MAINE REPORTS

111

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JULY 7, 1913—MAY 5, 1914

WILLIAM P. THOMPSON

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1914

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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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, CHIEF JUSTICE, CORNISH, BIRD, HALEY, HANSON, PHILBROOK, A. J.

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ELVINGTON P. SPINNEY, Executor
Of Will of Charles Oscar Littlefield, In Equity,

vs.

LAURA J. EATON, et als.

York. Opinion July 7, 1913.

Adeem. Bill in Equity. Codicil. Construction. General. Legacy. Revocation. Special. Testator.

1. A specific legacy is a bequest of a specified part of the testator's estate which is so distinguished.
2. A general or demonstrative legacy is not adeemed by the sale or change of the fund.
3. A legacy is general when it is so given as not to amount to a bequest of a particular thing, or money of the testator, as distinguished from all others of the same kind.
4. A demonstrative legacy is a bequest of a certain sum of money, stock or the like, payable out of a particular fund or security, and partakes of the nature of a general legacy by bequeathing a specified amount.
5. The testator, having made a specific bequest of all notes of hand which were then payable to him and thereafterwards released one of the signers and took new notes from the other signers, secured by mortgage, the legacy was not adeemed.

In equity. On report. Bill sustained. Decree in accordance with this opinion.

This is a bill in equity by the executor of the last will and testament of Charles Oscar Littlefield, to obtain a construction of said will and codicil. The defendants severally filed answers to the bill and the usual replications were filed. At the conclusion of the hearing before the presiding Justice, the case, by agreement of the parties, was reported upon bill and answers to the Law Court for decision.

The case is stated in the opinion.

E. P. Spinney, for plaintiff.

All the defendants appear pro se.

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

HANSON, J. This is a bill in equity brought by the executor to obtain a judicial construction of the will of Charles Oscar Littlefield, who died September 29, 1911, leaving a widow, a son, and three sisters. The will is dated March 10, 1911.

At the date of the will the testator was the owner of one thousand eight hundred and thirty shares of the preferred stock of the J. L. Prescott Company, a corporation having a place of business at Passaic, New Jersey, each of the par value of one hundred dollars.

The questions submitted for determination arise under the first three paragraphs of the will and the codicil, which are as follows:

"First: I give and bequeath to my sister, Laura J. Eaton, of said Wells, wife of Joseph D. Eaton, fifty shares of my preferred stock in the J. L. Prescott Company, a corporation duly created by law and having its place of business at Passaic, New Jersey, and nothing more.

Second: I give and bequeath to my sister, Alice Littlefield Gray, of said Wells, wife of Edward Gray, fifty shares of my preferred stock in the said J. L. Prescott Company, and nothing more.

Third: I give, devise and bequeath to my sister, Julia F. Littlefield of said Wells, one hundred shares of my preferred

stock in the said J. L. Prescott Company, and also a home on my homestead farm in said Wells as long as she remains single and unmarried, and if she never marries, said home on my homestead farm to continue during her natural life."

The codicil, which was dated March 15, 1911, provides that, "whereas by my said will I gave and bequeathed to my sister, Julia F. Littlefield, in Paragraph 'Third' of my said will, one hundred shares of my preferred stock in the J. L. Prescott Co.; and whereas since the date of my said will and the date of this codicil, to wit, on the 13th day of March, I have in my lifetime transferred to my said sister, Julia F. Littlefield, one hundred shares of my preferred stock in the said J. L. Prescott Co., as witnessed by certificate of stock No. 4, dated March 13, 1911; and whereas I desire to make a bequest to my niece, Elva L. Gray, of said Wells, out of the property given my wife and son by paragraph 'Seventh' of my said will, now I do hereby make, publish and declare this my codicil to my last will and testament, to be annexed to and taken and allowed as a part thereof.

First: I do revoke the bequest, made in paragraph 'Third' of my said will of said one hundred shares of my preferred stock in said J. L. Prescott Co. to my sister, Julia F. Littlefield, for the reason above stated, but the remaining part of said paragraph 'Third' of my said will, relating to the home for my said sister, I leave and give to her as stated therein.

Second: I give and bequeath to my niece, Elva L. Gray, above named, one thousand dollars."

On July 1st, 1911, the testator exchanged his one thousand seven hundred and thirty shares of preferred stock in the J. L. Prescott Company for one hundred and seventy-three First Mortgage Bonds of the same Company, the denomination and value of each bond being one thousand dollars and bearing date July 1, 1911. On the same day Julia F. Littlefield exchanged her one hundred shares of preferred stock for ten bonds of the same issue.

Six questions are propounded to the court, three of which are upon the character of the bequests in paragraphs First and Second, relating to the fifty shares to each of the sisters named therein,

viz.: (1) Are the legacies specific? (2) General, without any attempt at a definite description? (3) Demonstrative, payable out of a specific fund primarily, or out of the general estate if the fund does not exist and no such assets belong to said estate? (4) Have the two legacies been adeemed or lost? Questions 5 and 6 ask for direction as to payment, and interest to be allowed if the legatees are entitled to payment in money under said paragraphs.

The answer determining the character of the legacies involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all the other provisions of the will. Stilphen, Aplt., 100 Maine, 146.

After bequeathing the two hundred shares of preferred stock by paragraphs 1, 2 and 3, the testator says in paragraph "Fifth"— "All the rest, residue and remainder of my shares of the preferred stock in the said J. L. Prescott Co., which have not been disposed of by this will, I give and bequeath to my beloved wife Olive M. Littlefield and my son Roland Smith Littlefield, in the following shares, amounts and proportions, to wit: one-third thereof to my said wife, and two-thirds thereof to my said son."

This paragraph was not changed by or referred to in the codicil. Paragraph "Seven" of the will reads, "All the rest, residue and remainder of my estate, real, personal, and mixed, of every name and nature, wherever found or situate, not already disposed of, I give, devise and bequeath in equal shares and amounts to my said wife and son, to them and their assigns forever."

Under the last named clause the inventory shows about $12,000 to be distributed.

What, then, was the intention of the testator? His intention must control the disposition of his property, and it is the duty of the court to construe the will so as to carry out the general purposes of the testator. *DeMerritt* v. *Young,* 72 N. H., 22.

We think the testator intended to do what the language of paragraphs 1 and 2 plainly indicates, viz.: to give to each of his married sisters fifty shares of preferred stock from the 1830 shares owned by him.

"A specific legacy is a bequest of a specified part of the testator's estate which is so distinguished. A general or demonstrative legacy is not adeemed by the sale or change of the fund; but generally a specific legacy is revoked by a sale or change of form of the thing bequeathed. Courts are averse to construing legacies to be specific, and will not unless it be clear that the testator so intended."

"A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, as distinguished from all others of the same kind."

"If made payable primarily out of a specified fund, it is called demonstrative." Smith's Appeal, 103 Penn. State Rep., 559.

A demonstrative legacy is a bequest of a certain sum of money stock or the like, payable out of a particular fund or security, and partakes of the nature of a general legacy by bequeathing a specified amount, and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made; but differs from a specific legacy in this particular, that if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate. *Crawford* v. *McCarthy*, 159 N. Y. Rep., 514, citing Willard Eq. Jur., 502, 503; 2 Bouvier Law Dict. (Rawle's Ed.), 161; and authorities there cited. Stilphen Appellant, 100 Maine, 146, supra.

In this case the bequests under consideration are in the nature of a general legacy, and the fund out of which the payment is to be made is pointed out. We think, therefore, they are demonstrative legacies.

Have the legacies been adeemed? A careful reading of the will and codicil leads to but one conclusion as to this question. The testator evidently desired to place the stock of his unmarried sister where she would have control of the same from that moment, and further desired to give his niece $1000. These purposes were stated as the reasons for making the codicil. There is no expression of desire or intent to change paragraphs 1 and 2 or in any manner to affect their force, and there is no ground for an inference of such intent. On the contrary, if the change of securities worked an ademption of the two legacies, whether so intended by

the testator or not, then his entire will would be affected, his general purpose frustrated, and the interest of the son so carefully guarded in the will would be lessened substantially. Under such construction the provision for distribution of the stock, one third to the wife and two-thirds to the son, would be changed to an equal division between them because of such ademption, a result never intended by the testator.

It is apparent that at the date of the codicil the testator had not considered the subject of exchange of stock for bonds, and the exchange taking place three months and fifteen days thereafter affords ample reason for the conclusion that such change was made because the corporation had of its own motion changed the form of its securities, and the testator in common with other stockholders assented to the change. The stock was exchanged, not sold, and the security it represented is substantially the same as at the date of the will. It has not lost its identity. It represents the same property, is of the same value substantially, and the bonds in a varied form constitute the same fund.

In *Ford* v. *Ford,* 23 N. H., 212, a testator, having made a specific bequest of all notes of hand which were then payable to him, and then holding four notes signed by two persons, afterwards, before his death, released one of the signers, and took new notes for the debt from the other signer, secured by a mortgage. *Held,* that there was no ademption of the legacy. See also *Gardner,* Executor, v. *Gardner,* 72 N. H., 257 and cases cited.

We are, therefore, of the opinion, and so advise the executor, that there has been no ademption of the legacies mentioned in paragraphs one and two, and that under the will of the testator, Laura J. Eaton and Alice Littlefield Gray are each entitled to five thousand dollars, the admitted value of the original preferred stock severally bequeathed to them, payable in bonds of the J. L. Prescott Company, together with the interest thereon after September 29, 1911.

Bill sustained.
Decree in accordance with this opinion.

CLARENCE RANDALL *vs.* THE F. W. ABBOTT COMPANY and Trustee.

Cumberland. Opinion July 7, 1913.

Assumption of Risk. Assurance and Order by Master. Contributory Negligence. Damages. Instructions. Obedience of Servant.

1. The master and servant do not stand upon equal footing. It is the duty of the servant to obey his superior, and he is not bound at his peril to set his judgment above that of the master.
2. He has a right, within reasonable limits, to rely upon the master's knowledge, skill and ability.
3. The servant has a right to rely upon the belief that the master has performed the duty of furnishing him a reasonably safe place in which to perform his work.
4. When the servant calls the master's attention to an apparent danger and is ordered by the master to do the work, and is told there is no danger, and is ordered to do the work, may be excused from the exercise of the same degree of care that would have been required of him but for the order and assurance of the master.
5. In obeying the order of the master, he would not be guilty of contributory negligence, unless the execution of the order involved a danger so apparent, or obvious, that a person of average prudence and intelligence would have refused to obey it.

On Motion by Defendant. Motion overruled. Judgment on the verdict.

This is an action on the case to recover damages for personal injuries received while in the employment of the defendant, and which injuries are alleged to have been sustained by reason of the defendant's negligence. The defendant pleaded the general issue. The jury found for the plaintiff and assessed damages for the plaintiff in the sum of $725, and the defendant filed a motion for a new trial. The case is stated in the opinion.

William Lyons, and Foster & Foster, for plaintiff.

William H. Gulliver, and Gerry L. Brooks, for defendant.

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

HALEY, J. This is an action on the case, to recover damages for personal injuries received by the plaintiff while in the employment of the defendant. The defendant, on the day of the accident and prior thereto, was engaged in the construction of a large power house and dam at Hollis in York County, and was using in the construction large quantities of cement, which was put up in bags, about twenty inches long, ten or twelve inches wide and six inches in thickness. This cement was stored in a barn containing three bays, the bays extending from the barn floor back to the side of the barn a distance of seventeen feet, and one foot below the barn floor to the ground, and from the ground up to the eaves, a distance of about seventeen feet, the three bays being thirty-six feet in length, each being about twelve feet, with a beam extending the whole width of the bays along by and about seven feet above the barn floor. The bags were piled in tiers, the ends of the bags in the back tier being against the wall or side of the barn, the next tier piled in the same way against that one and so on out to the barn floor, and up to the eaves. Before the 28th day of April, 1911, a large quantity of the bags from several of the front tiers had been removed, so that the broken tiers were somewhat lower than the beam extending along by the barn floor.

Plaintiff begun work for the defendant on Monday preceding Saturday, the 29th day of April, and had worked on a stone crusher some distance from this barn until about nine o'clock Friday morning, when the crusher broke down, and the foreman told him to go up to the barn and handle cement. The plaintiff went to the barn, found it locked, and returned to the foreman and so reported, and was told by the foreman to go back and by that time Mr. Snodgrass, who was the general superintendent and vice-president of the defendant corporation, would be there and would unlock the barn for him as he had gone after the key. Plaintiff returned to the barn and there found Mr. Snodgrass, who set the plaintiff to work loading the cement. Mr. Snodgrass got a board or plank, five or six feet long, and put one end on the beam and

the other on a cart to be loaded, and told the plaintiff to put the cement on the plank and let it slide down into the cart. After putting a few bags on the plank as told it was found that they broke open, and Mr. Snodgrass instructed the plaintiff not to use the plank any more, but to place the cement on the girt (beam) and let the teamsters take it and place it in their carts. Mr. Snodgrass remained with the plaintiff until he had partly loaded the first load. Plaintiff worked during the remainder of Friday, the 28th day of April, loading the cement into dump carts, the carts being backed in on the barn floor. On Saturday while the plaintiff was helping to load the second load into Chester Haley's cart, several of the tiers from which no bags had been taken fell forward and down a distance of ten or twelve feet on to the plaintiff, breaking six or seven of his ribs, several of his teeth, and otherwise injuring him.

