate in matters of fact are conclusive, if there is any evidence to support them. And when the law invests him with the power to exercise his discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions. *Small* v. *Thompson,* 92 Maine, 593; Eacott, Appl't, 95 Maine, 522; Dunlap, Appl't, 100 Maine, 397; *Costello* v. *Tighe,* 103 Maine, 324.

The long continued contention between Clinton C. Palmer and the executors of his mother's will has appeared in this court in several cases. *Holcomb* v. *Palmer,* 106 Maine, 17; *Palmer, Appellant,* v. *Palmer,* 106 Maine, 26; and *Haley* v. *Palmer,* 107 Maine, 311. The first case was a trustee process at law wherein a creditor of Clinton C. Palmer summoned and sought to hold these executors as trustees of Palmer, on account of property or funds of the estate in their hands as executors. The trustees were discharged. The second case was an appeal by Clinton C. Palmer from the allowance of the executors' first account. The court made no decree as to allowance of costs or expenses to the executors. The third case was a bill in equity, in the nature of an equitable trustee process, as it is called, wherein a creditor of Clinton C. Palmer sought to impress a creditor's equitable lien upon certain stocks and other property in the hands of the executors, and Clinton C. Palmer's trustee, and have the same applied to the payment of his debt. The executors, one of whom was the trustee, were parties defendant. The bill was sustained as to the trustee, which produced funds sufficient for the purposes of the case. No allowance of costs or expenses was made to the executors.

Many of the credits claimed in the present account were for expenses incurred in connection with these three proceedings. Some of the items were disallowed by the Supreme Court of Probate under the rule stated in *Peabody* v. *Mattocks,* 88 Maine, 164. It is now claimed that some items allowed should have been disallowed under the same rule. That rule is that after the settlement, on appeal, of the account of a testamentary trustee or an executor, in the decree for which no provision was made for the payment of the expenses and counsel fees of the accountant in that proceeding, neither the Judge of Probate nor the Supreme Court of Probate has power, in the settlement of a subsequent account, to allow him credit for such expenses and counsel fees, either in connection with the hearing before the Judge of Probate, or on appeal. Such expenses and counsel fees must be allowed, if allowed at all in the proceeding in which the expenses were incurred, and the services of counsel were rendered. Whether they shall be allowed at all rests in the discretion of the court, and that discretion can be exer-

cised only by the court that heard the case. If the decree of the court is silent as to the allowance of expenses, it is to be assumed that the court determined that expenses should not be allowed. Silence is denial. The rule is the same in equity.

This rule is applicable to expenses incurred in connection with the settlement of the first account, *Palmer* v. *Palmer,* and the equity suit, *Haley* v. *Palmer.* But it is not applicable to expenses incurred in the Holcomb case. The statute provides that one who is summoned as a trustee in a suit at law may, if he discloses in accordance with the statute requirements, retain his costs, that is, his taxable costs, out of the fund, if he is charged as trustee, or recover them of the plaintiff, if he is dicharged. But there is no legal method by which he can have his personal expenses or expenses of counsel, if he finds them necessary, allowed to him out of the fund, or taxed as costs against the plaintiff.

Three of the plaintiff's exceptions relate to expenses incurred by the executors in the Holcomb case, namely, expenses for counsel fees, for printing the case for the Law Court, and for typewriting briefs. Whether that kind of expenses might be allowed at all, and whether the question of their allowance is properly raised by the appeals, are questions of law, and are open to present consideration. How much should be allowed, if any is legally allowable, and the propriety of allowance, depend upon questions of fact, and the conclusion of the presiding Justice thereon is conclusive, if there is any testimony to support it. See cases cited, supra.

We think that when executors are summoned in a suit at law as trustees of a legatee interested in the residuum of the estate, they may not only deny their liability, but they may, in proper cases, contend against it. And for that purpose they may employ counsel. It is their duty to conserve the estate. Though it may turn out in the end that only the interest of that particular legatee might be affected, nevertheless, it might turn out that there would be no residuum, and that the entire body of the estate would be required for payment of debts and other expenses of general administration. There may be other reasons, but this is sufficient. It is not necessary now to consider what would be the duties of executors after full administration and order for distribution of the residuum. We

are not now saying that the condition of this estate did or did not require the retention of all the property for purposes of general administration. We are only saying that as a matter of law executors summoned as trustees may in proper cases employ counsel and incur other expenses for the protection of the estate. The propriety of allowing such expenses in a given case, and the amount to be allowed, depend upon a consideration of the facts of that case, concerning which the decision of the presiding Justice on appeal is conclusive. These considerations apply to the allowance of expenses of printing, and of typewriting, as well as of counsel fees.

But Clinton C. Palmer contends that the question of the propriety of a charge for counsel fees in the Holcomb case was not open on the appeal, that it was not raised by any of the reasons of appeal. It appears that the attorney employed by the executors has been paid by them the sum of $625 for services in the settlement of the first account, and in the Holcomb case, and otherwise. The Judge of Probate allowed $188 of this amount, being for "professional services and disbursements in the matter of the settlement of the first account of the executor," and disallowed the rest of the attorney's bill, or $437. From the allowance of the $188, Clinton C. Palmer appealed. The Supreme Court of Probate disallowed the $188 under the rule in *Peabody* v. *Mattocks,* but did allow $171.50 paid to the attorney for professional services in the Holcomb case. Although the items of the attorney's bill do not appear in the account, nor elsewhere in the record, it is obvious that they were included in $437 disallowed. In their appeal, the executors give as one reason, because "$437 being a part of an item which said executors in said account asked to be allowed them as disbursements paid for professional services rendered on account of said estate was disallowed as not being a proper charge against the executors." It is contended that this assignment does not present the question whether or not the executors should be allowed credit for some part of the $437, or for such part thereof as was paid for services in the Holcomb case. We think otherwise. The appeal from the disallowance of $437 raised the questions of the legality and propriety of every item that made up the $437, as charges against the estate. It was unnecessary that the appellants should state in particular the items disallowed, because all the items were disallowed. The excep-

tions to the allowance of $171.50 counsel fees, $20.50 printing and $20.50 typewriting in connection with the Holcomb case are therefore overruled.

An exception is taken to the allowance of the "private account" of Francis Palmer, an executor. One objection is that the claim is barred by the statute of limitations relating to claims against executors. This point is not tenable. The case shows that the executors actually paid the claim within a few weeks after their appointment, though they did not ask the court to allow it as a "private claim" until after the statutory limit for suits had been passed. We know of no statutory requirement that "private claims" of executors must be presented to the Probate Court for allowance within the period of limitation, or not at all. Unless within some statute bar, the claim is not barred.

But the further point is made that the claim is not "particularly stated" in the account. It is provided in R. S., Chap. 66, Sec. 65, that "no private claim of an executor . . . against the estate under his charge shall be allowed in his account, unless particularly stated in writing." The claim is stated in the account as the "private claim of Francis Palmer, an executor, amount due on note signed by deceased in favor of said Francis Palmer, $61.93." The date of the note is not given. Whether the $61.93 is the face of the note, or the face of the note with interest, or the balance due on the note does not appear in the statement. The statement is no more paticular than it would be to say "balance of account." This statement clearly falls short of the standard required. It is not enough that the other executors had recognized the legality of the claim by paying it. An executor is required to state his private claim with particularity in order that all persons interested in the administration of the estate may have an opportunity to investigate the claim, and contest it if they see fit. They are entitled to have the claim stated with as much particularity, but perhaps not with as much formality, as would be required in a declaration in a suit on the claim. See *Hurley* v. *Farnsworth,* 107 Maine, 306. The statute is peremptory. The claim if not properly stated cannot be saved by proof. Upon the present statement the claim should be disallowed as a matter of law, and this exception

must be sustained. Whether it ought to be disallowed without prejudice to the right to present it properly in a further account is a question which must be determined when the matter comes up for further hearing in the Supreme Court of Probate.

An exception was taken to the allowance of $112.70 to Chase Palmer executor for disbursements. The case shows that all of these disbursements except $34.50 were made in connection with the settlement of the first account, and of the Haley case. Under the rule in *Peabody* v. *Mattocks,* they should have been disallowed as a matter of law. This exception must be sustained. The exception to the allowance of $10.72 to Chase Eastman, executor, for disbursements, must be sustained for the same reason. Out of $19.70 claimed for allowance, at least $13.58 was for disbursements in connection with the first account and the Haley case. So that at the most, only $6.12 could properly have been allowed.

The remaining exception relates to the allowance of commissions. One point made is that no commissions should have been allowed on the ground that the executors have mismanaged and wasted the estate. That point presents no question of law and is not open on exceptions. The decision of that question rested in the discretion of the presiding Justice, to be exercised in accordance with the proofs in the case.

But the further point is made that the Supreme Court of Probate allowed 5 per cent on $37,901.02, while the total amount for which the executors charge themselves in this account is $18,538.85. The executors begin their account by charging themselves with "balance of former account" $15,574.92. To this sundry items of receipts are added, making the total $18,538.85. The record entirely fails to show how much was accounted for in the first account. It fails to show how much, if any, more than $18,538.85 ever came into their hands. There is no proof in this case that they had received $37,901.02, or any other specific sum more than $18,538.85. The omission was doubtless inadvertent. If we were permitted to supply the omission by the knowledge of the situation which we have gained in other litigation between these parties, we might do so. But we have no right to do this. We are limited to the record before us. We cannot go outside of it. *Hunter* v. *Heath,* 76 Maine,

219, and many other cases. We must leave the omission to be supplied on a further hearing. Reluctantly, therefore, we are compelled to say that the exception must be sustained.

Three exceptions relating to expenditures in connection with the Holcomb case overruled; all other exceptions sustained.

GEORGE F. LIBBY et als., Petrs., *vs.* CHARLES G. ENGLISH, et als.

Androscoggin. Opinion May 17, 1913.

Appeal. Australian Ballot Law. Cross. Defective Ballots. Distinguishing Marks. Intention. Marking. Municipal Elections. Party Groups. Public Laws of 1911, Chapter 71. Returns. Revised Statutes. Chapter 6, Sections 70-74. Stickers.

1. The plain intendment of the statute, Public Laws of 1911, Chapter 71, is that in counting ballots under the Australian Ballot Law of this State, all ballots marked with a cross in the square at the head of the column shall be counted, if the intention of the voter can be ascertained, no matter what other casual, accidental, mistaken or unnecessary marks the voter may have placed upon the ballot, provided the same are not deemed to have been fraudulently made.
2. When a voter has made unauthorized marks upon his ballot, or has made a peculiar or irregular mark in the proper place, with a design to distinguish it from other ballots, so that the identity of the voter can be determined afterwards, such marking must be deemed dishonest and fraudulent, and the ballot must be rejected.
3. A ballot not marked with a cross in the square at the head of any column cannot be counted. Such marking is indispensable.
4. Marking a cross in the margin opposite to a candidate's name does not necessarily invalidate a ballot, but a ballot so marked cannot be counted unless it is also marked with a cross in the square at the head of a column.
5. The placing of crosses in two squares at the heads of columns does not necessarily invalidate a ballot. It does invalidate the ballot, if the marking in that manner is deemed to be fraudulent. Such a ballot, if not deemed

to have been fraudulently marked, is to be counted once for the candidates whose names appear in both columns, but not for any candidate whose name appears in only one column.

6. A ballot upon which the voter apparently first made a cross in a square, and then covered over the connecting part of the cross and one of the arms with three stickers, one running at nearly right angles with the other two, must be deemed to have been so marked for a fraudulent purpose, and it cannot be counted.
7. A ballot upon which the voter wrote "Geo. H." at the bottom must be deemed to have been so marked for a fraudulent purpose, and it cannot be counted.
8. When the place where a name is written indicates on the face of it a purpose to vote for a person of that name, rather than a fraudulent purpose to make a distinguishing mark, the vote should be counted, even if it should appear that there was no voter of that name in the city where the election was held.
9. When it appears that each of two candidates received the same number of ballots, neither can maintain a petition under Revised Statutes, Chapter 6, Sections 70-74 to determine the election.

On appeal by respondents from decision of the presiding Justice. Petition sustained with single bill of costs in cases of petitioners Libby, Kernan, Coombs, Elder, McMinn and Reade; dismissed in case of petitioner Maines.

This is a petition brought under Revised Statutes, Chapter 6, Sections 70-74, to determine whether the petitioners, or respondents, were severally elected to the offices for which they were candidates at the municipal election in ward 2 in Lewiston on the first Monday of March, 1913. The case was heard by a Justice of the Supreme Judicial Court, and from the decision by said Justice rendered, the respondents appealed and the case was thereupon certified to the Chief Justice, under Section 12, Chapter 6 of Revised Statutes.

The case is stated in the opinion.

W. B. Skelton, and W. H. White, Jr., for petitioners.

William H. Hines, for respondents.

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

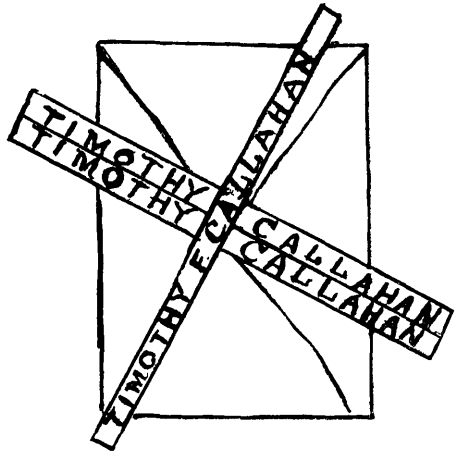
SAVAGE, C. J. This is a petition brought under R. S., Chap. 6, Sections 70-74 to determine whether the petitioners were severally elected to the offices for which they were candidates at the munici-

pal election in ward 2, in Lewiston, on the first Monday in March, 1913, or whether the respondents were. The case comes here on appeal by the respondents from the judgment of a single Justice. The petition is joint. The statute seems to contemplate a separate petition for each petitioner. But in this case no objection has been made to the form of the proceeding. And as the rights of all the petitioners on the one side, and all of the respondents on the other, depend practically upon the same facts, we will proceed to an examination of the merits. As was decided in *Bartlett* v. *McIntire,* 108 Maine, 163, the case is to be considered de novo upon all disputed questions of law and fact.

The ballot used at the election had four columns, or party groups of names, "Democrat," "Republican," "Progressive" and "Citizens." The names in the "Republican" and "Citizen" columns were identically the same. The names in the "Progressive" column were the same as in the "Republican" and "Citizen" columns, except for the office of mayor. The names of all the petitioners appeared in all three of these columns. The names of all the respondents appeared in the "Democrat" column.

We shall need to consider only such ballots counted or rejected, as were in dispute before the single Justice. They are sixteen in number. Of these the single Justice counted three for the petitioners, three for the respondents, and rejected ten as defective. No objection is now made to the three that were counted for the respondents, so that they disappear from the case. For convenience we number the remaining thirteen serially. Ballots 1 to 7 inclusive have no cross in any of the squares at the heads of columns. Five of these, however, have crosses in the column against or under the names of one or more, and in one case, all of the respondents. One has a cross under the name of the candidate for mayor in the "Democrat" column, and one a cross under the name of the candidate for mayor in the "Citizens" column. Ballots 8 and 9 have crosses in the squares at the head of both the "Republican" and "Citizens" columns. Ballot 10 has crosses in the squares at the head of both the "Republican" and "Progressive" columns. Ballot 11 was marked as follows in the square at the top of the "Democrat" column:—First, as may be believed, the voter made a cross with a

pencil. Then he pasted three "Timothy F. Callahan" stickers in the form of a cross over and partly concealing the pencilled cross, as appears in this sketch.



Ballot 12 has "Geo. H." written on the bottom of it.

Ballot 13 is not before us for examination. It is claimed in the appeal that it was inadvertently returned in the ballot box to the city clerk, after the hearing, and so was not retained among the contested ballots. But we think it is not necessary to examine it, for we assume that it is correctly described in the appeal. The appeal states that the name "Jas. A. Scoot was written under the name of John D. Clifford," one of the respondents, or "George K. Elder" one of the petitioners, the names of Clifford and Elder being opposite to each other in adjoining columns, and the reason assigned in the appeal for rejecting the ballot is that there is no voter by the name of Jas. A. Scoot in the city of Lewiston. Hence it is claimed that the name is a distinguishing mark.

Most of the essential rules which govern the manner of voting under the so called Australian Ballot law of this State, and of counting the ballots, were carefully considered and determined in *Bartlett* v. *McIntire,* 108 Maine, 161, and *Pease* v. *Ballou,* 108 Maine, 177. The statutory provisions in force when those cases

originated, so far as it is necessary to refer to them now were these:—

"On receipt of his ballot the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting shelves or compartments so provided and shall prepare his ballot by marking in the appropriate margin or place a cross (x) as follows: He may place such mark within the square above the name of the party group or ticket, in which case he shall be deemed to have voted for all the persons named in the group under such party or designation." Then follow provisions for erasing names and filling in other names, and for the use of stickers. "Before leaving the voting shelf or compartment the voter shall fold his ballot without displaying the marks thereon, in the same way it was folded when received by him, and he shall keep the same so folded until he has voted." R. S., Chap. 6, Sect. 24. "If a voter marks more names for any one office than there are persons to be elected to such office, or if for any reason it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office. No ballot without the official endorsement shall, except as herein otherwise provided, be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this chapter shall be counted. Ballots not counted shall be marked defective on the back thereof, and shall be preserved, as required by section twenty-five." R. S., Chap. 6, Sect. 27.

Under these statutory provisions, it was held in *Bartlett* v. *McIntire,* supra, among other things, that although in the original statute, Laws of 1891, Chapter 102, one of the ways by which the voter was authorized to indicate his choice was by making a cross in a blank space opposite the name of the candidate of his choice, yet the amendment of 1893, Chapter 267, rendered inapplicable the foregoing provision of the statute of 1891, that marking in the margin or opposite the name of a candidate was no longer recognized as a legal method of marking, that the only marking permissible under the statutes then in force, in order legally to indicate a choice must be in the square at the head of the party group, that while marking in the margin opposite a candidate's name did not necessarily invalidate a ballot, that alone could not validate one, because it was not a

compliance with the statute requirement, that the marking must be as the statute commands, in a particular place and by a particular emblem, and that the intention of the voter must be expressed in compliance with statutory requirements, and if not so expressed his ballot is fatally defective.

Furthermore is was held, in the same case, that before a ballot should be rejected because of an alleged distinguishing mark, it should appear (1) that the mark is in fact a distinguishing mark, that is, a mark or device of such a character as to distinguish this ballot from others, (2) that it was made intentionally, and not accidentally, and (3) that it was intended to be a distinguishing mark, that is, a mark which fairly imports upon its face design and dishonest purpose. But, it was also held, "if a voter has placed such a mark or device or name or initials or figures upon the ballot as seem inconsistent with an honest purpose, such a ballot should be rejected."

By Public Laws of 1911, Chapter 71, the Legislature amended Section 27 of Chapter 6, Revised Statutes by adding the following words: "No marks, other than those authorized by law, shall be placed upon the ballot by the voter, but no ballot, after having been received by the election officers, shall be rejected as defective because of marks, other than those authorized by law, having been placed upon it by the voter, unless such marks are deemed to have been made with fraudulent intent, and no ballot shall be rejected as defective because of any irregularity in the form of the cross in the square at the head of the party column, unless such irregularity is deemed to have been intentional and made with a fraudulent purpose."

The amendment of 1911 seems to have been framed to modify some strict rules of rejection expressed in the earlier cases, *Curran* v. *Clayton,* 86 Maine, 42 and *Durgin* v. *Curran,* 106 Maine, 509, and is not inconsistent in the main with the modified rules expressed in *Bartlett* v. *McIntire.* The requirement that a ballot, to be counted, must be marked with a cross in the square at the head of a party column is neither abrogated nor modified. The law in this respect stands as declared in *Bartlett* v. *McIntire.* It is true, indeed, that the 1911 statute expressly prohibits the placing of any mark upon the ballot by the voter other than those authorized by law. But it is

obvious that this provision is practically ineffective, as to marks on the face of the ballot, because the statute, Section 24, requires the voter, before leaving the voting shelf, to fold his ballot without displaying the marks thereon, and to keep it so folded until he has voted, and the 1911 amendment declares that no ballot after it has been received by the election officers shall be rejected as defective because of unauthorized marks placed upon it by the voter, or because of any irregularity in the form of the cross, unless the one or the other, as the case may be, is deemed intentional and made with a fraudulent purpose. Whatever mark is made on the face of the ballot by the voter, the election officers cannot know of it before the ballot is received, and after it is received, it cannot be rejected, unless deemed to be intentional and fraudulent.

The plain intendment of the statute seems to be that all ballots marked with a cross in the square at the head of the column shall be counted, if the intention of the voter can be ascertained, no matter whatever other casual, accidental, mistaken or unnecessary marks the voter may have placed upon the ballot, provided the same are not deemed to have been fraudulently made. And since the manifest purpose of the Australian ballot law is to secure the secrecy of the ballot and thereby prevent bribery and corruption at the polls, *Bartlett* v. *McIntire,* supra, it must follow that when a voter has made unauthorized marks upon his ballot, or has made a peculiar or irregular mark in the proper place, with a design to distinguish it from other ballots, so that the identity of the voter can be determined afterwards, and so that it may be ascertained that he has kept his part of a bargain, such marking must be deemed dishonest and fraudulent; and the ballot must be rejected.

We now come to a consideration of the particular ballots involved in the decision of this case. Under the foregoing rules, it is manifest that ballots 1 to 7 inclusive must be rejected. However clearly the voters who marked these ballots may have indicated their intentions by other markings on the ballots, they failed to comply with the one essential statutory requirement that ballots must be marked with a cross in the square at the head of a party column. This is indispensable. Whatever else he does the voter must express his intention as the statute requires. *Bartlett* v. *McIntire,* supra.

We think ballots 8, 9 and 10 should be counted for the petitioners. The placing of crosses in two squares at the heads of party columns does not necessarily invalidate the ballot, since the passage of the 1911 statute. It would invalidate it if such marking appeared to be fraudulent. It could not be counted for a particular office when different names appear in different columns as candidates for that office, for in such case it would be impossible to determine for whom the voter intended to vote. The 1911 amendment declares that ballots shall not be rejected because of unauthorized marks, unless deemed fraudulent. We think these ballots come within the saving grace of that amendment. That a voter marked in the squares at the head of the columns, both containing the same names of candidates, or in the case of another of the ballots, the same names except for the office of mayor, appears to us rather to have been due to a misapprehension as to the proper manner of marking than to a fraudulent purpose. It clearly seems to us that it was the intent of the voter to cast one ballot, and only one for the names that appeared in both columns, and those names included all the petitioners.

Ballot 11 presents a different question. If it be assumed, as we think it may, that the voter first made a pencilled cross in the square, he then covered over the connecting part of the cross with three stickers, one running at nearly right angles with the other two. What remains now of what we assume was once a cross does not appear to the eye as a cross, but rather the three ends of the original lines, the fourth, as well as the connecting point, being entirely concealed. So the voter left it. He left no visible cross except that made by the stickers. Besides, it is difficult to understand what good or allowable purpose the voter had in so preparing his ballot. It is manifest that it was not done accidentally. It was designed. What was the purpose? If he had only used one sticker it might be concluded that he had intended to vote a split Democratic ticket, with Mr. Callahan for mayor, but mistook the proper place for the sticker. But why use three? We can judge of the ballot only by the voter's acts. His acts indicate that the stickers were not placed there inadvertently, but for a purpose. What good purpose could they serve? None. If such a ballot as this is not to be rejected for

unlawful distinguishing marks, we can hardly conceive of one that should be. If ballots such as this are to be counted, there is no virtue left in the secrecy of the ballot. Purchasable voters may easily prove their right to their ill gotten rewards. Judging this ballot by its face, and that is all we have to judge by, there is, we think, no purpose discoverable, but a dishonest one. Therefore we conclude this ballot must be rejected.

Ballot 12 falls in the same category. The voter wrote "Geo. H." on the bottom of his ballot. This is clearly an unlawful distinguishing mark. The act itself imports a dishonest, fraudulent purpose. The ballot cannot be counted.

In ballot 13, the name "Jas. A. Scoot" appears written in the body of the ballot, under the name of John D. Clifford, or that of George K. Elder, or perhaps partly under both. It is stated in the appeal that there is no voter of that name in ward 2, or in the city. But we have no evidence before us on the subject, either way. Even if the allegation were proved, the writing in of his name, unless fraudulently done, would not necessarily invalidate the ballot. A voter may vote for whom he pleases, whether the name be on the official ballot, or is written in by himself. The eligibility of his candidate does not affect the validity of his ballot. The place where the name was written indicates on the face of it a purpose to vote for a person of that name, rather than a fraudulent purpose to make a distinguishing mark. We think this ballot should be counted for the petitioners. Inasmuch as this ballot is not included by the presiding Justice as one of the disputed ballots, we assume that he counted it with the undisputed ballots. We will do likewise, and add it to the count for the petitioners.

We conclude therefore that there should be counted for the petitioners and the respondents respectively the following numbers of ballots.

For Alderman

For George F. Libby (petitioner)

Undisputed ballots,	259
Ballots 8, 9 and 10,	3
	262

For Charles G. English (respondent)

undisputed ballots,	257

For common councilmen

For Charles G. Kernan (petitioner)

Undisputed ballots,	260
Ballots 8, 9 and 10 to be added,	3
	263

For Charles F. Maines (petitioner)

Undisputed ballots,	258
Ballots 8, 9 and 10 to be added,	3
	261

For Henry A. Coombs (petitioner)

Undisputed ballots,	259
Ballots 8, 9 and 10 to be added,	3
	262

For James E. Ballard (respondent) 261

For Ferdinant Ebert (respondent) 256

For M. A. Sullivan (respondent) 260

For member of Superintending School Committee

For George K. Elder (petitioner)

Undisputed ballots,	258
Ballots 8, 9 and 10 to be added,	3
	261

For John D. Clifford (respondent) 259

For Warden

For Alexander McMinn (petitioner)

Undisputed ballots,	258
Ballots 8, 9 and 10 to be added,	3
	261

For Thomas F. Hawkins (respondent)

Undisputed ballots,	259

For Ward Clerk

For John L. Reade (petitioner)

Undisputed ballots,	259
Ballots 8, 9 and 10 to be added,	3
	262

For M. F. McGillicuddy (respondent)
Undisputed ballots, 260

It is therefore held that the petitioners receiving a plurality of the ballots cast at the municipal election in ward 2 in the city of Lewiston, held on the first Monday in March, 1913, were duly elected, as follows:—

George F. Libby to the office of alderman.

Charles G. Kernan and Henry A. Coombs to the office of common councilmen.

George K. Elder to the office of Superintending School Committeeman.

Alexander McMinn to the office of warden, and John L. Reade to the office of ward clerk.

It appearing that Charles F. Maines and James E. Ballard received an equal number of ballots for the office of common councilman, it is held that neither was elected. It is moreover held that since the petitioner has not shown himself entitled to the office, the petition cannot be sustained as to him. *Benner* v. *Payson,* 110 Maine, 204.

Petition sustained with single bill of costs in cases of petitioners Libby, Kernan, Coombs, Elder, McMinn and Reade; dismissed in case of petitioner Maines.

FREDERICK TUELL *vs.* INHABITANTS OF MARION.

Washington. Opinion May 27, 1913.

Action. Bridges. Constructing. Damages. Declaration. Demurrer. Floatable Stream. Highways. Municipal Corporations. Navigation. Negligence. Nuisance. Obstruction. Special Damage.

In this action the plaintiff seeks to recover damages claimed to have been occasioned by reason of defendants' negligence in carelessly constructing and maintaining the bridge across Cathance Stream in Marion.

1. Navigable streams are public highways, that all persons have the right to pass over and to float logs, timber and other merchandise upon, and cities or towns have no right to obstruct the navigation thereof, unless they are given the right or the duty is imposed by statute.
2. The general rule is that municipal corporations are not liable to a private action for their neglect to perform, or their negligent performance of corporate duties imposed by statutes, but if the acts complained of are not authorized by statute and are done by authority of the municipal corporation, or are afterwards ratified by the corporation, they are liable, as an individual would be liable for the same wrongful acts. The law only exempts them from neglect or their negligent performance of their public or corporate duties imposed by statute.

On exceptions by defendant. Overruled.

This is an action on the case to recover damages alleged to have been sustained by the plaintiff by reason of the defendants' negligence in carelessly constructing and maintaining two bridges across Cathance Stream in the town of Marion, and by negligently omitting to provide the abutments to said bridges with suitable wings, and that by reason thereof said stream was unreasonably obstructed. The defendant filed a general demurrer to the declaration, which was overruled by the Justice presiding. To this ruling, the defendant excepted.

The case is stated in the opinion.

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

Ashley St. Clair, and James H. Gray, for defendants.

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

HALEY, J. This is an action on the case to recover damages alleged to have been sustained by the plaintiff by reason of the defendants' negligence in carelessly constructing and maintaining two bridges, with the abutments thereto, across Cathance Stream in the town of Marion, and by permitting them to fall into a condition of dilapidation, and by negligently omitting to provide said abutments with proper and suitable wings, and that thereby the navigation of said stream was unreasonably obstructed.

Cathance Stream is alleged to be a non-tidable, floatable stream, a public highway through the town of Marion, and that, during the time complained of, the plaintiff was engaged in floating logs and lumber down said stream to a mill pond below said bridges, and that, by reason of the obstruction caused by said bridges and abutments, the passage of said logs and lumber was greatly obstructed and delayed, and the plaintiff put to the expense of employing more men than he otherwise would have done but for said obstruction, and put to other expenses which are specified in the declaration.

At the return term of the writ the defendant filed a general demurrer to the declaration, which, after joinder by the plaintiff, was overruled by the presiding Justice. To this ruling the defendants excepted, and the case is before this court upon the exceptions.

The defendants rely upon two rules of law to sustain their demurrer:

First: That a common law action cannot be maintained to recover special damages sustained by one against a municipal corporation, or a town, for damages received through its neglect or omission to perform a public or corporate duty, and that the statutes of this State do not authorize an action for the causes set forth in the declaration.

Second: That the cause of complaint, viz., an obstruction to the navigation of Cathance Stream, constituted a public nuisance, and the plaintiff has not suffered such special damages thereby as gives him the right to maintain this action.

1. The general rule is that municipal corporations are not liable to a private action for their neglect to perform, or their negligent

performance of corporate duties imposed by statute; but if the acts complained of are not authorized by statute and are done by authority of the municipal corporation, or are afterwards ratified by the corporation, they are liable, as an individual would be, for the same wrongful acts. *Kelley* v. *Portland,* 100 Maine, 265; *Woodcock* v. *Calais,* 66 Maine, 234; *Anthony* v. *Inhabitants of Adams,* 2 Met., 284; *Small* v. *Inh. of Dennysville,* 51 Maine, 359; *Deane* v. *Inh. of Randolph,* 132 Mass., 475; *Thayer* v. *Boston,* 19 Pick., 511. The law only exempts them from neglect, or their negligent performance of their public or corporate duties imposed by statute.