The case was tried at the April term, 1912, in Cumberland County, the verdict was for the plaintiff, and the damages assessed at the sum of seven hundred and twenty five dollars, and the case is before this court upon a motion to set aside the verdict; because it is against law, and the evidence, and because the damages awarded are excessive.

The principal question of fact presented to the jury was in regard to the instructions given the plaintiff by Mr. Snodgrass, the superintendent of the defendant company. The plaintiff claimed that Mr. Snodgrass told him to take the bags right off from the tiers, just the same as others had, and that the plaintiff said to Mr. Snodgrass, "that had ought to be taken off the top, that will be coming over on to somebody by and by, I ought to have another man and take it from the top," and that Mr. Snodgrass said, "you take it just the same as I tell you, you couldn't push that cement over if the back side of the barn was torn down," and further said, "that is all piled in good shape." The defendant claimed that the plaintiff inquired of Mr. Snodgrass how to take the bags off, and was told to go ahead in his own way, and that Mr. Snodgrass gave the plaintiff no instructions or directions how to take the bags down, or how to load them, and that he gave him

no assurance of safety, or assurance of the stability of the pile of cement in the bags.

The plaintiff relied upon his own testimony as to the conversation. The defendant relied upon an affidavit, filed by counsel, of what Mr. Snodgrass would testify to, if present, and the fact that the plaintiff did not tell the defendant's attorney, who was investigating the accident, May 6th of the conversation with Mr. Snodgrass, but told him that Mr. Snodgrass told him to do it in his own way. This conversation is denied by the plaintiff, who it is admitted was confined to his bed at the time, and the testimony shows that a part of the time he was delirious. And the plaintiff further seeks to impeach the attorney's statement by the fact that the plaintiff cannot read, while the attorney says that while he was having this talk with the plaintiff, the plaintiff was in bed reading a book.

The fact that the plaintiff within a few days of the accident, while confined to his bed, and suffering, as the testimony shows, severe pain, did not state the conversation between him and Mr. Snodgrass, it not being brought to his attention, may well have been considered by the jury as entitled to but little consideration, if any. It was a question of fact, and the jury must have found that the plaintiff's version was correct, and we cannot say they were not authorized to believe the plaintiff's testimony, instead of the affidavit of what Mr. Snodgrass would testify to, if present.

The defendant claims that even if the instructions and assurance of safety were given by Mr. Snodgrass, as testified to by the plaintiff, that the verdict should be set aside and a new trial granted; because the plaintiff could, by the exercise of due care, have seen the danger, and could have avoided the accident, but that as the plaintiff continued to work after the conditions had changed materially from the time it is claimed the assurance of safety was given him, if he performed his duty as he should, he could not help knowing and appreciating the danger, and that he assumed the risk caused by the changed condition, and was guilty of contributory negligence.

"The master and servant do not stand upon equal footing; it is the duty of the servant to obey his superior, and he is not bound at his peril to set his judgment above that of the master, but has a

right within reasonable limits to rely upon the master's knowledge, skill and ability, and an order and an assurance of safety coming from the master, justify the servant having confidence that the assurance is true, and have a natural tendency to throw him off his guard, and lull him into a feeling of security." *Jensen* v. *Kyer,* 101 Maine, 106. The servant has a right to rely upon the belief that the master has performed the duty of furnishing him a reasonably safe place in which to perform his work, and when the servant calls the master's attention to an apparent danger, and is ordered by the master to do the work, and assured there is no danger, and states facts as of his own knowledge, that if true, make the place free from danger, the servant may, by the order and assurance, be excused from the exercise of the same degree of care that would have been incumbent upon him but for the order and assurance of the master, and by obeying the order of the master he would not be guilty of contributory negligence, unless the execution of the order involved a danger so apparent or obvious that a person of average prudence and intelligence would have refused to obey it. "For, if the danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order and assurance of safety, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order, or believed the assurance of safety given by the master." Labatt Master and Servant, Sec. 439; 48 L. R. A., 542 note. "If the servant is shown to have entered upon the performance of certain work, or continued to perform that work, relying upon an assurance of his master, or his master's representative, that said work would not imperil his safety, the mere fact that before he received the assurance, his apprehension as to the possibility of injury had been excited by circumstances which had come to his knowledge, will not as a matter of law render him chargeable, either with an assumption of the risk involved in the work, or with contributory negligence." Labatt Master and Servant, Secs. 450-451; *McKee* v. *Tourtelotte,* 167 Mass., 69.

The plaintiff testified that he relied upon the assurance of safety given by his superior, giving as a reason for relying upon it, the

answer, "because I thought he knew more about it than I did," and if the fact stated by the superior was true, (and the plaintiff had no knowledge of whether the statement was true or not), it was safe for the plaintiff to perform the work in the manner he was ordered to by his superior.

The plaintiff's version of the accident is only attempted to be contradicted by an affidavit prepared by defendant's attorney and signed by Chester Haley, who was a witness, and whose testimony as to the accident corroborated the plaintiff, but that affidavit was not proof of any fact stated therein; it was only admissible as tending to impeach the witness Haley, and that part of it which attempted to give the opinion of Haley as to the cause of the accident was not admissible for that purpose.

If the assurance of safety was given to the plaintiff, it was given that he would feel safe in doing the work in the place and surroundings furnished by the master, and the jury was the proper tribunal to pass upon the question of the plaintiff's due care, contributory negligence, and whether he assumed the risk of the cement falling or not, and if they believed the assurance was given him, and he relied upon it as he testified, there being nothing to contradict his statement as to the manner in which the accident happened, they would be justified in finding, that he was in the exercise of due care, free from contributory negligence, and that he did not assume the risk, and as the evidence would authorize that conclusion, we should not substitute our judgment for the judgment of the jury, and their finding upon those questions being authorized by the evidence are binding upon this court.

The evidence does not show that the plaintiff lost by his failure to work the amount of the verdict, but the pain he necessarily suffered from the injuries received, together with his loss of time, unquestionably authorized the finding of the jury upon that branch of the case.

Motion overruled.
Judgment on the verdict.

SADIE H. WHITING *vs.* HENRY WHITING.

Hancock. Opinion July 10, 1913.

Bill of Sale. Bonds. Conversion. Demand. Gratuitous Bailee. Intention. Ownership. Possession. Refusal. Title. Trover.

1. An action of trover cannot be maintained without proof that the defendant either did some positive wrongful act, with the intention to appropriate the property to himself, or to deprive the rightful owner of it.
2. The refusal to deliver the property, upon demand, must be absolute, amounting to a denial of the plaintiff's title to the possession and not a mere apology for not delivering the goods at present.
3. If the intention be based on a denial of the owner's rights or be accompanied by an intent to convert the property to the holder's own use, an action for conversion will lie.

On report. Judgment for the defendant.

This is an action of trover to recover the value of eight bonds of one thousand dollars each alleged to be the property of the plaintiff. 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 case is stated in the opinion.

Daniel E. Hurley, for plaintiff.

Peters & Knowlton, for defendant.

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

HANSON, J. Action of trover for eight bonds of the value of $1,000 each. The writ is dated January 12, 1911.

Henry Whiting, the defendant, died January 24, 1911, and his administrator, Samuel K. Whiting, comes in and defends. The case is reported for judgment upon so much of the evidence as is legally admissible. The material facts are these: In 1901, George W. Whiting and Henry Whiting, brothers, rented a box in the safe deposit vault of the Union Trust Company at Ellsworth. The

bonds which are the subject of this suit were the property of George W. Whiting, and were deposited in that box. Both had access to the box, but Henry Whiting, by some arrangement with his brother, removed the coupons from the bonds, and the amounts accruing therefrom were collected and credited to the account of George W. Whiting at the Trust Company. It appears that Henry Whiting rightfully came into possession of said bonds, and that such arrangement continued until the death of Henry Whiting, January 24, 1911. It further appears that Henry Whiting made no charge, and received no compensation for any service he may have rendered in connection with the bonds. George W. Whiting was twice married. He has one daughter living who was born of the first marriage. He married the plaintiff in September, 1910, and is now living at Ellsworth. The plaintiff claims ownership of the bonds in question under a bill of sale from George W. Whiting dated December 10, 1911, and has a conveyance of all the property of George W. Whiting.

The foregoing is substantially agreed to as the important details of the case to December 10, 1911, in relation to the ownership, location, and custody of the bonds.

On December 9th, 1911, Mr. D. E. Hurley, acting for the plaintiff, made demand by letter upon Henry Whiting, asking for delivery of the bonds to the plaintiff, or to himself as her attorney. No reply thereto was received by Mr. Hurley or the plaintiff. The plaintiff claims that about January 1st, 1911, she made formal demand upon Henry Whiting at his home in Ellsworth, in the presence of her sister Mrs. Carr, who testified in answer to the plaintiff's attorney as follows:

"Q—Will you tell the jury what the conversation was that you heard between Mrs. Whiting and Henry Whiting? A—Mrs. Whiting asked Mr. Henry Whiting to deliver her up her bonds, and he told her that he could not because Mr. Peters and Mr. Saunders had made a request for him not to do so. Q—Who is Mr. Saunders? A—Mr Hutson Saunders, the father of the wife—former wife—of George Whiting. Q—Did Henry Whiting at that time refuse to deliver the bonds to your sister? A—He did. Q—Did he tell her when he would deliver them? A—He did not."

Henry Whiting did not deliver the bonds to the plaintiff, and this suit followed. The defendant denies that Henry Whiting at any time, or in any manner, was guilty of conversion of these bonds. To prevail, it is incumbent upon the plaintiff to prove both property in herself, and conversion by the defendant; but inasmuch as neither Henry Whiting in his lifetime, nor his administrator, claimed any ownership or property in the bonds, or any interest adverse to the true owner, we will consider first the question of conversion. Has the plaintiff proved a sufficient conversion?

The plaintiff's attorney, relying upon the second demand, says that the ground of the refusal to deliver the bonds to the plaintiff is not a defense to this suit, and that the stand taken by Henry Whiting and the reasons given therefor, constitute conversion.

We are unable to view it in that light. Henry Whiting was ill at his house, and according to the testimony, in his last illness. The bonds were at the Trust Company's vault. The demand was made at his house. The answer was not in such language as courts hold to constitute conversion. On the contrary, the testimony indicates that the request came from Mr. Saunders, the father-in-law of George W. Whiting, who would naturally be interested for his grandchild, the daughter of George W. Whiting, and with no evidence before him of the legal rights of all the parties, his delaying was but natural. However that may be, it is well settled that a mere detention of another's chattels which rightfully came into one's possession is not an actionable conversion. If, however, the detention be based on a negation of the owner's rights, or be accompanied by an intent to convert the property to the holder's own use, a right of action for conversion will arise. 38 Cyc., 2028 and 2029, and cases cited.

The first demand was made on December 9th, the day before the bill of sale was executed, and was therefore premature; and being followed by a second demand in person, the first demand was waived even if not premature. But in order to lay the foundation for an action by the second demand, there must also be, not only a neglect, but a refusal. "This refusal must be absolute, amounting to a denial of the plaintiff's title to the possession, and not a mere apology for not delivering the goods at present." 2 Greenleaf on

Ev., sec. 644. An action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act, with the intention to appropriate the property to himself, or to deprive the rightful owner of it, or destroyed it." *Spooner* v. *Holmes,* 102 Mass., 506; *Hagar* v. *Randall,* 62 Maine, 439.

Henry Whiting was a gratuitous bailee of the bonds in suit. The relation had been maintained for many years. He was bound to use ordinary care in his custody of the bonds. He was responsible to his brother alone, and no limit had been placed upon the duration of the bailment, or place of delivery named. The testimony fails to show any act on his part tending to prove an intention to deprive the plaintiff, or any other person, of property in the bonds, or to appropriate them to his own use. The case shows plainly that he always regarded the bonds as the property of George W. Whiting, and not as his own. The language testified to by Mrs. Carr, and it is the only evidence in the case upon the question of conversion, clearly negatives any claim of ownership, or intention to set up any claim for himself, and explains such delay as he was making, if any delay may be inferred from the facts in the case, by the words "that he could not (deliver the bonds) because Mr. Peters and Mr. Saunders had requested him not to do so." Within twelve days thereafter this action was brought, and in another twelve days Henry Whiting died. The demand claimed was not supported by any evidence of change of ownership in the bonds. His duty was to his brother, the owner of the bonds, and no order or word came from him requiring obedience. He was entitled to such notice from his brother, or the production of satisfactory evidence from third parties of a change of ownership, and he was entitled to a reasonable time and the opportunity to determine what course to pursue, and especially to ascertain what steps to take to protect his brother and himself. *Stahl* v. *B. and M. R. R. Co.,* 71 N. H., 57; *Robinson* v. *Burleigh,* 5 N. H., 225; *Fifield* v. *Me. Cent. R. R. Co.,* 62 Maine, 77.

The event shows that the time allowed was not reasonable, and the testimony utterly fails to show a conversion. It is therefore unnecessary to consider the question of ownership.

The entry will be,

Judgment for the defendant.

STATE *vs.* JOSEPH DONDIS.

Knox. Opinion July 15, 1913.

Averments. Complaint. Demurrer. Evidence. Exceptions. Inferior Court. Jurisdiction. Prima Facie Evidence. Recorder. Revised Statutes, Chapter 29, Section 49. Search and Seizure.

1. The recorder of a municipal court is at most a magistrate of inferior and limited jurisdiction and even within limits his jurisdiction is only exceptional and occasional.

2. There is no presumption of jurisdiction of the recorder of a municipal court arising from the fact that he assumed to exercise jurisdiction.

3. Whether he has jurisdiction or not is a question of fact depending upon proof.

4. The words in chapter 114 of the Private and Special Laws of 1903 as amended by the Private and Special Laws of 1909, creating the police court of the city of Rockland, viz.: "the signature of the recorder as such shall be sufficient evidence of his right to act," instead of the Judge in accordance with the provisions of the act in criminal proceedings, created a presumption of his authority to act.

5. The recorder's signature created a presumption of his authority to act and obviated the necessity of allegation and proof at the outset.

6. The want of averment of the day when the alleged offense was committed is fatal.

7. The Law Court has no power to permit an amendment of the record sent up on a bill of exceptions. If the record was faulty, the proper place to correct it was in the court below.

On exceptions by defendant. Exceptions sustained.

This is a process of search and seizure instituted under Revised Statutes, Chapter 29, Section 49. The complaint was made to the Recorder of our Police Court for the city of Rockland, in the County of Knox, and the warrant to search was issued and signed by him. This case was carried to the Supreme Judicial Court by appeal. At the September term, 1912, of the Supreme

Judicial Court, the defendant filed a demurrer to the complaint and warrant, which was overruled by the Justice presiding, and the defendant excepted to said ruling.

The case is stated in the opinion.

Philip Howard, County Attorney, for State.

M. A. Johnson, and Edward C. Payson, for defendant.

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

SAVAGE, C. J. This case comes up on exceptions to the overruling of the defendant's demurrer. The process was a search and seizure process instituted under R. S., chap. 29, sect. 49, which chapter is the prohibitory liquor law of this State. A complaint was made "To the Recorder of our Police Court for the city of Rockland, in the County of Knox," wherein the complainant averred that he believed "that on the ..... day of .... A. D., 1912, at said Rockland in said County of Knox, intoxicating liquors were, and still are, kept and deposited by Joseph Dondis," intended by him for sale in violation of law. The complaint was sworn to before the recorder of the court, who issued a warrant for search, over his signature.

In support of the demurrer, it is contended that the process is fatally defective in two particulars: First, that there is no sufficient averment or statement in the complaint or warrant of the recorder's jurisdiction or authority to issue the warrant, and secondly, that the complaint contains no averment of the day in which the offence was committed.

In the Act creating the Rockland Police Court, Chapter 114, of the Private & Special Laws of 1903, as amended by Chapter 368 of the Private & Special Laws of 1909, it is provided that that court shall "consist of one judge, who shall be appointed, commissioned and qualified in the manner provided by the constitution of the state. . . . Also, one recorder, . . . to be appointed by the governor, by and with the consent of the council, commissioned and qualified in the manner provided by law." The court has jurisdiction over search and seizure complaints. It is made the duty of the recorder to make and keep the records of the court, and "to

perform all other duties required of similar tribunals." It is provided that the court shall be considered in constant session for the trial of criminal offenses.

The Act further provides in section 10, as amended, that whenever the judge "shall be engaged in the transaction of civil business, or be absent from the court-room, or the office shall be vacant; the recorder shall have and exercise the same powers and perform the same duties which the judge possesses and is authorized to perform in the transaction of criminal business. All processes issued by the recorder in criminal matters shall bear the seal of the court and be signed by the recorder and have the same authority as if issued and signed by the judge." And section 14, as amended, provides that "the signature of the recorder as such shall be sufficient evidence of his right to act instead of the judge in accordance with the provisions of this act or with provisions relating to trial justices not conflicting with this act."

The defendant's point is that a criminal proceeding consisting of a complaint addressed "to the recorder" and warrant issued by the recorder is unauthorized and void, unless it appears upon their face, by proper allegation or statement, either that the judge was engaged in the transaction of civil business, or was absent from the court room, or that the office of judge was vacant. Neither of these contingencies is expressly alleged in this proceeding.

Apart from any consideration of the words quoted above from section 14, it is doubtless true that there is no presumption of the recorder's jurisdiction arising from the fact that he assumed to exercise it. He is at most a magistrate of inferior and limited jurisdiction, and even within limits his jurisdiction is only exceptional and occasional. Whether he has jurisdiction or not is a question of fact depending upon proof. The facts essential to show his jurisdiction must be averred, and, if his jurisdiction is challenged, it must in proper cases be proved. Such was the conclusion of this court in *Guptil* v. *Richardson,* 62 Maine, at p. 265. In that case as in this, a complaint was made to a clerk of a municipal court who possessed only such exceptional and occasional jurisdiction as the recorder in this case had, and the warrant issued

thereon lacked any allegation showing the clerk's jurisdiction. And it was held that the warrant afforded no protection to an officer who seized liquors under it. It was unauthorized. And the case of *Guptil* v. *Richardson* must be controlling here, unless this case is saved by the words quoted from section 14, namely, that "the signature of the recorder as such shall be sufficient *evidence* of his right to act instead of the judge."

The defendant contends that these words indicate a mode of proving the authority of the recorder, but do not excuse want of averment, that the signature is *evidence* merely. But we think these words are to be given a wider meaning and effect. We do not understand that the Legislature meant to say by the phrase "sufficient evidence" that the signature would be conclusive proof of jurisdiction, because to say so would exceed legislative power. We think the Legislature meant that the signature of the recorder should be evidence, and prima facie proof, of the authority of the recorder. It created a presumption of his authority at any time and at any place and proceeding, when material.

It obviated the necessity of allegation and proof at the outset; a matter that is to be presumed need not be alleged; without any presumption of authority, it must be alleged; with the presumption, or prima facie proof which the statute declares, allegation is unnecessary. To achieve this result was we think the evident purpose of the Legislature. We hold therefore that this point of demurrer is not well taken.

The second point in demurrer, namely, the want of averment of the day when the alleged offense was committed, is well taken. The defect is fatal. *State* v. *Beaton,* 79 Maine, 314. The State concedes that this is true upon the record sent up to the Law Court, but claims that the original complaint was perfect in this respect, the omission being only in the copy sent up by the Police Court to the Supreme Judicial Court with the appeal. And the State produces before the Law Court what purports to be a true copy of the original complaint pending in the Police Court, certified by the recorder of that court, showing that in the original complaint there was an allegation of the day on which the supposed offense was committed, and asks to have it considered as a part of the record

before us. In other words, the State virtually asks the Law Court to permit an amendment of the record sent up on this bill of exceptions. The Law Court has no power to do this. It is a court of limited jurisdiction. Stenographer Cases, 100 Maine, 271.

The presiding Justice below ruled upon the record as he found it, and exceptions were taken to his ruling. We cannot go outside that record. If the copy of the complaint sent up by the Police Court was faulty, the error could have been cured there by substituting a correct copy. That was not done. It is too late to attempt it here. We can only overrule or sustain the exceptions. It is simply a question of law now. For want to averment of a day when the alleged offense was committed, as appears by the only record properly before us, the entry must be,

Exceptions sustained.

ALVARADO GRAY, Executor *vs.* ETTA F. GRAY.

Hancock. Opinion July 17, 1913.

Conversion. Delivery. Evidence. Gifts. Inter Vivos. Possession. Trover. Will.

1. The law requires gifts inter vivos to be completed by actual delivery to the donee or to some person for him, unless the property which is the subject of the gift is at the time in the possession of the donee.

2. If the property which is the subject of the gift is in the possession of donee, the evidence to establish the gift must be clear and satisfactory that the donor had relinquished all control of and claim to the property which is the subject of the gift.

3. The delivery may be proved by circumstances, but the circumstances proved must clearly and satisfactorily show delivery.

4. When the gift is claimed between husband and wife, the possession by the alleged donee is presumed to be the possession of the donor.

On report. Judgment for the plaintiff. Damages $1,050, with interest from date of the writ.

This is an action of trover by the executor of the last will and testament of Lewis F. Gray and against Etta F. Gray, testator's widow, to recover damages for the alleged conversion of a bond for one thousand dollars of the Lewiston, Augusta and Waterville Street Railway Company, and alleged to be of the value of one thousand dollars, gold coin of the value of one hundred and fifty dollars, and bank bills, gold and silver certificates of the value of sixty-five dollars. The defendant claimed that all of the above enumerated property was given and delivered to her by her husband, Lewis F. Gray. The defendant pleaded the general issue. At the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court with the stipulation that if, upon the evidence a verdict for the defendant, or verdict for the plaintiff based upon conversion of currency only, could be sustained, the case shall be remanded for trial; otherwise, judgment shall be rendered for the plaintiff for such sum as the Law Court shall determine.

The case is stated in the opinion.

Deasy & Lynam, for plaintiff.

Peters & Knowlton, for defendant.

SITTING: SAVAGE, C. J., CORNISH, BIRD, HALEY, PHILBROOK, JJ.

HALEY, J. This is an action of trover by Alvarado Gray, executor of the will of Lewis F. Gray, against Etta F. Gray, the widow of said Lewis, to recover the value of a one thousand dollar bond, of the Lewiston, Augusta & Waterville Street Railway Co., gold coin of the value of one hundred and fifty dollars, and bank bills and gold and silver certificates of the value of sixty-five dollars.

At the conclusion of the testimony the case was taken from the jury and reported to this court upon the following stipulation:

"That if upon the evidence a verdict for defendant, or a verdict for the plaintiff based upon conversion of currency only, could be sustained, the case to be remanded to trial; otherwise judgment to be rendered for the plaintiff for such sum as the court shall determine."

It is admitted that, at the date of the writ, the defendant was not liable in trover for the gold coin, and that she had used the sixty-five dollars in bank bills and gold and silver certificates above mentioned.

Lewis F. Gray died July 25, 1911, testate. The plaintiff was appointed executor of his will, which was proved and allowed September 5, 1911. The will was dated May 1, 1911, the first item of which was, "I give and bequeath to my wife Etta F. Gray all my bank books and their contents." In three other items of the will, he gave and bequeathed to his two children by his former wife, the rest of his small estate. In August, 1910, Lewis F. Gray purchased the bond in question through Robert B. Holmes. September 28, 1911, the defendant left the bond mentioned in the writ with her attorney, to deposit in a safety deposit box for safe keeping. Her attorney wrote the plaintiff a letter September 29th denying the plaintiff's right to the bond, and at the trial the defendant claimed that the bond was her property.

By the stipulation in the report, this court is only called upon to determine whether or not a verdict for the defendant upon the testimony introduced for the value of the bond can be sustained.

In passing upon that question we must look at the case as if a verdict for the defendant had been returned, as the jury might have believed all the testimony that tended to sustain the defendant's position, that the bond had been given to her by her husband in his lifetime, and might have rejected as unreliable all the testimony that tended to support the plaintiff's contention, that there had not been a completed gift.

The testimony tending to sustain the position of the defendant is, in substance: In August, 1910, Lewis F. Gray purchased the bond in dispute, and when he purchased it, inquired if the bond could be made out in his wife's (defendant's) name. He was told that it could not, that it was a coupon bond and negotiable. He said he wanted his wife to have the bond and was told, "All you have got to do, is to give it to her the same as you would anything else that you wanted her to have." May 1, 1911, he made his will, by the terms of which he gave his bank books to his wife, and his will did not mention the bond. The last of June or first of July,

1911, the bond was in his possession, in a tin box with his bank books and other valuable papers. A witness testified that Mr. Gray told him the 6th of July, 1911, that he wanted him to see his will, that he called for the box, opened it, and took out all the papers, and said to the witness, Merrill Howard, "I am worth $10,000, I have given my wife $3,000 in *money*," that he passed the will and papers to the witness who looked them over, and after examining the bank books said, "Did I understand you to say that you had given your wife $3,000 in *money;*" and he said, "Yes," to which the witness replied, "I only see about $2,100 here mentioned in the bank books," and Mr. Gray then replied, "the other I have made all right with her, I have fixed the other all right with her."

The proved facts, considered in their most favorable view for the defendant, show, that when Mr. Gray purchased the bond, he intended to give it to his wife, that he afterwards made a will and did not give it to her by will, but gave her by will his bank books, and retained possession of the bond. The last of June or first of July, two months after the will was executed, the bond was in his possession, and he died in about three weeks after it was seen in his possession, and the witness Merrill testified he did not see the bond among Mr. Gray's papers July 6th. Two months after his death, the bond is proved to have been in the possession of the defendant, there being no evidence of when or how she obtained it, or how long it had been in her possession, except as it may be inferred from the testimony of Mr. Merrill.

The defendant contends that, from the above facts and circumstances, the jury would be authorized to find that the bond had been given to her, and the gift completed by actual delivery in the lifetime of her husband.