The declaration alleges, and the demurrer admits, that Cathance Stream is a navigable stream and a public highway for all persons to go upon, and that the town constructed and maintained the bridges and the abutments in such condition that they were an obstruction to the navigation of said stream.

Navigable streams are public highways, that all persons have the right to pass over, to carry and to float logs, timber and other merchandise upon, and they being public highways, cities or towns have no right to obstruct the navigation thereof, unless they are given the right, or the duty is imposed by statute. As stated in *Commonwealth* v. *Coombs,* 2 Mass., 492, "A navigable river is, of common right, a public highway, and the general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public." *Arundale* v. *McCullock,* 10 Mass., 71; *State* v. *Anthoine,* 40 Maine, 435; *State* v. *Inh. of Freeport,* 43 Maine, 198; *Rogers* v. *Kennebec & Portland R. R. Co.,* 35 Maine, 319; *Inh. of Cape Elizabeth* v. *County Commissioners,* 64 Maine, 456.

The building and maintaining of the bridges complained of not being duties imposed upon the town by the general law, the town cannot justify their construction or maintenance, if an obstruction to navigation, except by an act of the Legislature, and the pleadings do not show that they were authorized by the Legislature to erect and maintain the bridge. The declaration does contain the allegation that the town "was liable to keep in repair, and did then and there

maintain them;" but the liability alleged is a statement of law which the demurrer does not admit. There are no facts stated in the declaration which authorize that conclusion.

In *Cumberland & Oxford Canal Company* v. *Portland,* 62 Maine, 504, the court says: "The declaration avers, and therefore the demurrer admits, that the city of Portland did the acts complained of. Those acts are, prima facie, acts of trespass. No justification or excuse being shown, the plaintiffs are entitled to judgment." In this case the declaration avers, and the demurrer admits, that the defendants did the acts complained of. They were acts that obstructed the navigation of the public highway. Even when a town is authorized by the Legislature to erect a bridge across navigable waters, unless it is constructed as authorized by the act in a reasonable and proper manner, and it is an obstruction to navigation, the town is liable. The legislative authority, under color of which bridges are built across navigable streams, contemplates its being done in a reasonable manner, and does not justify their erection so as to obstruct navigation, unless it is reasonably necessary so to do, or the act expressly authorizes the construction in such a manner as to obstruct navigation, for damages that result from a careless or unreasonable exercise of their power, are not treated as having been contemplated by the act conferring the authority. *Perry* v. *Worcester,* 6 Gray, 544; *Deane* v. *Inh. of Randolph,* 132 Mass., 475; Wood on Nuisances, Secs. 750, 754 and 757.

2. Has the plaintiff alleged that he sustained special damages different from those suffered by the community at large, either to his person or property, from the public nuisance alleged in the declaration to have been created by the obstruction of Cathance Stream? If he has, he has stated a cause of action; otherwise, he has not.

The declaration alleges that on April 1, 1909, and on each and every other day between said date and the first day of June next following, he was in possession of 1,600,000 feet of logs, lumber and timber, which he had contracted to float and drive down said Cathance Stream, passing through and under said bridges to the mill pond of the Dennysville Lumber Company; and also alleges the same facts as to the year 1910, except that in 1910 the amount

of logs, lumber and timber is stated to have been 1,200,000 feet, and that, by reason of the unreasonable obstruction of said stream, caused by the negligent acts of the defendants above referred to, the use of said stream was thereby unreasonably interfered with, and he was put to the expense of hiring additional men, and was delayed in floating the logs, lumber and timber, and thereby incurred other additional expenses.

To sustain their position the defendants rely upon cases which state that the party bringing the action must have sustained damages different from those sustained by the community at large, and urges upon us the case of *Blood et al.* v. *Nashua and Lowell Railway Co.*, 2 Gray, 137, as a case on all fours with the case at bar. In that case there was a stone bridge erected by the defendants across Stony Brook, and the plaintiffs owned a mill privilege on that stream, and the erection of the bridge prevented the floating of logs to the mill of the plaintiffs. The case was sent to referees, and they awarded, subject to the opinion of the court, among other things, "damages caused by being rendered more laborious and expensive to get logs, for the use of its mill, from the Merrimac River up Stony Brook, under the stone bridge, than it had been under the pile bridge," and the court held that the plaintiff was not entitled to the damages found by the referees for that cause, stating, "The obstruction of a public right of way is a public, not a private, wrong; it may affect those near the obstruction more than the rest of the public; but the damages sustained by those near it differ in degree only, not in amount."

The case does not show that the plaintiff had been put to any expense, or that he had attempted to use the passage. The fair inference from the report of the referees is that they awarded the damages, because the way had been made impassable, not for special damages that he had actually sustained.

In this case the damages alleged are damages suffered by the plaintiff different from those suffered by the community at large. The community only suffered the damage of not having the stream open to navigation, a damage common to all. The plaintiff suffered the same damages that the community suffered, and, in addition thereto, he alleges other damages by reason of the obstruction to navigation, those damages being the expense that he was obliged to

incur to pass the logs and lumber over the public highway, to wit, Cathance Stream.

It is alleged that the plaintiff sustained special damages by attempting to use the public highway, and for those damages, being special and different from those suffered by the community, if the allegations of the declaration are proved, unless the obstruction was lawful, he can maintain this action. *Smart* v. *Lumber Co.,* 103 Maine, 50, and cases cited; Wood on Nuisances, Sec. 632; *McPheters* v. *Log Driving Co.,* 78 Maine, 329; *Dudley* v. *Kennedy,* 63 Maine, 465; *Rogers* v. *Kennebec & Portland R. R. Co.,* supra; *Brown* v. *Chadburn,* 31 Maine, 9; *Brown* v. *Watson,* 47 Maine, 161; *Thayer* v. *Boston,* 19 Pick., 511.

Exceptions overruled.

ORRIN COLFER *vs.* FRANK E. BEST.

Kennebec. Opinion May 31, 1913.

Appreciate the Danger. Assumption. Contributory Negligence. Exceptions. Instructions. Negligence. Nonsuit. Stipulations. Questions for the Jury.

1. It is the duty of the master to instruct the inexperienced servant of dangers of the employment which he did not know and appreciate, or which he cannot reasonably be held to have known and appreciated.
2. But to throw this responsibility upon the master, it must also appear that the master knew, or ought to have known, that the servant was inexperienced and thus inexcusably ignorant of the danger, and that the act of the servant which exposed him to danger was reasonably likely to be expected by the master.
3. The question of negligence of the defendant, the questions relating to the assumption of risk and contributory negligence of the plaintiff should have been submitted to the jury.

On exceptions by the plaintiff to ruling of the presiding Justice ordering a nonsuit. Exceptions sustained and in accordance with

the agreement of the parties, judgment must be rendered for the plaintiff in the sum of six hundred dollars and costs.

This is an action on the case in which the plaintiff seeks to recover damages for injuries sustained by reason of the negligence of the defendant. The plaintiff, while assisting in operating a portable sawing machine for the defendant, was injured by his hand coming in contact with the saw. Plea, the general issue.

At the conclusion of the testimony introduced, by the plaintiff the presiding Justice ordered a nonsuit, to which order the plaintiff excepted. The following agreement was made by the parties, viz., "If plaintiff's exceptions are sustained, the Law Court to render final judgment for the plaintiff in the sum of six hundred dollars ($600.00) and costs. The defendant to pay one-half of expense of transcribing and printing testimony. Testimony to be filed May 1, 1912 and case to be argued in Portland."

The case is stated in the opinion.

Benedict F. Maher, for plaintiff.

Heath & Andrews, and Thos. Leigh, for defendant.

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

BIRD, J. The exceptions in this case were taken to the ruling of the presiding Justice ordering a nonsuit at the close of the evidence for the plaintiff.

The injury to plaintiff is alleged to be due to the negligence of the defendant in failing to warn plaintiff, who was without experience, of the dangers of the machinery which caused the injury. The nonsuit must have been ordered either for want of testimony to establish the negligence of defendant, or the want of due care on part of plaintiff or because plaintiff assumed the risk or upon two or all of these grounds.

It is the duty of the master to instruct the inexperienced servant of dangers of the employment which he did not know and appreciate or which he cannot reasonably be held to have known and appreciated. But to throw this responsibility upon the master, it must appear that the master knew or ought to have known that the

servant was inexperienced and thus excusably ignorant of the danger, and that the act of the servant which exposed him to the danger was reasonably likely to be expected by the master: *Hull* v. *Hull,* 78 Maine, 114, 117-8; *Campbell* v. *Eveleth,* 83 Maine, 50, 54; *Wyman* v. *Berry,* 106 Maine, 43-47; *Bartley* v. *Boston, etc. Ry.,* 198 Mass., 163; *Grace* v. *United etc. Society,* 203 Mass., 355, 364; *Daynes* v. *Quinn,* 204 Mass., 306, 309; *Reardon* v. *Byrne,* 195 Mass., 146, 149, 150; *Louisville & N. R. Co.* v. *Miller,* 104 Fed., 124, 125, 126; *Felton* v. *Girardy,* 104 Fed., 127, 130; *Gaudet* v. *Stansfield,* 182 Mass., 451, 454.

Is the evidence offered by the plaintiff, assuming it, as we must, to be true, insufficient to authorize a verdict in his behalf or, if a verdict upon such evidence had been rendered for plaintiff, would it be the duty of this court to set it aside? Upon the evidence the jury would have been warranted in finding that the plaintiff was inexperienced and that defendant either knew it or ought to have known it. Whether upon the evidence the plaintiff knew and appreciated or ought to have known and appreciated the danger, exposure to which caused the injury, is a question upon which, we think, fair minded men might reasonably differ. The plaintiff states that he did not know the table was movable. Considering his position beside the saw and his evidence upon cross-examination, it may be difficult to believe his statement but it is not inherently impossible as was the case in *Blumenthal* v. *B. & M. R. R.,* 97 Maine, 255, 261, 262. But if he knew, while engaged in taking away the wood and having no duty to perform respecting the table, he may have failed to appreciate the danger which would be experienced when suddenly and for the first time called upon to push the machine forward. It may well be, the plaintiff's knowledge of the operation of the machine was only of that general and indefinite character which might be derived from the casual observation of a laborer, who was not charged with any special duty in regard to it, and that he did not comprehend the perils incident to pressure upon the table. *Drapeau* v. *Paper Co.,* 96 Maine, 299, 304. See also *Bowen* v. *Mfg. Co.,* 105 Maine, 31, 34; *Sawyer* v. *Paper Co.,* 90 Maine, 354, 362; *Wright* v. *Stanley,* 119 Fed., 330, 332. Did the defendant know or ought he to have known that plaintiff might, in obeying the order to push the

machine, push upon the table in such way as to encounter peril and consequent injury? Here again men of fairness of mind might differ. Assume it found that the plaintiff was inexperienced and that defendant knew or ought to have known it; plaintiff had been at work taking away for ten minutes; he had no duty to perform as regards the table; when the order to push was given, he was standing behind the table. Would the ordinarily prudent man anticipate or foresee that the servant might so push the table as to come in contact with the saw? We think the question of negligence of the defendant should have been submitted to the jury. *Brooks* v. *Libby,* 89 Maine, 151, 152-3.

The questions relating to assumption of risk by plaintiff and his contributory negligence are so correlated evidentially to that of the negligence of defendant, in such a case as the present, that separate and independent discussion of them is unnecessary. Under the circumstances they were equally for the jury. See *Heffernan* v. *Fall River Iron Works Co.,* 197 Mass., 28, 31-2; *Wright* v. *Stanley,* 119 Fed., 330, 333; see also *Jensen* v. *Kyer,* 101 Maine, 106.

The exceptions are sustained and, in accordance with the agreement of the parties, judgment must be rendered for the plaintiff in the sum of six hundred dollars and costs.

CORA M. HOLYOKE, Applt., *vs.* ESTATE OF FRANK H. HOLYOKE.

HENRY D. HOLYOKE et al., Applts.,

vs.

ESTATE OF FRANK H. HOLYOKE.

Penobscot. Opinion June 9, 1913.

Appeal. Burden of Proof. Change of Domicil. Communications. Confidential. Declarations. Decree. Domicil. Evidence. Executors. Foreign Will. Intention. Jurisdiction. Privileges. Probate Court. Revised Statutes, Chapter 66, Section 14. Will.

1. A person can have but one domicil at a time, and the burden is on the party who asserts a change of domicil.
2. When the question of jurisdiction depends upon the proof of domicil, it is sufficient prima facie, for him who attacks jurisdiction to show that the domicil of origin was in a State other than the one which exercised jurisdiction.
3. The presumption of the continuance of domicil is enough until disproved.
4. Confidential communications between husband and wife are in general strictly privileged and the death of the communicating party does not terminate the privilege.
5. This rule is based upon the necessity of preserving the confidence which must exist in order to create and maintain mutual happy relations and fulfill the purposes of marriage. But it does not apply when the parties are living in separation under articles of separation as in this case.
6. Communications made to an attorney in good faith for the purposes of obtaining his professional advice or opinion are privileged.
7. After the death of the client, the privilege may be waived, when the character and reputation of the deceased are not involved, by his executor or administrator, and in testamentary contest, by his heirs or legatees.
8. The evidence in this case, of declarations to counsel as to domicil are not regarded as privileged in this proceeding, as the controversy is not one that effects the estate as such, but rather the manner of its administration and distribution.
9. In testamentary contests between personal representatives, heirs and legatees, the claim of privilege is unavailing when the character and reputation of the deceased are not involved.

10. When it is necessary to show the nature of an act, or the intention with which it is done, proof of what was said by the party at the time of doing the act, is admissible.

On report. Appeals dismissed. Decree of Probate Court affirmed. Case remanded to the Probate Court for further proceedings according to law.

These are appeals from the decree of the Judge of Probate in Penobscot County, allowing the will of Frank H. Holyoke, as a foreign will. The appellants contended that Frank H. Holyoke had never changed his domicil from Maine to California, and that the burden to establish it was on the appellees.

At the conclusion of the hearing of the matter in the Supreme Court of Probate, the case was reported to the Law Court for its determination upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

George H. Worster, for executors.

Stearns & Stearns, for guardian of Madeline Holyoke and Marjorie Holyoke.

E. C. Ryder, and Charles H. Bartlett, for Bangor Children's Home, Home for Aged Men, and Bangor Theological Seminary.

F. A. Floyd, for Brewer Public Library.

Fellows & Fellows, and Hugh W. Ogden, for Cora M. Holyoke.

Herbert L. Harding, for Harry Holyoke and Sidney A. Holyoke, Applts.

Fellows & Fellows, for same.

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

SAVAGE, C. J. These are appeals from the decree of the Judge of Probate in Penobscot County, allowing, as a foreign will, the will of Frank H. Holyoke. One of the appellants is the widow, and the others the sons, of Frank H. Holyoke, by a prior marriage. Mr. Holyoke, who had been a lifelong resident in Maine, first at Brewer and then at Bangor, removed to Pasadena, California, in 1910, and died there, October 3, 1911. His will, which was executed August 8, 1911, was probated as a domestic will in the Superior Court for

Los Angeles County, California, a court having jurisdiction in matters of probate. The executors named in the will, having been qualified as such in California, now seek to have the will probated as a foreign will in Penobscot County, in which county there is real estate on which the will can operate. On petition therefor the Judge of Probate allowed the will, and the appellants appealed to the Supreme Court of Probate. The case is reported to the Law Court for its determination upon so much of the evidence as is legally admissible.

The vital question of fact is whether Mr. Holyoke changed his domicil from Maine to California. The appellants contend that although he moved personally to California and resided there the last sixteen months of his life, he never became domiciled there, and therefore that the court in California had no jurisdiction to allow his will as a domestic will. If this contention be correct, it follows that it cannot be allowed here as a foreign will. If Holyoke's domicil at the time of his death was in Maine, the Probate Court here has original jurisdiction to admit his will to probate, and the court in California had none.

The statute, R. S., Chap. 66, Sect. 14, provides that "a will proved and allowed in another state or county, according to the laws thereof, may be allowed and recorded in this state in the manner and for the purposes hereinafter mentioned. A copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any person interested, to the judge of probate in any county in which there is estate, real or personal, on which the will can operate." Then follow provisions as to notice and hearing.

It is contended in argument that the decree of the Judge of Probate in this case was not filed on a day when the Probate Court was open, and was therefore void. Without discussing what would have been the legal consequence if such had been the fact, it is sufficient to say that the case shows that such was not the fact. The decree was filed on the day of an adjourned session of the court.

The appellants also contend that the copy of the record of the court in California, filed with petition here, was not "duly authenticated" as required by Section 905, U. S. Compiled Statutes, 1901,

so as to bring it within the operation of Article IV of the federal Constitution, which declares that "full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state." Section 905, above referred to, provides that "the records and judicial proceedings of the courts of any State or Territory . . . shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form." It is contended that the copy of the record was not authenticated by the clerk, but by the deputy clerk. And such an attestation was held fatal in *Willock* v. *Wilson,* 178 Mass., 68. The record here, however, does not support the contention. It appears that some parts of the records of the various proceedings in the California court were attested by deputies of the clerk, but the final authentication of them in the copy filed here was under the hand of the clerk himself, and that is sufficient in that respect. Other irregularities in the proceedings were suggested in the reasons of appeal, but they are not now relied upon.

Starting then with a sufficient record of the judgment in California, what is its effect? The Superior Court in California has not only probate jurisdiction, but it is a court of general jurisdiction. *Robinson* v. *Fair,* 128 U. S., 87. Its records import a verity. *Otto* v. *Doty,* 61 Iowa, 23. In a case where it had jurisdiction in fact, its judgment is conclusive as to all facts which are necessary to the establishment of a will, and as to the regularity of its proceedings and their conformity to the law of the state where they were had. Such is the effect of the "full faith and credit" clause in the federal Constitution. *Crippen* v. *Dexter,* 13 Gray, 330; *Dubtin* v. *Chadbourne,* 16 Mass., 433. But if the court had not jurisdiction in fact, its judgment is conclusive of nothing. And whether it had jurisdiction in fact is always open to inquiry, when the efficacy of the judgment is questioned. The "full faith and credit" clause does not apply in such a case. *Gregory* v. *Gregory,* 78 Maine, 190; *Smith* v. *Central Trust Co.,* 154 N. Y., 333. But it is considered that the judgment in prima facie proof of jurisdiction, that is to say, it is sufficient unless attacked.

This being so, the proponents contend that the burden is on the appellants to show that the California court did not have jurisdiction, while on the other hand the appellants contend, it being unquestioned that Mr. Holyoke had his domicil in Bangor, Maine, until 1910, that the burden is on the proponents to show that he changed it to California. The rule as to the succession of property is commonly stated to be that the domicil of origin, the prior domicil, is presumed to continue until another sole domicil has been acquired. *Mather* v. *Cunningham,* 105 Maine, 326; *Leach* v. *Pillsbury,* 15 N. H., 137. A person can have but one such domicil at a time. *Gilman* v. *Gilman,* 52 Maine, at p. 175. And the burden is on the party who asserts the change. And since the question of jurisdiction depends upon the proof of domicil, a question first in the order of proof, we think it is sufficient for him who attacks jurisdiction to show that the domicil of origin was in a state other than the one which exercised jurisdiction. The burden is then on him who asserts a change to prove it. The presumption of continuance of domicil is enough, until disproved.

When this case was taken out to be reported, all evidence offered by either side was received, but it was stipulated that the case should "be determined upon the evidence legally admissible." Besides the evidence of the acts of Mr. Holyoke, there was much evidence offered by the proponents, and some by the appellants, as to declarations made by him orally before and after he went to California in 1910, and by letters afterwards. The proponents claim that the declarations offered by them tended to show an intention to make California his permanent home, while the appellants claim that those offered by them tended to show an intention not to remain there, but to return after he had accomplished a specified purpose. Of the declarations, some were made to his wife, some to his attorneys, both in this State and in California, and others to various acquaintances. Some of the declarations were made in connection with acts or business being done by him at the time relating to his going to or remaining in California, and some were not.

The proponents object to the evidence of declarations made by him to his wife, on the ground that they are privileged. The appellants object to evidence of communications to his attorneys on the

ground that they are likewise privileged. They challenge generally the admissibility of all declarations, as to intention, except such as come within the res gestæ rule, that is, such as being contemporaneous with some act, tend to illustrate, explain or give it character. They contend that most of these declarations should be excluded for the reason that they were made at a time when Holyoke had a motive to make testimony for himself. Lastly, it is urged that they should be rejected as self serving declarations.

We will determine the merits of these contentions before we consider the evidence in detail. And first, as to communications made to the wife. They were in part while the husband and wife were living together, and in part while they were living in separation.

1. Confidential communications between husband and wife are in general strictly privileged. So rigid is the rule that death of the communicating party does not terminate the privilege. 4 Wigmore on Evidence, Sect. 2341. Hughes on Evidence, at p. 312. The communications originate in confidence. The privilege is necessary to preserve the confidence which is essential to the relation of husband and wife. While there is some contrariety of opinion as to what constitutes a confidential communication, there is none as to the privilege when the confidence exists. 4 Wigmore on Evidence, Sect. 2336. But since the rule is based upon the necessity of preserving the confidence which must exist in order to create and maintain mutual happy relations and fulfill the purposes of marriage, we think it should not apply when the parties are living in separation, and especially, as in this case, so living under articles of separation, and the one making the communication is actively hostile to the other, and is known to be so. There is no suggestion of confidence in such a relation. The parties are put on their guard. Mr. Wigmore, in speaking of such a situation in Sect. 2341, already cited, well says,—"the relation is not one in which the law need seek to foster confidence, and no privilege ever came into existence."

2. As to communications made to attorneys by clients. Such communications made to an attorney in good faith for the purpose of obtaining his professional advice or opinion are privileged. *Wade* v. *Ridley*, 87 Maine, 368. The reason for the rule, briefly stated, is that it is essential to the administration of justice that there should

be perfect freedom of consultation by clients with legal advisers, without any apprehension of a compelled disclosure by the legal advisers to the detriment of the clients. *Wade* v. *Ripley,* supra. But after the death of the client, it is held that the privilege may be waived, when the character and reputation of the deceased are not involved, by his executor or administrator, and, in testamentary contests, by his heirs, or legatees. *LeProhn,* Applt., 102 Maine, 455; 4 Wigmore, Sect. 2329. The deceased has no longer any interest in the privilege. The personal representatives, heirs and legatees, are all interested in the protection of the estate, and it is to be presumed that they will waive the privilege only for the benefit of the estate. The testimony objected to in this case was offered by the California executors, and it is claimed that they have the right of waiver under the foregoing rule. But this may be doubted, since the precise question to be determined in this case is whether the California court had jurisdiction to appoint them executors. If no jurisdiction, then they are not executors in this case. It may be noted that the residuary legatees, though not strictly parties to the record, appear voluntarily upon the docket and are represented by the same counsel as the proponents. And it may be presumed that so far as they had power to do so, under the circumstances, they waived the privilege.

But it is not necessary to pursue this feature of the doctrine of waiver further, for we think that the evidence in this case, of declarations to counsel as to domicil, is not to be regarded as privileged in this proceeding, whether it be that the nature of the communications was such as to raise an implication of waiver, or such that as between personal representatives or legatees, and heirs, there is no privilege.

As in all testamentary contests, so in this case, the controversy is not one that affects the estate as such, but rather the manner of its administration and distribution. The real parties ultimately interested are the heirs and widow on one side, and the legatees on the other. It seems to be settled on good authority that in testamentary contests between personal representatives, heirs and legatees, the claim of privilege is unavailing, when the character and reputation of the deceased are not involved. In *Glover* v. *Patten,* 165 U. S.,

394, the court said that "in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged, if offered by third persons to establish claims against the estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin. In *Winters* v. *Winters,* 102 Iowa, 53, it was said, "In a controversy between heirs at law, devisees and personal representatives, the claim that the communication was privileged can not be urged, because in such case, the proceedings were not adverse to the estate, and the interest of the deceased, as well as of the estate, was that the truth be ascertained." In *Doherty* v. *O'Callaghan,* 157 Mass., 90, it was held that directions to a lawyer for drafting a will did not come within the reason of the rule relating to privileged communications. In *Laymen's Will,* 40 Minn., 371, the court said, "There is abundant authority for saying that upon the decease of the only person who could in his lifetime exercise the privilege of waiver, the rule should not be so perverted by a strict adherence to it as to render it inconsistent with its object, and thus bring it into direct conflict wth the reason upon which it is founded. The object of the rule, so far as it relates to this class of communications, being the protection of the estate, there remains no reason for continuing it, when the very foundation upon which it proceeds is wanting. The testimony served to protect the estate, and tended to aid in a proper disposition of it. It is not an action in which the success of an adverse third party must prove detrimental to the property. See *Scott* v. *Harris,* 113 Ill., at p. 454. In *Blackburn* v. *Crawfords,* 3 Wall, at p. 192, it was said that "the reasons for privilege do not apply to testamentary dispositions. The disclosure in such case cannot affect the right or interest of the client. The apprehension of it can present no impediment to a full statement to the solicitor;" and further, "The client may waive the protection of the rule. The waiver may be expressed or implied. We think it is as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be

challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its objects, and in direct conflict with the reason upon which it is founded."

While the language used in the foregoing cases relates in the main to contests involving the probate of wills, or testamentary dispositions, the reasons for the rule apply in this case. Here is a kind of testamentary contest, not like the others indeed, but entirely analogous, so far as the question of the admissibility of evidence is concerned.

The appellants, so far as the evidence of the California attorney is concerned, place some reliance upon the California statute, relating to communications to attorneys. But it is sufficient to say that the admissibility of this evidence depends upon the law of the forum where the case is being tried. Story on Conflict of Laws, 7th Ed., Sects. 634, 635.

3. As to admissibility of declarations showing intention to change domicil.

Since the acquisition of a domicil in a given place depends upon two factors, actual personal presence there and the concurrent intent, some courts have admitted the declarations of the party tending to show intent, whether accompanying, qualifying or explaining acts, or not. *Leach* v. *Pillsbury,* 15 N. H., 137; *Ayer* v. *Weeks,* 65 N. H., 248; *Chase* v. *Chase,* 66 N. H., 588; *Kreitz* v. *Behrensmeyer,* 125 Ill., 141; In re Catharine Roberts Will, 8 Paige, Ch. 519; *Chambers* v. *Prince,* 75 Fed. Rep., 176. Even under this liberal rule, self serving declarations are excluded; so are those made after the beginning of a controversy, or after the declarant had an interest to make evidence for himself. The ground on which declarations are held admissible to show intention is stated in *Insurance Co.* v. *Hillmon,* 145 U. S., 285, as follows:—"A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in the chain of circumstances, it may be proved by contemporaneous oral or written

declarations of the party." Mr. Wigmore inclines to this view, holding it more logical. 3 Wigmore on Ev. Sect. 1727.

But the rule declared in this State is more limited. The cases involving the admissibility of declarations tending to show intent, here as well as in Massachusetts, from which State we derive the rule, have been mainly pauper suits and tax suits. And in the latter class, the declarations offered and excluded have been generally of a self serving character. *Wright* v. *Boston,* 126 Mass., 161, is an example. The rule is stated variously, but always to the same effect. "Where it is necessary to show the nature of an act, or the intention with which it is done, proof of what was said by the party, at the time of doing the act, is admissible." *Gorham* v. *Canton,* 5 Maine, 266. "When one is doing a certain act, declarations of his motives and intentions at the time are admissible. But when he is doing no act, in itself indicative of a change of place, for one purpose or another, we are not aware that the verbal expression of his intention can be received." *Wayne* v. *Greene,* 21 Maine, 357. Declarations respecting an intention, in going from one place to another, made days before the declarant left, and unaccompanied by any acts, held inadmissible in *Bangor* v. *Brunswick,* 27 Maine, 351. "The declarations of a party to a transaction, made at the time of the acts done, and expressive of their character, motive or object, are regarded as verbal acts, indicating a present purpose or intention," and are admissible. "But declarations cannot with propriety be received as evidence, unless the act which the declarations accompany, has itself a material bearing upon the issue presented. *Corinth* v. *Lincoln,* 34 Maine, 310. Declarations of one then in the pursuit of his ordinary business, just starting on a voyage to sea, on which he was to be employed several months, as to his future expectations and intentions, after he should have completed the voyage, held not admissible in *Richmond* v. *Thomaston,* 38 Maine, 232. In *Knox* v. *Montville,* 98 Maine, 493, it was contended that *Baring* v. *Calais,* 11 Maine, 463, was authority for the doctrine that declarations disconnected with any distinct acts which would themselves be evidence, are admissible. The question was again examined, with the result that the rule above stated was adhered to. The court said, "A person's intention can only be shown by his acts and words, but

a mere expression of intent disconnected with any relevant circumstances would be too remote to be admissible as evidence, . . . The pauper's intention is a question of fact. He could himself testify to it; and his declarations could be received in evidence of it, but only if accompanying acts which they explain, so that they are regarded as a part of acts from which his intention may be inferred."

The earlier Massachusetts cases are to the same effect. *Thorndike* v. *Boston,* 1 Met., 242; *Kilburn* v. *Bennett,* 3 Met., 199; *Salem* v. *Lynn,* 13 met., 544; *Reeder* v. *Holcomb,* 105 Mass., 93; *Wright* v. *Boston,* 126 Mass., 161. It should be noted, however, that the Massachusetts court appears to have changed its view. In *Viles* v. *Waltham,* 157 Mass., 542, after stating that declarations of a person accompanying a change af his residence have always been held competent to explain the change as a part of the res gestæ, the court added, "but declarations in these cases are often admissible on a broader ground than as a part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and everything which tends to show his intention in making the change may be introduced, if it is free from objection in other particulars. The intention may be inferred from acts and conduct, and conduct which tends to show the intention is competent for that purpose. Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show intention." See *Com.* v. *Trefethem,* 157 Mass., 180.

Whichever doctrine may be founded in the better reason, the doctrine in this State is settled, and we do not feel at liberty to change the rule, so many times, and so recently, considered and declared. The rule, however, does not limit admissibility to declarations accompanying acts of removal, acts of merely coming and going. In *Deer Isle* v. *Winterport,* 87 Maine, 37, declarations accompanying the acts of breaking up housekeeping and storing household goods two or three weeks previous to leaving town were admitted. The court said:—"A person's intention can only be shown by his acts and his words, and any of his acts and words which tends to show his intention are admissible in evidence. With proper caution, however, the law does not admit mere words unconnected with any

material act, and which the person had no occasion to speak. A mere verbal expression of some past or future intention, not called out by relevant circumstances, but uttered voluntarily and perhaps officiously, may be too remote to be of any evidential value. Such an expression, however, called out by material circumstances, and naturally made at the time in explanation of some visible, relevant conduct, is of some, even if of small, evidential value as to a person's actual intention." It should be borne in mind that the acts which declarations must accompany, to be admissible must be relevant to the issue of domicil. *Deer Isle* v. *Winterport,* supra; *Wright* v. *Boston,* supra. It only remains to add in this connection, that the rules of evidence are necessarily the same, whether it be the domicil of a pauper that is in issue, or that of a testator.