The law requires gifts inter vivos to be completed by actual delivery to the donee, or to some person for him, unless the property which is the subject of the gift is at the time in the possession of the donee, in which case the evidence must be clear and satisfactory that the donor had relinquished all control of and claim to the subject of the gift, and when the gift is claimed, as in this case, between husband and wife, the possession by the alleged donee is

presumed to be the possession of the alleged donor, unless the contrary is clearly proved. The evidence to justify a jury in finding a delivery that makes a complete gift inter vivos, first advanced after the death of the alleged donor, must be clear, satisfactory and convincing. The delivery may be proved by circumstances, but the circumstances proved must clearly and satisfactorily show a delivery. *Lane* v. *Lane,* 76 Maine, 524; *Savings Institution* v. *Titcomb,* 96 Maine, 63; *Drew* v. *Hagerty,* 81 Maine, 233; *Hanson* v. *Millett,* 55 Maine, 184; *Marshall* v. *Jaqueth,* 134 Mass., 140.

The only evidence in this case claimed to have a tendency to prove a delivery is, the alleged statement testified to by Mr. Merrill, that the alleged donor said he had given his wife $3,000 in money, and it is urged that, because he had by his will given her from $2,100 to $2,200 in money, and stated that he had fixed the other all right with her, he meant he had given her the bond in dispute. The fair inference from the language would be that he had fixed the other with her by giving her money, but not by his will; that inference is as reasonable as it is to infer that he meant he had given her the bond. He may have meant he had given her the bond, and he may have meant he had given her other property; he said he had given her money, therefore it is not a declaration that clearly and satisfactorily proves a delivery.

In *Hahn* v. *Dean,* 108 Maine, page 556, it is stated, "To constitute a valid gift inter vivos delivery is essential. No intention, however clear, nor declaration, however strong, can take its place."

The evidence in the case it not sufficient to authorize a jury to find a completed gift of the bond in the lifetime of Mr. Gray to the defendant, and the judgment should be for the plaintiff for the value of the bond $985.00 and $65.00 the amount of the bills converted, with interest from the date of the writ.

Judgment for plaintiff, damages $1,050.00, with interest from the date of the writ.

KING, J. I do not concur in the conclusion reached by the majority of the court. There is no doubt as to the principles of law applicable to the question involved. Delivery must be proved in

order to constitute a gift inter vivos, but the fact of delivery may be proved by circumstances. After a painstaking examination of the record in this case, it seems to me that a jury would have been justified, from all the facts and circumstances disclosed in the evidence, in finding that the bond in question became the property of Mrs. Gray before her husband's death by a gift to her from him completed by delivery.

MR. JUSTICE SPEAR and MR. JUSTICE HANSON concur in this view.

LEROY H. KENNEY *vs.* EVA S. PITT.

York. Opinion July 17, 1913.

Assumpsit. Contract. Evidence. Extra Work. Materials. Motion. Recoupment. Workmanlike.

1. When a party makes a contract to do work for a price certain, he cannot come into court and successfully defend his non-performance by saying that the contract price is inadequate. Having agreed to do the work in a certain manner and for a certain price he is bound to do it according to his contract.

On motion by defendant. Motion sustained. New trial granted.

This is an action of assumpsit on an account annexed to recover a balance of $70 claimed to be due plaintiff on a contract for repairing and building an addition to buildings in the town of Wells and also $458.39 claimed to be for extra work and materials in repairing and building said addition, amounting in all to $528.39. The defendant pleaded the general issue and filed a brief statement in which she claims to recoup for damages sustained by reason of the plaintiff's failure to perform said work according to his contract. The jury rendered a verdict for the plaintiff for

$453.00, and the defendant filed a motion for a new trial. The case is stated in the opinion.

Allen & Willard, for plaintiff.

E. P. Spinney, for defendant.

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

HALEY, J. This is an action of assumpsit, brought on an account annexed to recover a balance of $70 alleged to be due as the balance on a contract for repairing and building an addition to buildings in the town of Wells, and forty-one items claimed to be for extra work and material in repairing the building and building the addition, in all amounting to $528.39. The verdict was for the plaintiff for $453, and the case is before this court on a motion to set aside the verdict as against law and evidence.

The defendant pleaded the general issue, and recoupment by brief statement.

The defendant claimed at the trial that the plaintiff did not do the work, or furnish the material, according to the contract, that many of the items in the account annexed were for work called for by the contract, and that the plaintiff had been paid more than was due him by the terms of the contract, and for the extra work done and material furnished.

May 14, 1909, the plaintiff entered into a contract with the defendant to build an addition and make repairs to a set of buildings situated in Wells, with specifications attached to the contract. The price named in the contract was $2,060. Another item was afterwards added, making the contract price $2,070, and the plaintiff agreed that the labor and material as per plans was to "give a finished job," was "to be done in a thorough workmanlike manner," and that the work was "to be done in good faith and workmanlike manner."

The testimony clearly shows that the plaintiff's labor and material did not give a "finished job," that the work was not done "in a thorough workmanlike manner," or "in good faith." The floors were to be of good southern hard pine. It was clearly proved that the floors, when walked upon, buckled for want of sup-

port, so that the grooves broke, and the plaintiff's explanation of that, was, as the floor was built of short pieces that, if it did break, it could not break very bad. The plaintiff admitted (after it was proved) that in a room that was nine feet long some of the hard pine flooring was made up of pieces of flooring boards five feet long instead of nine feet in length, as they should have been, and that such work was not good workmanship. The contract called for a "good quality of southern hard pine, matched," for the top flooring. The plaintiff admitted that he used for that purpose a quality of southern hard pine known as sea rift flooring, and the testimony is that such pine is one of the poorest grades of southern hard pine, and that it is not suitable for house floors. In the dado in the dining room, in the space of three widths of the sheathing, there were fifteen knot holes and twelve pitch holes. The skylight in the sun parlor had no bedding for the glass, and in that room the gable end window was nailed together instead of being mortised and tenanted. Some of the glass in the roof of the sun parlor and gable window was not even puttied, but was held in place by brads. The finish was rough, and it was testified that it was all streaked up and torn out as if a rough plane had been used upon some of it. The joints were bad, some of the base boards were flush with the plastering, while other parts of the same board would be three-quarters of an inch from the plastering. Southern pine floors were laid in pieces, some of the pieces as short as eight inches, in the center of the room; the floors were not smoothed after being laid, and the finish and doors were full of knots, one knot in the stile of the door being four inches long and the width of the stile lacking one-quarter of an inch; the floors were marked with hammer blows; the roof leaked; in the kitchen the floor was laid so that one could look through into the cellar, where there were supposed to have been double floors with paper between; the contract called for the finish to match the finish in the part of the house not repaired, and it did not. The plaintiff claimed that the leaks came from the gutter of the old house, but it was shown that the water came in the new part built by the plaintiff.

If the jury believed the improbable story of the plaintiff, that the defendant, having a contract with the plaintiff to shingle with

No. 2 clear cedar shingles, waived that contract and gave consent that the plaintiff might take old pine shingles that came from a shingled wall and use them instead of new cedar shingles, even then, the plaintiff should have laid them in a workmanlike manner, and the evidence proves that they were nailed so close together that when it rained they swelled and broke and blew off the roof, which was not the way shingles do when laid in a workmanlike manner.

To the defendant's plea of recoupment the plaintiff claimed nothing should be allowed, and it was sought by the examination of the witnesses to prove that the job could not have been done for the contract price, and the same position is taken in the written argument filed in the case. A party who makes a contract to do work for a price certain, cannot come into court and successfully defend his non performance by saying that the contract price is inadequate. Having agreed to do the work in a certain manner for a certain price, he is bound to do it according to his contract.

The evidence clearly and satisfactorily shows that the plaintiff did not perform his part of the contract. The witnesses who made an examination of the premises described the defects that existed in workmanship and material, and their testimony is attempted to be explained away, not by a denial of the defects and deficiencies, which they enumerated in detail, but by the broad statement of the plaintiff that the material was suitable and the workmanship good, and that the defendant agreed to some of the work now complained of.

The testimony shows that the difference in the value of the property, if the contract had been performed by the plaintiff, and its value as the work was left by him, is from $500 to $700; but what sum the jury should have allowed it is unnecessary for us to discuss, as an examination of other parts of the case shows that, with much less than a reasonable deduction for the poor material and unworkmanlike manner in which the work was performed, the verdict should be set aside.

In the account annexed there is a charge of $116.87 for labor and skimming, and one for $40 for lime and plaster of paris. The contract called for the plastering to be smoothed to a good surface. The testimony shows that the defendant, by her husband, talked with the mason when he was plastering the rooms and protested

against the work, that he then protested to the plaintiff and stated that he would not accept the work unless performed according to the contract, that it should be smoothed to a smooth surface. Although the parties do not agree as to what else was said, there is no testimony that the plaintiff was authorized to skim-coat the rooms and charge the defendant for it as an extra, and the two items, amounting to $156.87, was charged for that work. It was the duty of the plaintiff to plaster the rooms so there would be a smooth surface. With that the defendant was bound to be satisfied, and if the plaintiff could not perform his contract by putting on one coat it was not the defendant's fault, and as the defendant never authorized, or promised to pay for that labor and material, the two items amounting to $156.87 should not have been allowed by the jury.

The plaintiff charged in the account for extras for 600 bricks at $18 per thousand that were used in building a chimney in the office built by the plaintiff. The defendant claims there was to be no charge for the chimney, that it was to take the place of other work, by agreement with the plaintiff. There was no evidence that the bricks were worth $18 per thousand, and it is a matter of common knowledge that such bricks as would be used in building a chimney in this house, where the plaintiff built one chimney of old bricks, were not worth more than $10 per thousand. The charge is for 600 bricks. According to the testimony, the bricks in the chimney were counted, and but 443 were used. The plaintiff charged $12 for labor in building the chimney, and the testimony of the man who built it shows that it was built in one day, and that the labor did not exceed $5.98. He charged $1.25 for hauling one bag of cement for the chimney, and $3 for hauling the bricks. The charge for the trucking may be all right, although some men would have hauled both at the same time and for less money than is charged; but there is no excuse for the excessive overcharge for bricks and labor, and there should have been deducted at least $12 from those items.

The charge of $10 for sills should have been disallowed. There was no promise to pay for them, and they were within the terms of the contract. The plaintiff also charged as an extra $15 for the

difference between the cost of plastering the office as he did and sheathing it as called for by the contract. The defendant denied that there was any agreement to pay extra for the plastering, and the disinterested carpenters, who testified in the case, stated that it was cheaper to plaster the room than it would have been to have sheathed it. If so, this item should have been disallowed. The plaintiff furnished 18 doors for the new ell, and furnished a very inferior quality of pine. The defendant objected for the reason that they were not according to the contract and were not suitable for the work. Thereupon the plaintiff substituted cypress doors of the same style (the cypress doors are spoken of in the case and in the account annexed as spruce; counsel state in their brief that this is a mistake and that it should have read cypress), and charged the defendant $18 extra for the doors. In other words, the plaintiff did not perform his contract as to furnishing doors, but attempted to palm off upon the defendant inferior doors, and when the defendant asked him to perform his contract, he furnished doors of another kind which might possibly be said to comply with his contract and charged the defendant $18 extra for performing that part of his contract.

It is useless to discuss all of the items in the account annexed. Some of them are admitted to be for extras, which the defendant ordered and which she is willing to pay for, but many of them were like the above items, part of the work and material that the plaintiff was bound by his contract to furnish and perform. It would seem, from an examination of the testimony, that the plaintiff increased the price for which he had agreed to furnish materials and do the work by doing inferior work and furnishing inferior materials, and when objection was made, attempting to make the work or furnish the materials almost as good as he had contracted to furnish, and then charge extra therefor. When the plaintiff first presented his bill for extra work and materials furnished, he claimed no balance due upon the contract. He next presented a balance due of $270 and sued for that amount.

The contract was for $2,070. The defendant introduced receipts, signed by the plaintiff, showing that she had paid the plaintiff $2,050, and upon his cross examination the plaintiff admitted that

they represented the amount paid. He was recalled in rebuttal, after the adjournment over night, and then attempted to say that three of the $100 receipts were reckoned into the amount of another receipt. His testimony upon cross examination, when he had every opportunity of explaining, and stated positively that they were not included in the other receipts, together with the positive testimony on the defendant's side, with the receipts and their dates, shows conclusively that the $2,250 was in fact paid the plaintiff, and that he was overpaid upon the contract the sum of $180, and the only conclusion that the jury were authorized to reach from the testimony was that the plaintiff had been overpaid that amount on the contract, which sum should be credited on the extra work and materials.

Deducting from the account annexed the items that were charged for as extras that were not extras, to which attention has been called, the overpayment upon the contract practically, if not entirely, wipes out all proper charges against the defendant, and the evidence shows conclusively that the premises, in the condition in which they were left by the plaintiff, were worth several hundred dollars less than they would have been if the plaintiff had performed the contract, and the defendant is entitled to recoup in this action for those damages which, with the overpayment, necessarily wipes out any claim that the plaintiff may have against the defendant growing out of the contract, or for extra work and materials.

Motion sustained.

New trial granted.

JOHN A. NORRIS, Petr. *vs.* MORRILL MCKENNEY et als., Co. Commrs.

Sagadahoc. Opinion July 30, 1913.

Amendment. Compensation. Deputy Sheriff. Errors. Fees. Inferior Courts. Public Laws of 1907, Chapter 138. Remuneration. Revised Statutes, Chapter 79, Section 3. Revised Statutes, Chapter 29, Section 69. Services.

Public Laws of 1907, chapter 138, did not amend R. S., chapter 29, section 69, so as to increase the per diem compensation of deputy sheriffs engaged in the enforcement of the statutes prohibiting the illegal manufacture and sale of intoxicating liquors. The per diem compensation mentioned in said section 69 is to be regarded as a fee and remains fixed at two dollars.

On report. Petition dismissed.

This is a petition brought under Revised Statutes, Chapter 79, section 3, by John A. Norris, a deputy sheriff of Sagadahoc County, against Morrill McKenney, C. M. Mason and A. B. Thwing as County Commissioners of said County, to compel said County Commissioners to correct an error in disallowing a part of petitioner's claim for services rendered by him under the provisions of Revised Statutes, Chapter 29, Section 69. The petitioner claimed a per diem compensation of three dollars per day and the County Commissioners allowed him two dollars per day for said services. The respondents filed a joint answer to said petition. By agreement of the parties, the case was reported to the Law Court, upon the petition, answer and agreed statement of facts, the Law Court to order such final decree to be made therein as the legal and equitable rights of the parties require. The case is stated in the opinion.

Frank L. Staples, for petitioner.

Edward W. Bridgham, and George E. Hughes, for respondents.

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

PHILBROOK, J. This is a petition brought to this court under the provisions of R. S., chap. 79, sec. 3, which confers upon the Supreme Judicial Court the power of general supervision of all inferior courts for the prevention and correction of errors and abuses when the law does not expressly provide a remedy. The case is reported on an agreed statement of facts. The petitioner is a deputy sheriff of Sagadahoc county, and the defendants are the County Commissioners of the same county. The question at issue is, are deputy sheriffs entitled to a per diem compensation of two dollars only, for services rendered by them under the provisions of R. S., chap. 29, sec. 69, or do the provisions of P. L., 1907, chap. 138, entitle them to a per diem compensation of three dollars?

That portion of R. S., chap. 29, sec. 69, which is here under discussion reads as follows: "For services under this section, sheriffs, and their deputies acting under their directions, shall receive the same per diem compensation, as for attendance on the Supreme Judicial Court, the same fees for travel as for the service of warrants in criminal cases, together with such necessary incidental expenses as are just and proper." The services referred to are those rendered in the enforcement of the statute prohibiting the illegal manufacture and sale of intoxicating liquors. The act of 1907 under discussion reads as follows; quoting the title of the act as well as the act itself: "An Act to provide for the remuneration of Deputy Sheriffs. Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows: Section 1. The remuneration of deputy sheriffs while in attendance upon Supreme Judicial Courts in the several counties, and in attendance on any court where jury trials may be held, shall receive for said attendance three dollars per day for such attendance. The fees provided by section sixty-nine of chapter twenty-nine of the revised statutes shall remain as heretofore established." The language of the first sentence, of the act last quoted, is ungrammatical, but the idea contained in that sentence is easily ascertained. The language of the second sentence of the act will be referred to later.

The petitioner claims per diem compensation of three dollars for services rendered under the provisions of R. S., chap. 29, sec. 69, while the defendants claim that such per diem compensation should be two dollars. Prior to 1907 the compensation to be paid deputy sheriffs, when ordered to attend the Supreme Judicial Court, or either of the Superior Courts, was fixed at two dollars per day, by R. S., chap. 117, sec. 5. The petitioner argues, first, that the compensation to be paid to sheriffs, and to their deputies acting under their direction, for services rendered under the provisions of R. S., chap. 29, sec. 69, was fixed, prior to 1907, as the same in amount as that to be paid to deputy sheriffs for attendance on the Supreme Judicial Court; and, second, that the Legislature in 1907, increased the compensation of deputy sheriffs for attendance upon the Supreme Judicial Court from two dollars per day to three dollars per day, thus drawing the conclusion that these two provisions necessarily increased the compensation due this petitioner for services rendered under the provisions of R. S., chap. 29, sec. 69. Both the major and minor premises of the syllogism must be sound if the conclusion is to be proved. In our opinion, the minor premise is not sound, hence the conclusion must fail.

The act of 1907 is not declared by the Legislature, in express terms, to be an amendment of any existing statute, but under the most elementary rules of law governing the construction of statutes it must be conceded that the act of 1907 did amend R. S., chap. 117, sec. 5, so far as that section applied to the remuneration of deputy sheriffs when ordered to attend certain courts. Did that act of 1907 also amend R. S., chap. 29, sec. 69? We think not. In support of this view attention is called to the second sentence in the act of 1907, which reads as follows: "The fees provided by section sixty-nine of chapter twenty-nine of the revised statutes shall remain as heretofore established." Herein lies the unsoundness of the minor premise of the petitioner. But he seeks to avert the force of this sentence by arguing that the fees referred to are only fees "for travel as for the services of warrants in criminal cases, together with such necessary incidental expenses as are just and proper," quoting from said section sixty-nine, also that the per diem renumeration is apart from the fees, and the restriction

upon change of fees does not therefore apply to the per diem remuneration. He also claims that the Legislature has clearly distinguished between "fees" and "compensation." He claims also that this court has so distinguished in *Sterling* v. *Cumberland County,* 91 Maine, 316. We cannot approve these latter claims. That the Legislature has not clearly distinguished between "fees" and "compensation" is shown in the same section sixty-nine which is now under consideration, where this language is used: "But said commissioners shall not allow any per diem compensation to said sheriffs or their deputies for any day for which said sheriffs or their deputies are entitled to fees or compensation for attendance at or services in any court." Here the use of the expression, "fees or compensation for attendance at or service in any court," shows that the Legislature not only did not distinguish between the words "fees" and "compensation" but used them as synonomous words. In R. S., chap. 117, the Legislature provides a long schedule of fees, and among them states what shall be paid a deputy sheriff for attending court, thus adopting the word "fees" for a per diem attendance. In the same chapter, the per diem compensation for grand and traverse jurors is fixed under the head of "fees," which indeed is the prevailing head of the whole chapter. Many other examples may be found in various legislative acts. Referring to the claim made by the petitioner that this court has distinguished between fees and compensation in *Sterling* v. *Cumberland County,* supra, we think the opposite is true. In that case, Mr. Justice Haskell, in construing this same section 69 of chap. 29, says: "Nothing can be plainer than that for all services under this statute the compensation fixed by it shall be in full satisfaction thereof. Now what does the statute require? 1. Diligent inquiry into all violations of law; 2. The institution of proceedings against offenders by complaint to magistrates and the execution of process granted by them; 3. Promptly informing county attorneys who offenders are, and giving them the names of witnesses. For doing this, what shall be the compensation? Two dollars a day and six cents a mile for travel, and also incidental expenses that are just and proper, and the county commissioners are made the arbiters to determine the whole matter, and order payment from the treas-

ury. These are all the fees allowable for such services. The legislature considered them adequate, and when they are not, can provide compensation that is." It seems plain that when Mr. Justice Haskell said, "These are all the fees allowable for such services," he clearly referred to all three of the elements of compensation mentioned in his previous sentence, viz.: "Two dollars a day and six cents a mile for travel, and also incidental expenses that are just and proper."

We conclude, therefore, that when the Legislature of 1907 enacted chapter one hundred thirty-eight, providing for the fees or compensation of deputy sheriffs, when attending court, and expressly declared that the fees provided by section sixty-nine of chapter twenty-nine of the revised statutes shall remain as heretofore established, it intended to regard the per diem compensation of officers under the latter section as a fee, and hence the same remains as heretofore established, namely, two dollars a day.

Petition dismissed.

PATRICK F. TREMBLAY, Pet'r *vs.* GEORGE A. MURPHY, Applt.

JOHN LACROIX and W. S. KEENE

vs.

GEORGE Z. BERNIER and GEORGE A. WELCH.

Androscoggin. Opinion August 6, 1913.

Appeal. Bill in Equity. Claimant. Election. Joint Convention. Jurisdiction. Municipal Officers. Officers. Public Election. Revised Statutes, 1903, Chapter 6, Section 70. Revised Statutes, 1841, Chapter 1, Section 3. Revised Statutes, Chapter 4, Section 55.

1. Under chapter 6, section 70, of the Revised Statutes the court had jurisdiction in the cases, and that any municipal office is included, whether to be filled by election, by the people, or by a city council, or separate boards thereof.
2. This municipal board, acting under the city charter, is constituted a court for the time being, and sitting as a judge upon the election of its own members, its functions are clearly judicial.
3. In the absence of statutory provisions establishing a safe and reasonable mode of procedure in such cases, required to be observed by municipal boards, when sitting as judges, the rule of the common law must govern.
4. Municipal boards, when sitting in such cases, should give to all parties interested reasonable notice and an opportunity to be heard.
5. As an aid in ascertaining the legislative intent, the court may look at the object in view, the remedy to be afforded, and the mischief to be remedied.
6. In construing a statute, the intention of the Legislature must govern and the language of the statute itself is the vehicle best calculated to express that intention, and such intention cannot be ascertained by adding to or detracting from the meaning conveyed by the plain language used.

On appeal by Patrick F. Tremblay, Pet'r., against George A. Murphy, and by John LaCroix and W. S. Keene, Pet'rs., against George Z. Bernier and George A. Welch. Appeal sustained without costs.

This is a proceeding under Sections 70 to 73 inclusive of Chapter 6 of the Revised Statutes by Patrick F. Tremblay, petitioner,

against George A. Murphy for the office of collector of taxes for the city of Lewiston, and by John LaCroix and W. S. Keene against George Z. Bernier and George A. Welch for the office of assessors of taxes for said city of Lewiston. These cases, with several others involving the rights to various municipal offices in said Lewiston, were heard by SITTING JUSTICE SAVAGE, and by a decree of said Justice, Patrick F. Tremblay was declared duly elected to the office of tax collector and John LaCroix and W. S. Keene were declared duly elected to the office of assessors of the city of Lewiston. From this decision, an appeal was taken by George A. Murphy, George Z. Bernier and George A. Welch respectively. The case is stated in the opinion.

McGillicuddy & Morey, for Murphy, Bernier and Welch.

White & Carter, and Newell & Skelton, for Lacroix, Keene and Tremblay.

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

MR. JUSTICE HALEY concurred in the result.

SPEAR, J. Chief Justice Savage heard all these cases and rendered a decision in favor of the petitioners, from which George A. Murphy, claimant to the office of Collector of Taxes, and George Z. Bernier and George A. Welch, claimants for the office of Assessors, appealed. We adopt in full, with a single exception, the following finding of facts by CHIEF JUSTICE SAVAGE as the basis upon which the opinion of the court will proceed. The exception relates to the clerical error in stating that the original statute applied to the Judge of Probate, when an inspection shows that it applied to all county officers including the Judge of Probate.

THE FINDING.

These cases are petitions brought under Revised Statutes, Chapter 6, Section 70 by persons claiming to have been elected to certain municipal offices in the city of Lewiston, and were all heard together.

The first question presented is whether the court has jurisdiction to determine the election of these persons. They claim to have

been elected by joint convention of the boards of mayor and aldermen and common council in the city of Lewiston to the offices of city physician, city solicitor, city auditor, member of board of water commissioners, fire commissioner, collector of taxes and assessors of taxes.

Section 70 as originally enacted in 1880 provided that persons claiming to have been elected to the office of Judge of Probate or county attorney might maintain such a petition. By an amendment adopted in 1893, the section was so amended as to read: "Any person claiming to be elected to any county or municipal office or to the office of county attorney may maintain this proceeding as in equity." It is contended that inasmuch as the election referred to in the original act necessarily related only to elections by the people, that under the amendment of 1893 the section should have the same restricted meaning, and that only such municipal officers as may be elected by popular vote can maintain this petition. But the statute is very broad as it now stands and says that any person claiming to be elected to "any municipal office" may maintain a petition. And although the question is not free from doubt I think the statute intended to give to claimants of all municipal offices the same right to a speedy determination of a disputed election as claimants of other offices have and not leave them to the remedy of quo warranto, which ordinarily could not be effective until the terms of office have expired or nearly so, and therefore I hold that these petitions are properly brought and that the court has jurisdiction.

After the municipal election in March, 1913, certain persons claiming to have been elected to the common council of Lewiston brought petitions before a Justice of the Supreme Judicial Court to determine their right to the office of common councilman. Their opponents had been declared by the ward officers to have been elected. A hearing was had and on the 14th day of March decision was rendered to the effect that the petitioners, Messrs. Kernan and Coombs had been elected, and that the defendants, Messrs. Sullivan and Hebert had not been elected, and the same day the defendants had notice entered on the docket of an intention to appeal, but

this I regard as of no consequence inasmuch as the statute does not require such notice.

CITY COUNCIL ORGANIZES.

On Monday, March 17, the city government organized. The common council elected a president and clerk and adopted rules of procedure. Thereupon the common council, by resolution reciting the proceedings before the Justice of the Supreme Judicial Court and his decision, unseated Sullivan and Hebert who held certificates of election, and seated Kernan and Coombs. On March 24 the defendants of that proceeding filed a formal appeal from the decision of the Justice, which was served on the first or second day of April following.

On April 4th there was a meeting of the city government. By direction of the mayor, police officers were stationed at all the doors leading to the common council chamber which had not been locked, and all persons except certain ones whose names had been given to the officers were excluded. Sullivan and Hebert were admitted to the common council chamber; Kernan and Coombs were excluded. The door to the council chamber was left open, officers guarding it. There were also two windows opening from the chamber into the corridor which were open or partially so. The board of mayor and aldermen passed an order for a joint convention for the election of city officers and sent it down to the common council for concurrence.