4. Declarations which may have been uttered for the purpose of making evidence are excluded on the issue of what was the intention or state of mind of the declarant, unless they are made under such circumstances as to give to them some corroboration. In general, such corroboration is found in the fact that they accompany and explain acts which of themselves would be competent evidence on the issue involved. They are then admissible as part of the res gestæ. *Viles* v. *Waltham,* supra. The same rule applies to declarations made after the controversy has commenced. *Ayer* v. *Weeks,* supra.

5. It is objected that some of Mr. Holyoke's declarations were inadmissible because made in his own favor. But that point is not tenable. Mr. Holyoke is not a party to this proceeding. He is not self served by them.

There are two or three minor matters of evidence to be alluded to later.

These rules must now be applied to the evidence, of which we can give only a brief summary.

Frank H. Holyoke, a lifelong resident of Brewer and Bangor in this State, went to California early in June, 1910, and resided there until he died, October 3, 1911, at the age of 67. In his lifetime he had been engaged in timberland and mill business until 1906 or 1907, when he sold most of his timberlands and invested the proceeds in stocks and bonds. After that he had little or no business. He had been twice married and twice divorced. By his first wife he had two

sons, who are appellants. From them he had been long estranged. It does not appear that he had any relatives in Bangor. His brother Jacob lived in the old homestead in Brewer. He had a second cousin living in Brewer. In January, 1898, he married his third wife, now his widow, and an appellant. Each winter thereafter, except one, they spent in California, at Los Angeles, San Diego, or Pasadena, at hotels. Each spring they returned to Bangor. There they lived at a hotel for several years, during the summer and autumn. In 1901 he purchased a residence in Bangor, which he refurnished in 1906 at great expense.

On February 5, 1910, at Pasadena, he and his wife had trouble. He accused her of infidelity with his chauffer. He compelled her to leave the hotel where they were boarding. An agreement of separation was executed, by which he was to pay her $5000 at the time and $5000 within a year. She was to have the automobile. She agreed to relinquish all claim of support from him, all claim upon his estate, and all interest in his lands, the Bangor residence, and the "contents" of the home were particularly referred to. In the house at that time was furniture which he had previously given to her. Early in March, 1910, he returned to Bangor, and remained until June, when he went again to Pasadena, and resided there until he died, sixteen months later. Mrs. Holyoke returned to Bangor in April, 1910, and since then has resided there. At some time before he went to Pasadena in June the residence in Bangor had been placed in a real estate agency for sale, but it has never been sold. Before returning to California in June, he arranged to have his stocks and bonds, which were in safety deposit boxes in Bangor, $300,000 in amount, shipped to him at Pasadena, and this was done. He caused the furniture in the Bangor residence to be shipped to him in September, 1910. At Pasadena, he lived with friends, the Marstons, in a house he had built for them, until about two months before his death, when he went to a hotel in the same place. To these friends he sold part of the furniture. The rest he took to the hotel with him. He caused a chauffer with his family to go from Bangor to Pasadena, in November, 1910, and not being able to rent a satisfactory tenement, he bought a house for them. He had letter

heads made, giving his name and residence at Pasadena. In June, 1910, he had a will drafted, in which he stated his residence at Pasadena. This will does not appear to have been executed. He registered in 1910 and 1911 at two hotels, as of Pasadena. He described himself as of Pasadena, in a discharge of a mortgage, executed in November, 1910. June 28, 1910, he filed in the court in California an application to perpetuate testimony to be used in a divorce proceeding which he stated therein he expected to file on or about June 1, 1911. He described himself as a resident of Pasadena. It does not appear that any testimony was taken, and he never commenced divorce proceedings in California. September 19, 1910, Mrs. Holyoke began divorce proceedings in Penobscot County. At the April term, 1911, after notice to him, Mr. Holyoke appeared by attorney, and the case on his motion was continued. July 17, 1911, he began a cross libel, which was filed August 3. Notice was ordered, returnable to the October term of the court in Penobscot County. He died on the day of entry. March 7, 1911, he made formal application to be registered as a voter in Los Angeles County, and described himself therein at a resident of Pasadena, and stated that he had resided in California for one year next preceding. August 8, 1911, he made his last will describing himself in it as a resident of Pasadena. In the will, among other things, he gave his wife $1000, his sons $100 each, made various charitable bequests, gave the residuum to his nieces, daughters of his brother Caleb, and directed his burial to be in Bangor.

The appellants introduced declarations as follows:—Mrs. Holyoke testified that prior to 1906, she having expressed a wish to live in California, he said perhaps he would go; but that after the San Francisco earthquake he said "he wouldn't live in the damned hole if they would give him the whole state;" that in March, 1910, after the separation, she saw him in Passadena, when he said "he wanted her to stay in California, so that he could go home and live in his Bangor house in peace;" that at his office in Brewer, about May 18, 1910, he said to her "Now that you have come here I am going to California and stay until I can get a divorce. Why in Hell didn't you stay in California as I wanted you to, so that I could live in my home in peace. If you follow me to California, I will come back home. If you try to follow me you will have to travel some;"

that she said "Couldn't both of us live in the same place?" that he replied, "No, not by a damned sight;" that he said "After he got his divorce he didn't care where in hell I lived."

Harrison C. Young, a public carriage driver testified that prior to Memorial day, 1910, he carried Holyoke from Bangor to Brewer, and that on the trip Holyoke said he was going to California, but not to stay for any great length of time, that he was too old a man to change his residence and make new friends. This witness also testified that in August 1910, he received a letter from Holyoke in which he asked him to mail an enclosed letter to Mrs. Holyoke six months after his death, and an enclosed note twelve months after his death. The note enclosed was dated June 15, 1911, was for $10,000 payable on demand to Mrs. Holyoke, and was signed by Holyoke.

Charles E. Goodwin, a brother of Mrs. Holyoke, testified that he met Holyoke on the street in Boston in June, 1910, which evidently was when the later was on his way to California; that he said he was going west; that when the witness expressed surprise that he was going west in the summer season, he replied, "I am coming back again. I am through with your sister. I am going to California, and I am coming back here again."

John M. Lane, a Pullman car conductor, who had met Holyoke several times in Los Angeles in 1905, testified that he met him casually in Boston on School Street in the summer of 1910, evidently when Holyoke was on his way west, and that he said "he had had trouble with his wife, and was going to get rid of her;" that he "was going out there and get rid of his business and coming back here to stay."

Joab W. Palmer testified that Holyoke told him in 1910 that he had spent some very pleasant winters in California, that it was pretty hot in summer, and he didn't like it as well as in Maine.

Luther J. Fickett testified that in May, 1910, Holyoke told him he was going to California, that he might be gone until fall and perhaps until spring, for he wanted to be rid of the cold weather.

Charles R. Goodwin, father of Mrs. Holyoke, testified that he had an interview with Holyoke in Bangor; that he said he did not know where Mrs. Holyoke was, nor where she could be reached; that he said "I am all done with her. I am back here to get a divorce, and

she must not come here; that on April 15, Holyoke said, "That daughter of yours has got back to Boston. I want you to stop her and not let her come to Bangor. She shan't come to my house, and she mustn't come to Bangor. If she comes here I will make it damned hot for her."

The proponents offered declarations as follows:—Hugh R. Chaplin, the attorney of Mr. Holyoke in Bangor, testified that Holyoke came to his office in Bangor in April, 1910. "We talked over the trouble between him and his wife. He told me what he said had taken place in California. Told me of the contract, and we discussed it. Said he had given her all he was going to give her if there was any way to prevent her having any more. I told him I wanted to think it over, and to come in again. A day or two later I said to him, which was true, 'You have been telling me for a number of years of your intention of moving to California.' Now you have had two divorces here. I think in the eyes of the community they have been nasty. In my judgment you cannot get a divorce from Mrs. Holyoke without a contest on her part, and I believe it will be a vigorous contest. You will have to bring witnesses here from California, I believe, to protect your interest, because you will not know and cannot know what you will have to meet. Again, if you should die a resident of Maine, I know of no way to prevent her from getting a third of the property which you shall leave. I understand that if you should die a resident of California that she can get only a certain proportion of the property which you have acquired since you married her. Now I want in a way to confirm that, and if my understanding of the California law is correct, I am going to advise you that now is a good time to move to California if you have not changed your intention of finally going there. He told me that he had some time in February declared, in California, his intention of making California his home. I told him I would not want to base domicil in California upon that declaration. A letter was written to California and a letter came back confirming me. I advised him to move to California, and he said he would move. He asked me how soon he should go. I told him the sooner the better, because he would have to live there a year before the court could get jurisdiction to grant him a divorce there."

"After he left, at his request, I published a notice forbidding anybody to trust anybody on his account." "He asked me what he would do with his furniture. I told him he could do anything he wanted to with it. He wanted to know if he could take it to California, and I said certainly."

Bisbee B. Merrill testified that in April or May, 1910, Holyoke told him what had happened between him and his wife, showed him the agreement for separation, and said that he "purposed going to California to live.

Joseph B. Atwood, employed in May, 1910, to take care of the Bangor residence until the furniture should be shipped, testified that he packed some papers, by Holyoke's directions, that were to go with the furniture; that the witness said to him, "It looks as if you was going out there to stop awhile," and that Holyoke replied, "I am going out to make my residence there. I have been out over the Rocky Mountains, I guess, a dozen times, and I am going out there to stop now." On cross-examination the witness said that Holyoke said he would settle for his work when he came back.

Albert B. Taylor, one of the executors, testified that he talked with Holyoke at the Bangor residence in April or May, 1910: "He did not then tell me as to the trouble between him and Mrs. Holyoke. I told him I had become interested somewhat in going to the east coast of Florida. He said 'If you go anywhere, I would advise you to go to southern California. I have been there for a number of years. It's a fine climate, and a person would in all probability live ten years longer out there than here.' I said 'I am sure I wouldn't want to go out there, because they have earthquakes out there.' He said 'No, not in the vicinity of Pasadena. That is outside of the earthquake belt.' Then he told me of the trouble he had been having, and that he was making preparations to close up his affairs here in Maine and go to California to live there permanently. He said 'If I send for you will you go?' Said he couldn't tell when he was likely to get away, but should settle up his affairs as soon as possible, and get away as quickly as possible. I had a letter from him in which he said (Sept. 16, 1910) 'I don't expect to get east until about one year from this time and never again to make it my residence.' Holyoke once said in Pasadena, 'If you have an office, I want to hire desk room of you.'"

Mrs. Taylor, wife of the preceding witness, corroborated her husband's testimony, and added that Holyoke said:—"I am going to leave Bangor and make my permanent residence with my adopted sister, Mrs. Marston."

Edwin F. Hahn, Mr. Holyoke's attorney in California, testified that he drafted the agreement of separation, and that Mrs. Holyoke confessed her infidelity. (It is fair to Mrs. Holyoke to say here that in her testimony she denies making confession, and denies improper relations with the chauffer.) Mr. Hahn says that during the week following the separation, Holyoke remarked that he could not stand the winters in Maine, that he was ashamed of going back to Bangor, and then that he used these words: "If it was not my desire to proceed immediately with the divorce suit in Maine I should not go back there. How long would I have to wait in California? Would I have to wait a great while?" I said "You would have to be a resident of California a year before you could apply for a divorce here." Finally he said "What must I do to become a resident of California?" I said "You must have the intent, and follow it up with the act. If you decide to become a resident of California you should declare it in some way or manner." He said "Ed Hahn, take notice that I declare that I am going to be a resident of California." Mr. Hahn says further that Holyoke showed him the Marston house while it was being built and called it "my house," that he showed him a particular room, and said "Don't you think this would be a comfortable place to spend my remaining years?" He said he was to occupy it as long as he lived, or until his death, and wanted Hahn to draw up an agreement with the Marstons to that effect.

In a letter written November 20, 1910, to his former partner he said "I wish you would have that sign (F. H. Holyoke) taken off the office door, as that will never be my headquarters again, and as it is now it might be misleading." In a letter written November 11, 1910, to Kenney, his collector of rents and general caretaker in Bangor, he said "You will notice that I have changed my address which will hereafter be permanent." He was referring to a change in the street number. In this letter he enclosed a photograph of himself in a garden at the Marstons', on which he had written "F. H. H. in his garden, Pasadena, California." In a letter written

September 16, 1910, to Taylor, now one of the executors, who then lived in Bangor, he said "I don't expect to get East until about one year from this time, and never again to make it my residence." In the letter he urged Mr. Taylor to come to Pasadena to live. In another letter to Taylor, dated March 11, 1911, he asked, "Are you yet thinking of coming to Pasadena or Los Angeles to make your home in the future?" and added, "Why I ask is that at some time soon I may have to name a new executor in my will," and asked Taylor to give him his name in full in his next letter.

The foregoing statement presents, we think, all the facts in the case which can be regarded as material. The appellants object to Holyoke's statements of residence contained in his will, in his application to be registered as a voter, in his registry in hotels, and in the discharge of his mortgage. In some cases, where they have been offered by the party himself, such declarations have been excluded. They were self serving statements. Such was the case in *Wright* v. *Boston,* supra, though the court held that the papers in which the declarations were made were not relevant to the issue of domicil. But the court in *Ennis* v. *Smith,* 14 How., 400, said, "Declarations of residence in wills have always been received in evidence." The purpose of stating the residence of a testator in a will, or of a party to a deed or other written instrument, is in part at least to identify the party *by his residence* from all others who may chance to have the same name. The statement of residence is therefore material to the act. It is a part of it. And so considered, we think, the act is relevant and probative. So of registry at a hotel. Such declarations under some circumstances may have little significance, but we think they are admissible for what they are worth. *Rockland* v. *Deer Isle,* 105 Maine, 155; *Ward* v. *Oxford,* 8 Pick., 476; *Shannon* v. *Shannon,* 111 Mass., 331. Objection is made to the proof of the hotel registries by photograph. That is immaterial. The fact sufficiently appears without the photographs.

Under the rules already stated, as to the admissibility of declarations, we think the declarations made by Mr. Holyoke to his wife before their separation are inadmissible; that those made afterwards are admissible. The declarations made to Young in May, 1910; to Palmer; to Fickett; to Charles R. Goodwin; to Merrill; to Mr. and Mrs. Taylor; on the photograph, "F. H. H. in his garden;" and

in the letter to Taylor, of September 16, 1910, so far as they are declarations as to intention, must be excluded from consideration. They are not res gestæ to any act, or if so, not to any act relevant to the issue of domicil.

It is not possible, within the reasonable length of an opinion, to discuss the remaining evidence in detail. We have studied it with great care. The conclusion at which we have arrived is by no means free from doubt, but the opposite conclusion would, we think, be more doubtful. See *Mather* v. *Cunningham,* 105 Maine, 326.

It being admitted that Maine was the domicil of origin of Mr. Holyoke, the burden is on the proponents to show either that he went to Pasadena with the intention of making that place his home for an indefinite time, or that at some time, being in Pasadena, he formed the intention of remaining there as a home for an indefinite time. The result would be the same in either case. Domicil is defined as the habitation fixed in any place without any present intention of removing therefrom. *Putnam* v. *Johnson,* 10 Mass., 488. This definition was applied in *Warren* v. *Thomaston,* 43 Maine, 406, and was expressly approved in *Gilman* v. *Gilman,* 52 Maine, 165. To effect a change of domicil there must be actual residence in the new place, and an accompanying intention to make it the real, true, fixed home.

The purpose of an attempted change is not material, except as it tends to strengthen the probabilities, one way or the other. *McConnell* v. *Kelley,* 138 Mass., 372. The appellants contend that Mr. Holyoke's sole intention was to go to California, reisde there long enough to give the California court apparent jurisdiction in a proceeding for divorce, get a divorce, and then return to Maine. Such an apparent change in domicil would be colorable merely, not real. No change of domicil would be effected in such case. *Sewall* v. *Sewall,* 122 Mass., 161. It may be conceded, for we think it is quite likely true, that such was at one time Mr. Holyoke's purpose. But the evidence leads us to think that after his interview with Mr. Chaplin, he formed another purpose. He had learned that if he died domiciled in Maine nothing could prevent his wife, if undivorced, from obtaining a much larger portion of his estate than if he died domiciled in California. He seemed determined that she should have no more than he had already given her. He apparently

relented afterwards to some extent, for he sent to a friend his note for $10,000 to be given to her one year after his death. And we think he meant by this, death in California, for if he expected to return to Maine and die here, the statutes of Maine would amply provide for her. Even if one of his purposes was to deprive his wife of that share in his estate which the laws of Maine would give her, still if he went to California with a bona fide intention to reside there as a home for an indefinite time, or formed such an intention after reaching there, it effected a change in domicil. And that purpose could be accomplished only by so residing there until his death.

The appellants contend, we may say in passing, that his giving the residence of his wife in his cross-libel as "of Bangor," was a recognition of a fact that his own residence was then in Bangor. Hardly so. For many purposes, a wife's domicil may be separate from her husband's. Witness hundreds of divorce libels in this State. See *Burlington* v. *Swanville,* 64 Maine, 78.

The circumstances of his life in California tend to show a purpose of staying there. He had all his personal estate in stocks and bonds sent to him there. He had his household furniture shipped there. It is true he might have done all this, if he had intended to return. If it was his sole purpose to stay there only long enough to get a divorce, that is, one year, he might, indeed, have taken these rather unusual steps to give color to a claim of California domicil, or to prevent their being reached by his wife in Maine. But after he went to California, though he began proceedings to perpetuate testimony for a divorce suit, he did not pursue them. He took no such testimony. He evinced no undue haste. After notice of his wife's pending divorce proceeding in Penobscot county was served upon him, he voluntarily made his appearance in the proceeding, and became so far a party to it that a judgment for alimony against him would be valid against his estate wherever it might be. There was no longer any occasion for his remaining in California to prevent the wagging of the tongues of scandal in Bangor. The controversy was bound to be ventilated in the court in Bangor. And yet, he continued to reside in Pasadena through the heated season of 1911. He even brought a cross-libel in the court at Bangor, that the whole matter might be settled here. And after that, when he no

longer had any reason to claim a California residence for divorce purposes, he made his will in which he declared Pasadena was his residence, and indicated an expectation, more or less strong, of dying away from Bangor, in that he expressly directed his burial to be in Bangor.

In November, 1910, he had a new chauffer go out from Bangor, and not finding a satisfactory rent, purchased a house for him. And all this when only a little more than six months remained before he would have acquired a domicil in California supposably sufficient for divorce purposes. He urged the Taylors to "come" to California to live. If he ever had the intention of coming back to Bangor to live, his selling the furniture which he had shipped from his Bangor residence would rather indicate that he did not expect to refurnish that house. In March, 1911, after he knew of the pendency of the divorce proceeding here, and that some part of the troubles between him and his wife must be aired here, he sought registration as a voter there.

Mr. Holyoke's declarations offered by the appellants and considered by us indicate that his intention at the time they were made was to go to California for a temporary purpose. But even then they are not inconsistent with a later settled purpose of residing there indefinitely. And such a purpose, we think, the evidence tends to show he had.

It is true that old men do not transplant easily, and that in the decline of life men's minds and wishes revert to the friends and associations of former years. But in this connection it is to be remembered that in Bangor he had no kindred of near degree, none there to whom he had a right to look for the care which old age craves. The evidence is silent as to his social intimacy with his relatives in Brewer. Who his other social intimates were, or whether he had any, does not appear. But it does appear that when he decided that his wife should receive his $10,000 note after his death, he entrusted it to a public carriage driver, known to him. He had no business interests to draw him to, or keep him in, Bangor. The most important part of his property remaining there was his house, and that unfurnished, and for sale.

On the other hand, he had for ten years spent several months each winter and spring but one in California, and latterly in Pasadena.

It had been his winter home. He had acquaintances there. And there were the Marstons, for whom he built a house, and with whom he lived for many months, and with whom he was so intimate as to call Mrs. Marston his "adopted sister." It would not seem at all strange if he concluded that to live permanently in Pasadena would be more agreeable than to live in Bangor, where his wife lived, to whose living in the same place where he did, he had expressed at the outset a strong repugnance.

To change one's domicil is not difficult; it is easy. Given bodily presence, it is but to form a purpose. It is but to conceive an intention. It is done in the twinkling of an eye. Intention may be shown by conduct, without words, or it may be shown by both, under limitations already stated.

Upon the whole, our conclusion is that the proponents have fairly sustained the burden of showing that Frank H. Holyoke, before his death changed his domicil from Maine to California, and that the court in California had jurisdiction to admit his will to probate, as of one domiciled in that state. It follows that the decree of the Judge of Probate appealed from was right, and must be affirmed. The certificate will be,

Appeals dismissed.
Decree of the Probate Court affirmed.
Case remanded to the Probate Court for further proceedings according to law.

ANDREW P. HAVEY, Insurance Commissioner,

vs.

HANCOCK MUTUAL FIRE INSURANCE COMPANY.

Hancock. Opinion June 20, 1913.

Assessment. Decree. Examination. Insurance. Jurisdiction. Receiver. Revised Statutes, Chapter 49, Sections 36, 37, 38, 39-40. Term Time. Vacation. Petition.

1. Under the provisions of the statutes and the general rules governing chancery practice, an order, upon the petition of a receiver of an insolvent insurance company asking for authority to levy an assessment upon the premium notes of the company, may be made returnable upon a day in vacation.
2. The provisions of Revised Statutes, Chapter 49, apply to cases arising where the insurance company is a going concern, but not to the case at bar.
3. The general rules of chancery practice authorize the petition in the case at bar to be made returnable on a day in vacation.

On report. Exceptions overruled. Motion denied. Petition to be heard and determined.

This was a petition by the receiver of the defendant company asking court examination of the liabilities and assets of said company and a decree of court authorizing an assessment upon the premium notes of said company, if such assessment was found to be necessary. Upon this petition a hearing was ordered to be held at the court house in Ellsworth, in the county of Hancock, on the 27th day of March, 1913, at ten o'clock in the forenoon. Notice of said hearing was given in accordance with said order.

On the day assigned for hearing, the sitting Justice adjourned the same to the second Tuesday of April following, there being no regular term of said court in session in said county on the 27th day of March, 1913. At the regular term of the court, on the 10th day of April, certain policy holders in said company moved the dismissal

of said petition for want of jurisdiction over said persons. The Justice presiding denied said motion and exceptions thereto were taken. Thereupon, the case was reported to the Law Court for decision of all questions involved and any subsequent proceedings as the court may direct.

The case is stated in the opinion.

Scott Wilson, for plaintiff.

Hale and Hamlin, for defendants.

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

PHILBROOK, J. On February 20, 1912, William B. Blaisdell was appointed receiver of the defendant company. In due time he presented a petition asking court examination of the liabilities and assets of the company and all matters therewith connected, and a decree of court authorizing an assessment upon the premium notes of the company, if such assessment were found to be necessary.

Upon this petition it was ordered that a hearing be held at the court house in Ellsworth, in the county of Hancock, on the 27th day of March, 1913, at ten o'clock in the forenoon, and that notice of said hearing be given by publication and by mailing a printed copy of the petition and order of notice to each of the policy holders of the defendant company.

On the day assigned for hearing the sitting Justice ordered an adjournment of the same to the second Tuesday of April.

There was no regular term of court in session in Hancock County on the 27th day of March, 1913, but such a term began on said second Tuesday of April, to wit, the 8th day of April. On the 10th day of April certain policy holders in the company and other persons in interest appeared and moved dismissal of the petition *"for want of jurisdiction over said persons in interest notified by publication to appear."* In support of the motion attention was called to R. S., Chapter 49, Sections 36, 37, 38, 39 and 40, and it was claimed in the motion that the statute contemplated an examination of matters connected with the petition *in term time* and that the petition should not have been made returnable in vacation.

The motion to dismiss the petition was denied and, exceptions to this denial having been taken, the cause was reported to the Law Court for the decision of all questions involved and any such subsequent proceeding, if any, as said Law Court may direct.

The provisions of statute referred to in the motion seem plainly to apply to cases arising when the insurance company is a going concern, but not to the case at bar. In this case the company is apparently insolvent and a receiver for it has been appointed under the provisions of R. S., Chapter 49, Section 68, which authorizes any justice of the court, in connection with other duties imposed by this section, to do "any other act conformable to the general rules of chancery practice which in his opinion is requisite for the safety of the public and for the best interests of all parties concerned, all which orders and decrees he may in like manner enforce." The general rules of chancery practice authorize the petition in the case at bar to be made returnable on a day in vacation and the decree must be,

Exceptions overruled.
Motion denied.
Petition to be heard and determined.

GEORGE H. LITTLEFIELD *vs.* CHANDLER E. HILTON.

York. Opinion June 30, 1913.

Construction. Deed. Description. Homestead. Intention. Title. Trespass.

1. It is the general governing principle in the exposition of deeds and other instruments that effect should be given to the legal intention of the parties.
2. That in ascertaining that intention, the entire instrument is to be regarded so that every word shall, if possible, have effect and none be rejected.
3. If by any consistent construction the different parts of the deed are reconciled and a reasonable effect given to all its terms, such construction should be adopted.
4. It is an ancient principle of the common law that when the words used in a deed are not sufficiently precise to fix its meaning beyond every uncertainty, the words are to be taken most strongly against the grantor.

On report. Judgment for plaintiff for five dollars.

This is an action of trespass quare clausum to recover damages for breaking and entering the plaintiff's close situate in Wells, in said county, and cutting and carrying away certain growing trees. The only question presented was the title to the locus in question. The defendant pleaded the general issue and filed a brief statement denying the plaintiff's title and claiming title in himself. Upon 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.

The case is stated in the opinion.

Leroy Haley, for plaintiff.

Mathews & Stevens, and Cleaves, Waterhouse & Emery, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HANSON, JJ.

KING, J. An action of trespass quare clausum reported to this court. The title to the locus is the only question now presented.

By a warranty deed, dated April 6, 1850, Frederick Hilton conveyed to his son Edward Hilton, Jr., certain real estate described in the deed as follows: "All of my homestead farm situated in said Wells, together with all of the buildings standing thereon, bounded as follows, viz.: On the north by land owned by the heirs of Joseph Littlefield late of Wells, deceased, and the heirs of Josiah Littlefield, late of Wells, deceased, on the northwest by land of William Hilton and John Hilton and on the southwest by land of John Hilton and Daniel Baston, and on the southeast by Daniel Stuart and John Hilton's land, containing about fifty acres be it more or less, and also one other lot of land laying out in the commons, bounded as follows, viz., on the Baston road, so called, on the north and northwest by land of Nahum Littlefield and James Hilton, on the south by land of Nathaniel Hilton, containing twenty acres be it more or less, and also one other lot of wood land, situated in the town of York, bounded as follows, viz., (here follows a description by metes and bounds of that lot containing about fifteen acres).

By deed, dated April 11, 1891, Edward Hilton conveyed to his son Alvirda F. Hilton certain real estate described in the deed as follows: "Certain real estate now occupied owned and improved by me situated in Wells, including and conveying by this deed the land and buildings therein embraced; in the following described title deeds made to me as 'Edward Hilton, Jr.' Viz.: My homestead estate situated in said Wells described in a deed from my father Frederick Hilton deed, dated April 6th, A. D. 1850 excluding a parcel of wood land, in York, which is specified in said deed, which is recorded in York County Registry of Deeds in Book 44 on pages 44 and 45, to be referred to, containing 70 acres more or less, with buildings thereon.

"Also a lot of tillage land containing 6 acres, more or less in said Wells deeded to me by said Frederick, August 21st, A. D. 1852, recorded in Book 225, page 43 of said Registry.

"Also a lot of field land containing 23 acres more or less, deeded to me by Daniel and Jacob A. Stuart by deed dated June 30, A. D. 1864, recorded in Book 288 on page 457 of said Registry to be referred to.

"Also a piece of mowing land in said Wells containing two (2) acres more or less, deeded to me by Joshua F. Hilton by deed dated

January, 1871, acknowledged June 2, 1871. Recorded in Book 351 on page 331 of said Registry; in all of said original deeds, I was then known and properly called 'Edwin Hilton, Jr.,' now being senior."

From the report it appears that it was conceded at the trial that the locus where the alleged trespass was committed is the same tract "laying out in the commons" described as the second lot conveyed in the deed of April 6, 1850, from Frederick Hilton to Edward Hilton, Jr., and the plaintiff claims title to that lot under a deed from Alvirda F. Hilton to him dated November 4, 1909, in which that lot was described as conveyed.

The controlling question presented is, whether the title to the lot in question passed from Edward Hilton to his son Alvirda F. Hilton by the deed of April 11, 1891, above referred to, for, if so, the plaintiff appears to have the better title to the locus.

The defendant contends that only the homestead of Edward Hilton, so far as the property described in the deed to him from his father in 1850 is involved, was conveyed by his deed to Alvirda F. Hilton of April 11, 1891, urging in support of that contention that the words used in the deed "My homestead estate situated in said Wells," limit the conveyance in this particular to the homestead only. On the other hand the plaintiff claims that the words "homestead estate" are comprehensive enough to include the lot in question with the homestead proper, especially if that lot had been used in connection with the homestead, and he introduced evidence tending to show that fact; and he also claims that a reasonable and consistent construction of the deed is, that it conveyed all the real estate then owned by the grantor in Wells, the title to which he acquired under the deed referred to of April 6, 1850, and therefore, included both the homestead and the lot laying out in the commons.

But for the words used, "my homestead situated in said Wells," it would have been altogether plain that the deed in question would have conveyed all the grantor's real estate in Wells, which he acquired by the deed therein referred to from his father to him, dated April 6, 1850. Because of the use of those words must the conveyance be restricted to the homestead only? We think not.

It is the general governing principle in the exposition of deeds and other instruments, that effect should be given to the legal inten-

tion of the parties, and that in ascertaining that intention the entire instrument is to be regarded so that every word shall, if possible, have effect, and none be rejected. If by any consistent construction the different parts of the deed are reconciled, and a reasonable effect given to all its terms, such construction should be adopted. And it is also an ancient principle of the common law, that when the words used in a deed are not sufficiently precise to fix its meaning beyond every uncertainty, the words are to be taken most strongly against the grantor.

It is important to consider that the method adopted in drafting the deed in question was to designate the lands thereby conveyed only by express reference to the title deeds whereby they were conveyed to the grantor, and without adding any particular description by metes and bounds. The words used at the beginning of the part of the deed designating the property conveyed, "certain real estate now occupied owned and improved by me situated in said Wells, *including and conveying by this deed the land and buildings therein embraced in the following described title deeds made to me,*" reasonably indicate an intention to convey all and the same lands in Wells that the grantor acquired by the certain title deeds to be specifically referred to; and when those title deeds were referred to no exception of any lands included therein was made, except the wood lot in the town of York. And this exception, as expressed in the deed, "excluding a parcel of wood land, in York, *which is specified in said deed,*" plainly indicates the grantor's understanding that the deed he was then executing covered all the property conveyed to him by his father's deed of 1850, except the wood lot in York. If it was not intended that the deed should convey the lot out in the commons, without doubt it would have been excepted as the York lot was.