The common council voted not to concur, the clerk calling the names of Kernan and Coombs, who answered from the corridor, and not calling the names of Sullivan and Hebert. Thereupon one of the councilmen moved to elect a temporary clerk on the ground that the duly elected clerk refused to call the names of Sullivan and Hebert. The president declared the motion out of order and declined to admit an appeal. Thereupon the councilman put the motion himself and was elected temporary clerk, he calling the names of Sullivan and Hebert and omitting the names of Kernan and Coombs. The roll of the common council was called by Kerrigan, including Sullivan and Hebert, but excluding Kernan and Coombs, and on this roll call it was voted to concur in the order

for a joint convention. Then the regular clerk went to the chamber of the mayor and aldermen, followed by the so-called temporary clerk, and presented to the mayor, the common council's endorsement upon the order for a joint convention, to wit: "Voted not to concur, Eugene Cloutier, clerk." The temporary clerk informed the mayor that he had been elected temporary clerk, and was directed by the mayor to make an endorsement which he did in these words: "Voted to concur," and joint convention was in order, and they signed it. The mayor then ruled that board go to the common council room, where an election was had wherein these respondents were voted for and declared elected, Sullivan and Hebert being allowed to vote, and their votes being necessary to an election, while Kernan and Coombs were not allowed to vote. The public were still excluded from the room. In this joint convention 15 voted, including Sullivan and Hebert. All others retired from the chamber. The city council of Lewiston consists of seven aldermen and twenty-one councilmen. Later the appeal from the decision of the presiding Justice in the election petition was affirmed by the Supreme Court, and Kernan and Coombs were declared elected to the common council. After the decision of the Law Court another convention was held, May 19, 1913, regular in form at which these petitioners were elected respectively to the several officers, and they have brought these petitions.

The petitioners contend that the election of April 4 was void for two principal reasons: First, that the meeting was not public as the charter of the city of Lewiston requires, and therefore, that the proceedings were void; secondly, that the election of April 4th was void on the ground that two persons authorized to vote were not permitted to vote, and that two persons unauthorized to vote did vote and that their votes were necessary to make a quorum and accomplish the election.

Although the election was not public in any proper sense of the word, I do not place my decision upon that ground.

Although the convention was held under circumstances forbidden by the charter, I do not think it necessarily follows that the election would be void if only proper persons voted, and every man who had a right to vote was permitted to do so. But it needs no argu-

ment to show that if persons properly entitled to vote were prevented by force from attending the meeting and voting, and others who had no right to vote were present and did vote and determine the election, that the election should be declared void. So that ultimately the question resolves itself as to whether Sullivan and Hebert had been legally unseated and Kernan and Coombs legally seated.

The defendants say first that section 70 before referred to virtually repealed that provision of the city charter of Lewiston which provides that each board of the city government "shall judge of the election of its own members," and secondly, that inasmuch as the petitioners resorted to the court to have their election determined, and inasmuch as the question was still before the court, the defendants having a right to appeal, that the city council then had no jurisdiction and could not lawfully unseat Sullivan and Hebert.

I do not take that view of it. Undoubtedly the action of the court upon a petition in the end is binding, but I do not think the fact that these two councilmen petitioned the court to have their rights definitely determined in accordance with the statute prevented the city council, which had rights in the matter and represented the public, from taking such action as they saw fit. The right of the council to determine its own members is primary, subject to revision of the court, and until the court has decided definitely as to the legality of the election of the members, it seems to me that it was within the power of the common council to pursue the power given them by the charter.

So that I conclude that the election held by the joint convention on April 4th was void, and that no one of the officers there elected has any title to his office.

There are some special objections, however, raised, which it is necessary to consider. It is claimed in defense that the petition of LaCroix and Keene, claiming to be elected assessors of taxes, cannot be maintained for the reason that the jurat attached to the petition does not contain the name of W. S. Keene. The petitioner, Keene, moved for leave to amend the petition by having his name inserted in the jurat, I find that as a matter of fact the petition was

signed by Keene and that he made oath to it, but by inadvertence his name was left out of the jurat. I think the error is amenable and I grant the amendment prayed for. In both conventions each assessor was elected for the term of three years but it is claimed that that is error, that one of the assessors should only have been elected for two years. It appears that some years before that an assessor had resigned after serving only one year and his successor was elected for a term of three years when he should have been elected only for the unexpired balance of the term of his predecessor, so that at the time of the election in April there was a vacancy for one entire term of three years and another vacancy for two years of an unexpired term, and it is claimed that these petitioners having joined in a petition it is impossible to tell which is entitled to the three year term and which to the two year term. But I do not think that follows.

The records show that in the convention of April 4, George A. Welch was first declared elected assessor for the term of three years. That being so the only remaining assessor to be elected was one for two years and although George Z. Bernier was recorded as elected for a term of three years, his term necessarily would be limited to two years. And so of the election held by the latter joint convention when the petitioners were elected. John LaCroix was first elected assessor of taxes for three years. Keene was afterwards elected to the remaining vacancy which was really only for two years, although otherwise recorded. So that John LaCroix is the petitioner claiming the office to which George A. Welch was declared elected, and W. S. Keene the claimant for the office to which George Z. Bernier was declared elected.

It is further contended in defense that Patrick F. Tremblay, claimant of the office of collector of taxes is not entitled to maintain the petition because he has as yet filed no bond. It appears in evidence that he has taken the oath; that the board of mayor and aldermen have not fixed the amount of his bond, and that the board has held no meeting since election. Under these circumstances I think he is entitled to maintain the petition.

The petition in each case is sustained with cost.

THE OPINION.

The first question raised is one of jurisdiction. Section 70, chapter 6, R. S., under which the petitions are brought reads as follows: "Any person claiming to be elected to any county or municipal office, or to the office of county attorney, may proceed as in equity against the person holding or claiming to hold such office, or holding a certificate of election to such office, or who has been declared elected thereto by any returning board or officer, or who has been notified of such election, by petition returnable before any justice of the supreme judicial court, in term time or vacation, in the county where either party resides, or where the duties of such office are to be performed, and said court shall have jurisdiction thereof." It is contended by the appellants that this section is intended to apply only to an office involving an election by the people and not to an office involving an election by a city council. In support of this contention it is asserted that, as this section as originally enacted related only to an election by the people, and was subsequently compiled in that chapter of the statute which related to elections, it should now be construed only with reference to its original purpose, and to the context, and be limited in its application to elections by the people.

But the history of this legislation shows that this section, in its inception, was not an amendment of the election statute, but an original act, very properly codified, upon the revision of the statutes, in the chapter relating to elections, under the heading, "Contested Elections." But it should also be observed that the first section, 68, under the heading "Contested Elections," relates to contests in the House of Representatives, which, of course, may involve questions entirely distinct from those of election by the people. Accordingly the context was not intended to confine all the proceedings which might arise under this heading to those of popular elections. Our conclusion therefore is that, while the context is to be considered, and under certain conditions may be entitled to great weight, it is not by any means controlling.

While this statute originally related to elections by the people, it was amended in 1893 so that instead of reading "any person claiming to be elected to any county office," etc., it was made to

read "any person claiming to be elected to any county or municipal office," etc. As stated by CHIEF JUSTICE SAVAGE, this language is very broad and when given its usual and original meaning includes "any municipal office." The same scope is given this language in *Curran* v. *Clayton,* 86 Maine, at page 54, in which former C. J. WHITEHOUSE says the act of 1893 "extended the scope of this statute to include a contest for 'any municipal office.'" While it is true that the intention of the Legislature is the law when that intention can be unequivocally determined, it is equally true that that intention cannot be ascertained by adding to or detracting from the meaning conveyed by the plain, unambiguous language used. Such language is regarded in law as the vehicle best calculated to express the intention of the Legislature. We discover nothing in the context or the consequences, which furnishes adequate reasons for departing from the rule of literal interpretation. There is nothing in the literal meaning of the language, or the purpose conveyed by its use, in conflict with the context, or repugnant to a just and beneficent result, nor is the language technical. In such a case our court have said, *Davis* v. *Randall,* 97 Maine, 36: "When clear and unequivocal language is used which admits of only one meaning, it is not permissible to interpret what has no need of interpretation." This language was approved in the opinion of the Justices in the 108th Maine, 545, in answer to question propounded by Governor Plaisted. It was here further said: "It has accordingly been distinctly stated from early times even to the present day, that judges are not to mould the language of statutes in order to meet an alleged convenience or an alleged equity, and are not to alter plain words though the legislature may not have contemplated the consequences of using them." Endlich On the Interpretation of Statutes, section 4, says: "When, indeed, the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. . . . Such language best declares, without more, the intention of the lawgiver, and is decisive of it. The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It is, therefore, only to the construction of statutes whose terms give rise to ambiguity, or whose grammatical construction is

doubtful that courts can exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the lawmakers. Where the words of the statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. . . . Where by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though they be absurd or mischievous. If the words go beyond what was probably the intention, the effect must nevertheless be given to them."

The statement that "the plain language is to prevail when not rendered dubious by the context" does not apply in the present case. The Act of 1880, as amended, should not be considered with reference to the other provisions of chapter 6. This was an original act. It did not amend or relate to any other statute. It was entitled: "An Act providing for the Trial of Causes involving the Right of Parties to hold public Office." The fact that it was incorporated by the commissioner on revision in the election chapter gives it no constructive relation to that chapter. It did not amend it. It did not allude to it. It stood alone, and, as amended, stands alone now, so far as the rest of chapter 6 is concerned. *Harlow* v. *Young,* 37 Maine, 88, is a case in point, involving the construction of a statute with reference to the context of the chapter, to whose general provisions it relates and in which it is found. The contention in favor of the construction, with reference to the subject matter of the chapter where found, is fully stated by the court as follows: "It is provided by R. S., c. 6, sec. 62, that 'in no case shall any officer of any city, town or plantation incur any punishment or penalty, or be made to suffer in damages, by reason of his official acts or neglects, unless the same shall be unreasonable, corrupt, or wilfully oppressive.'" . . .

"As these provisions are in the chapter bearing the title, 'Of the Regulation of Elections,' and under the fourth article, entitled 'Penal Provisions and Regulation, affecting the Purity of Elections,' it is now urged, in argument for the plaintiff, that they are limited to such official acts and neglects as are mentioned in that chapter."

This is the precise construction urged, in giving an interpretation to Section 70, R. S., ch. 6. But the court proceeds to say, respect-

ing this contention; "Neither its title, nor the preamble, forms any essential part of an act of the Legislature. The latter has fallen into disuse with us, and the former can never be regarded as a safe expositor of a law which is plain and positive in its provisions. *Mills* v. *Wilkins,* 6 Mod., 62; *United States* v. *Fisher,* 2 Cranch., 386; 1 Kent, 460." Reference is then made to the rule of construction, R. S., 1841, ch. 1, section 3, as to the force which should be given to the title of an act, now R. S., chapter 1, section 6, par. XXVIII, which with the change in the phraseology, reads: "Abstract of Titles and Chapters, and Marginal and Other Notes are not Legal Provisions." The opinion then proceeds as follows: "The terms of the sixty-second section, before quoted, are general, and apply to all cases, and to all the official acts of every officer of every city, town or plantation, in the state; whether his official duties are connected with elections or otherwise. They are not to be restricted by the title of the act; and to avoid a forfeiture they should receive a fair and liberal construction. If standing alone, as a separate enactment, there could be no doubt that they would apply to all cases of official neglects, by the class of officers mentioned; and as they stand now, upon the statute, unrestricted by the title, and unconnected with other sections, they are to be construed in the same manner, and by the same rules, as if they constituted an independent enactment."

The plain meaning of the language in Section 70, "Any municipal office," is strengthened rather than weakened by the context of the Act of 1880 with reference to which alone it is to be construed. Section 73 in the present statute, which comes from the Act of 1880 unchanged, supports this conclusion. This section specifies an office in which the incumbent has papers, records, moneys and property. Such an office is entirely consistent with the municipal office of a treasurer, clerk or assessor of a town or city. In other words we are unable to find any provision in the context of the Act of 1880, as amended in 1893, that is inconsistent with the conclusion that the language of the amendment of 1893 was intended to include any municipal officer whether elected by the people or by the city council.

Moreover, it seems almost a reflection upon the intelligence of the Legislature to assume that it did not know the meaning of the

phrase, "municipal office" and use it advisedly. It is also true that the municipal officers who administer the affairs of cities, under the city council, are the real administrative agents of the city, charged with important and continuous responsibilities, and accordingly, on account of their great importance would as readily engage the attention of the Legislature as the board of aldermen or common council.

Another important rule of construction, to ascertain the evident intention of the Legislature is, that we may "look at the object in view, to the remedy to be afforded, and to the mischief intended to be remedied." Under this rule it would seem not at all improbable that it was the active intent of the Legislature to apply the procedure prescribed in Section 70 to all elective offices, county and municipal. Previous to this enactment, the only way in which a party, claiming to have been elected to an office, could determine his right was by quo warranto to test the title, and, if successful, by mandamus to secure the office. This proceeding was so slow, in accomplishing the purpose of the law, that an annual office usually expired before the litigation could be terminated. This delay affected equally a state, county or municipal office. To obviate the result of this ineffective remedy the Legislature in 1880 enacted the statute, providing that county officers and county attorneys might proceed as in equity to have their claim to an office determined; and that an appeal, if taken, including the printing of the record and arguments of counsel on both sides, should all be accomplished within sixty days; and that, instead of waiting for the sitting of the Law Court, the case should be certified to the Chief Justice, and, in the language of the statute, "thereupon the justices of said court shall consider said cause immediately."