Again, the acreage of the land conveyed, as specified in the deed, is "70 acres more or less," and this is in exact accord with what should have been stated if both lots were included in the conveyance, but it is an entirely erroneous statement if only the homestead was conveyed, for the homestead proper is described in the deed of 1850 as containing "about fifty acres more or less," and the lot out in the commons "twenty acres be it more or less."

Nor do we think the use of the words, "My homestead estate situated in said Wells," is materially inconsistent with the conclusion that both the homestead proper and the twenty acre wood lot out in the commons were intended to be embraced in the language used in the deed to designate the property conveyed.

We do not here undertake to define the precise meaning of the words "homestead estate" as used in the deed. It is undoubtedly a term having a broader signification than "homestead." And it may not be as limited in meaning as "homestead farm." Shaw, C. J., in *Taylor* v. *Mixter,* 11 Pick., 341, 346, and also in *Aldrich* v. *Gaskill,* 10 Cush., 151, 158, strongly intimated that "homestead" might include land not contiguous to that whereon the dwelling-house is located, if intimately connected and used with it, and that "homestead farm" might have a broader signification than the word "homestead" used alone. Whether the expression "My homestead estate situated in said Wells" has a significance broad enough to include both the homestead lot proper and the other lot out in the commons if used, as claimed, in connection with the homestead, we do not here decide, for it is not necessary. The use of that expression does not necessarily exclude the idea that the other lot was included, and it is reasonably reconcilable with that construction; on the other hand, a construction that limits the conveyance, in this particular, to the homestead proper only, and excludes the other lot in Wells "laying out in the commons," does not give effect to what seems to have been the intention of the parties, nor does it give the effect that manifestly should be given to other important recitals in the deed. The other construction, whereby the deed is held to convey all the land the grantor owned in Wells that he acquired by the deed of 1850 which was expressly referred to, best comports with the plain and ordinary meaning of the language used in the deed and gives effect to all its terms.

It is therefore the opinion of the court that the plaintiff has the better title to the locus. It is stipulated in the report that the damage for the alleged trespass was five dollars, accordingly the entry will be,

Judgment for plaintiff for five dollars.

EDWARD B. BLAISDELL *vs.* INHABITANTS OF THE TOWN OF YORK.

York. Opinion July 1, 1913.

Assumpsit. Breach. Contract. County Commissioners. Declaration Demand. Jurisdiction. Laying Out of Way. Notice. Pecuniary Interest. Petition. Record. Supplemental Contract. Town. Meetings. Void. Voidable. Votes. Warrant.

1. If the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such error be considered when the judgment is brought collaterally into question.
2. The board of County Commissioners was the tribunal designated by statute to have jurisdiction over laying out of the way in question and was the only tribunal having such jurisdiction.
3. The pecuniary interest of one of the board, although of trifling value, was disqualifying so far as he was concerned, but such pecuniary interest on the part of one member did not oust the board of jurisdiction, nor render its subsequent proceedings void.
4. It rendered them merely voidable, subject to being set aside upon proper process, therefor. This rule of law is firmly established by the authorities.
5. When a member of an inferior tribunal is interested at common law, the only remedy is to set proceedings aside, upon proper process. They cannot be attacked collaterally.
6. In calling town meetings, the person to whom the warrant is directed must post an attested copy of the warrant in some public and conspicuous place in said town, unless the town has appointed by vote in legal meeting a different mode, but the statute does not require that the return shall recite the words "public and conspicuous" but it does require that the copies shall in fact be posted in a public and conspicuous place, and the return of the officer is the only competent evidence upon the question.
7. If the return recites the places of posting and those places of posting are of such a character that as a matter of common knowledge they are public and conspicuous places, that is sufficient. It is for the court to say whether the statute has been complied with.

On report. Judgment for plaintiff for $44,536.99, with interest from May 15, 1913.

This is an action of assumpsit to recover the sum of $51,066.71, claimed to be due plaintiff from the defendant town for the construction of a way and bridge across York River. The declaration contains a count for breach of contract, an account annexed for labor performed, and materials furnished and the common counts. The defendant pleaded the general issue and filed a brief statement alleging, among other things, that the written contract between the plaintiff and defendant for the construction of said way and bridge was invalid, and that the County Commissioners of York County had no jurisdiction to lay out said way, etc.

At the conclusion of the testimony, by agreement of the parties, the case was reported to the Law Court for its determination upon so much of the evidence as is relevant and legally admissible.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, Frank D. Marshall, and John C. Stewart, for plaintiff.

James O. Bradbury, and E. P. Spinney, for defendants.

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

CORNISH, J. This is an action of assumpsit brought by the plaintiff to recover the sum of $51,066.71, the amount alleged to be due him under two contracts made with the defendant town for the construction of a way and bridge across York River. The declaration contains one count for breach of contract, another on an account annexed for labor performed and materials furnished, and also the common counts.

This is one, and well-nigh the final chapter in a varied and prolonged litigation arising from the laying out and construction of the York Bridge, so called, connecting the towns of York and Kittery.

The history of the case is this:

The first step towards the laying out and construction of this way and bridge was taken when the selectmen of York, two of whom continued to act in that capacity during all the subsequent controversy, petitioned the Legislature for the passage of a special act authorizing the construction of a highway and bridge across York River. Such an act was necessary because the proposed way

and bridge would cross tide waters. *Cape Elizabeth* v. *Co. Commrs.*, 64 Maine, 456; *Chapin* v. *Maine Central R. R. Co.*, 97 Maine, 151; *Chase* v. *Cochrane,* 102 Maine, 431. This authority was conferred by Chap. 50 of the Priv. and Special Laws of 1905, which was approved and took effect February 17, 1905.

On April 4, 1905, Seabury Wells Allen and one hundred and sixty-nine other residents and taxpayers of the defendant town petitioned the County Commissioners of York County to lay out the way in question, as one required by common convenience and necessity. This petition was entered at the April session, 1905, hearing was had on May 18, 1905, the petition was granted and the way laid out. The matter was then continued to the January session, 1906, when the report was recorded and the proceedings closed. From this action of the County Commissioners no appeal was taken.

At the annual meeting held in March, 1906, an article was inserted in the warrant to see if the town would appropriate a sufficient sum of money for the construction of the bridge and highway as laid out by the County Commissioners. This article was indefinitely postponed.

A special town meeting was held on October 13, 1906, "to see if the town will vote to build the bridge and approaches as laid out by the County Commissioners across York River at York Harbor." This is the crucial meeting in this case, because the plaintiff bases his rights upon the action then taken.

Upon a written ballot being taken the whole number of ballots cast was 297, of which 174 were in favor of building and 123 were opposed.

"On motion of Mr. Gifford, a committee of four was chosen to act in conjunction with the selectmen in building the bridge, said committee, as suggested by Mr. Gifford, to consist of Charles H. Young, Joseph W. Simpson, Charles E. Weare and J. Perley Putnam, said committee to serve without pay."

As the record was first made, it was "voted to accept the bid of E. B. Blaisdell for $30,000." By order of court, upon mandamus proceedings subsequently brought, the record was changed by inserting the word "not" after "voted," so that it now stands, "Voted not to accept the bid of E. B. Blaisdell for $30,000."

On the same day, October 13, 1906, the three members of the board of selectmen, and the four persons above named appointed to act in conjunction with them, met and chose Charles H. Young permanent chairman, the selectmen not voting. On October 17, 1906, the seven members met again by adjournment and chose Mr. Bragdon, who was chairman of the selectmen, secretary of the committee, but he declined to serve. A discussion followed as to the duties and powers of the three selectmen and of the four associates, the former claiming that in fact the selectmen and the associates constituted two committees, one composed of three and the other of four members, while the associates contended that one committee of seven had been appointed by the town. It was finally agreed that each faction should consult counsel. This was done, and on October 22, 1906, another meeting was held at which, after discovering that each faction had obtained legal advice substantiating its previous claim, the selectmen informed the other members that they would no longer act with them, and withdrew. At this meeting, J. Perley Putnam was chosen permanent secretary, the selectmen taking no part. From that time on, the selectmen attended no other meetings of the committee, although they were duly notified of each meeting.

For convenience, we will designate hereafter the selectmen by that name, and the remaining four as the committee, it being understood that in each instance all the members were present and their votes were unanimous.

On October 25, 1906, the committee met and voted to employ R. W. Libby as engineer, but he declined to serve; and on October 30, 1906, they voted, "to engage A. W. Gowen to take levels, change plans and take charge of the construction of the bridge." It was also "voted to adopt the plans with some changes that were offered for inspection at the special town meeting of October 13, 1906."

On November 5, 1906, it was voted to prepare proposals for bids to be in the hands of the secretary not later than November 14, 1906.

On November 16, 1906, "an injunction was read which had been served upon Mr. Young, restraining the committee from awarding the contract for the bridge."

On November 30, 1906, Mr. Young "reported from Joseph P. Bragdon that no further action would be taken in relation to the injunction now pending in court;" and at the same meeting the bids were opened and the contract was awarded to E. B. Blaisdell, the plaintiff, he being the lowest bidder, for the sum of $39,500.

On December 5, 1906, a written contract which forms the basis of this action was entered into between the plaintiff and the town of York, the same being signed in behalf of the town by the four members of the committee only.

At various times subsequent to this, the selectmen sent communications both to the contractor and to the committee, protesting against the carrying out of the contract, denying its validity and all liability on the part of the town in connection therewith.

The Legislature of 1907 passed a Private and Special act, Chap. 101 which took effect February 21, 1907, and was in these terms:

"The vote of the inhabitants of the town of York, passed in town meeting October 13, 1906, appointing a committee of four to act in conjunction with the selectmen of said town in building a bridge across York River as laid out and ordered by the County Commissioners of the county of York, and the action of said committee in behalf of said town in petitioning the secretary of war and the chief of engineers that the location and plans of said bridge be approved, and that the said town be authorized to commence the construction thereof and maintain the same as provided by law, are hereby authorized and ratified."

At the next annual town meeting held in March, 1907, various articles were submitted to the voters, viz.:

"To see what action the town will take for the construction and maintenance of the proposed bridge and approaches across York River which the County Commissioners have ordered to be built," etc.:

"To see what action the town will take for the payment of all contracts and bills to be legally entered into for the proposed construction and maintenance of the proposed bridge," etc.:

"To see if the town will authorize its board of selectmen to obtain proper surveys, drawings, contracts and specifications relating to the proposed construction of bridge and approaches across York

River and to enter into such contracts therefor as said board shall consider wise," etc.

All these articles were indefinitely postponed.

Another article read: "To see what action the town will take relative to the committee of four appointed at a town meeting held October 13, 1906, in connection with the proposed construction of said bridge." Upon this, it was voted, "that the committee be dismissed from further service."

The contractor began work regardless of the protests, and from time to time as the work progressed the committee drew orders in favor of the contractor upon the town treasurer, in accordance with the certificate of the engineer in charge, and payment of each was demanded. No single one of them was honored after April 1, 1907.

In September, 1907, the War Department required certain changes in the work, causing additional expense; and on October 17, 1907, a supplemental contract to cover these changes was entered into between the plaintiff and the committee, the agreed price being $9,118.65, with a deduction from the former contract price of $2,128.22, making a net increase of $6,990.43.

January 29, 1908, the engineer notified the entire committee of seven that the bridge and way were so far completed that the plaintiff was entitled to the balance of eighty per cent under the contract. The committee accepted the work, and notified the selectmen who replied on March 18, 1908, declining to recognize any authority on the part of the committee to act for the town in any matter relating to the bridge.

May 16, 1908, the committee notified the selectmen that the work was completed at a total expense of $49,765.63, for which amount they had drawn orders upon the town treasurer.

At the annual town meeting held in March, 1910, an article to see if the town would vote to pay for the bridge and way was indefinitely postponed.

At the annual town meeting held in March, 1911, and at a special meeting held on June 10, 1911, similar articles met a similar fate.

The present situation therefore is, that the bridge has been completed, but has not been accepted by the town; and although since

completion it has been used by the traveling public to some extent, the selectmen have erected signs indicating that it is a private way, and disclaiming all liability in connection with its maintenance or use. The contractor has not received his pay, and this action is brought to determine his rights.

What are the legal rights of the parties? The plaintiff's claim is assaulted from many angles. Is any one of these assaults fatal?

1. VALIDITY OF PETITION TO COUNTY COMMISSIONERS.

The defendants contend in limine that the original petition of April 4, 1905, did not describe with sufficient definiteness the termini of the proposed way, and therefore conferred no jurisdiction upon the County Commissioners, with the result that all their subsequent proceedings thereunder were null and void.

The rule of law is firmly established in this State that the "petition describing a way," under R. S. Chap. 23, Sec. 1, must describe it with reasonable definiteness, in order to give the County Commissioners jurisdiction. The chief reason for this requirement is to give all parties, over whose land the proposed way is to be laid, and all others whose interests may be affected thereby, such information, through the public notice on the petition, as will enable them to be present and be heard. Keeping this object in view, it is apparent that the description should not, on the one hand be vague and indefinite, nor on the other need it be expressed with extreme technical precision. It must set forth "with reasonable certainty," "with reasonable and approximate definiteness," the termini and the route. Cases applying this rule with greater or less liberality, and therefore cited by the one side or the other, are numerous and familiar.

But the defendants contend that this particular petition has already been held insufficient by this court in *Bliss* v. *Junkins,* 106 Maine, 128, and that the question is therefore res judicata. In that case, the owner of land over which this way was laid out brought a bill in equity against the County Commissioners, the selectmen, the conjoined committee of four and the contractor, asking that they be enjoined from entering upon or attempting to take, under these proceedings of the County Commissioners, any portion of the complainant's lot, or from erecting or maintaining any structures on or adjacent to the same. The bill alleged, as grounds for relief, want

of jurisdiction in the County Commissioners, because of defective petition and a disqualifying interest in one member of that board, Mr. Junkins. The defendants demurred generally to the bill. No evidence was therefore introduced, and upon the face of the petition alone the description was held not to make the termini reasonably definite, and therefore the demurrer was overruled. The description under consideration then and now is as follows: "A county way between some point in York Harbor on the county way leading from York Village through York Harbor to Norwood Farm, to another point *southwesterly* over tide water to the county way leading from Sewall's Bridge to Seabury R. R. Station to Kittery Point. . . . Said way to pass over Harris Island and Bragdon's Island in York River."

It may well be that the words of the petition, which alone were before the court of the former case, might seem too vague and indefinite. But when applied to the geographical situation and to the location on the face of the earth, as brought out in the evidence, we think the termini are set out with such reasonable certainty as to meet the fair intent and requirement of the statute. It is true that the distance on the county road between York Village and Norwood Farm, which marks the easterly base line, some point on which the new road was to make its eastern terminus, is more than a mile; and the distance on the county road from Seabury Station to Kittery Point, some point on which the new road was to make its western terminus, is four or five miles, the York River lying between; and were there nothing in the petition, when applied to the locus, to limit these termini, its inadequateness and invalidity must be conceded.

But the location of Harris and Bragdon's Islands in York River, with reference both to each other and to the bank on either side, taken in connection with the general "southwesterly" course which the way and bridge were to run, bring the termini within reasonable and fairly definite limits. It matters not how far it may be from York Village to Norwood Farm, nor from Seabury Station to Kittery Point. There is only a short portion of that distance on either side of the river that can be utilized if the way is to cross the two islands in a southwesterly direction. The islands serve as piers on which the bridge and the way are to rest, and from which

they cannot greatly swerve. That is definite which can be rendered definite. Any owner of land over which the way was to pass, and any other person whose interests could be affected by the location, must have been fully appraised of the proposed route, the test which must not be lost sight of in applying the legal rule. An equally liberal construction has been adopted by this court in other cases. *Windham* v. *Co. Commrs.*, 26 Maine, 406; *Sumner* v. *Co. Commrs.*, 37 Maine, 112; *Raymond* v. *Co. Commrs.*, 63 Maine, 112; *Packard* v. *Co. Commrs.*, 80 Maine, 43; *Andrews* v. *Co. Commrs.*, 86 Maine, 185.

We hold, therefore, upon the full evidence that the description in the petition was reasonably definite as to both termini and course, and that the County Commissioners were thereby given jurisdiction of the case.

2. DISQUALIFICATION OF ONE COMMISSIONER.

The defendants attack the jurisdiction of the County Commissioners on another ground. It appears in evidence that Samuel W. Junkins, one of the three members of the board to whom the petition was addressed, was, during the whole period covered by the proceedings, the owner of one-fourth undivided interest in Bragdon's Island, one of the small islands over which the way was located.

The defendants contend that by reason of this interest in one member, the board had no jurisdiction over the subject matter, their action was void ab initio, and therefore the judgment rendered by them was open to collateral attack in this action. This is not our view of the law.

It may be granted that the pecuniary interest of Mr. Junkins, although apparently of trifling value, was nevertheless disqualifying so far as he was concerned. *State* v. *Delesdernier,* 11 Maine, 473; Conant's Appeal, 102 Maine, 477; *Pierce* v. *Bangor,* 105 Maine, 412. The law is jealous of the absolute disinterestedness of its judicial tribunals and wisely so. But did the existence of this interest oust the board of entire jurisdiction in the subject matter and render all its proceedings utterly void, or did jurisdiction vest and the proceedings become merely voidable? That is the precise question to be determined.

The general rule of law as to validity of judgments is stated by the Supreme Court of the United States as follows: "If the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such error be considered when the judgment is brought collaterally into question." *McGoon* v. *Scales,* 9 Wall, 23.

It must be conceded that the board of County Commissioners was the tribunal designated by statute to have jurisdiction over the laying out of the way in question, and was the only tribunal having such jurisdiction. The petition itself was in proper form, as we have already determined; and the jurisdiction was thereby conferred upon the board, leaving out for the moment the question of pecuniary interest. Under these conditions, and in the absence of any prohibitive statute, such pecuniary interest on the part of one member did not oust the board of jurisdiction, nor render its subsequent proceedings void. It rendered them merely voidable; that is, subject to being set aside upon proper process therefor; and this rule of law is firmly established by the authorities.

The leading English case, and one that is frequently cited by the courts in this country as well, is *Dimes* v. *Grand Junc. Canal,* 3 H. L. C., 759, decided in 1852. In that case, the Chancellor who was interested in the defendant company to the extent of several thousand pounds affirmed a decree made by the vice-chancellor, and the question whether this decree was void or voidable was very carefully and exhaustively considered by the fifteen judges who answered through Parke, B., that it was voidable and not void, that unless it was attacked directly either by writ of prohibition in some instances, or by writ of error in others, the action of the court in which the interested judge had taken part was valid, and the persons acting under its authority could not be treated as trespassers. The court added: "The many cases in which the court of King's Bench has interfered when interested parties have acted as magistrates and quashed the orders of the court of which they formed a part, after they had been removed by certiorari afford an analogy. None of these orders is absolutely void; it would create great confusion and inconvenience if they were."

The doctrine of that case stands as the rule at common law, and has been reaffirmed in many jurisdictions.

A leading case in this country, where the whole subject is elaborately discussed, is *Moses* v. *Julian,* 45 N. H., 52, 84 Amer. Dec., 114, and full note p. 126. There the rule is stated to be that "at common law the recusation of a judge does not affect the jurisdiction, but is merely ground to set aside the judgment on error or appeal, except in cases of inferior tribunals, where no writ of error or appeal lies."

"Where a member of an inferior tribunal is interested at common law, the only remedy is to set the proceeding aside." *Foot* v. *Stiles,* 57 N. Y., 399, 408.

Further citation of authorities is unnecessary.

The fact that the judicial disqualification may be waived by the parties necessarily concedes jurisdiction because consent can never give jurisdiction where none existed before. And yet the courts hold with unanimity, so far as we have been able to discover, that such disqualification, in the absence of any express statute to the contrary may be waived. *Moses* v. *Julian,* 45 N. H., 52; *Stearns* v. *Wright,* 51 N. H., 600; and cases cited in 84 Amer. Dec. supra, pp. 130-131. See also *Danvers* v. *Co. Commrs.,* 2 Met. 185; *Tolland* v. *Co. Commrs.,* 13 Gray 12; *Stevens* v. *Co. Commrs.,* 97 Maine, 121-127.

The legal effect of judicial disqualification and of waiver is laid down by the Wisconsin Supreme Court in these words: "At common law, it was recognized that a judge who was interested in the action or of kin to either party was disqualified from sitting in any case. Notwithstanding this rule, his judgment in the cause was generally considered erroneous only and not void, and the objection might be waived by the parties either expressly or impliedly by proceeding without objection to the trial, knowing the facts." *Case* v. *Hoffman,* 100 Wis., 314. To the same effect is Freeman on Judgments, Secs. 144-145.

Another principle equally well-settled is that when a statute provides that in a certain case or under certain specified conditions a judge shall not sit or shall not act, any judgment rendered by such judge in such a case is coran non judice and utterly void. He is

prohibited from taking jurisdiction of the cause and it therefore follows that in such cases there could be no effective waiver, as that would be an attempt to confer jurisdiction by consent, which is impossible. 84 Amer. Dec., 126, supra, and cases. *Case* v. *Hoffman,* supra; Freeman on Judgments, supra.

These two principles of voidable judgments in the absence of statute, and void judgments when jurisdiction is expressly prohibited run through all the cases, and failure to discriminate between them has sometimes led to inacurracy of statement. More or less confusion may also have arisen from the use of the word "void" instead of "voidable." *State* v. *Richmond,* 26 N. H., 232. Thus, the judgment of an interested tribunal may be void in the sense of invalid, if set aside on proper proceedings. But unless thus set aside, it stands. It therefore, strictly speaking, is not void, but voidable. It was in this sense that the judgment of the selectmen was termed void in Conant's Appeal, 102 Maine, 477, 481, because of the interest of one of the board. In that case, the question was raised directly on appeal, and the disqualifying interest was properly held to render the judgment of the board in laying out a town way invalid, and in that sense void; but not void in the broader sense of entire lack of jurisdiction, and therefore attackable collaterally. All the cases cited in that case in support of the invalidity of the judgment had raised the question directly, either by certiorari, *State* v. *Delesdernier,* 11 Maine, 473, Ex parte Hinckley, 8 Maine, 149; on appeal, *Friend* v. *Co. Commrs.,* 53 Maine, 387; *Case* v. *Hoffman,* 100 Wis., 357; or on the acceptance of the report, *Andover* v. *Co. Commrs.,* 86 Maine, 185. So in *Bliss* v. *Junkins,* 106 Maine, 128, the word void is used in the same similar sense of voidable, citing Conant's Appeal, supra, as its authority.

Keeping in mind these distinctions, the decisions are in harmony.

In Cottle, Aplt., 5 Pick., 482, *Sigourney* v. *Sibley,* 21 Pick., 101; *Gay* v. *Minot,* 3 Cush., 352; *Hall* v. *Thayer,* 105 Mass., 219, which have been called to our attention, probate proceedings were held void on appeal because the Judge of Probate was interested in the estate; and they were void and not merely voidable, because of express statutory inhibition. The court was thereby ousted of all jurisdiction.

On the other hand, in *Ipswich* v. *Co. Commrs.*, 10 Pick., 519, on a petition for certiorari, it was claimed that the proceedings were invalid because one of the commissioners was an owner of land in the town, through which town the road as altered was to pass, and was therefore not a disinterested person within the contemplation of law, there being no statutory inhibition at that time. Chief Justice Shaw, without deciding the question whether the interest was sufficient to disqualify the commissioner, held that the objection had been waived. He says: "It was well known to the town that Mr. Wildes was a freeholder there, because they had taxed him. They were parties to the proceedings, and might have objected to his sitting, if they thought fit. But they might also waive the exception if they chose, and if they were satisfied that the decision would be impartial. By consenting to proceed, with a full knowledge of the ground of exception, the exception was waived. It would be attended with great injustice were we to hold otherwise. A party might take his chance for a favorable decision, knowing of an exception which would invalidate the proceedings if unfavorable, and intending, in that event, to rely upon it. Besides, if the exception had been seasonably taken, the commissioner might have withdrawn or been replaced by one against whom no exception would lie."

It is unnecessary to discuss these legal principles at greater length. It only remains to apply them to the case at bar.

There is no statute in Maine prohibiting a county commissioner from taking part in a proceeding where the proposed way is to be located over his own land. His disqualification rests upon principles of the common law. This board of County Commissioners therefore had jurisdiction of the subject matter notwithstanding Mr. Junkins' pecuniary interest. The defendants were a party to the proceedings. They were made such by statute, R. S., Chap. 23, Sec. 2. Service must be made upon the clerk of the town as well as by posting up in three conspicuous places and by publication; and such service upon the clerk was made in this case. They were the party most in interest because upon them fell the expense of building the way. They had an opportunity to be present and seasonably object to the proceedings because of the interest of Mr. Junkins. The record does not show whether they were in fact represented or

not. It might perhaps be assumed that they knew of the interest because Mr. Junkins was a resident of the defendant town. In any event, no objection was made in their behalf at the hearing. The irregularity could also have been taken advantage of by appeal to the Supreme Judicial Court. This was not done, and the judgment of the board stands unreversed.

This case, therefore, falls under the general rule that where jurisdiction is lacking, the judgment of County Commissioners is open to collateral attack. *Small* v. *Pennell,* 31 Maine, 267; otherwise, the proceedings are binding, unless quashed on certiorari as in *State* v. *Delesdernier,* 11 Maine, 473, or set aside on appeal, as in Conant's Appeal, 102 Maine, 477.

It has been so held in an action of trespass. *Baker* v. *Runnells,* 12 Maine, 235; *Gay* v. *Bradstreet,* 49 Maine, 580; *Cyr* v. *Dufour,* 62 Maine, 20; *Thomas* v. *Churchill,* 84 Maine, 446; in an action of tort to recover injury to a bridge by turning the current of a stream, *Topsham* v. *Brunswick,* 65 Maine, 445; and in a bill in equity praying for an injunction, *White* v. *Co. Commrs.,* 70 Maine, 317. The same rule should and does apply in an action of assumpsit, like this, to recover the cost of building the way and the bridge. In so far as *Lyon* v. *Hamor,* 73 Maine, 56, is at variance with the doctrine here laid down it is overruled.

Another principle of law might with propriety be invoked, and that is the doctrine of estoppel, jurisdiction having once attached. The special act of the Legislature authorizing the County Commissioners to lay out the way was procured upon the petition of the selectmen of the defendant town. Notice of the pendency of the subsequent proceedings before the commissioners was served upon the defendants. They either did not attend the hearing, or if they did, they raised no objection so far as the record discloses. They took no appeal to the Supreme Judicial Court from the finding of the board. The proceedings were closed and recorded in January, 1906; and on October 13, 1906, the town voted "to build the bridge and approaches as laid out by the County Commissioners." In reliance upon that vote, the plaintiff entered into the contract in question. Will the defendants now be permitted, after the contract has been completed and the bridge built, to deprive the plaintiff of

his just dues by saying that the way had not been laid out by the County Commissioners? Clearly not. They were silent when they should have spoken. They now speak too late, and their complaint falls upon deaf ears. *Martin* v. *Maine Central R. R. Co.,* 83 Maine, 100; *Stubbs* v. *F. & M. Ry. Co.,* 101 Maine, 355; *Hyde Park* v. *Wiggin,* 157 Mass., 94; *Robinson* v. *Co. Commrs.* (Maine, 1886), 4 Atl., 556.

3. LEGALITY OF THE TOWN MEETING OF OCTOBER 13, 1906.

The next point raised by the defendants is that the special town meeting of October 13, 1906, at which a vote was passed to build the bridge and appointing a committee therefor, was illegal, and its proceedings invalid, because the voters were not legally notified, as appears from the constable's return on the warrant.

The original return recites that notice of the meeting was given by posting three attested copies of the warrant, "one at the Congregational Church at Brixham, one at the Town Hall and one at the Cape Neddick Post Office in said York."

Subsequently, the constable amended his return by inserting the allegation of public places, so as to read, "by posting three attested copies of the within warrant *in three public places* in said town, to wit: One at the Congregational Church," etc.

But the defendants say that this attempted amendment is invalid because it was not on oath as the statute requires. R. S., Chap. 4, Sec. 10. This point is well taken, because the amendment is not under oath, nor does the word "conspicuous" appear even in the amendment; and were it necessary, the report could be discharged in order that further amendment be made and these technicalities complied with. *Bresnahan* v. *Soap Co.,* 108 Maine, 124. But we think the original return was in itself sufficient, and required no amendment.

R. S. Chap. 4, Sec. 7, specifies that an attested copy of the warrant shall be posted by the person to whom it is directed "in some public and conspicuous place in said town seven days before the meeting, unless the town has appointed by vote, in legal meeting, a different mode, which any town may do. In either case, the person who notifies the meeting shall make return on the warrant, stating the manner of notice and the time when it was given." There is no

evidence before us that the town of York has ever adopted any other than the statutory method; and with the requirements of that method, the constable more than fully complied. He posted attested copies of the warrant in three public and conspicuous places instead of in one. It is true that he did not state in his original return that the places named were "public and conspicuous," but in this case that omission did not render it fatally defective, because the court can and will take judicial notice of the fact that those places were public and conspicuous. None could be more so, a fact of such common knowledge that the court is permitted to recognize it. *McTaggart* v. *Maine Central R. R. Co.,* 100 Maine, 223, 228. The statute does not require that the return shall recite the words "public and conspicuous;" but it does require that the copies shall in fact be posted in public and conspicuous places. The question that arises then is, how can it be proved that this has been done?

It cannot be by evidence aliunde. The return of the officer is the only competent evidence upon the question. *Auburn* v. *Water Power Co.,* 90 Maine, 71, 78. But if that return recites the places of posting, and those places are of such a character that as a matter of common knowledge they are public and conspicuous, that is sufficient. The return then shows the required fact as clearly as if it added the adjectives. In such a case, the adjectives are superfluous.

It is for the court to say whether the statute has been complied with; and the judgment of the officer is not controlling. It has often been held that a return which recites that the copies have been posted in a "public" place, or in a "public and conspicuous place," without specifying the places themselves, was defective. *State* v. *Williams,* 25 Maine, 561; *Fossett* v. *Bearce,* 29 Maine, 523; *Bearce* v. *Fossett,* 34 Maine, 575; *Allen* v. *Archer,* 49 Maine, 346. The irresistible logic of these cases is that the characterization by the officer is not conclusive and that it is still for the court to determine whether the places selected are of the required kind; and it can determine that fact only when the precise places are specified.

Suppose for instance a return recited that a copy had been posted on a "pine tree in the midst of a large forest, being a public and conspicuous place in the town," would the court accept that as a compliance with the statute, even though the adjectives were used?

On the other hand, a recital that it had been posted at the Post Office, or the Church, or the Town House, should be sufficient, without the adjective. The essential thing is the fact, and not the adjectives.

It must be admitted that dicta may be found to the effect that the return should both specify the places and state that they are public and conspicuous, as in *State* v. *Williams,* 25 Maine, 561, 566, and in *Brown* v. *Witham,* 51 Maine, 29; but in the former case the place was not specified, and in the latter it did not appear that the places named were situated within the town, so that in each the decision rested upon other points, and was not in conflict with what we conceive to be the true rule.

In all the other cases called to our attention, the return was clearly defective. *Christ's Church* v. *Woodward,* 26 Maine, 172; *Hamilton* v. *Phippsburg,* 55 Maine, 193; *Bessey* v. *Unity,* 65 Maine, 342.

We have been unable to find any decision in this State directly in point; but in *Scammon* v. *Scammon,* 28 N. H., 419, we have a well considered authority. In that case, the statute required the posting of a town warrant in a public place. The return recited that a copy had been posted at the Baptist meeting house, but failed to add that it was a public place. The same point was raised there as here; but the court held that a meeting house is prima facie a public place, and the omission to so describe it in the return was immaterial.

We have no hesitation in holding therefore that the return in the case at bar was valid, the copy of the warrant legally posted, and the meeting of October 13, 1906, legally called.

It might be added that by Chap. 101 of the Priv. and Spec. Laws of 1907, the action of the town at that meeting was "authorized and ratified;" but it is unnecessary to discuss the legal effect of that act.

4. THE BRIDGE COMMITTEE.

As has already been stated, at the special meeting of October 13, 1906, it was voted to build the bridge as laid out by the County Commissioners; and "a committee of four was chosen to act in conjunction with the selectmen."

What were the powers and duties of the selectmen and of this committee of four under this vote? Were two committees thereby created, one composed of the three selectmen and the other of the

four men named, as claimed by the defendants; or was there one committee of seven, as claimed by the plaintiff? The validity of the subsequent contract depends upon the answer to these questions.

What was the situation?

The Legislature of 1905, upon a petition signed by the selectmen, two of whom were still members of the board, had authorized the laying out of this way over tide waters. The County Commissioners, acting upon a petition signed by a large number of the taxpayers of York, had decided that public convenience and necessity required the laying out of the way and had laid it out, and had allowed the town of York two years in which to open it and make it safe and convenient. From this adjudication no appeal was taken.

It then became the duty of the town to construct the way and bridge; and if it neglected or refused so to do within the allotted time, the County Commissioners could have appointed an agent to perform that duty, at the expense of the town. R. S., Chap. 23, Sec. 39; *Keyes* v. *Westford,* 17 Pick., 273.

At the March meeting, 1906, the town had indefinitely postponed an article concerning the raising of money for the construction of the bridge; but the duty to construct it remained upon the town no less heavily. Independent of a special vote, however, the selectmen had no power to proceed in the matter. *Smith* v. *Cheshire,* 13 Gray, 318; *Bean* v. *Hyde Park,* 143 Mass., 295; *Goff* v. *Rehoboth,* 12 Met. 26; *Chase* v. *Cochrane,* 102 Maine, 431-7. As selectmen, they had no more authority in the premises than the school committee.

At the special meeting of October 13, however, the town by a "written ballot" voted to build the bridge and appointed its agents to have charge of the work, namely, the selectmen and the committee of four acting in conjunction with them. The selectmen received their power and authority by precisely the same vote and in precisely the same manner as the other four gentlemen named. The entire committee of seven was created at one and the same time. The names of the three selectmen were not recited in full, because it was unnecessary. The names of the other four were specified because it was necessary. But the vote had the same effect as if the seven

men had been specifically named. The members of the board of selectmen, as such, had no more and no less power than the members of the committee of four. Had the selectmen been appointed to act in conjunction with the committee of four, the effect would have been the same. It was not the creation of two boards, which must act concurrently or not at all, like the two branches of a city government or of the Legislature, but of one board, all the members of which were equal. "In conjunction with" meant "in association with," "combined with," "united with." Such is the ordinary signification of the term. Such is its definition by lexicographers, "Conjunction," Webster's Dic.; Standard Dic. Such is its legal interpretation; *Hume* v. *U. S.*, 118 Fed., 689. They were all together created a single committee, which has been defined to be "a person or persons to whose consideration or determination certain business is referred or confided." *Farrar* v. *Eastman,* 5 Maine, 345.

5. THE CONTRACT OF DECEMBER 5, 1906.

The duty of the bridge committee thus chosen is obvious. They were to take the necessary steps to carry out the vote of the town and obey instructions by building the way and the bridge. It was their duty to select an engineer, obtain plans and specifications, advertise for bids, make the award and execute a contract.

This the four members of the committee set about doing at once. But the selectmen, upon discovering that their idea of two concurrent committees was not accepted, refused to take any part whatever in the proceedings. They were notified of every meeting, but they attended only the first two and declined to act in those. Under these circumstances, there was nothing left for the majority of the committee to do except to proceed without the assistance of the minority. This they did, and after taking the necessary preliminary steps as set forth in the history of this case, they entered into a contract with the plaintiff, as the lowest bidder, on December 5, 1906, for the construction of the way and bridge for the sum of $39,500. This was a legal and binding contract, entered into on the part of the town by a majority of a duly constituted committee.

It is true that the town made no appropriation to meet the cost at the meeting when the committee was appointed; but that in no way affected the validity of the appointment or of the contract made

by the committee thus chosen. Liability on the part of the town was created when the contract was signed. *Westbrook* v. *Deering,* 63 Maine, 231. And if the contractor saw fit to proceed with the work and rely upon future appropriations or upon collecting his debt by other means, he had a legal right so to do. It does not lie in the mouth of the town to say we repudiate the contract because we made no appropriation with which to meet its requirements.

No valid steps were taken to prevent either the making of the contract, or its performance after execution. It is true that the selectmen in November, 1906, instituted proceedings in the nature of an injunction to restrain the other members of the committee from awarding the contract; but prior to December 5, 1906, these were abandoned. They also sent various communications to the other members, the first being dated January 31, 1907, denying the authority of the four to make the contract and protesting against any work being done thereunder. But these communications were unauthorized and futile. The selectmen, as such, had no powers in the matter. The only powers they possessed were as members of the bridge committee, and as such they had been appointed to construct the bridge, not to block its construction. Under date of July 26, 1907, they wrote a similar letter to the plaintiff, disclaiming both as selectmen and in behalf of the town any liability under the contract, protesting against his proceeding further, and notifying him that he was incurring expense at his peril. This was equally futile, because their attempting to act in behalf of the town was a mere assumption. There was no vote of the town authorizing them to rescind the contract, nor to prevent its execution.

If the town had voted not to carry out the contract, the plaintiff would then have had a right to sue for the breach. But this the town never did. It took no action after the special meeting of October 13, 1906, until the annual meeting in March, 1907, the effect of which we will now consider.

6. THE TOWN MEETING OF MARCH 11, 1907.

Two subjects were taken up. In the first place, various articles were considered, all looking to the obtaining of plans and specifications, the making of a new contract, and the appropriation of money for building the bridge; and they were all indefinitely postponed.

But these had to do with the future, not with the past. The existing contract was ignored, or perhaps it might be inferred that by the refusal to consider the making of a new one, the old one was recognized as binding and satisfactory. In any event, no new contract was authorized, and no vote was passed touching the one already made. The plaintiff's rights, thereunder, remained unchanged.

In the second place, the town voted that the committee of four appointed to act in conjunction with the selectmen "be dismised from further service."

The right of the town to do this cannot be questioned. The authority given to these men was a naked authority, and revocable, *George* v. *School Dist.*, 6 Met., 497; but not of course to the injury of the rights of third parties that had already intervened, *Getchell* v. *Wells*, 55 Maine, 433.

What was the effect of this vote?

It reduced the bridge committee from seven to three. The selectmen were not dismissed. They continued to possess the powers conferred upon them at the special meeting in building the bridge. The powers of the other four ceased. But this in no way affected the contract already made. That stood in full force and virtue. The fact that the selectmen still maintained their attitude of non-participation in carrying it out was of no consequence. The work continued without their supervision, but under the eye of the engineer who was legally employed, was never discharged, who issued his certification from time to time, and finally accepted the work.

The committee of four disregarded the vote of dismissal and continued to act; but all acts on their part after March 11, 1907, were unauthorized and void.

Such we believed to be the legal effect of the annual meeting of 1907.

Nor was the situation changed by the vote at the annual meetings in March, 1910, and March, 1911, and the special meeting of June 10, 1911, indefinitely postponing articles authorizing payment for the bridge and way or the settlement of the claim of the contractor. The work had then been long since completed, and the refusal to pay a debt can in no way lessen the obligation.

7. SUPPLEMENTAL CONTRACT OF OCTOBER 17, 1907.

It follows from what we have already held that this supplemental contract was unauthorized and void. It was entered into in behalf of the town by the four members of the committee several months after they had been dismissed from further service. The subject matter of the contract was certain modifications and additions required by the War Department and the town was obliged to make them; but it was not obliged to contract with the plaintiff therefor. The work has been done by the plaintiff, acceptably to the engineer, and it is a hardship that he must bear the loss. But he was bound to ascertain and take notice of the power of the committee to bind the town. *Turney* v. *Bridgeport,* 55 Conn., 412; *Lowell Sav. Bank* v. *Winchester,* 8 Allen, 109; *Boston Elec. Co.* v. *Cambridge,* 163 Mass., 64; and if the persons assuming to act did so without authority, he cannot recover. *Clark* v. *Russell,* 116 Mass., 455; *Bean* v. *Hyde Park,* 143 Mass., 245; *Blanchard* v. *Ayer,* 148 Mass., 174; *Tufts* v. *Lexington,* 72 Maine, 516. Even the use of the bridge by the town would not necessarily bind it to pay for unauthorized work upon it, although the same was beneficial. *Hayward* v. *School Dist.,* 2 Cush., 419; *Stuart* v. *Cambridge,* 125 Mass., 107; *Boston Elec. Co.* v. *Cambridge,* supra.

8. DAMAGES.

The conclusion reached is that the defendants are liable under the original contract of December 5, 1906; but not under that of October 17, 1907. What then is the amount of damages?

The original contract price was $39,500; but when the supplemental contract was made, the plaintiff was relieved from performing certain work under the original contract, the cost of which was agreed to be $2,128.22, so that the contract price of the work actually performed under the first contract was $37,371.78. From this should be deducted the sum of $3,947.71, the amount received by the plaintiff from John C. Stewart while town treasurer. This leaves a balance of $33,427.07. But the contract provided that the plaintiff should receive his pay monthly, on the 15th of each month "for all work done and materials furnished and delivered on the work up to and including the last day of the preceeding month, certified to by the committee's engineer to be in accordance with this contract; less twenty per cent of such amount, which percentage

shall be withheld by the committee until the final completion and acceptance of the work, under the terms and agreements of this contract, when the percentage so retained together with the balance due, shall be paid by the committee upon the certificate of the committee's engineer that the whole work provided for in this contract is completed and acceptably finished within the time specified." These monthly statements were duly furnished, and the contractor thereupon made demand upon the full committee for payment and the majority of the committee gave the plaintiff an order on the town treasurer, Edward E. Mitchell, for the amounts so certified. None of these orders was honored by the treasurer or paid after April 1, 1907. Being signed only by those members of the committee who had been dismissed on March 11, 1907, the treasurer was doubtless justified in his course. But the dismissal of those four members did not relieve the town from paying the installments when due in accordance with the terms of the contract. The plaintiff should not be deprived of his money because the town had interfered with the machinery of payment, or had failed to make an appropriation.

The payments were due at certain specified times, demand was duly made, and the payments not having been made when due, the plaintiff is entitled to interest for the default.

Computing, therefore, the interest on the various sums due under the first contract, from their due dates to May 15, 1913, disregarding entirely the amount of the second contract, gives $11,109.92; and adding this to the balance found due on the principal, $33,427.07, makes a total of $44,536.99, due the plaintiff on May 15, 1913.

The plaintiff has also embraced in his account items aggregating $519.85, the amount claimed to have been paid by him to the engineer in charge. But we find nothing in the contract authorizing him to make any such payments and to charge the town therefor. These items are disallowed.

The entry must therefore be,

Judgment for plaintiff for $44,536.99 with interest from May 15, 1913.

INHABITANTS OF YORK *vs.* JOHN C. STEWART, et als.

York. Opinion July 1, 1913.

Authority. Bond. Breach of Bond. Committee. Hiring Money. Meeting. Treasurer. Trust Funds. Vote.

1. A town treasurer by virtue of his office has no authority to borrow money upon the credit of the town for any purpose, unless specially authorized by vote of the town.
2. As no provision is made in the two bequests in the wills of Olive Clark and Mary H. Emerson that the principals should be funded and only the income be used for the purposes named, a trust was thereby created and the town became the trustee, having voted to accept the funds.
3. Under the regulations therein specified, the town could invest the fund in interest bearing securities and use the income for the purposes of the trust, or use the principal for ordinary municipal purpose, devoting a fair rate of interest thereon to the same trust purposes.

On report. Judgment for defendant.

This is an action of debt on the official bond of the defendant as treasurer of the town of York for the municipal year of 1906-7. The plaintiffs claimed as breaches by the defendant:

First. That he paid certain amounts on account of the construction of the bridge across York River.

Second. That he diverted certain trust funds held by the town amounting to $3,104.37 to the same bridge account.

At the conclusion of the evidence, by agreement of the parties the case was reported to the Law Court for final determination upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

James O. Bradbury, and George F. & Leroy Haley, for plaintiff.

Cleaves, Waterhouse & Emery, for defendants.

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

CORNISH, J. Debt on official bond. The defendant was treasurer of the town of York for the municipal year 1906-7, and this case is an echo of the famous York bridge controversy, many phases of which have reached the court. At a special meeting held on October 13, 1906, the town voted to build a bridge across the York River, between the towns of York and Kittery as already laid out by the County Commissioners, and chose a bridge committee of seven, consisting of the three members of the board of selectmen and four other persons, but neither made an appropriation therefor nor provided for the hiring of money with which to meet the cost.

The selectmen declining to act, the other four members, constituting a majority, proceeded to perform their duty, engaged an engineer, obtained plans and specifications, advertised for bids and on December 5, 1906, entered into a contract with one Edward B. Blaisdell for the construction of the bridge.

The defendant, as town treasurer, hired $25,000 in the name of the town and on March 9, 1907, turned it over to the bridge committee for construction purposes. He had no legal right to do this. A town treasurer by virtue of his office has no authority to borrow money upon the credit of the town for any purpose unless specially authorized by vote of the town. *Lovejoy* v. *Foxcroft,* 91 Maine, 367. The vote of the town at the previous annual meeting on March 12, 1906, whereby the treasurer was instructed and authorized "to hire money on the credit of the town to meet pressing liabilities" did not contemplate any such authority as this. That vote had in view the ordinary town expenses for the payment of which an emergency might arise, perhaps before the taxes were collectible. It certainly cannot be held to cover a loan for building a bridge when at the same meeting an article to see if the town would vote to construct the bridge was indefinitely postponed, and authority for such building was not given until seven months thereafter.

It appears, however, that the committee to whom the defendant paid over the proceeds of the loan returned the amount to the newly elected town treasurer on April 20, 1907, upon demand of the selectmen. So that the town has received the full benefit of that loan and that item is admittedly eliminated from this case.

Two breaches are claimed by the plaintiffs: First, certain amounts paid by the defendant on account of the construction of the

bridge, upon orders signed by the majority of the committee, amounting to $3,974.21 and second, the diversion of certain trust funds held by the town amounting to $3,104.37, to the same bridge account.

The first alleged breach rests upon the theory that, the laying out of the way and bridge was void, the meeting of October 13, 1906, illegal because not properly called, the action of the majority of the committee in making the contract and in all their doings also void, and that all payments under the contract were unauthorized. All these points except the last were raised in the case of *Blaisdell* v. *York,* 110 Maine, argued with the case at bar and decided against the contention of the town. The contract was there held to be legal and enforceable. It follows, therefore, that the town has received full benefit and consideration for all sums paid by the defendant as treasurer during his term of office, on that contract.

In fact in computing the amount due the plaintiff in *Blaisdell* v. *York,* supra, the town was given credit for two of these identical payments made to him by Mr. Stewart, $2,805.72 and $1,142.99, aggregating $3,947.71. Had this credit not been given, the judgment for the plaintiff in that suit would have been increased by that amount together with interest thereon for a period of six years. Certainly the town has lost nothing but rather has gained by having these payments made by the defendant. The other two items aggregating $25.50 and falling under the same head, were paid by the defendant to the engineer who had been employed by the majority of the committee and was in charge of the work. The town was liable therefor and the defendant was justified in making the payments.

Upon this first breach there is clearly no breach of defendant's bond. The decision in *Blaisdell* v. *York* practically settles this.

The second alleged breach is that the defendant had illegally used trust funds to pay an ordinary town debt, even assuming that the bridge debt was legal.

It appears that in October, 1906, the town received under the will of Olive Clark the sum of $2,504.37 "to be used for the support of a free high school to be kept in said town of York, but in case such free high school shall cease to be maintained, or be aban-

doned, then and in that case . . . the same or such part thereof as may remain unexpended to the New Home so-called in York, to be used for the benefit, care and comfort of the unfortunate and needy women who may be compelled by circumstances to remain therein."

The town also received in 1906-7 under the will of Mary H. Emerson the sum of $600, "to be used for the support of a free high school to be kept in said town of York."

No provision is made in these bequests that the principal should be funded and only the income used for the purposes named, but we may assume that a trust was thereby created, and that the town became the trustee, having voted to accept the funds.

What then became the duty of the town? This question is answered by R. S., Ch. 4, Sec. 80 to 85. Under the regulations therein specified the town, speaking in general terms, may invest the fund in interest bearing securities and use the income for the purposes of the trust, or may use the pricipal for ordinary municipal purposes, devoting a fair rate of interest thereon to the same trust purposes. The town is absolutely responsible for the fund whatever disposition is made of it and whatever liability existed when these funds were first received, exists now, *Ayer* v. *Bangor,* 85 Maine, 511.

Apparently the town of York had not invested these funds but simply received them into its treasury, and they became a part of the general fund of the town. The defendant testifies that he had no knowledge of these trusts, but supposed that all the funds in the treasury belonged absolutely to the town. Whether this was so or not is immaterial. It is not claimed that the defendant converted any portion of these trust funds or of any other to his own use, but that he used them to pay the ordinary liabilities of the town. This did not work a breach of his bond. If he used the funds to pay legitimate town expenses the town has received the benefit and is still liable for the trust funds. It is simply a matter of bookkeeping. The defendant has accounted for every dollar that came into his hands, and has fulfilled his official duty.

Judgment for defendant.

ELIZABETH B. BLISS *vs.* EDWARD B. BLAISDELL.

York. Opinion July 1, 1913.

Contract. Trespass. Way.
See Blaisdell vs. Inhabitants of the Town of York, Reported in this Volume.

All the questions raised in this case were raised and disposed of in the case of *Blaisdell* v. *Inhabitants of York.* It was there held that the laying out of the way was valid, and that the defendant was proceeding under a legal contract with the town.

On report. Judgment for defendant.

This is an action of trespass quare clausum to recover damages for entry upon plaintiff's land in York, in the county of York. The defendant justifies under a contract made with the town of York for the construction of a way and bridge laid out by the county commissioners of York County. This case was reported with the case of *Blaisdell* v. *Inhabitants of the Town of York,* reported in this volume.

The case is stated in the opinion.

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

John C. Stewart, for defendant.

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

CORNISH, J. This is an action of trespass quare clausum, to recover damages for entry upon plaintiff's land in the town of York.

The defendant justifies under a contract made with the town for the construction of a way and bridge as laid out by the county commissioners of York County between the towns of York and Kittery and across the York River. The plaintiff replies that the proceedings of the County Commissioners were invalid, that they conferred no authority upon the town to build the way and that the town conferred no legal authority upon the plaintiff as the contract was illegal and void. All of the questions raised in this case were

raised and disposed of in the case of *Blaisdell* v. *York,* decided herewith, and it is unnecessary to consider them further. It was there held that the laying out of the way was valid, and that the defendant was proceeding under a legal contract with the town. His entry upon the plaintiff's land was therefore lawful and the mandate must be,

Judgment for defendant.

THE AMERICAN AGRICULTURAL CHEMICAL COMPANY

vs.

GEORGE E. BERRY.

Franklin. Opinion July 1, 1913.

Assumpsit. Bankruptcy. Construction. Contract. Debt. Discharge. Embezzlement. Exceptions. Factor. "Fiduciary Capacity." Trust.

1. The written contract between the parties contained the following provision: "All proceeds of sales and goods remaining unsold to be our property and you are to have no title or lien upon said fertilizers, or their proceeds. It is specially agreed that you will hold the same in trust and separate for the settlement of our account with you. All sales shall be guaranteed by you, and the specific proceeds of the same are to be sent to me as received by you; and until the proceeds of such sales are received by us, the same shall be held by you in trust for us."
2. The use of the word "trust" does not alter the relations between the parties so as to create such a fiduciary capacity as would escape the bankrupt act.

3. The phrase "while acting in a fiduciary capacity" relates to special trusts and does not include those trusts which the law implies from the contract and which form an element in every agency and in nearly all the commercial transactions in the country.
4. A factor, commission merchant or agent, who has sold property of his principal and has failed to pay over to him the proceeds, is held not to owe to him a debt created in a fiduciary capacity.

On report. Judgment for the defendant.

This is an action of assumpsit upon an account annexed for balance of the price of certain fertilizers shipped to and received by the defendant under a contract in writing, which fertilizers the defendant sold and failed to account to the plaintiff for the proceeds thereof. The defendant pleaded his discharge in bankruptcy proceedings, which were begun after contracting the debt sued for. The case was reported to the Law Court for determination.

The case is stated in the opinion.

Frank W. Butler, for plaintiff.

Elmer E. Richards, for defendant.

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

CORNISH, J. Action of assumpsit on an account annexed for the balance of the price of certain fertilizers, shipped to and received by the defendant under a written contract a copy of which is printed in the statement of the case, which fertilizers were disposed of by him but the proceeds were not accounted for. The defendant has pleaded his discharge in bankruptcy proceedings begun after the debt sued was contracted, and the case is before the Law Court on report.

The controlling question presented is whether the debt sued was released by the defendant's discharge in bankruptcy, and it involves the meaning of sub-division 4, Sec. 17 of the bankruptcy act of 1898, as amended, which excepts from the operation of the discharge such debts as, "(4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." The question turns upon the meaning of the phrase "in any fiduciary capacity" as used in the act.

This phrase as so used has not been construed by this court, but it has been interpreted in decisions of the Supreme Court of the United States, which are controlling because construing an act of Congress.

The leading case in that court is *Chapman* v. *Forsyth,* 2 How, 202. That case arose under the bankrupt act of 1841 in which "debts created in consequence of a defalcation as a public officer, or an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity" were excepted from the discharge. It was there held that a balance due from a factor to his principal is not a fiduciary debt within the meaning of that act. The court there said:

"If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the 1st section of the act."

"The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act."

To the same effect is *Hayman* v. *Pond,* 7 Met., 328, which also involved a construction of the bankruptcy act of 1841.

The question again came before the Supreme Court of the United States under the act of 1867, in *Hennequin* v. *Clews,* 111 U. S., 676. In that act the language used in stating the exception was slightly different from that of the act of 1841. It provided that a discharge did not release a debt "created by the fraud of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character." It omitted the enumerated cases. In *Hennequin* v. *Clews* the court pointed out that a series of diverse rulings by different courts had arisen under the act of 1867; one class treating agents,

factors, commission merchants, etc., as acting in a fiduciary capacity under the act, on the view that the phrase "in any fiduciary capacity" was used in a broader sense than it was in the act of 1841, not being restricted by any enumeration of certain special trust capacities; the other class taking the view that the act of 1867 used the phrase "acting in any fiduciary capacity" in the sense in which it had been interpreted by judicial construction. After enumerating the diverse authorities the court said: "We have examined these cases and others bearing on the subject, but do not deem it necessary to refer to them more particularly, inasmuch as the question has recently been fully considered by this court, and the decision in *Chapman* v. *Forsyth* has been followed. We refer to the case of *Neal* v. *Clark,* 95 U. S., 704." Accordingly it was there held that a discharge in bankruptcy under the act of 1867 did release the bankrupt from a debt or obligation which arose from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty. and his failure or refusal to return the same after the money had been paid or the duty performed.

Other cases giving a like construction to the bankruptcy act of 1867 are *Noble* v. *Hammond,* 129 U. S., 65; *Upshur* v. *Briscoe,* 138 U. S., 365, and *Cronan* v. *Cotting,* 104 Mass., 245.

The bankruptcy act of 1898, which is under consideration in the case at bar, is similarly construed. In re Basch, 97 Fed., 761; *Blacken* v. *Milner,* 104 Fed., 522; *Crawford* v. *Burke,* 195 U. S., 176; *Crosby* v. *Miller, Vaughn & Co.,* 25 R. I., 172.

In *Blacken* v. *Milner,* supra, the leading cases on this subject are referred to and the decisions are held applicable to the act of 1898.

The settled rule is stated in Loveland on Bankruptcy, 3d Ed., p. 845, Sec. 294, as follows: "The phrase 'while acting in any fiduciary capacity' relates to special trusts, and does not include those trusts which the law implies from the contract, and which form an element in every agency and in nearly all the commercial transactions in the country. It is confined to technical trusts, and the fiduciary character is not that which the debt gives rise to, but must exist independently of it. Thus a factor, commission merchant, or agent who has sold property of his principal and has failed to pay over to him the proceeds, is held not to owe to him a debt created in a fiduciary

capacity." The author cites in support of the text substantially all the case we have above referred to. See also Collier Bankruptcy, p. 326.

The admissions and testimony contained in the agreed statement in the case at bar reasonably justify the conclusion that the defendant received from the plaintiff under the terms of the written contract, the fertilizers sued for, all of which he sold or used and the proceeds of which he failed to account for. It is the typical case of a factor withholding money for property disposed of by him and comes squarely within the decisions before cited.

It is true that the written contract between the parties contained the following provision: "All proceeds of sales and goods remaining unsold to be our property and you are to have no title or lien upon said fertilizers, or their proceeds. It is specially agreed that you will hold the same in trust and separate for the settlement of our account with you. All sales shall be guaranteed by you, and the specific proceeds of the same are to be sent to us as received by you; and until the proceeds of such sales are received by us, the same shall be held by you in trust for us."

But this in no wise changes or strengthens the plaintiff's case. The use of the word "trust" does not alter the relations between the parties so as to create such a fiduciary capacity as would escape the bankrupt act. That relation was fixed by the nature of the transaction itself and grew out of the transaction as between principal and agent, or owner and factor. Had it been an oral agreement the rights of the parties would have been the same. Reducing the contract to writing and inserting the word "trust" did not change its character. In *Upshur* v. *Briscoe,* supra, there was a written agreement and the party in that case, as here, was designated as trustee but the Supreme Court of the United States held that that did not create such a fiduciary relation as took the case out of the statute. In both cases the fiduciary character was that which the debt gave rise to and did not exist independently of it. That is not the technical trust which the statute contemplates, but one of those "which the law implies from the contract and which form an element in every agency" Loveland Bankruptcy, supra.

The entry must therefore be,

Judgment for the defendant.

CARROLL P. MARSTON

vs.

THE F. C. TIBBETTS MERCANTILE COMPANY.

Cumberland. Opinion July 2, 1913.

Abatement. Amendment. Attachment. Corporation. Plea in Abatement.

1. When a party is sued by a wrong name, it is a matter of defense in abatement, and is waived by a failure to plead the misnomer, whether the defendant appears or makes default.
2. Misnomer of parties must always be pleaded in abatement, or the right of exception will be lost.
3. The plaintiff in attachment will usually be allowed to amend his pleadings as in other actions, without affecting the attachment, provided such amendment will not change the cause of action.
4. The amendment is clearly allowable and is within the purview of Chapter 84, Section 10 of Revised Statutes, as it corrects a clerical error, and does not let in a new cause of action.

On report. Plea in abatement is sustained. Amendment allowed.

The plaintiff on the eighth day of March, 1912, brought this action against The F. C. Tibbetts Mercantile Company, describing the defendant as a corporation organized and existing under the laws of Maine and located at Portland, in the County of Cumberland and State of Maine. The defendant was a foreign corporation and was organized under the laws of Arizona. The sheriff, by virtue of said writ, attached personal property of The F. C. Tibbetts Mercantile Corporation organized under the laws of Arizona, and the writ was properly served upon the proper officer of said corporation. The defendant seasonably filed a plea in abatement and the plaintiff filed a motion to amend his writ by striking out the words "of the State of Maine."

The case was, by agreement of parties, reported to the Law Court upon an agreed statement of facts, the Law Court to determine

whether or not the plea in abatement shall be sustained, and if it be, whether the proposed amendment is allowable, and if the writ is amended accordingly, whether or not said amendment vacates the attachment.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

I. E. Vernon, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HANSON, JJ.

HANSON, J. This case comes up on report, with an agreed statement as follows:

The plaintiff on the eighth day of March, A. D. 1912, brought his action against the F. C. Tibbetts Mercantile Company. The writ was returnable at the October Term of the Supreme Judicial Court. The plaintiff in his writ described the defendant as "The F. C. Tibbetts Mercantile Company, a corporation organized and existing under the laws of the State of Maine, and located at Portland in the County of Cumberland and State of Maine." The defendant corporation was not organized under the laws of the State of Maine, but was a foreign corporation, and was organized under the laws of the State of Arizona. The sheriff, by virtue of said writ, attached personal property of The F. C. Tibbetts Mercantile Company, organized under the laws of Arizona. After entry, the defendant seasonably filed its plea in abatement, and the plaintiff filed a motion to amend by striking out the words "of the State of Maine." It was not in dispute but that the corporation, organized under the laws of Arizona, was the corporation against which the plaintiff intended instituting his suit, and further that the proper officer of the Arizona corporation was properly served upon; it was further not in dispute that there was no such Maine corporation as The F. C. Tibbetts Mercantile Company.

"This cause is reported to the Law Court upon the foregoing statement of facts by agreement of the parties; the Law Court to determine whether or not the plea in abatement shall be sustained and, if it be, whether the proposed amendment is allowable, and if the writ is amended accordingly whether or not said amendment vacates the attachment."

The questions raised will be considered in the order named.

1. The plea in abatement is well founded, and is sustained. *Gilbert* v. *Nantucket Bank,* 5 Mass., 97.

Misnomer of parties must always be pleaded in abatement or the right of exception is lost. *Ibid.*

That a party is sued by a wrong name is matter of defense in abatement, and is waived by a failure so to plead the misnomer, whether the defendant appears or makes default. *First Nat'l Bank of Baltimore* v. *Jaggers,* 100 Am. Dec., 53, and cases cited.