Can there be any doubt in view of the object, remedy, and mischief to be corrected that the Legislature intended by the Act of 1880 to give the claimant of a county office, or the county attorney, a direct and speedy process to determine his rights? In 1893 this statute was amended so as to include "any municipal office." With these same ends in view, the object, the remedy and the mischief to be corrected, can any reason be assigned why the Legislature should give an alderman or councilman this speedy remedy and withhold

it from a city collector? Was it the intention of the Legislature to differentiate between these claimants? Is the mischief to be remedied less flagrant in the one case than in the other? Does not every fair and reasonable consideration prevail for the application of the remedy in the one case as strongly as in the other? It no less preserves the popular will. It equally prevents usurpation and fraud. It protects the officer legally elected. It conserves honest elections. It can injure no one. As literally expressed it is also a beneficent law.

Under these rules, so familiar that an apology almost seems due for quoting them, we are unable to discover any principle of construction which authorizes the court to interpret language so plain and certain that it cannot be misunderstood.

But it is not necessary to rest upon the rules of interpretation to reach the conclusion that the court had jurisdiction. Since the enactment of the statute in 1893 our court has twice taken jurisdiction, under the statute, of cases embracing the precise issue presented in the questions before us, the first involving the petition of a city treasurer; the second the petition of a tax collector. *Redington* v. *Bartlett,* 88 Maine, 54, was decided in May 1895, two years after the amendment of Section 70 as it now stands. This was an appeal in equity heard on petition, answer and testimony brought to this court by the defendant, as provided in R. S., Chap. 4, Sec. 55, relating to contested elections. Section 55 is now Section 72, R. S., 1903, under which the present appeal was taken. The opinion was a PER CURIAM containing the entry only, "Appeal Dismissed, Decree below Affirmed." This decision was concurred in by PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WISWELL, J. J. The decree was issued by former CHIEF JUSTICE WHITEHOUSE.

The next case is *Smith* v. *Randlette,* 98 Maine, 86. This was a petition and appeal under these same statutes, the petitioner claiming to have been elected to the office of tax collector of the town of Richmond against the respondent who had been appointed to that office by the selectmen of the town. The court assumed jurisdiction and sustained the bill. In neither of these cases was the question of jurisdiction raised; and, while they may not be regarded as full

precedents for the jurisdiction of the court under this statute, they must, nevertheless, be regarded as carrying a weight of authority little short of a precedent. Inasmuch as jurisdiction lies at the foundation of judicial action it is hardly possible that that question in these cases could have escaped the notice of the eleven judges who considered them, and the eminent counsel who presented them. It may be, however, that the language conferring jurisdiction was so broad, clear and certain that it did not suggest the want of jurisdiction to either court or counsel. In *Curran* v. *Clayton*, 86 Maine, 42, in which this statute was discussed, the court say: "It has been the policy of the legislature of this State to enlarge rather than restrict the admitted power of the court to enquire into the regularity of election."

Under the rules of construction and decisions of the court, we thing the legislative will must be regarded to have been expressed in the plain language of the amendment of 1893. It is accordingly the opinion of the court that the ruling of the Chief Justice in exercising jurisdiction of these cases must be sustained.

The second important objection raised by the appellants is to the finding of the sitting Justice, that Kernan and Combs were primarily entitled to their seats under the action of the common council of March 17, 1913, when the body declared them entitled to seats in the place of Sullivan and Hebert, who held certificates of election.

While the respondents do not seriously question the right of the common council, under the language of the charter, to determine the election of its own members, they however contend: first, "that so much of the charter as allows the common council to be the judge of its own members was repealed by Sections 71, 72 and 73 of Chap. 6, of the Revised Statutes;" and second, that Kernan and Coombs "having once selected their forum, which was the Supreme Judicial Court, had no authority, after submitting and instituting their proceedings in the Supreme Judicial Court, to present a petition to the common council to remove councilmen Sullivan and Hebert."

These contentions are untenable. The Act of 1880, as amended in 1893, did not, by necessary implication, repeal these sections of

the statute. *Curran* v. *Clayton,* 86 Maine, 42. Nor did it confer upon Kernan and Coombs the power, by selecting another tribunal, of depriving the common council of jurisdiction to pass upon the election of its own members.

Section 20 of the city charter provides that each board of the city council shall "judge of the election of its own members." We have no doubt that the common council retained the right to exercise this prerogative conferred by the charter when it acted upon the seating of Kernan and Coombs.

But the crucial question is: Did the common council exercise this prerogative in a legal manner? After a most careful and exhaustive examination of the law, we are constrained to the opinion that it did not.

It will be conceded, first, that this municipal board, acting under the city charter, is constituted a court for the time being, and sitting as a judge upon the election of its own members. Its functions are clearly judicial, and so declared by the great weight of authority. In *Andrews* v. *King,* 77 Maine, at p. 332, it is said, referring to the mayor and aldermen, as a tribunal constituted for the purpose of hearing causes: "In proceedings under the statute, they do not act as municipal officers, nor as agents of the city, but pro tempore, as judges." *Cates* v. *Martin,* 69 N. H., 610; *Meacham* v. *Common Council, etc.,* N. J. Law, 62 Atl., 303; *People* v. *Fornes,* N. Y. Court of Appeals, 67 Atl., 216. This premise, then, may be regarded as settled.

It will be observed, next, that the city charter prescribes no mode of procedure by which the board may be governed in the exercise of its judicial duties. This brings us to the enquiry: Shall it exercise its own absolute will; or shall it be governed by the rules of the common law? If by the former method, it can act arbitrarily without notice or hearing. If by the latter, it cannot so act; but must give to all parties interested, reasonable notice and an opportunity to be heard. This precise question has not been settled in this State, and it now becomes the duty of the court to prescribe a course of procedure that shall, as a general rule, best operate to secure fair and consistent action on the part of municipal boards, and, at the same time, protect the rights of all

parties whose interests are concerned. The natural instinct to so bend the law as to right a specific wrong, has led to the maxim, that "Hard cases make shipwreck of the law." But the rules of law must be general; and, being general, must be applied to all similar cases with uniformity, without modification or variation. Otherwise, no definite result could ever be predicted upon the rules of law.

The case before us presents a hardship. The respondents are holding offices by virtue of votes cast by two councilmen, who were not legally elected, and whose offices were subsequently declared vacant by a judgment of the Supreme Judicial Court. But this specific hardship should not be permitted to influence the judgment of the court against declaring what it deems to be the true rule of law for governing the method of procedure in this class of cases. Proper procedure must precede, and underlies every valid judgment.

We are accordingly of the opinion that, in the absence of statutory provision, the safe and reasonable mode of procedure, required to be observed by municipal boards, when sitting, pro tempore, as judges, should be in accordance with the rules of the common law.

Andrews v. *King*, 77 Maine, 224, an exhaustive opinion upon this subject by former Chief Justice Emery, emphatically sustains this doctrine, and is a controlling precedent upon the issue here concerned. It involves the action of municipal officers when acting pro tempore, as judges. The principles of law enunciated specifically relate to the duties of municipal officers, when so acting, as to the legal mode of procedure by them to be pursued, in the absence of statutory direction. In the opinion it is said: "The public and the respondent are entitled to the unbiased judgment of each (mayor and aldermen) after hearing, and as the result of the hearing. It is a part of the "law of the land," that the authority which strikes must hear.

"The proceding before the tribunal should be according to "the law of the land" which is the common law wherever the statute is silent." It is further said: "We think it may be assumed, in the absence of specific directions, that the legislature intended this special tribunal should follow the course so long, and generally

followed by the common law courts, and special courts charged with similar duties. The same reasons for such a court certainly exist."

While in that case the statute required the municipal officers to give a hearing, but not notice, yet the rule of procedure announced required notice as well as hearing, and does not distinguish it from the case at bar, as a judicial interpretation of the statute before us requires, by the common law rule, that the words "notice and hearing" should be read into it. In harmony with the doctrine declared in *Andrews* v. *King* is *Meacham* v. *Common Council of the city of New Brunswick,* N. J. Law, 62 Atl., 303. The common council in this case declared a seat vacant, under a charter similar in import to the one before us. As to the mode of procedure, the court say:

"The action of the common council is claimed to be justified upon the ground that, by the charter of the city of New Brunswick, it is provided in Sec. 26 'that the common council shall be the sole judge of the election, returns and qualifications of its own members.' The common council, by the section above quoted, is made a judge and it must exercise its judgment and not its arbitrary will upon these matters, and that judgment is subject to the regularly organized judicial tribunals."

It has been held by some courts that the power conferred by the Legislature upon municipal bodies to determine the election of their own members was analagous to the power conferred by the Constitution upon the Legislature to determine the election of the members of that body; but the great weight of authority is the other way, and seems to be based upon the sound reason that the Legislature is an independent, co-ordinate branch of the government. and supreme within its sphere of action.

In *Meacham* v. *Common Council,* supra, upon this point, it is said: "The provisions in the state and federal constitutions that each house of the legislative bodies shall be the judge of the election, returns, and qualification of its own members, stands upon quite a different footing from the like provisions in the charter of the defendant. The federal and state legislatures are creatures of the federal and state and constitution, and constitute one of the three branches of government provided for by those instruments, which

also contain distinct provision against interference by each branch with the other."

In *People* v. *Fornes*, N. Y. Ct. of Appeals, 67 N. E., 210, it is said: "Under this authority, each house of Congress and each branch of the state legislature has exercised the most plenary power to determine who had been elected members of the body. Indeed, it has been generally assumed by publicists and writers on constitutional law that the absolute right of determining the election of its own members is a power necessary to the independence of the legislative branches of the government."

Then, comparing the power of the Legislature with that of a municipal body, it is further said: "There is this distinction between the two: the action and determination of a house of the legislature is final, while that of a municipal assembly or chamber is subject to review by the court, even without expressed declaration to that effect, unless it has been enacted in the charter to the contrary."

It is accordingly plain that no such scope can be accorded a municipal body, authorized to determine the election of its own members, as is delegated to the Legislature by the Constitution, under similar authority.

Upon both authority and reason, we are unable to avoid the conclusion that a municipal body, acting for the time being as a judge, must be required to conform its procedure to the rules of common law, where the statute is silent. It is unnecessary to cite authorities, upon what the common law requires. The very foundation of judicial proceedings under the common law is reasonable notice and opportunity to be fully heard. In *Andrews* v. *King*, supra, although the statute was silent upon notice and provided only for a hearing, it is said: "The incumbent should have reasonable notice of the charges, as formulated, and of the time and place of the hearing. At the hearing, he should be allowed to cross-examine the witnesses against him, within the rules of evidence. His own testimony and that of the witnesses for the defence should be fully heard within the same rules. The hearing should be full and fair, and by a patient unprejudiced tribunal. The proceeding is adversary or judicial in its character, and where the statute is silent.

the substantial principles of the common law must be observed. Dillon on Mun. Corp. (3rd ed.) 253; *Murdock* v. *Phillips Academy,* 7 Pick., 303; 12 Pick., 244."

In that case the board was not permitted to give a hearing simply, nor act upon inadequate notice, but upon "reasonable notice."

A judicial proceeding implies a trial. A trial cannot be had, under the common law, without notice and hearing. Sullivan and Hebert had neither notice nor hearing. Neither of them had an opportunity to be heard. They were unseated by resolution only. The sitting Justice states the proceeding thus: "Thereupon the common council by resolution reciting the proceedings before the Justice of the Supreme Judicial Court, and his decision, unseated Sullivan and Hebert, and seated Kernan and Coombs.

But the prior hearing before the single Justice, under an independent statutory proceeding, and his decision therein, could not be substituted for the hearing before the board itself under the municipal charter. Its weight and effect upon the judgment of the members of the board, provided a legal hearing had been given to the respondents, might and doubtless would have been great. That would have been a matter within their discretion, but one judicial tribunal cannot simply adopt the decision of another and omit the essential formalities to protect the rights of the respondent which the law obliges it to take. Nor can the judgment of the court subsequently rendered, on appeal from the sitting Justice, affirming his decision as to Kernan and Coombs, relate back and take effect as of the date of his decision. The appeal vacated the decision below. *Bartlette* v. *McIntire,* 108 Maine, 161. It accordingly follows that Kernan and Coombs were not entitled to their seats, until the final judgment of the court was announced, some little time after April 4, when the respondents were elected to the respective offices which they now claim. It is conceded that the votes of Sullivan and Hebert were necessary to the election of the respondents. But while their seats were later declared vacant, they were on April 4, when the election took place, each holding a certificate of election from the proper returning board, which made them prima facie members, Dillon on Mun. Corp., sec. 892, Meacham on Public Officers, Sec. 328, and, if not properly removed by the action of the city council on March 17, de facto members of that body.