2. The amendment proposed is clearly allowable, and is within the purview of Chapter 84, Sec. 10, R. S., which provides that "no process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood. Such errors and defects may be amended, on motion of either party, on such terms as the court orders." The amendment corrects a clerical error, and does not let in a new demand, or new cause of action. The original declaration is not affected, and the defendant is not surprised or injured thereby. It can understand the case as well after as before the amendment, and its plea and defence, so far as the merits of the case are concerned, will be the same as before the amendment. The amended writ will be treated as it would have been, if so made, when the suit was commenced, as between the parties thereto. *Wentworth* v. *Sawyer,* 76 Maine, 434; *Chase* v. *Kenniston,* 76 Maine, 209, and cases cited. Courts are liberal in the allowance of amendments, and by the statute, Chap. 84, Sec. 10, supra, mere defects in form and circumstantial errors and mistakes may be amended. *Willoughby* v. *Atkinson Furnishing Co.,* 93 Maine, 185; *Chapman* v. *Nobleboro,* 76 Maine, 427; *Griffin* v. *Pinkham,* 60 Maine, 123. In *Hayes* v. *Rich,* 101 Maine, 314, the words describing plaintiff as administrator were stricken out as merely *descriptio personae,* and he was allowed to take judgment in his individual capacity. *Bragdon* v. *Harmon,* 69 Maine, 29; *Fleming* v. *Courtenay,* 95 Maine, 128; *same* v. *same,* 98 Maine, 401.

3. The amendment will not vacate the attachment. In *Wentworth* v. *Sawyar,* supra, hay in a mow was attached on mesne pro-

cess. The writ was amended by striking out the middle letter in the name of the defendant, and it was there held "that such amendment will not dissolve an attachment of personal property when the suit is between the original parties, and no rights of third persons intervene." The court in reaching this conclusion quotes from a leading Massachusetts case: "The power of our courts," as remarked by Morton, C. J., in *Cain* v. *Rockwell,* 132 Mass., 194, "to allow amendments is very broad." In that case the name of the plaintiff was amended by substituting "Ann" Cain for "Mary" Cain, thus correcting a mere clerical error or misnomer, as the court there say. The rights of third persons had intervened by assignment of the funds attached on trustee process, but the court held that the amendment was rightly allowed, and that the attachment of the funds was not vacated so as to give the assignment to the claimant, made before the amendment, the preference over the attachment. "Amendments in form merely, will not dissolve an attachment so as to let in subsequently attaching creditors, or discharge bail. To have this effect, the amendment must be such as may let in some new demand, or some new cause of action." *Haven* v. *Snow,* 14 Pick., 28; *Page* v. *Jewett,* 46 N. H., 444; *Gooch* v. *Bryant,* 13 Maine, 386; *Patten* v. *Starrett,* 20 Maine, 145; *Anderson, Admx.* v. *Wetter,* 103 Maine, 257.

The plaintiff in attachment will usually be allowed to amend his pleadings as in other actions, without affecting the attachment, provided such amendment will not change the cause of action. 4 Cyc. Law and Procedure, 820, and cases cited.

The entry will be,

The plea in abatement is sustained.
Amendment allowed.

HARRIET RICH *vs.* CITY OF EASTPORT.

Washington. Opinion July 3, 1913.

Claim for Damages. Defect. Exceptions. Highway. Injuries. Motion. Newly Discovered Evidence. Notice. Safe and Suitable Condition.

1. A notice to the municipal officers of injuries received by reason of a defective highway that contains no claim for damages, nor specifies the nature of the injuries, is fatally defective.
2. Whether the municipal officers knew otherwise the requisites of a legal notice is immaterial, as the written notice provided by statute is an indispensible prerequisite to the right to maintain the suit.
3. The municipal officers cannot waive the required statutory notice.

On exceptions and general motion for new trial and motion for new trial on the ground of newly discovered evidence by the defendant. Motion for new trial sustained.

This is an action on the case to recover damages sustained by the plaintiff and caused by an alleged defect in a way in said City of Eastport. Plea, general issue. The jury returned a verdict for the plaintiff for $1852. The defendant filed exceptions to the admission of testimony of the contents of the written notice to the municipal officers of the injuries to the plaintiff, and a general motion for a new trial, and a motion for a new trial on the ground of newly discovered evidence.

The case is stated in the opinion.

L. D. Lamond, and H. H. Gray, for plaintiff.

E. W. Pike, and J. H. Gray, for defendant.

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

SAVAGE, C. J. Case against the defendant city for injuries caused by an alleged defect in a way. The plaintiff obtained a verdict, and the case comes before us on exceptions by the defendant and the

ordinary motion for a new trial, and a motion for a new trial on the ground of newly discovered evidence. The view we take of the latter motion renders it unnecessary to consider any other question.

The statute, R. S., Chap. 23, Sect. 76, provides that a person injured by a defect in a way cannot recover damages of the town whose duty it was to keep the way in a safe and suitable condition for travel, unless he, or some person in his behalf "shall within fourteen days thereafter, notify . . . one of the municipal officers of such town, by letter or otherwise, in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury."

At the trial it was admitted that a letter was seasonably sent to the mayor and aldermen of Eastport by one of the attorneys of the plaintiff, and that the letter was received by Mr. Garnett, who was then mayor. The letter was not produced by the defendant, and the plaintiff was permitted to show its contents by the testimony of the attorney who wrote and mailed it. This testimony showed that the letter contained all the essential elements of notice required by the statute, and the case then proceeded to a verdict.

After the verdict, the defendant filed its motion for a new trial, setting forth in substance that due diligence had been used before the trial to find the letter, that the search was unsuccessful, and that some weeks after the trial Mr. Garnett found the letter among some private letters of his own. A copy of the letter was made a part of the motion. The evidence taken under this motion shows satisfactorily that, shortly before the trial, the files, desks and safes in the city clerk's office, and the mayor's office were carefully searched by Mr. Swett who was then mayor and by the city clerk, for the purpose of finding this letter in order that it might be used at the trial; and that it could not be found. It also appears that Mr. Garnett, the former mayor, was notified of the loss of the letter, and that he searched through his files, his desk, and, as he says, "in every available place where he was in the habit of filing any papers," and that he did not find it. In December, following the trial in October, Mr. Garnett says he was clearing out a hat tree in his hall, at the bottom of which was a receptacle with a cover over it. In this receptacle he kept old gloves, fishing tackle and so forth.

In it at this time he found a bundle of old letters. Examining these to see whether they should be kept or destroyed, he found the letter in question in one of the envelopes with another letter. He says that this receptacle was not the place where he kept his letters, and that he did not know they were there until he accidentally found them there in the manner stated.

The letter thus found reads as follows: "Eastport, Maine, Sept. 10, 1910. To the Hon. Mayor and Board of Aldermen for the city of Eastport.

"You are hereby notified that on the 2nd day of September, A. D. 1910, about eight o'clock in the evening, I received and suffered bodily injury by the team, in which I was riding, falling into an excavation in the highway, in said Eastport, made by the road commissioners, at a point between the entrance to the Spring Farm (so called) and the premises occupied by Andrew Stevenson, said excavation not being suitably protected by a railing or sufficient lights to warn the traveling public of danger." The notice was signed by the plaintiff by her attorney.

No suggestion is made that the notice found by Mr. Garnett is not the genuine notice sent to the mayor and aldermen. It was manifestly fatally defective in at least two particulars. It makes no claim for damages. *Wagner* v. *Camden,* 73 Maine, 485. It does not specify the nature of the injuries. *Low* v. *Windham,* 75 Maine, 113; *Joy* v. *York,* 99 Maine, 237.

But the plaintiff argues that the case elsewhere shows that the municipal officers knew otherwise all that a perfect notice would have shown them, and that by their conduct they had waived the imperfections in the notice. Neither point is well taken. The knowledge of the municipal officers is immaterial. The written statutory notice is an indispensible prerequisite to the right to maintain a suit. *Clark* v. *Tremont,* 83 Maine, 426. The municipal officers cannot waive. *Veazie* v. *Rockland,* 68 Maine, 511.

Finally, the plaintiff contends that the defendant did not use due diligence before the trial to find the notice, and that the evidence is not newly discovered, because it was known by the defendant's officers to exist before the trial. Neither of these contentions can be sustained. We think the evidence shows that the defendant

used all reasonable and due diligence to find the notice before trial. It was for the advantage of the defendant to find it then, for it afforded a perfect defence. Search appears to have been made in every place where there was any reason to expect that it would be found. It could not be found. It was lost. The city officials knew that it had been in existence. They did not know, and apparently could not know, that it was still in existence. Its existence was discovered after the trial. It was newly discovered, within the meaning and spirit of the law. The new discovery of the existence of written evidence of this character is a much more satisfactory ground on which to grant a new trial, than is the discovery of a new witness. This is certain. The testimony of a new witness may be uncertain, imperfect, untruthful and suborned. It is made clear that the attorney who testified as to the contents of the notice was mistaken in his recollection. The notice itself, now found and produced, demonstrates that the plaintiff cannot maintain her action, and that the verdict in her favor is unmistakably wrong.

Motion for a new trial sustained.

BENJAMIN HART *vs.* BANGOR & AROOSTOOK RAILROAD COMPANY.

Penobscot. Opinion July 3, 1913.

Appreciation. Assumption of Risk. Damages. Danger Signal. Due Care. Negligence. Warning.

1. Upon the facts shown in evidence, the risk was apparent, and the plaintiff must have known and appreciated the danger. He, therefore, assumed the risk, although he was at the time engaged in the performance of a service which he had not contracted to render.

2. Car repairers who knowingly go under damaged cars in a railroad yard where cars are likely, at any time, to be moved against such car, without placing a danger signal of some character or taking other precaution for safety, are held generally to assume the risk of injury while so engaged.
3. Assuming, knowingly, a position of danger not readily discoverable, it was the duty of plaintiff to use all available means to give warning to his master and others and failing to use due care to do so, he cannot recover for injuries due to lack of such warning.

On exceptions, by plaintiff. Overruled.

This is an action on the case to recover damages for personal injuries received while in the employ of the defendant and alleged to have been caused by the negligence of the defendant. The defendant pleaded the general issue. At the close of the testimony for the plaintiff, the presiding Justice ordered a nonsuit to be entered, with the stipulation that if the order is overruled by the Law Court, judgment is to be entered for the plaintiff in the sum of five hundred dollars.

The case is stated in the opinion.

A. L. Blanchard, for plaintiff.

Stearns & Stearns, for defendant.

SITTING: SAVAGE, C. J., KING, BIBD, HANSON, JJ.

BIRD, J. The plaintiff, a man of mature years and ordinary intelligence, was employed early in December, 1909, by defendant corporation as a repairer of damaged or "cripple" cars. It was understood by the parties that the work was to be done upon a track or tracks of defendant designated for the purpose and known as "cripple tracks" or "repair tracks." On these tracks the workmen or repairers were required to provide for their safety by the use of blue flags. Prior to his employment by defendant, plaintiff had had experience as a section hand upon the railway of another corporation. During his employment, by defendant, and prior to the receipt of the injury complained of he was frequently sent by defendant to make repairs upon its cars standing upon the tracks of the yard of the Maine Central Railroad in close vicinity to the "cripple tracks" of defendant and this he did both alone and in company with fellow servants. In this work upon the tracks of the

Maine Central Railroad, neither plaintiff nor his fellow servants made use of the blue flag; "simply go down and do the work as quick as you could and back" as plaintiff testifies.

On the third day of February, 1910, plaintiff with two fellow servants was sent to repair certain cars upon the tracks in the yard of the Maine Central Railroad and while plaintiff was beneath a car engaged in his work, one of his fellow servants standing meanwhile beside and north of the car and the other beside and south of the car, a locomotive operated by the Maine Central Railroad propelled a car against that under which plaintiff was working causing him serious injury. Upon trial of the plaintiff's action to recover damages for his injuries thus sustained, the presiding Justice at the close of testimony for plaintiff directed a nonsuit and the case is before this court on exceptions to such direction.

It is the opinion of the court upon the facts shown in evidence, that the risk was apparent and that plaintiff must have known and, knowing, have appreciated the danger. He therefore assumed the risk, although he was at the time engaged in the performance of a service which he had not contracted to render. *Wormell* v. *Railroad Company*, 79 Maine, 397, 403, 406; *Jones* v. *Manufacturing Co.*, 92 Maine, 505; *Babb* v. *Paper Co.*, 99 Maine, 298; *Elliott* v. *Sawyer*, 107 Maine, 195. Car repairers, who knowingly go under damaged cars, in a railroad yard where cars are likely, at any time, to be moved against such car, without placing a danger signal of some character or taking other precaution for safety, are held generally to assume the risk of injury, while so engaged. *Latremouille* v *Railroad Co.*, 63 Vt., 336; *Campbell* v. *Railroad Co.*, 24 Am. & Eng. R. Cas., 427; 4 Atl., 489; *Renfro* v. *Railroad Co.*, 86 Mo., 302. See also *Southern Pac. Co.* v. *Pool*, 160 U. S., 438, 444; *Whitcomb* v. *McNulty*, 105 Fed., 863, 865; *O'Rorke* v. *Un. Pac. Ry. Co.*, 22 Fed. 189.

Assuming knowingly, as he did, a position of danger not readily discoverable, it was the duty of plaintiff to use all available means to give warning to his master and others and, failing to use due care to do so, he cannot recover for injuries due to lack of such warning. *McLean* v. *Chemical Paper Co.*, 165 Mass., 5, 6; *Cypher* v. *Huntingdon, etc. Co.*, 149 Pa. St., 359; *Goodlett* v. *Louisville Railroad,*

122 U. S., 391, 411; *Montague* v. *Railway Co.*, 82 Fed., 787; *Alabama, etc. Railroad Co.* v. *Roach*, 112 Ala., 360. See also *Cincinnati, etc. Ry. Co.* v. *Long*, 112 Ind., 166, 177; *Hulien* v. *Railway*, 107 Wis., 122, 125.

The exceptions are overruled.

Amendment to Schedule of Fees Taxable as Costs.

STATE OF MAINE.

Supreme Judicial Court. At June Law Term, Portland, July 15th, 1913.

All the Justices concurring.

Ordered, that the paragraph of the Schedule of Fees as printed at the top of Page 537 of the 103rd Maine Reports be amended so as to read as follows:

Transcript of cases made by the official stenographer and printed copies, certified by the clerks to the Law Court may be taxed for in the bill of costs at the rate actually paid to the stenographers for transcripts, not exceeding the rate established by statute, and at the rate actually paid to the printers for the printing, not exceeding, however, ninety cents per page for pages averaging two hundred and forty words each, (exclusive of initials "Q" and "A" for "Question" and "Answer,") together with compensation to the clerks for preparing manuscripts for the printer when necessary, and for correcting proof and certifying, at the rate of ten cents per printed page, for pages averaging two hundred and forty words each. If a party prints his own case, there may be taxed, also, compensation paid to the clerk for copies for the printer of writs, pleadings and exhibits which are in his official custody, but not of the transcript of the testimony.

By the Court,
A. R. Savage,
Chief Justice.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

WILLARD SMALL et als. *vs.* WILLIAM SWEETSER.

Hancock County. Decided April 3, 1912. This was an action of trespass quare clausum for cutting and carrying away certain wood and timber from land claimed by the plaintiffs. The controversy was over the location of the dividing line between the adjoining lots of the parties. The jury returned a verdict for the defendant, and the case comes to the Law Court on a motion to set it aside as against the evidence. Motion overruled. *Elmer P. Spofford,* for plaintiff. *Deasy & Lynam,* for defendant.

FRED T. CARTER *vs.* SEWALL A. POTTER.

Franklin County. Decided April 30, 1913. This is an action of tort, to recover damages for injuries sustained by the plaintiff in being thrown from a wagon, caused, as he claims, by the negligence of the defendant in the management of his automobile. The jury returned a verdict for the plaintiff for $1896. The defendant filed a motion for a new trial. Motion overruled. *H. S. Wing and E. E. Richards,* for plaintiff. *F. W. Butler,* for defendant.

CHARLES L. GRANT *vs.* ALBERT B. BRAGDON, Admr.

HARRIET S. GRANT *vs.* ALBERT B. BRAGDON, Admr.

County of York. Decided May 16, 1913. These two suits, brought by husband and wife, were tried together. Verdicts were rendered for the plaintiffs for the husband $1500 and for the wife $145.85. It was claimed in behalf of both plaintiffs that Joseph G. Swett, defendants' intestate, in 1886 agreed with Mrs. Harriet S. Grant to pay her $3.00 per week for his board, and if at his decease, he had property remaining sufficient, she should be paid therefrom enough to make the consideration $9.00 per week. He at once became her boarder and so continued until his decease May 11, 1909. At this time he had paid to her board at $3.00 per week to August 11, 1908. The verdict was substantially the amount of board from the last named date of the day of his decease with interest.

The husband's claim is for "care, labor, entertainment, accommodation, services, nursing, watching, accompaniment and horse board of intestate from July 14, 1886 to May 11, 1909, at $3.00 per week except for the last two weeks of intestate's last illness for which $21 is claimed and also for property destroyed in disinfecting house after decease of intestate, $100. Under another count he claimed remuneration upon a quantum meruit. The last payment on account was made in 1899 when deceased made payment for board of his horse at the rate of $1.00 per week. It is fairly inferable from the evidence that the deceased intestate had no horse after that date.

A careful reading of the evidence as to the character and frequency of the plaintiff's services renders it apparent that the jury must either have misapprehended the evidence or been moved by sympathy of bias in reaching its verdict. We conclude that $600 is a most liberal allowance for the services rendered. This sum and the allowance of the amount claimed for property destroyed, with interest from the day of demand until the day of verdict, would, we think, be ample compensation. A new trial will be granted in the case of Charles L. Grant unless plaintiff within thirty days remits all of the verdict in excess of $827.98.

In the case of Harriet S. Grant we find no occasion to disturb the conclusion of the jury and the motion is overruled. *E. P. Spinney,* for plaintiffs. *John C. Stewart, Cleaves, Waterhouse & Emery,* for defendants.

OCTAVE M. MICHAUD, Admr. *vs.* FLETCHER-LAHEY CO.

Kennebec County. Decided June 9, 1913. The Court are of opinion:

1. That the evidence not only does not support the plaintiff's theory as to how his intestate was injured, but flatly contradicts it.

2. That the defendant did not owe the plaintiff's intestate the duty of warning him of danger at the place where he was injured.

3. That a verdict should have been directed for the defendant. Motion and exceptions sustained. *Williamson, Burleigh & McLean,* for plaintiff. *N. F. Heseltine, Cleaves, Waterhouse & Emery,* for defendant.

CORA B. SMITH

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin County. Decided June 9, 1913. The plaintiff obtained a verdict for $2900 for injuries received while a passenger in a car of the defendant. The liability of the defendant is not seriously controverted. The injuries consisted of a fractured clavicle; and a possible damage to the ribs which produced neuralgic pains. The recovery from the former has been complete, and from

the latter in a large measure. No permanent injuries were received. Taking into consideration all the elements of legal damage as disclosed by the evidence, we think the verdict was manifestly excessive.

It is therefore: *Held,* that the defendant's motion for new trial be sustained, unless within thirty days from the filing of this certificate of decision the the plaintiff remits all of said verdict in excess of eighteen hundred dollars (1800). So ordered. *McGillicuddy & Morey,* for plaintiff. *Newell & Skelton,* for defendant.

RELIABLE MACHINE AND DYE WORKS

vs.

MACNICHOL PACKING CO.

Washington county. Decided June 26, 1913. An action of assumpsit upon account annexed to recover the price of one round can sealing machine. The verdict was for plaintiff for the sum claimed and the case is before this court on general motion of defendant for new trial.

The charge of the justice below is not found in the record. We must assume it unobjectionable. A careful reading of the evidence leads to the conclusion that there was sufficient to warrant the conclusion of the jury and in the absence of any indication of bias or prejudice on the part of the jury the verdict must stand. Motion overruled. *E. W. Pike, W. R. Pattangall,* for plaintiff. *J. H. Gray,* for defendant.

ALVIN L. SMITH *vs.* JOHN WALLACE et al.

Washington County. Decided June 28, 1913. This is an action of trespass for entering upon plaintiff's land in Jonesport and picking and carrying away blueberries. Defendants admitted entry and

justified under Oscar W. Look and John V. Sawyer. Plaintiff claimed title by prescription. The jury returned a verdict for plaintiff. Defendant filed exceptions and motion for new trial. Motion and exceptions overruled. *A. D. McFaul and J. F. Lynch,* for plaintiff. *H. H. Gray and O. H. Dunbar,* for defendants.

THE SPRINGER LUMBER CO. *vs.* HENRY H. PUTNAM.

Aroostook County. Decided June 28, 1913. The plaintiff recovered a verdict of $2,429.16 for damages sustained at its mill and boom, and in driving and hauling its logs, by reason of mill waste alleged to have been deposited in the river by the defendant, as upper riparian proprietor.

Upon motion by defendant to set aside the verdict, as against the evidence, it is *held:*

1. That the evidence justified the jury in finding the defendant liable for the damages sustained.

2. That those damages are not excessive. Motion overruled. *Hersey & Barnes and Shaw & Shaw,* for plaintiff. *E. B. Putnam, P. H. Gillin and Powers & Archibald,* for defendant.

ELISHA TIBBETTS *vs.* EDWARD W. MURPHY et al.

Cumberland County. Decided July 3, 1913. This is an action to recover damages for injuries received by reason of taking certain drugs by advice of a physician, which drugs were sold to him by defendant and which were different from those which he ordered. The jury returned a verdict for the defendant and the plaintiff filed a motion for a new trial. Motion overruled. *Frederick W. Hinckley,* for plaintiff. *Wilson & Bodge,* for defendants.

ALFRED C. OSGOOD, Adm'r. *vs.* ABBIE M. CARTER.

Hancock County. Decided July 8, 1913. This is an action of trover, brought by the administrator of *Christiana Grendell* v. *Abbie M. Carter,* a daughter of Mrs. Grendell, to recover the value of one savings bank deposit book, thirty hens, one cow, ten tons of hay, one mowing machine, one gold watch and chain, household furniture and eighteen dollars in cash, alleged to have been the property of Mrs. Grendell in her lifetime and converted by the defendant to her own use.

The defendant claimed title to the property by a gift inter vivos. The verdict was for the defendant, and the case is before the court on a motion to set aside the verdict as against law and evidence. Motion overruled. *D. E. Hurley,* for plaintiff. *Coggan & Coggan,* for defendant.

A. B. SMALL *vs.* EUGENE W. PENLEY.

EUGENE W. PENLEY *vs.* A. B. SMALL.

Sagadahoc County. Decided July 14, 1913. A majority of the qualified Justices are of opinion, for varying reasons, that the motions and exceptions in these two cases tried together should be overruled. Motions and exceptions overruled in both cases. *Geo. W. Heselton,* for A. B. Small. *John A. Morrill,* for Eugene W. Penley.

HANNAH O'BRION,
Appellant from Decree of Judge of Probate, in re Last Will and Testament of Mary Farrell.

Cumberland County. Decided September 5, 1913. In this case, at the Portland law term, 1913, the following docket entry was made:

"Printed case to be filed with the Chief Justice within thirty days, or exceptions to be overruled for want of prosecution."

Thirty days having elapsed since the adjournment of that law term, and no case having been filed with the Chief Justice as stipulated, it is ordered that the exception be overruled for want of prosecution, and that the case be remanded to the Probate Court for further proceedings. Exceptions overruled for want of prosecution. Case remanded to the Probate Court for further proceedings. *M. T. O'Brien and Harry E. Nixon,* for plaintiff. *D. A. Meaher,* for defendant.

CLARA B. COY et al. *vs.* GRANITE STATE INSURANCE CO.
SAME *vs.* HAMBURG-BREMEN FIRE INS. CO.
SAME *vs.* THE HOME INSURANCE COMPANY.

Penobscot. Decided September 28, 1913. These three actions upon policies of insurance against loss by fire were tried together. At the conclusion of the evidence, the presiding Justice directed a verdict for defendants, to which direction the plaintiffs excepted. Exceptions sustained.

In accordance with the stipulation of the parties judgment must be entered for the plaintiffs for the sum of $2600. (Twenty-six hundred dollars.)

(Memo.	Granite State Ins. Co.	$1100
	Hamburg-Bremen Fire Ins. Co.	1100
	The Home Ins. Co.	400
		$2600.)

Martin & Cook and M. L. Durgin, for plaintiffs. *G. E. Thompson and J. E. Nelson,* for defendants.

ABBOTT BROTHERS CO. *vs.* MAINE STEAMSHIP CO.

Androscoggin County. Decided October 2, 1913. It being impossible to ascertain from the agreed statement of facts what some of

the essential facts are, the report is discharged. Report discharged. *Newell & Skelton,* for plaintiff. *White & Carter,* for defendant.

GEORGE FOSTER vs. EASTERN TRUST & BANKING CO.

Aroostook County. Decided October 11, 1913. On motion to set aside a verdict of a jury. The evidence was conflicting. Although we might have decided the question of fact differently from the way the jury did, we cannot say that the jury were not warranted in believing the plaintiff's version, and in returning a verdict for him. Motion for a new trial overruled. *Shaw, Burleigh & Shaw,* for plaintiff. *Madigan & Pierce,* for defendant.

JAMES G. GAMMON et al. *vs.* JOHN P. LIBBY.

Oxford County. Decided October 13, 1913. A real action for the recovery of a strip of land in Hartford. The verdict was for the plaintiff and defendant files a motion for a new trial. The evidence was conflicting and, while, it is possible that upon the evidence the court, if the issue had been submitted to it, might have come to a different conclusion, it is our opinion that there was sufficient evidence to sustain the action of the jury and that the motion must be overruled. Motion overruled. *Frederick R. Dyer, and McGillicuddy & Morey,* for plaintiff. *E. M. Briggs and John P. Swasey,* for defendant.

JAMES H. NEALLEY,

Appellant from the Decree of the Judge of Probate in re First and Final Account in re Estate of Nettie L. W. Nealley.

Cumberland County. Decided October 13, 1913. This case involves an appeal from the Judge of Probate of Cumberland

County with reference to the settlement of a final account of an administrator involving his private claim against the estate. This account involves quite numerous items amounting to $176.94. It was not filed by the administrator within the statutory limitation for bringing suits. Appeal dismissed with costs. *U. G. Mudgett,* for appellant. *Eben Winthrop Freeman,* pro se for Appellees.

C. A. SMITH *vs.* INHABITANTS OF TOWN OF EXETER.

Penobscot County. Decided October 27, 1913. There are two counts in the plaintiff's writ. The first count is on an account annexed for services of horses and men in breaking out a certain road in defendant town from January 9, 1912, to February 29, 1912, amounting to $38.14. The second count is brought to recover damages under the provisions of Sec. 62, Ch. 23, Revised Statutes, which reads as follows:

"When any ways are blocked or encumbered with snow, the road commissioner shall forthwith cause so much of it to be removed or trodden down, as will render them passable. The town may direct the manner of doing it. In case of sudden injury to ways or bridges, he shall, without delay, cause them to be repaired. And all damage accruing to a person in his business or property, through neglect of such road commissioner or the municipal officers of such town, to so render passable ways that are blocked or encumbered with snow, within a reasonable time, may be recovered of such town by a special action on the case."

A verdict of $62 was returned for the plaintiff and the case comes up on defendants' motion for a new trial.

The plaintiff was clearly not entitled to recover anything under the first count. The services there sued for were admittedly rendered by the plaintiff without authority or direction of the town or of any person or official authorized to bind the town therefor, and accordingly it must be assumed that the jury were instructed that the town was not liable for those services. The verdict must there-

fore, be considered as rendered under the second count. Motion overruled. *P. A. Smith,* for plaintiff. *F. W. Halliday and D. I. Gould,* for defendant.

ETTA L. MILLER *vs.* ORRIN FEYLER.

Lincoln County. Decided November 4, 1913. This is an action of slander in which the plaintiff sets out the defamatory words in two counts. A general demurrer was filed, and the declaration adjudged bad. Exceptions overruled. *Geo. A. Cowan,* for plaintiff. *Wm. H. Miller,* for defendant.

INDEX

ACCORD AND SATISFACTION.

See CONTRACTS.

If one makes an offer of a certain sum to settle an open and unliquidated account, and attaches to his offer the condition that it must be accepted, if at all, in full satisfaction of the claim in dispute, the party receiving the sum offered will be taken to have accepted it subject to the condition attached to it. *Chapin* v. *Little Blue School,* 415.

Such acceptance will operate as an accord and satisfaction, even though the party receiving it declares that he received it only in part payment of the debt. *Chapin* v. *Little Blue School,* 415.

ADVERSE POSSESSION.

See TITLE.

Under Revised Statutes, Chap. 23, Sec. 90, relating to adverse possession of public streets by buildings, *held,* that the adverse possession of land by maintaining buildings thereon for forty years gives title to the extent of such occupancy. *Kelley* v. *Jones,* 360.

By possession of land and the exercise of dominion over the whole of it for a period of forty years, by virtue of a warranty deed, the grantee acquired title to all the land described in the deed, although a part was covered only by the clause of release and quitclaim. *Kelley* v. *Jones,* 360.

AMENDMENT.

See PLEADING. PARTIES.

The plaintiff in attachment will usually be allowed to amend his pleadings, as in other actions, without affecting the attachment, providing such amendment will not change the cause of action.
Marston v. *F. C. Tibbetts Mercantile Co.*, 533.

An amendment to a writ which describes defendant corporation as a domestic corporation, when it is in fact a foreign corporation, so as to correctly describe it as a foreign corporation, does not vacate the attachment made by virtue of the writ. *Marston* v. *Tibbetts Mercantile Co.*, 533.

APPEAL.

See TRUSTEE PROCESS.

After the settlement, an appeal, of the account of a testamentary trustee, or an executor, in the decree for which no provision was made for the payment of expenses and counsel fees of the accountant in that proceeding, neither the Judge of Probate, nor the Supreme Court of Probate has power, in the settlement of a subsequent account to allow him credit for such expenses and counsel fees. The rule is the same in equity.
Palmer, Appellant, 441.

ATTACHMENT.

See FIXTURES.

Lathes, a drill press and hand milling machine in a shop, bolted to the main shaft, and pair of them bolted in the floor, are all attachable as personal property. *Tolman* v. *Carleton*, 57.

An attachment of a machine weighing 1200 pounds, two others weighing 800 pounds each, one other weighing 400 pounds and one other weighing 100 pounds, all in a shop, bolted to the main shaft, the two lighter ones bolted to the floor, held preserved by filing copy of return in town clerk's office.
Tolman v. *Carleton*, 57.

BANKRUPTCY.

Where a bankrupt was in possession of a farm at the time of the adjudication, whatever interest he had in the real and personal estate, including growing crops, passed to and invested immediately in the trustee.
Carney v. *Averill,* 172.

A trustee in bankruptcy is an officer of the court, and cannot be subjected to suits by the purchaser of personal property belonging to the estate without leave of the bankruptcy court. *Carney* v. *Averill,* 172.

Under the provisions of the bankrupt act, the trustee thereunder is vested in a qualified sense with all the assets of the bankrupt, yet it is the well recognized doctrine that he may decline to take such property as he deems burdensome and worthless. *Dow* v. *Bradley,* 249.

Such items of estate, corporeal or incorporeal, as the trustee declines to appropriate or utilize, remains the property of the bankrupt, subject always to the superior right and title of the assignee. *Dow v. Bradley,* 249.

Indebtedness of a bankrupt for proceeds of fertilizers sold by him as plaintiff's agent, under a contract providing that the bankrupt should hold the same in trust is not a debt erected in a fiduciary capacity so as to be exempt from the operation of a bankrupt's discharge.
Am. Agr. Chem. Co. v. *Berry,* 528.

The use of the word "trust" does not alter the relations between the parties so as to create such a fiduciary capacity as would escape the bankrupt act.
Am. Agr. Chem. Co. v. *Berry,* 528.

BANKS AND BANKING.

In an action to recover a deposit where the bank claimed with the depositor's authority to have purchased a bond out of the proceeds of such deposit, evidence held to support a finding that the purchase had not been authorized by the depositor. *Trainer* v. *Marine Nat. Bank,* 112.

In an action to recover an excess payment of interest on a loan, evidence held insufficient to support a finding for the depositor on the theory that the notes had been altered after execution by increasing the rate of interest.
Trainer v. *Marine Nat. Bank,* 112.

BILLS AND NOTES.

One who signs on back of a promissory note at its inception is a joint, or joint and several, maker with one who signs on its face, and want of demand and want of notice to him of non-payment affords him no defense.
Stewart v. *Oliver,* 208.

An accommodation maker, or surety, on a note is discharged from liability if, without his knowledge or assent the holder, having notice that the accommodation maker or surety is such, extends the time of payment to the principal maker for value. *Stewart* v. *Oliver,* 208.

The payment of interest in advance is a sufficient consideration for an agreement to extend the time of payment of a promissory note.
Stewart v. *Oliver,* 208.

It is immaterial whether the bank officers had actual knowledge that the defendant was an accommodation maker or merely that the circumstances were such as ought to have placed them on their inquiry.
Stewart v. *Oliver,* 208.

BOUNDARIES.

See ESTOPPEL.

When a boundary line is located and marked and thereafter recognized and treated by the parties as the true line, it is conclusive upon them and their assigns, though it varies from the record line. *Proctor* v. *Libby,* 39.

The testimony to overcome a record boundary line should be full, clear and convincing and should be scanned with care and caution.
Proctor v. *Libby,* 39.

BREACH OF CONTRACT.

See BURDEN OF PROOF.

In an action for breach of contract to accept and pay for sweet corn, in suitable condition for canning, the burden of proving that the corn tendered was suitable for canning purposes was upon the plaintiff.
Gardiner v. *Davis,* 310-318.

BREACH OF THE PEACE.

See SCIRE FACIAS. SENTENCE.

A voluntary engagement entered into on the part of a citizen with the state to keep the peace and be of good behavior, and especially not to violate a particular law does not create an enforceable contract.
State, in Scire Facias, v. *Sturgis, et als,* 96.

BURDEN OF PROOF.

See CONTRACT.

Plaintiff, in his action for damages for defendant's breach of their contract to accept and pay for sweet corn in suitable condition for canning, had the burden of proving that the corn tendered by him was suitable for canning. *Gardiner* v. *Davis,* 310-318.

CARRIERS.

See NEGLIGENCE.

The terminal carrier may be presumptively liable for injuries to goods in transit, but it must be shown that it was the last of a line of carriers under a through bill of lading or contract of shipment, and that the goods were received by the initial carrier in good condition.
Conti v. *American Express Co.,* 145.

A steamboat company held liable for negligence in leaving a hole in a wharf, causing injuries to one who accompanied a passenger, such portion of the wharf being customarily used for passengers.
Hutchins v. *Steamboat Co.,* 369.

In going upon the defendants' wharf as an escort for her daughter in the case at bar, the plaintiff was not a trespasser, nor a mere licensee to whom the defendant owed no duty. *Hutchins* v. *Steamboat Co.,* 369.

CONTRACTS.

See FALSE REPRESENTATIONS.

If one party to a contract, with intent to deceive, conceals or suppresses from the other a material fact, which he is bound in good faith to disclose, it is tantamount to a false representation.
Barrett v. *Lewiston, Brunswick & Bath St. Ry.*, 24.

If a party conceals any fact material to the transaction, and peculiarly or exclusively within his knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if it were expressly denied. *Barrett* v. *L. B. & B. St. Ry.*, 24.

The duty of a party to a contract to disclose to the other party facts within his knowledge may arise from a trust relation, confidence or inequality of condition or knowledge. *Barrett* v. *L. B. & B. St. Ry. Co.*, 24.

Concealment of material facts by a party to a contract is not fraud, unless the other party is thereby misled.
Barrett v. *L. B. & B. St. Ry. Co.*, 24.

When the terms of a contract, are clear and unambiguous, evidence of acts of the parties claimed to be an interpretation of the contract cannot be permitted to vary such terms.
Gooding v. *Northwestern Life Ins. Co.*, 69.

Custom cannot be taken into account when the contract is express, clear and unambiguous. *Gooding* v. *N. W. Life Ins. Co.*, 69.

When a contractor, in making a bid for steel roof framing, understood the specifications to cover only one building, instead of two, and the owner knew facts, putting him on inquiry as to whether the contractor was mistaken, the contract will be treated as cancelled and the contractor permitted to recover on a quantum meruit.
Hudson Structural Street Co. v. *Smith & Rumery Co.*, 123.

A mistake by one party only justifies cancellation of a contract where the other party is guilty of inequitable conduct, concealment of facts or has deceived or misled the first party by active or passive representations or conduct. *Hudson S. S. Co.* v. *Smith & Rumery Co.*, 123.

Notice sufficient to put a person on inquiry imposes on him such a degree of diligence as will enable him to ascertain the truth, and in failing to do so, he will be charged with the knowledge he ought to have obtained by reasonable investigation. *Hudson S. S. Co.* v. *Smith & Rumery Co.*, 123.

An unsealed written agreement must be treated as a simple contract, though its words may show an intent to enter into a contract under seal.
Simpson v. *Ritchie,* 299.

Partners can any time they see fit sever their interest by contract and hold each other strictly to common law liability. *Simpson* v. *Ritchie,* 299.

When the fulfillment of a contract becomes impossible by reason of illness, the obligation to perform it is discharged.
Chapin v. *Little Blue School,* 415.

CONSTITUTIONAL LAW.

See MASTER AND SERVANT.

Public Laws, 1909, Chap. 259, Sec. 1-8, making a master liable for injuries to a servant, but excepting domestic servants or farm laborers injured by fellow employes, is constitutional.
Dirken v. *Great Northern Paper Co.,* 374.

The State, in the exercise of its police power, may enact such laws for the safety and protection of its citizens as the circumstances and necessities of a particular class may require, without violating any constitutional guaranty. *Dirken* v. *Great Northern Paper Co.,* 374.

A state may classify the objects of legislation so long as its attempted classification is not clearly arbitrary and unreasonable; the test being that the state embrace all persons under substantially like circumstances.
Dirken v. *Great Northern Paper Co.,* 374.

The equality clause of the fourteenth amendment of the Constitution of the United States does not take from the states the police powers reserved to them at the time of the adoption of the Constitution, and a state, under its police power, has the same power to provide for the public safety and convenience as to protect public health and morals and cannot divest itself of such police power. *Dirken* v. *Great Northern Paper Co.,* 374.

CORPORATIONS.

See ELECTRICITY. EQUITY.

Under Revised Statutes, Chapter 55, Section 1, relating to corporations organized to make and sell electricity, authority in one corporation to

supply electricity in a certain territory is prohibitive of the right of another corporation to supply it in the same territory, unless by consent or by special legislative authority, but prohibition does not extend to an individual. *Crawford Elec. Co.* v. *Knox Co. Power Co.*, 285.

That this prohibition is confined to corporations subsequently organized under general laws of the State and does not extend to a private individual. *Crawford Elec. Co.* v. *Knox County Power Co.*, 285.

Directors of a corporation cannot vote salaries to themselves, and money paid on account of such votes may be recovered. *Connors* v. *Connors Bros.*, 428.

The Treasurer of a corporation, not having objected to payments for assistance in procuring certain public contracts, is not entitled to maintain a suit against his co-officer and directors for an accounting on the ground that the payments were fraudulent. *Connors* v. *Connors Bros.*, 428.

It is well settled law that the directors of a corporation cannot serve themselves and the corporation at the same time. *Connors* v. *Connors Bros.*, 428.

DEDICATION.

A dedication of land to public uses must be accepted within a reasonable time *Kelley* v. *Jones*, 360.

DEEDS.

Deeds should be so construed as to effectuate the legal intention of the parties as shown by the entire deed. *Littlefield* v. *Hilton*, 495.

If the language of a deed is uncertain, the words should be construed most strongly against the grantor. *Littlefield* v. *Hilton*, 495.

It is the general governing principle in the exposition of deeds and other instruments that effect should be given to the legal intention of the parties. *Littlefield* v. *Hilton*, 495.

DEMURRER.

See WILLS.

Motion to dismiss a petition to be allowed to appeal from a decree admitting a will to probate based on a petition not making certain allegations, is equivalent to a demurrer. *Carter, et als, Petr.*, 1.

DESCENT AND DISTRIBUTION.

See INHERITANCE.

The disposition of the personal property of an intestate, wherever situated, is governed by the law of his domicil. *Holmes* v. *Adams*, 167.

It has been invariably held that a statute allowing an illegitimate child to inherit from his mother does not allow him to inherit from her lineal or collateral kindred. *Holmes* v. *Adams*, 167.

As all rights of inheritance become vested at the death of the person from whom they are derived, the statutes in force at the time of his death govern the disposition of the estate. *Holmes* v. *Adams*, 167.

DOMICIL.

As domicil is the habitation fixed in any place, without any present intention of removing therefrom, to effect a change of domicil, there must be actual residence in the new place and an accompanying intention to make it the fixed home. *Holyoke* v. *Holyoke*, 469.

As the wife's domicil may be separate from her husband, his act in giving the residence of his wife in a pleading is not a recognition of the fact that his own residence is there. *Holyoke* v. *Holyoke*, 469.

A person can have but one domicil at a time, and the burden is on the party who asserts a change of domicil. *Holyoke* v. *Holyoke*, 469.

DOWER.

See DESCENT. INHERITANCE.

Public Laws of 1895, Chapter 157, Section 1, amending Chapter 75 of Revised Statutes of 1883, which is found in Section 13 of Chapter 75 of Revised Statutes of 1903, abrogated the old rule of dower regarding the interest of a widow in the deceased husband's lands and conferred upon her an estate of inheritance, instead of an interest for life. *Cheney* v. *Cheney,* 61.

ELECTION.

A candidate receiving less than a plurality of the votes cast at an election, is not elected, even if the opposing candidate receiving a plurality of the votes cast is ineligible. *Heald* v. *Payson,* 204.

Votes cast for an ineligible candidate are at least so far effective as to prevent the election of a candidate who received a less number of votes. *Heald* v. *Payson,* 204.

A candidate, who did not receive a plurality of all the votes cast for a county office, cannot maintain a petition under R. S., Chap. 6, Sec. 70. *Heald* v. *Payson,* 204.

The plain intendment of Public Laws of 1911, Chapter 71 is that in counting ballots under the Australian Ballot Law of the State, all ballots marked with a cross in the square at the head of the column shall be counted, if the intention of the voter can be ascertained, no matter what other casual, accidental, mistaken or unnecessary marks the voter may have placed upon the ballot, provided the same are not deemed to have been fraudulently made. *Libby et als, Petrs.* v. *English,* 449.

A ballot upon which the voter apparently first made a cross in a square, and then covered over the connecting part of the cross and one of the arms with stickers, one running at nearly right angles with the other two, must be deemed to have been so marked for a fraudulent purpose, and it cannot be counted. *Libby* v. *English,* 450.

A ballot upon which the voter wrote "Geo. H." at the bottom must be deemed to have been so marked for a fraudulent purpose, and cannot be counted. *Libby* v. *English,* 450.

EQUITY.

See DEMURRER.

For the purpose of considering the sufficiency of a bill, the demurrer admits all allegations of fact well pleaded. *Bailey* v. *Merchants' Ins. Co.*, 348.

In general a decree in equity cannot be impeached or vacated, except by a bill of review or by an original bill for fraud.
Bailey v. *Merchants' Inst. Co.*, 348.

In cases not heard on the merits, a decree obtained through surprise, accident or mistake may be impeached by an original bill for that purpose in general chancery practice. *Bailey* v. *Merchants' Ins. Co.*, 348.

It is an elementary principle of equity jurisprudence that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience and good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine. *Connors* v. *Connors Bros.*, 428.

A participant in injustice and wrong is not entitled to relief in a court in equity. *Connors* v. *Connors Bros.*, 428.

ESTOPPEL.

See WAIVER. BOUNDARIES.

Estoppel is a rule of law which prevents a party from asserting his rights when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.
Holt v. *New England Tel. & Tel. Co.*, 10.

When the owner of land points out a certain line as the boundary, he may be estopped from thereafter denying such boundary.
Proctor v. *Libby*, 39.

EVIDENCE.

See EXCEPTIONS. FRAUD. WAIVER.

Evidence held not to warrant a finding that water entering plaintiff's cellar came from pipes of a water company.
Littlefield v. *Newport Water Co.*, 129.

If one person makes a statement of a positive fact, which is material, the truth of which can be ascertained as of his own knowledge, and that statement is untrue, and if he made the statement for the purpose of inducing another party to act upon it, and the other party, relying upon the statement, without knowledge of its falsity on his own part, acts thereon to his damage, it is such a misrepresentation as will sustain an action of deceit. *Pierce* v. *Cole,* 134.

In an action for deceit, it is not necessary that the false statement complained of should have been made with a fraudulent purpose and with intention to cheat or defraud. Good faith in making the statement is immaterial. *Pierce* v. *Cole,* 134.

Where evidence of character is admissible, it must be shown by general reputation and not by specific acts, though proof thereof may come by way of admission. *Pierce* v. *Cole,* 134.

In an action for deceit in the sale of a farm, evidence of an admission by defendant that he had set a dishonest trap for a third person with reference to a sale of personal property, which plaintiff thereafter bought, was inadmissible. *Pierce* v. *Cole,* 134.

Evidence of character is not admissible in a civil action of this kind. *Pierce* v. *Cole,* 134.

The right of privileged communications is a personal privilege and can be invoked only by him who makes it, and it is to be strictly construed. *Whiting, Appellant,* 232.

The right of privileged communication may be waived and when waived cannot be again asserted with effect upon a subsequent trial or appeal of the same case. *Whiting, Appellant,* 232.

Attending physicians of skill and good repute, who are not experts in mental diseases, may testify as to the mental condition of their patients and that their opinions as to such condition are admissible when the facts upon which they base their opinions are detailed to the jury, although they may give their opinion as to the direct question to be determined. *Whiting, Applt. from decree of Judge of Probate,* 232.

The testimony of a witness, since deceased, given at a previous trial, may be received in evidence at a subsequent trial of the same case. *Edgeley* v. *Appleyard,* 337.

The testimony of a witness given at a coronor's inquest, upon the death of the plaintiff's intestate, is inadmissible, the witness having deceased after the inquest and before the trial. *Edgeley* v. *Appleyard,* 337.

Where the testimony of a witness since deceased is sought to be introduced in a subsequent trial, the question whether the issue in the two cases is the same, or substantially the same, is a preliminary one for the court. *Edgeley* v. *Appleyard,* 337.

Declarations of a testator, disclosing an intention to change his domicil, are admissible in contested proceedings for the probate of his will, as a foreign will, when they accompany his acts, which they explain. *Holyoke* v. *Holyoke,* 469.

Declarations of a testator, as to his domicil, are not inadmissible in proceedings for the probate of his will as a foreign will, on the ground that they are made in his favor, because he is not a party to the proceedings. *Holyoke* v. *Holyoke,* 469,

EXCEPTIONS.

See FALSE IMPRISONMENT. APPEAL.

The admission of inadmissible evidence which is harmless will not support an exception. *Pierce* v. *Cole,* 134.

The court, in reviewing an exception to the admission of evidence, limited, by the trial court to a specific issue, must assume that the jury followed the instructions. *Whittaker* v. *Sanford,* 77.

When, on appeal from decision of the Supreme Court of Probate, only questions of law are open for determination, the findings of the Justice in matters of fact are conclusive, if there is any evidence to support them. *Palmer, Appellant,* 441.

EXEMPTION.

See POOR DEBTOR.

A poor debtor should not have been required under Section 28, Chapter 114 of R. S. to assign to his judgment creditor, whose original debt was for

necessaries, a claim of $8, which was the only sum due him as wages for his personal labor earned within one month next preceding the date of his disclosure, because that amount of his wages, at least, is exempt from attachment. *Jumper* v. *Moore,* 159.

FALSE IMPRISONMENT.

A plaintiff may sue for false imprisonment based on her wrongful detention by defendant, which is done by showing that defendant refused to furnish a boat to enable her to land. *Whittaker* v. *Sanford,* 77.

A plaintiff suing for false imprisonment may show when and how she obtained her liberty, and may show that she was discharged from restraint by habeas corpus. *Whittaker* v. *Sanford,* 77.

In an action for false imprisonment, the plaintiff must show that the restraint was physical, but not necessarily that force was used upon the person. *Whittaker* v. *Sanford,* 77.

FIXTURES.

See ATTACHMENT.

Heavy machines which the owner has attached to a building on which he has a lease are not fixtures and exempt from attachment on the ground that they are part of the realty. *Tolman* v. *Carleton,* 57.

FORECLOSURE.

An entry by a mortgagee for the purpose of foreclosure, not followed up by the acts requisite to acquire rights thereunder, negatived his claim that he entered and took possession of a hay crop, and constituted an abandonment of whatever intention he may have had with respect to the crop or purpose to foreclose his mortgage. *Carney* v. *Averill,* 172.

FRANCHISE.

See CORPORATIONS.

A franchise is a privilege or immunity of a public nature, which cannot be exercised without the express permission of the sovereign power, that is without legislative grant.
Crawford Electric Co. v. *Knox County Power Co.*, 285.

FRAUD.

See SHERIFFS AND CONSTABLES.

A debtor must prove fraud by an officer, and not merely neglect, in order to recover under R. S., Ch. 86, Sec. 9, providing that an officer levying execution who commits any fraud in the sale or return, shall forfeit to the debtor five times the sum of which he defrauds him. *Spiller* v. *Bechard*, 221.

FRAUDULENT CONVEYANCES.

See SALES.

Public Laws, Ch. 114, providing that a sale of merchandise in bulk shall be void against creditors, unless the seller and buyer make an inventory, and unless the purchaser obtains a list of creditors, who are notified of the sale, is not invalid as depriving persons of their privileges and liberty to control their property guaranteed by Article 1, Section 6 of Constitution of Maine. *McGray* v. *Woodbury*, 163.

GIFTS.

A policy of life insurance payable to the legal representatives of the assured may be the subject of gift. *Gledhill* v. *McCoombs*, 341.

When an insurance policy is claimed as a gift, the proof must be clear and convincing, because the opportunity for fraud is so great.
Gledhill v. *McCoombs*, 341.

Such gift must be accompanied by such words or acts on the part of the donor as to indicate a clear intention to give, coupled with the subsequent retention by the donee. *Gledhill* v. *McCoombs*, 341.

Such gift may be effected by mere delivery, without assignment of the instrument. *Gledhill* v. *McCoombs*, 341.

HIGHWAYS.

Proceedings to establish a highway on land not within a town or plantation, under Revised Statutes, 1833, Chapter 18, Sections 41-42, are void when the County Commissioners did not provide for a hearing on the petition. *Haines* v. *G. N. P. Co.*, 422.

For want of notice to the owner of the land, as required by Statute, the County Commissioners had no jurisdiction of the particular case in which they were called to act on the petition in question, and that the assessment of the tax on the land in question and the plaintiff's tax deed based upon it are void. *Haines* v. *G. N. P. Co.*, 422.

A general jurisdiction conferred upon the Commissioners by Statute and the subject matter is not sufficient. It must appear that they have jurisdiction over the particular case in which they are called upon to act by the existence of those preliminary facts which confer it upon them. *Haines* v. *G. B. P. Co.*, 422.

A petition for the location of a way under Revised Statutes, Chap. 23, Sect. 1, in order to give the commissioners jurisdiction, must describe the way with reasonable definiteness, but reasonable certainty and reasonable and approximate definiteness is sufficient without great technical precision. *Blaisdell* v. *York*, 500.

Petition for location of county way describing it as leading from one county way one mile long to one four or five miles long, and to pass over two islands in a river is sufficiently definite as to the termini, when applied to the geographical situation as shown by the evidence. *Blaisdell* v. *York*, 500.

Order of County Commissioners locating highway voidable only and not void, or subject to collateral attack, because one of the members was disqualified by his ownership of land over which the way was to pass. *Blaisdell* v. *York*, 500.

HUSBAND AND WIFE.

See JOINT TENANCY.

The act of a husband owning a deposit in a savings bank in causing an entry to be made in a bank ledger and deposit book adding the name of his wife as joint depositor, with statement that the money may be drawn by either in any event, if intended as a gift to take effect at his decease, was a testamentary disposition, void under the Statute of Wills.
Staples v. *Berry*, 32.

It is one of the elementary rules of the common law that husband and wife are deemed one person, and that during the existence of the marriage relation, the legal identity of the wife was suspended or merged in that of her husband. *Spiller* v. *Close*, 302.

It is an established rule of the common law that a married woman could not sue or be sued without the joinder of her husband, unless the husband was an alien who had always resided abroad, or was regarded as civilly dead. *Spiller* v. *Close*, 302.

This common law rule has been modified and the right conferred upon the wife by legislation to prosecute and defend suits at law, or in equity, in her own name, without the joinder of her husband in certain classes of suits and for certain specified purposes. *Spiller* v. *Close*, 302.

Section 8 of Chapter 126 of the Revised Statutes, authorizing "any other person" to bring the action at bar was obviously not enacted for the purpose of removing the disabilities of married women. *Spiller* v. *Close*, 302.

An action brought by a married woman to recover of the winner treble the amount of money lost by her husband by gambling is not a "suit for the preservation and protection of her property, or her personal rights, or the redress of her injuries." *Spiller* v. *Close*, 302.

The legal disability of a married woman existing at common law was not removed by Section 5 of Chapter 63 of the Revised Statutes.
Spiller v. *Close*, 302.

ILLEGITIMATE CHILDREN.

See INHERITANCE.

It has been invariably held that a statute allowing an illegitimate child to inherit from his mother does not allow him to inherit from her lineal or collateral kindred. *Holmes* v. *Adams*, 167.

The words, "the same as if born in lawful wedlock," do not in this case enlarge the rights of the plaintiff to include inheritance from lineal or collateral kindred. *Holmes* v. *Adams*, 167.

INHERITANCE.

See DESCENT AND DISTRIBUTION.

It has been invariably held that a statute allowing an illegitimate child to inherit from his mother does not allow him to inherit from her lineal or collateral kindred. *Holmes* v. *Adams*, 167.

It is clear that the words, "the same as if born in lawful wedlock," do not, in this case, enlarge the rights of the plaintiff to include inheritance from lineal or collateral kindred. *Holmes* v. *Adams*, 167.

INSPECTION OF LIME.

See OFFICE.

An inspector of lime casks is a civil officer, appointed by the Governor, whose term of office is not fixed or limited by law, and who is subject to removal at any time by the Governor and Council.
Lothrop v. *Rockland Lime Co.*, 296.

He is entitled to receive for inspecting lime casks the fees fixed by Revised Statutes, Chapter 117, Section 21, but is not entitled to fees for lime shipped in bulk. *Lothrop* v. *Rockland Lime Co.*, 296.

INSURANCE.

See COMMISSION. CONTRACT.

The continued payment of the fixed premium by a policy holder does not warrant the recovery by the agent upon a count of money had and received of a commission on such renewal premium collected after he ceased to be

agent in the absence of any contract of the company with the agent for payment of such commission.
Gooding v. *Northwestern Mutual Life Ins. Co.*, 69.

In the absence of express stipulations to the contrary, the agent of a Life Insurance Company is not entitled to commissions or renewal premiums paid to the company after the termination of the agency.
Gooding v. *Northwestern Life Ins. Co.*, 69.

Under the provisions of Revised Statutes, Chapter 49, Section 68, and the general rules governing chancery practice, an order, upon the petition of a receiver of an insolvent insurance company, asking for authority to levy an assessment upon the premium notes of the company, may be made returnable upon a day in vacation. *Havey* v. *Ins. Co.*, 492.

The provisions of Revised Statutes, Chapter 49, apply to cases arising where the Insurance Company is a going concern, but not to the case at bar.
Havey v. *Ins. Co.*, 492.

INSURER OF QUALITY OF CANNED GOODS.

A carrier of passengers is not an insurer of the quality of canned goods furnished on its dining cars, and is not liable for injuries to a passenger eating canned goods bought from a reliable dealer and guaranteed under the Pure Food Laws, and containing no defect discoverable by the eye, smell or taste. *Bigelow* v. *M. C. R. R. Co.*, 105.

The wholesaler, the retailer and the user of canned goods, whether in the capacity of caterer, seller or host, sustains an entirely different duty respecting a knowledge of their contents and quality than prevails with regard to knowing the quality of those food products which are open to the inspection of the seller or victualer.
Bigelow v. *M. C. R. R. Co.*, 105.

INTOXICATING LIQUORS.

See SEARCH AND SEIZURE.

Under R. S., Chap. 29, Sec. 51, it is only a person who is found to be "entitled to custody of any part" of the seized goods who can be regarded as a lawful claimant. *State* v. *Intoxicating Liquors*, 178.

The lawful right to claim the liquors may arise either from ownership, as when the claim is made by the consignee, or from right to possession, as when made by the carrier. *State* v. *Intoxicating Liquors,* 178.

There are two prerequisites to the exercise of the right of stoppage in transitu on the part of the seller; first, a sale upon credit; second, the insolvency of the purchaser. *State* v. *Intoxicating Liquors,* 178.

In proceedings for the forfeiture of intoxicating liquors seized under a search and seizure process, it is essential to the validity of a complaint and warrant, or indictment, that the party against whom it is issued should be described therein sufficiently so that he may be thereby identified as the person on whom it is to be served. If his name is not known, he must be otherwise sufficiently described. *State* v. *Intoxicating Liquors,* 260.

A warrant to arrest a person described fictitiously as John Doe, without any further description or means of identification of the person to be arrested, is void. *State* v. *Intoxicating Liquors,* 260.

JOINT TENANCY.

See TENANTS IN COMMON. HUSBAND AND WIFE.

An estate in joint tenancy does not exist unless there is unity of interest, title, time and possession. *Staples* v. *Berry,* 32.

LANDLORD AND TENANT.

See WAIVER.

Evidence in lessee's action for constructive eviction, held, to show that the plaintiff by encouraging the act of which he complained waived his right to object thereto, and was estopped to maintain the action. *Seiger* v. *Gerber,* 52.

The act of a tenant in subletting a part of the premises without the consent of the landlord in violation of the lease, renders the lease voidable at the option of the landlord. *Linn Woolen Co.* v. *Brown,* 88.

A landlord who for several months, with knowledge of subletting without his consent, takes no steps to re-enter, but who treats the lease with the tenant as subsisting, thereby waived the right to re-enter for the subletting made in violation of the lease. *Linn Woolen Co.* v. *Brown,* 88.

A landlord, who assigned to a third person rent due and unpaid, thereby recognized the lease as effective for the term covered by such rent and waived his right under the lease to re-enter for non-payment. *Linn Woolen Co.* v. *Brown,* 88.

When plaintiff fell into an incomplete cellarway in defendants' business block, because a tenant had obtained the key thereto from a clerk in defendants' store and gave them to a plumber who was working in the cellar, and left the door unlocked, when plaintiff opened the door and walked into the cellar, *held,* that the defendant was not negligent so as to make him liable for the plaintiff's injuries. *Manning* v. *Sherman,* 332.

A landlord need only use ordinary care to keep the premises safe for the access of all persons having occasion to go upon them by his invitation and to provide a suitable entrance to stores, offices, etc., guarding against dangerous approaches thereto. *Manning* v. *Sherman,* 332.

When an injury to one going upon premises results solely from the negligent acts of a third person who does not stand in such relation to the landlord as to make applicable the doctrine of respondeat superior, the landlord is not liable. *Manning* v. *Sherman,* 332.

LICENSES.

See SALES.

Public Laws, 1907, Chap. 15, Sec. 6, as amended by Public Laws of 1909, Chap. 34, Sec. 3 and Public Laws of 1911, Chap. 176, Sect. 3, requiring persons who wished to sell nursery stock to procure an agent's license and prescribing a penalty for its violation, must be strictly construed. *State* v. *Staples,* 264.

The mere offer to take, or solicitation or reception of, an order for nursery stock by one who has no license, and who had no stock with him, is not a violation of the above law. *State* v. *Staples,* 264.

Under Sec. 6 of Chap. 15 of Public Laws of 1907, as amended by Pub. Laws of 1911, which forbids the sale of nursery stock, without a license,

by agents, or other parties, except growers, the act of soliciting and taking an order for nursery stock by an agent, to be filled by the principal at his option, is not a sale. *State* v. *Staples*, 264.

MASTER AND SERVANT.

See NEGLIGENCE. CONSTITUTIONAL LAW.

Employer held not negligent in failing to warn of danger a person eighteen years old, who had nearly three years' experience in mills, and was familiar with machinery and had assisted at least twice in operating the washing machine which caused his injury.
Gamrat v. *Worumbo Mfg. Co.*, 140.

An employer who directs his employee to perform a dangerous service, requiring skill and caution to avoid the danger, with knowledge that the employee is inexperienced and ignorant of the danger, must inform him of the danger and instruct him. *Hill* v. *Libby, et al.*, 150.

The care required of an employee depends on his knowledge of the risks and dangers of the work and when he does not know of a danger, he is not chargeable with negligence for failing to avoid it.
Hill v. *Libby, et al.*, 150.

It is the duty of a master to warn his servants of dangers attendant upon the place of employment of which the master has knowledge and which are unknown to the servant. *Dirken* v. *Great Northern Paper Co.*, 374.

The master cannot delegate the duty to warn a servant of dangers attendant upon his place of work. *Dirken* v. *Great Northern Paper Co.*, 374.

Public Laws, 1909, Chap. 258, Sec. 1-8, making a master liable for injuries to a servant, but excepting domestic servants or farm laborers, injured by fellow employes, is constitutional.
Dirken v. *Great Northern Paper Co.*, 374.

A master is bound to instruct an inexperienced servant only when it appears that the servant is inexperienced and that the act of the servant which exposed him to danger was reasonably likely to be expected.
Colfer v. *Best*, 465.

In a personal injury, action against a master, when the evidence was such that reasonable minds might reach different conclusions, the questions of

master's negligence, assumption of risk and contributory negligence of the servant should be submitted to the jury. *Colfer* v. *Best*, 465.

Car repairers who knowingly go under damaged cars in a railroad yard, when cars are likely, at any time, to be moved against such car, without placing a danger signal of some character, or taking other precaution for safety, are held generally to assume the risk of injury while so engaged. *Hart* v. *B. & A. R. R. Co.*, 541.

MONEY HAD AND RECEIVED.

See MORTGAGE.

The action for money had and received is comprehensive in its scope, equitable in spirit, although legal in form, and is favored by the courts and is maintainable when the defendant has money which in equity and good conscience belongs to the plaintiff. *Dow* v. *Bradley*, 249.

Where a mortgagee sold land in violation of an agreement to extend the time to redeem, mortgagor could recover surplus over the mortgage deed by an action at law for money had and received. *Dow* v. *Bradley*, 249.

MORTGAGE.

An oral agreement between a mortgagee and mortgagor to extend the time of redemption, supported by no consideration, except the promise of the redemptioner, when acted upon so that the parties cannot be placed in statu quo, is not within the statute of frauds. *Dow* v. *Bradley*, 249.

A contract to extend the time for redemption of a mortgage between a mortgagee and one having no legal equitable interest in the equity of redemption is within the statute of frauds and unenforceable, unless in writing and supported by a valuable consideration. *Dow* v. *Bradley*, 249.

The right to redeem mortgaged real estate may be kept open by the express agreement of the parties, or by facts and circumstances, from which an agreement may be satisfactorily inferred, when it would be foreclosed, were it not for such agreement. *Dow* v. *Bradley*, 249.

A chattel mortgage covering an after acquired horse, which was never in the mortgagee's possession, though right to foreclose existed, does not entitle the mortgage to maintain replevin for the horse against an innocent purchaser thereof from the mortgagor's manager, who pretended to own it. *Spinney* v. *Cook*, 406.

As between the plaintiffs as mortgagees and the defendant as stranger, they were not entitled to possession of said horse, and, hence cannot maintain this action of replevin. *Spinney* v. *Cook*, 406.

MUNICIPAL CORPORATIONS.

See SALARIES. TAXATION. NAVIGABLE STREAMS.

When at the time the board of police of Biddeford was appointed under Private Laws of 1893, Chapter 625, the full number of patrolmen provided for by ordinance were legally in office, the removal of a patrolman without cause and the appointment of another in his stead was illegal.
Ducharme v. *City of Biddeford*, 6.

A defacto patrolman is not entitled to the salary for duties performed under color of an appointment, but without legal title.
Ducharme v. *Biddeford*, 6.

The burden is on patrolman in action for salary to show death, resignation or legal removal, creating a vacancy to fill, which he could have legally been appointed. *Ducharme* v. *Biddeford*, 6.

Municipal Corporations are but instruments of government created for political purposes and are subject to legislative control.
Inh. of Bayville Village Cor. v. *Inh. of Boothbay Harbor*, 46.

A municipal corporation is not liable in a private action for the negligent performance of corporate statutory duties, but is liable as an individual if the acts are not authorized by Statute and are done by its authority.
Tuell v. *Marion*, 460.

Unless a town, authorized by Statute to erect a bridge across navigable waters, construct it in a reasonable and proper manner, it is liable if the bridge obstructs navigation. *Tuell* v. *Marion*, 460.

MUNICIPAL OFFICERS.

See NOTICE. WAIVER.

Whether the municipal officers knew the requisites of a legal notice is immaterial, as the written notice provided by Statute is an indispensable prerequisite to the right to maintain the suit. *Rich* v. *Eastport*, 537.

The municipal officers cannot waive the required statutory notice. *Rich* v. *Eastport*, 537.

NAVIGABLE STREAMS.

See MUNICIPAL CORPORATIONS.

Navigable streams are public highways, over which all persons have a right to pass, to float logs, timber and other merchandise upon, and cities or towns have no right to obstruct the navigation thereof, unless they are given the right or the duty is imposed by statute. *Tuell* v. *Marion*, 460.

NEGLIGENCE.

See BOOMS. WATERS. MASTER AND SERVANT. RAILROADS. CARRIERS.

The remedy of one whose land bordering on a river has been damaged by another negligently allowing his logs to jam on piers to such an extent as to cause the water to overflow the land and deposit thereon logs and debris is under Revised Statutes, Chapter 43, Sections 7, 8. *Howe* v. *Ashland Lumber Co.*, 14.

Employer held not negligent in failing to warn of danger an employee eighteen years old, who had three years' experience in mills and was familiar with machinery, and had assisted at least twice in operating the machine which caused his injury. *Gamrat* v. *Worumbo*, 140.

This suit is based on the negligence of the defendant. The burden is on the plaintiff to prove it. It is not enough for her to show that the goods were in a damaged condition when the defendant delivered them to her. She must show that they were injured while in the defendant's possession by its negligence. *Conti* v. *American Express Co.*, 145.

An employer, who directs his employee to perform a dangerous service requiring skill and caution to avoid the danger, with knowledge that the employee is inexperienced and ignorant of the danger, must inform him of the danger and instruct him. *Hill* v. *Libby*, 150.

The care required of an employee depends upon his knowledge actual or constructive, of the risks and dangers to be met with in the performance of the duty assigned him. *Hill* v. *Libby, et al.*, 150.

In an action for injuries to an employee by the explosion of the fuse cap, while being placed in position for blasting, held that the employee was not negligent in using a defective cap. *Hill* v. *Libby, et al*, 150.

A railroad company is bound to use reasonable care to maintain the passage-ways to its trains in such a reasonably safe and suitable condition that passengers, who are themselves in the exercise of ordinary care, can walk over them safely. This is the extent of its duty.
Woodbury v. *Me. Central R. R. Co.*, 224.

When a passenger voluntarily chooses to ride on the platform of a car, he is to be held to the exercise of a high degree of care to avoid the dangers and perils of his position that are known to him, or which are reasonably to be apprehended. *Blair* v. *L. A. & W. St. Ry.*, 235.

When a person is required to act in an emergency and under circumstances of suddenly impending personal peril, the law will not declare that reasonable care demands that he must choose any particular one of the alternatives presented and hold him guilty of contributory negligence as a matter of law for not doing so. *Blair* v. *L. A. & W. St. Ry.*, 235.

When passengers are permitted to ride on the platforms of electric cars, it is the duty of the company to take into account that they are thereby subjected to greater risks and to observe a high degree of care in the running of the cars at points where there is danger that the passengers may be thrown off. *Blair, Admr.*, v. *L. A. & W. St. Ry.*, 235.

A street railroad company was liable for injuries caused by its motorman's negligence in attempting to pass a team so near the track that a slight turn of the horses would throw the wagon against the car.
Fickett v. Street Railway, 267.

The duty of the defendant to the plaintiff in the situation of the parties was to use all possible efforts, by slackening the speed of the car or stopping it altogether, to avoid injury. *Fickett* v. *Railway*, 267.

A driver of a team is not bound to keep a lookout from behind his team for a car. *Fickett* v. *Railway*, 267.

A railroad company held liable for plaintiff's injuries while unloading potatoes into a standing car, under the directions of defendants, due to the engine being backed against the car without warning. *Gage* v. *M. C. R. R. Co.*, 274.

The defendant owed him the duty, while he was lawfully in the car, to do no act that might cause him injury without sufficient notice to him to enable him to guard against injury. *Gage* v. *M. C. R. R. Co.*, 274.

The primary lexical meaning of the word "fault" is defect or failing, and in the language of law and the interpretation of the statute, it is held to signify a failure of duty and deemed to be the equivalent of negligence. *Milliken* v. *Fenderson*, 306.

In the case of children, who have not arrived at the years of discretion, the exercise of due care does not require the thoughtfulness and judgment of persons of mature years. *Milliken* v. *Fenderson*, 306.

In the discharge of its duty to a passenger, the carrier is bound to exercise all ordinary care to maintain its wharf in such a reasonably safe and suitable condition, that the passenger himself, in the exercise of due care, can pass over it in safety. *Hutchins* v. *Steamboat Co.*, 369.

In going upon the defendants' wharf as an escort for his daughter in the case at bar, the plaintiff was not a trespasser, nor a mere licensee to whom the defendant owed no duty. *Hutchins* v. *Steamboat Co.*, 369.

A street railway company is liable for injury to an alighting passenger caused by defective condition of a flight of steps leading from the platform, at which defendants' cars stopped, to an adjoining sidewalk, even if defendant company did not maintain the steps or cause their defective condition, if, in alighting, passengers were expressly or impliedly invited to use the steps. *Carleton* v. *Rockland, Thomaston & C. St. Ry.*, 397.

Whether the defendant actually constructed and maintained the platform and steps or not, it had adopted them as a means of ingress to and egress from its cars, and had, by implication, invited its passengers to use them for such purpose. *Carleton* v. *R. T. & C. St. Ry.*, 397.

Evidence of subsequent repairs was competent on the issue of whether it was the duty of the defendant to make the repairs. On that issue it was in the nature of an admission. *Carleton* v. *R. T. & C. St. Ry.*, 397.

The service for which the plaintiff paid the defendant included not only transportation in its cars to the point of destination, but if that point was a station either built and maintained, or adopted by defendant, it also included the furnishing of a reasonably safe way by which the passengers could leave that station. *Carleton* v. *R. T. & C. St. Ry.*, 397.

NEITHER PARTY.

A judgment entry of Neither Party is a dismissal of the action, being an abbreviated form of the fact, that on being called neither party appeared to answer, and that plaintiff was nonsuited and the defendant was defaulted, so that neither party was given judgment for costs. *Means* v. *Hoar*, 409.

An entry, Neither Party, does not, of itself, bar another action for the same cause, not being evidence of the settlement of all matters involved in the action, but merely meaning that neither party appears further, so that no judgment can be rendered. *Means* v. *Hoar*, 409.

When to the entry of Neither Party the words "no further action for the same cause" are added, the plaintiff's right of further action is barred, not because any judgment of the court follows, but because the plaintiff has entered into an agreement that he will bring no further suit, and he is bound by this agreement. *Means* v. *Hoar*, 409.

This agreement, however, extinguishes only the plaintiff's cause of action, and not the defendant's on the items which were inserted in the plaintiff's account as credits. The defendant thereby surrenders no cause of action against the plaintiff. *Means* v. *Hoar*, 409.

NOTICE.

See MUNICIPAL OFFICERS. WAIVER.

A notice to the municipal officers, of injuries received by reason of a defective highway that contains no claim for damages, nor specifies the nature of the injuries, is fatally defective. *Rich* v. *Eastport*, 537.

OFFICE.

See INSPECTION.

An inspector of lime casks is a civil officer, appointed by the Governor, whose term of office is not fixed or limited by law and who is subject to removal at any time by the Governor and Council.

Lothrop v. *Rockland Lime Co.*, 296.

The appointment of the plaintiff as inspector of lime casks of the City of Rockland was the removal of inspector Crockett, and when the plaintiff qualified, he became inspector of lime casks.

Lothrop v. *Rockland Lime Co.*, 296.

PARTIES.

See AMENDMENT. CORPORATIONS.

A foreign corporation may, when sued as a domestic corporation, file a plea in abatement for the misnomer.

Marston v. *Tibbetts Mercantile Co.*, 533.

The failure of defendant to plead in abatement for a misnomer of the party defendant operates as a waiver of the misnomer, whether he appears or makes default. *Marston* v. *F. C. Tibbetts Mercantile Co.*, 533.

PARTNERSHIP.

See CONTRACTS.

Partners can, any time they see fit, sever their interest by contract and hold each other to strictly common law liability. *Simpson* v. *Ritchie*, 299.

Rights of members of an incorporated association are not governed by the rules of law applicable to copartnership; and one member may sue another for a transaction growing out of the association.

Simpson v. *Ritchie*, 299.

PAUPERS.

That overseers of the poor of the City of Bath had authority in this case, either to give the body of the deceased a Christian burial, or to deliver it to the Board of Distribution, if no member of the family had claimed it. *Harpswell* v. *Bath,* 391.

They were acting within the scope of their authority in preparing the body for burial, and the expenses so incurred were properly chargeable against the defendant town. *Harpswell* v. *Bath,* 391.

PLEADING.

See AMENDMENT. ABATEMENT.

A plea of the pendency of another action is dilatory, technical in its nature, and will not be allowed when justice to the defendant does not reasonably require it, or when it would work manifest injustice to the plaintiff. *Brown* v. *Brown,* 280.

When a plea is filed setting up the pendency of a former suit, and it appears that the second suit was not brought to harass or vex defendant and is not in fact vexatious, the second suit will be allowed to stand and the first to be discontinued. *Brown* v. *Brown,* 280.

When a party is sued by the wrong name, it is a matter of defense in abatement, and is waived by a failure to plead the misnomer, whether the defendant appears or makes default. *Marston* v. *F. C. Tibbetts Mercantile Co.,* 533.

POOR DEBTOR.

See EXEMPTIONS.

A poor debtor should not have been required, under Revised Statutes, Chapter 114, Section 28, to assign to his judgment creditor, whose original debt was for necessaries, a claim of $8, being the balance due him as wages for his personal labor, earned within one month next preceding the date of his disclosure, because that amount of his wages, at least, is exempt from attachment. *Jumper* v. *Moore,* 159.

PRIVILEGED COMMUNICATIONS.

Communications made to an attorney in good faith for the purpose of obtaining his professional advice or opinion, are privileged.
Holyoke v. *Holyoke*, 469.

Confidential communications between husband and wife are in general strictly privileged, and the death of the communicating parties does not terminate the privilege. *Holyoke* v. *Holyoke*, 469.

RAILROADS.

See NEGLIGENCE.

There was an implied invitation by the defendant to so much of the public as wished to take its trains and to passengers leaving its trains to use the station and its approaches. *Sherman* v. *Me. Central R. R. Co.*, 228.

This implied invitation by the defendant extended to friends who wished to visit the station to see their friends off or to welcome them upon their arrival, and to persons having business to transact with the defendant at its station. *Sherman* v. *Me. Central R. R. Co.*, 228.

The putting out of the lights in the station after the departure of the last train for the day, at the time of night shown in the case, and the closing of the station, was notice to every one that business for the day had ceased, and when the notice was given, the implied invitation to people having business with the defendant, or at the station, was withdrawn.
Sherman v. *M. C. R. R. Co.*, 228.

RELEASE.

Unless obtained by fraud, or misrepresentation amounting to fraud, or an unconscionable advantage is taken, a release for personal injuries is valid.
Borden v. *Railroad Co.*, 327.

The fact that the injured person's subsequent recovery is not so rapid as he expected is not ground for annulling his release of damages from such personal injuries. *Borden* v. *Railroad Co.*, 327.

SALES.

See FRAUDULENT CONVEYANCES. BANKRUPTCY. LICENSES.

Where a contract for the sale of merchandise in bulk was modified by mutual consent and the parties undertook to comply with Public Laws, 1905, Chapter 114, but creditors attached the merchandise within five days thereafter, there could be no sale. *McGray* v. *Woodbury*, 163.

A sale of personal property by a trustee in bankruptcy, under an order to sell, issued by the court, is a judicial sale. *Carney* v. *Averill*, 172.

Caveat Emptor prevails in bankruptcy sales, unless special directions otherwise is made in the order of sale, so that a purchaser with knowledge of all of the facts cannot expect to receive a greater interest than that conveyed by the sale. *Carney* v. *Averill*, 172.

Under Chap. 15, Sect. 6 of Pub. Laws of 1907, as amended by Sect. 3, Chap. 176 of Pub. Laws of 1911, which forbids the sale of nursery stock, without a license, by agents or other parties, except growers, the act of soliciting and taking an order for nursery stock by an agent to be filled by the principal at his option is not a sale. *State* v. *Staples*, 264.

The sale by a municipal corporation of an old horse, in consideration of the purchaser's agreement to keep her during her life, give her a good home, avoid overworking her, and when her usefulness was over to put her out of the way and bury her, was valid, and in the absence of fraud, not subject to repudiation. *Rockland* v. *Anderson*, 272.

The defendant's agreement as to care and treatment to be given the horse by him was a sufficient consideration for the sale.
Rockland v. *Anderson*, 272.

SCHOOL AND SCHOOL HOUSES.

The city council of the City of Auburn is in no sense a school committee, and can perform none of the functions of that body, except by special grant of the Legislature. *Lunn* v. *Auburn*, 241.

The provisions of Section 2, Chapter 88 of Public Laws of 1909 does not enlarge the powers and duties of the city council, but does confer upon the school committee all the additional powers and duties prescribed therein. *Lunn* v. *Auburn*, 241.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS.

Search and seizure process should strictly follow the express requirements of the statute authorizing it. *State* v. *Intoxicating Liquors*, 260.

If there is no legal seizure of the liquors in question, then there can be no judgment of forfeiture. *State* v. *Intoxicating Liquors*, 260.

SENTENCE.

The sentence in a criminal case should be definite and certain and not dependent upon contingency or condition. *State* v. *Sturgis, et als.*, 96.

There is no statutory provision in this State for alternative sentences, except that contained in Sec. 5, Ch. 136, R. S., which is special and limited in its application. *State* v. *Sturgis, et als.*, 96.

After the judgment in a criminal case is rendered and the sentence pronounced, the court has no power to indefinitely postpone the execution of that sentence, or commute the punishment and release the convict therefrom in whole or in part. *State* v. *Sturgis, et als.*, 96.

The court may temporarily suspend the execution of its sentence pending review, and also in cases where cumulative sentences are imposed. *State* v. *Sturgis*, 96.

SHERIFFS AND CONSTABLES.

See FRAUD.

A debtor must prove fraud by an officer and not merely neglect, in order to recover under R. S., Ch. 86, Sec. 9, providing that an officer levying execution, who commits any fraud in the sale or return, shall forfeit to the debtor five times the sum of which he defrauds him. *Spiller* v. *Bechard*, 221.

STATUTE OF FRAUDS.

See MORTGAGE.

A contract to extend the time for redemption of a mortgage between a mortgagee and one having no legal or equitable interest in the equity of redemption is within the Statute of Frauds and unenforceable, unless in writing and supported by a valuable consideration.

Dow v. *Bradley*, 249.

STATUTE OF LIMITATIONS.

See APPEAL.

A bill in equity, under Revised Statutes, Chapter 89, Section 21, cannot be maintained by a creditor whose claim has not been presented within the time limited by statute, unless it appears that justice and equity require it, and that such creditor is not chargeable with culpable neglect.

Blunt v. *McCoombs*, 211.

The private claim of an executor is not barred by the Statute of Limitations relating to suits against executors and administrators, though not presented to the Probate Court for allowance until after the statutory limit for suits is passed. *Palmer, Appellant*, 441.

STREET RAILROADS.

See NEGLIGENCE.

A street railroad company was liable for injuries caused by its motorman's negligence in attempting to pass a team so near the track that a slight turn of the horses would throw the wagon against the car.

Fickett v. *Railway Co.*, 269.

Street railroad company held liable when the motorman ran the car against wagon close to the track, although the driver failed to look back to see if a car was coming. *Fickett* v. *Railway Co.*, 267.

TAXATION.

See ADVERSE POSSESSION.

Private and Special Laws, 1911, Chapter 227, Section 5, incorporating Bayville Village Corporation, providing for the distribution of taxes collected from the inhabitants and estates within the village is not in violation of the constitutional provision requiring that all taxes shall be apportioned and assessed equally according to the just value of the property assessed.
Inh. of Bayville Village Cor. v *Inh. of Boothbay Harbor,* 46.

Inequality of assessment of taxes is necessarily fatal, but inequality of distribution is not, provided the purposes be the public welfare.
Bayville Village Cor. v. *Inh. of Boothbay Harbor,* 46.

The method of distribution of the proceeds of such a tax rests in the wise discretion and sound judgment of the Legislature.
Bayville Village Cor. v. *Inh. of Boothbay Harbor,* 46.

An assessment for benefits for a local improvement is made under the taxing power of the Legislature by municipal officers, acting as agents of the State, and the validity of the assessment must be determined by the rules governing the validity of other assessments. *Auburn* v. *Paul,* 192.

Revised Statutes, Chap. 21, Sec. 5, providing for the assessment of benefits for the construction of a sewer, sufficiently prescribes the manner in which the assessment shall be made. *Auburn* v. *Paul,* 192.

An appeal from an assessment for benefits for the construction of a local improvement is not a constitutional right, but a privilege which can be granted by the State alone. *Auburn* v. *Paul,* 192.

The description in a tax deed must correspond substantially with that employed in the antecedent proceedings, and locate the land with such reasonable certainty as to identify it without aid of extrinsic facts.
Kelley v. *Jones,* 360.

TITLE.

See ADVERSE POSSESSION.

In the assessment of a tax which establishes the lien on land and forms the basis of all subsequent proceedings, there must be a definite and distinct description of the land upon which the tax is intended to be assessed.
Kelley v. *Jones,* 360.

TOWNS.

See HIGHWAYS.

Town held not entitled to sue water company for specific performance of agreement to convey on payment of costs of construction, with interest less net income until it lawfully voted to purchase and lawfully provided means of payment. *Strong* v. *Strong Water Co.*, 256.

Vote of a town to purchase water works and issue promissory notes for the amount necessary to provide the purchase price, which would exceed the debt limit would be unauthorized and invalid under Const. Art. 22. *Strong* v. *Strong Water Co.*, 256.

Town held to have duty of constructing way laid out by County Commissioners, which it could not evade by failing to raise the necessary money therefor. *Blaisdell* v. *York*, 500.

The selectmen of a town had no power to proceed in behalf of the town to construct a highway laid out by the County Commissioners, until authorized by the vote of a town meeting. *Blaisdell* v. *York*, 500.

In calling town meetings, the person to whom the warrant is directed must post an attested copy of the warrant in some public and conspicuous place in said town, unless the town has appointed by vote in a legal meeting, a different mode. *Blaisdell* v. *York*, 500.

The statute does not require that the return shall recite the words "public and conspicuous," but it does require that the copies shall in fact be posted in a public and conspicuous place. *Blaisdell* v. *York*, 500.

If the return recites the places of posting and those places are of such a character that as a matter of common knowledge they are public and conspicuous places, that is sufficient and it is for the court to say whether the statute has been complied with. *Blaisdell* v. *York*, 500.

TOWN TREASURER.

A town treasurer by virtue of his office has no authority to borrow money upon the credit of the town for any purpose, unless specially authorized by vote of the town. *York* v. *Steward*, 523.

TRESPASS.

See LANDLORD AND TENANT.

The jist of trespass quare clausum is injury to the possessory right, and the action will not lie, unless the plaintiff is in possession at the time of the alleged trespass. *Linn Woolen Co.* v. *Brown*, 88.

TRUSTEE PROCESS.

See APPEAL. STATUTE OF LIMITATIONS.

Corporate stock, which an executor had transferred to a trustee and which afterwards had been retransferred to the executor is subject to equitable trustee process by a creditor of the cestui que trust; the bare legal title being in the executor, and the beneficial interest in the trustee for the benefit of the cestui que trust. *Tarbox* v. *Palmer*, 436.

When an executor is summoned in a suit at law as trustee of a legatee interested in the residuum of the estate, he may, in a proper case, contend against his liability, and may employ counsel for that purpose. *Palmer, Appellant*, 441.

WAIVER.

See ESTOPPEL. EVIDENCE. LANDLORD AND TENANT. MUNICIPAL OFFICERS.

Waiver is a voluntary relinquishment of a known right, benefit or advantage which would otherwise have been enjoyed. *Holt* v. *New Eng. Tel. & Tel. Co.*, 10.

It is essentially a matter of intention which may be proved by a course of acts and conduct, or by such neglect or failure to act as to induce the belief that it was the intention and purpose to waive. *Holt* v. *New England Tel. & Tel. Co.*, 10.

Evidence in lessee's action for constructive eviction, held to show the plaintiff, by encouraging the act of which he complained, waived his right to object thereto, and was estopped to maintain. *Seiger* v. *Gerber*, 52.

A landlord, who for several months, with knowledge of a subletting, without his consent, takes no steps to re-enter, but who treats the lease with the tenant as subsisting, thereby waived the right to re-enter for the subletting made in violation of the lease. *Linn Woolen Co.* v. *Brown,* 88.

The right of privileged communication may be waived and where waived cannot be again asserted with effect upon a subsequent trial or appeal of the same case. *Whiting, Applt.,* 232.

The municipal officers cannot waive the required statutory notice provided for in Revised Statutes, Chapter 23, Section 76. *Rich* v. *Eastport,* 537.

WATER AND WATER COURSES.

The "effective height" of a mill dam is the height at which the dam in good condition will flow land, unaffected by changes in the seasons or occasional leakage in the dam.
Carr v. *Piscataquis Woolen Co., et al.,* 184.

Mill owners having a prescriptive right to maintain a dam at a certain height had a right to make necessary repairs.
Carr v. *Piscataquis Woolen Co., et al.,* 184.

WILLS.

See DEMURRER. MOTION.

Motion to dismiss a petition to be allowed to appeal from a decree admitting a will to probate based on a petition not making certain allegations is equivalent to a demurrer to the petition. *In re Carter, et als., Petr's,* 1.

Under Revised Statutes, Chapter 65, Section 30, allowing appeals from a probate decree, when not seasonably taken, a petition for leave to appeal must allege accident, mistake or defect of notice and want of fault on petitioners' part. *In re Carter, et als., Petr's.,* 1.

The petition for leave to appeal from a probate decree, because of petitioner, through accident, mistake or defect of notice, without fault on his part, having omitted to seasonably prosecute his appeal, need not state with technical precision matter of proof of such excuses.
In re Carter, et als., Pet'rs., 1.

WORDS AND PHRASES.

Any other person 302
Assessment and Distribution 244
Care and Management 241
Compensator 376
Culpable Neglect 211, 341
Dedication 360
Equality clause U. S. Const. 387
Estoppel 10
False Representations 24
Fault 306
Franchise 285
Hygiene 244
Judicial Sale 172
Neither Party 361
Police Power 374
Public and Conspicuous Place 502
Trespass Quare Clausum 88
Trustee in Bankruptcy 172

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

XIV Amendment 385
Article IV 472
Amendment of 1893, Chapter 267 453

CONSTITUTION OF MAINE.

Article V, part first, section 11 101
Article I, section 6 165
Article XXII 258
Section 19 of Declaration of Rights 384

STATUTES OF UNITED STATES.

Bankruptcy Act of 1898, section 17, sub-division 4 529
Bankruptcy Act of 1841 530
Bankruptcy Act of 1867 530
U. S. Compiled Statutes, 1901, section 905 471

STATUTES OF NEVADA.

1900, Compiled Laws, 3046, section 280 168

SPECIAL LAWS OF MAINE.

1893, chapter 625 8
1897, chapter 351 15

1903, chapter 137 192
1905, chapter 109 192
1905, chapter 50 502
1907, chapter 101 502
1911, chapter 227 47

STATUTES OF MAINE.

1821, chapter 116, section 13 197
1841, chapter 11, page 196, section 1 426
1885, chapter 378 294
1887, chapter 88 68
1887, chapter 14 169
1891, chapter 102 453
1895, chapter 157, section 5 63
1895, section 1, paragraph 1 64
1897, chapter 221 66
1897, chapter 315, section 2, 3 395
1901 389
1901, chapter 276 395
1903, chapter 160 66
1903, chapter 75 68
1905, chapter 114 165
1907, section 186 213
1907, chapter 15, section 6 265
1909, chapter 177 49
1909, chapter 260 68
1909, chapter 231 98
1909, chapter 256 161
1909, chapter 88 241
1909, chapter 34, section 3 265
1909, chapter 258 375
1911, chapter 175 161
1911, chapter 84, section 1 265
1911, chapter 176, section 3 265
1911, chapter 71 454

REVISED STATUTES OF MAINE.

1841, section 4, paragraph 3 246
1857, chapter 11, section 30 246
1871 246
1883, chapter 75, section 1 63
1883, chapter 103 64

1883, chapter 65, section 5 64
1883, chapter 103, section 10 64
1883, chapter 103, section 1 64
1883 246
1883, chapter 24, section 35 394
1883, chapter 13 section 3 395
1883, chapter 18, section 41 423
1883, chapter 6, section 78 424
1883, chapter 18, section 46 424
1883, chapter 18, section 42 424
1883, chapter 6, section 83 427
1903, chapter 65, section 30 1
1903, chapter 43, sections 7-8 ..... 14, 16
1903, chapter 75, section 10 36
1903, chapter 83, section 27 58
1903, chapter 90 63
1903, chapter 77, section 13 63
1903, chapter 79, section 9 67
1903, chapter 65, section 21 67
1903, chapter 101, sections 4, 18..... 81
1903, chapter 22, section 2 98
1903, chapter 136, section 1 98
1903, chapter 136, section 9 99
1903, chapter 136, section 5 100
1903, chapter 114, section 28 160
1903, chapter 88, section 55, subdivsion VI..... 161
1903, chapter 29, section 51 181
1903, chapter 29, section 64 182
1903, chapter 21, sections 6, 10 192
1903, chapter 84, section 50 199
1903, chapter 10, section 27 199
1903, chapter 84 section 101 199
1903, chapter 21, sections 2, 5 201
1903, chapter 6, section 70 204
1903, chapter 6, section 73 207
1903, chapter 89, section 21 211
1903, chapter 89, sections 14, 17 212
1903, chapter 86, section 9 221
1903, chapter 86, section 8 222
1903, chapter 69, section 4, paragraph 11..... 232
1903, chapter 29, section 49 262
1903, chapter 47 293
1903, chapter 55 293
1903, chapter 55, sections 16-24 294
1903, chapter 2, section 37 297
1903, chapter 40, section 2 297

1903, chapter 117, section 21 298
1903, chapter 126, section 8 303
1903, chapter 63, section 5 305
1903, chapter 4, section 62 307
1903, chapter 89, sections 9-10 337
1903, chapter 84, section 162 338
1903, chapter 140, section 13 ..... 339, 340
1903, chapter 84, section 112 345
1903, chapter 23, section 90 364
1903, chapter 9 section 8 365
1903, chapter 6, section 9 365
1903, chapter 10, section 73 365
1903, chapter 17, section 3 393
1903, chapter 69, section 6, paragraph IX..... 437
1903, chapter 66, section 65 447
1903, chapter 6, sections 70-74 450
1903, chapter 6, sections 24, 27 453
1903, chapter 66, section 14 471
1903, chapter 49, sections 36, 37, 38, 39, 40..... 493
1903 chapter 49, section 68 493
1903, chapter 23, section 1 506
1903, chapter 23, section 2 512
1903, chapter 4, section 10 514
1903 chapter 4, section 7 514
1903, chapter 23, section 39 517
1903, chapter 4, sections 80 to 85..... 526
1903, chapter 84, section 10 535
1903, chapter 23, section 76 538

ERRATUM.

Strike out the word "debtor" in the second line of head-note 2 on page 159 and insert in place thereof the word "creditor."