This brings us to the further question: Can the respondents retain the benefit of the de facto act of these two councilmen? We are concerned only with the legal question presented. It is not within our province or power to legislate. We must accordingly pass upon the law, and not the merits, of the case. By the law this issue must be solved in favor of the respondent. The two councilmen in question held certificates of election. While those certificates had life, they had a legal right to participate in the action of the common council. The judgment of the sitting Justice in the proceedings of Kernan and Coombs against them, as already seen, did not invalidate their certificates. Consequently, Sullivan and Hebert, on April 4, were prima facie members of the common council and were entitled to act upon all matters regularly presented. The election of city officers of whom the respondents were two, was legally presented and could be legally acted on by Sullivan and Hebert. But, in view of the subsequent action of the court in unseating them, were their acts binding? Upon this question it should be observed that the attack upon their right to act, under the present proceeding, is collateral. This form of attack cannot be sustained. The court has repeatedly held in this State that a de facto act cannot be assailed collaterally. In *Stuart* v. *Inhabitants of Ellsworth,* 105 Maine, 523, the court say: "They were de facto officers and in controversies to which they are not parties their title to their offices and their acts therein cannot be questioned." In *Hooper* v. *Goodwin,* 48 Maine, 79, it is said upon this same point: "His right can only be questioned in a suit against him." See also cases cited in *Stuart* v. *Ellsworth,* supra, on page 527.

In addition to the authorities holding that de facto acts cannot be collaterally attacked, which are conclusive upon the present issue, is found a case directly in point in *The People* v. *Stevens,* Hill's Reports, Vol. V., 616. On page 631 it is said: "Having this color of title, he went into the common council and voted on the balloting for a clerk, and if it be conceded that he was not alderman de jure, still his vote was not an absolute nullity. If that vote had turned the election in favor of the defendant, there can be little doubt that he would be entitled to hold the office of clerk,

although Osborne himself should afterwards be ousted by quo warranto."

Upon the law as well established our conclusion is, that the proceeding of the common council in unseating Sullivan and Hebert, upon resolution, without notice or hearing, was contrary to the course of common law procedure, and consequently illegal; that, being de facto officers on April 4, when they cast their votes for the respondents, their action was valid in law; and, consequently, that the appellants, George A. Murphy, George Z. Bernier and George A. Welch, were legally elected and are entitled to retain their respective offices.

Appeal sustained without costs.

FRANK A. BISHOP *vs.* INHABITANTS OF THE TOWN OF HERMON.

Penobscot. Opinion September 9, 1913.

New Notice. Notice. Overseers. Pauper. Relief. Request. Revised Statutes, Chapter 27, Section 45. Supplies.

1. In an action for supplies furnished under the provisions of Revised Statutes, chapter 27, section 45, there must be notice to the overseers of the poor, express, formal and particular, also a request as distinct and explicit as the notice.
2. If the overseers act in good faith and with reasonable judgment, touching the necessity of relief of persons found in need, their conclusions will be respected in law.
3. When provision has been made upon such notice and request, the liability of the town ceases and in order to render it liable for further expense, a new notice and request are necessary.

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

This is an action of assumpsit in which the plaintiff seeks to recover the sum of $30.79 for supplies furnished to a pauper chargeable to the defendant town, by the plaintiff, under the provisions of Revised Statutes, chapter 27, section 45. Plea, the general issue. The jury returned a verdict for the plaintiff for $31.00. The defendant filed a general motion for a new trial and excepted to the admission of certain testimony.

The case is stated in the opinion.

B. W. Blanchard, for plaintiff.

Morse & Cook, for defendant.

SITTING: SAVAGE, C. J., SPEAR, CORNISH, BIRD, PHILBROOK, JJ.

BIRD, J. In this action plaintiff seeks to recover of defendant town, under the provisions of R. S., c. 27., sec. 45, the sum of $30.79 for supplies furnished one Dennis W. Palmer, a pauper chargeable to defendant. The account of plaintiff covers a period extending from January 8 to February 24, 1912. The jury found for plaintiff and the case is before this court upon exceptions and the usual motion for a new trial.

Upon the motion, it is necessary to consider only the sufficiency and effect of the notice and request required by statute—"after notice and request to the overseers, until provision is made for them." The purpose of the statute is to provide for the relief of the distressed and such as stand in need of immediate relief. *Warren* v. *Islesborough,* 20 Maine, 442, 448; *Perley* v. *Oldtown,* 49 Maine, 31, 33; *Hutchinson* v. *Carthage,* 105 Maine, 134, 138. Not only must there be notice, express, formal and particular but also a distinct request; *Walker* v. *Southbridge,* 4 Cush., 199, 202; *O'Keefe* v. *Northampton,* 145 Mass., 115. The request must be as explicit as the notice. *Williams* v. *Braintree,* 6 Cush., 399, 402. See also *Brown* v. *Orland,* 36 Maine., 376, 380; *Williams* v. *Braintree,* 6 Cush., 399, 403. If the overseers act in good faith and with reasonable judgment touching the necessity of relief of persons found in need, their conclusions will be respected in law; *Hutchinson* v. *Carthage,* 105 Maine, 134, 138. Being under oath, it is presumed they act with integrity until the contrary is shown. *Portland* v.

Bangor, 42 Maine, 403, 410, and it is the duty of the courts to expect decisive proof of a breach of their trust; *Warren* v. *Islesborough,* 20 Maine, 442, 448. When provision has been made by the overseers upon such notice and request, the liability of the town ceases and in order to render it liable for further expense a new notice and request are necessary. *Warren* v. *Islesborough,* 20 Maine, 442, 448; *Gross* v. *Joy,* 37 Maine, 9, 11. See also *Phelps* v. *Westford,* 124 Mass., 286, 288.

It appears from the testimony of the plaintiff, the proprietor of "a small country store" in defendant town, that he had for some years supplied goods to pauper upon the latter's credit; that on the eighth day of January, 1913, he had an interview with the Chairman of the overseers of the poor of defendant town and stated to him that he could no longer "carry him" on his books; that the overseers "were neglecting this man, under the circumstances, it was their place to take care of him when he couldn't take care of himself;" that the man should be relieved and provided for and that he asked him repeatedly if he did absolutely refuse to provide for him, and finally told him that unless they did provide for him that he should at the town's expense. "As I was about to go away after saying all I thought I could say, I put that question to him again, if he absolutely refused to relieve those people. And he said 'No, I will send them a little stuff . . . .'" The plaintiff had a list with him of what he claimed the pauper needed at that time and the chairman of the board directed him to supply the pauper with all the articles comprised in the list save one.

The plaintiff thereupon furnished supplies and has been paid by defendant for those he was directed to supply. The chairman of the overseers testifies that all articles in list were ordered sent which he thought necessary.

Six days later plaintiff furnished the pauper with other supplies and so continued to do from time to time until February 24, 1913, when he presented the account now in suit.

The overseers of the poor were thus notified, upon plaintiff's evidence, that he should cease to supply the pauper with goods, upon his credit; that he was in present need and should, unless the town provided for him, furnish him with supplies himself upon

credit of the town. It does not appear that the pauper could not obtain necessaries upon his own credit from merchants or citizens of the town. But without determining whether the notice was formal, express and particular, the distinct request was for the supplies alleged to be required for the immediate relief of the pauper— or the articles in the list of plaintiff. It does not appear that further conversation was had between the chairman of the overseers and plaintiff. Evidently the plaintiff assented. The presumption in favor of the determination of the chairman as to the supplies to be furnished we do not think is overcome by the evidence and it is the opinion of the court that the only explicit request of plaintiff importing a distinct call upon the town for immediate relief (*Walker* v. *Southbridge,* 4 Cush., 199, 202) was complied with and that a new notice and request by plaintiff was required in order to render the defendant liable for further supplies. *Williams* v. *Braintree,* 6 Cush., 399, 403; see also *Phelps* v. *Westwood,* 124 Mass., 286, 288.

The exceptions, which are to the admission of evidence, are not considered as the instructions to the jury are not reported and a new trial must be granted upon the motion.

Motion sustained.
New trial granted.

J. WESLEY MAXWELL *vs.* O. E. HEWEY, et al.

Androscoggin. Opinion September 11, 1913.

Assignment. Bond for a Deed. Consideration. Delivery. Foreclosure Mortgage. Payment. Purchase Money. Reimbursement.

The defendants held a bond for a deed of land for which they had given their notes. They desired to get a deed. One Jordan had agreed to lend them the money to take up the notes, and take a mortgage himself. The parties all met at the office of the plaintiff who was to make the writings. Jordan did not pay the money agreed, but the plaintiff did, upon the mutual understanding, that Jordan would reimburse him. The money was applied to the payment of the defendants' notes. The defendants got their deed, and executed a note for the amount, and a mortgage to secure it, both of which run to Jordan. It was agreed that the note and mortgage should remain in the plaintiff's hands until Jordan repaid him, which he never did. Subsequently Jordan assigned the mortgage and transferred the note to the plaintiff: *Held,*

1. That Jordan was the lender of the money which the defendants borrowed.
2. That the delivery of the mortgage to the plaintiff for Jordan, assented to by Jordan at the time, was a sufficient delivery, and that the mortgage became effective from that time.
3. That it is immaterial to the defendants whether there was any consideration for the assignment of the mortgage by Jordan to the plaintiff.

On exceptions by the defendants. Exceptions overruled.

This is a real action brought to foreclose a mortgage on real estate described in plaintiff's writ, and situate in Webster in the County of Androscoggin. The mortgage and the note thereby secured were originally made by the defendants to one James G. Jordan and by him transferred, by assignment of mortgage and endorsement of the note, to the plaintiff. The defendants pleaded the general issue, and filed a brief statement, alleging in substance that said mortgage and note were never delivered to Jordan; that Jordan gave no consideration for the assignment and that neither Jordan nor the plaintiff has any interest in them.

At the conclusion of the plaintiff's evidence, the defendants moved for a nonsuit, which motion was denied by the presiding Justice. The defendants introduced no testimony and the presiding Justice directed a verdict for the plaintiff and the defendants excepted. The case is stated in the opinion.

Newell and Skelton, for Plaintiff.

McGillicuddy & Morey, for defendants.

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

SAVAGE, C. J. Writ of entry to foreclose a mortgage. At the conclusion of the plaintiff's evidence, the defendants moved for a nonsuit. This was denied. The defendants introduced no testimony, and the presiding Justice directed a verdict for the plaintiff. The defendants excepted.

The mortgage in suit, and the note it secured, were originally made running to one Jordan, who later assigned the mortgage and endorsed the note to the plaintiff. The defendants, who were the mortgagors and makers of the note, by their brief statement filed with the general issue, and also, in argument, contend that the mortgage and the note were never delivered to Jordan, that Jordan gave no consideration for them, that there was no consideration for the assignment, and that neither Jordan, nor the plaintiff, has any interest in them.

The case shows the following facts. In March, 1899, the defendants took a bond for a deed of the land in question from one Golder, and gave their notes therefor. In October of the same year Golder executed a deed of the land to the defendants. He did not then deliver the deed, but left it in the hands of one Jones, his agent, to be delivered, upon payment of the balance due on the notes. Golder then lived in California. In June 1901, Golder wanted his notes paid. There was then due $454.73. The defendants apparently did not have the money available. Jones interested himself to see if the money could be hired. The plaintiff who had drafted all the papers up to that time, in some way became cognizant of the situation, and undertook to act as a kind of intermediary in

procuring the money. He interviewed Jordan, who agreed to furnish the money and take a mortgage. At this point, June 22, 1901, all the parties, Jones representing Golder, Jordan and the defendants met the plaintiff at his office for the purpose of completing the transaction. The plaintiff was to draft the mortgage and note. Jones had with him the undelivered deed from Golder to the defendants, but declined to deliver it, or have it used to furnish the description for the mortgage, until the amount due Golder had been paid. Thereupon the plaintiff gave his check to Jones for the amount, and Jones delivered the deed. The mortgage and note were then drafted by the plaintiff and executed by the defendants. But Jordan did not then furnish the money to reimburse the plaintiff for the amount advanced. It was understood however between him and the plaintiff that he was to do so later. And it was agreed that the mortgage and note should remain in the plaintiff's hands until Jordan repaid him. This Jordan never did. But several years afterwards he assigned the mortgage and transferred the note to the plaintiff. And this suit followed.

Now, what was the legal effect of the transactions of June 22? The defendants borrowed the money. They received it, by having it applied in payment of their note to Golder. They got their title. And although the plaintiff actually advanced the money to Jones for the defendants, it was done upon the understanding in which Jordan participated, that Jordan was to reimburse him. Therefore the plaintiff advanced the money on Jordan's account, and Jordan became impliedly liable to the plaintiff for it. So far as the defendants were concerned, it was Jordan's money. In law he was the lender, as they were the borrowers. The promised subsequent reimbursement by Jordan to the plaintiff did not concern them. That was a matter between the plaintiff and Jordan. They executed the mortgage to Jordan to secure the payment of the money they had borrowed from him. The mortgage was left with the plaintiff, upon an understanding which concerned only him and Jordan, that he was to hold it until Jordan repaid him. That ended the defendant's part in the transaction. That was a delivery of the mortgage to the plaintiff for Jordan, assented to by Jordan at the time. We think that was a sufficient delivery. It

was a completed transaction so far as the defendants were interested. The mortgage was delivered by them as an effective, operative instrument from that time.

In this, and in other respects also, this case is unlike *Rhodes* v. *School District in Gardiner,* 30 Maine, 110, relied upon by the defendants. In that case a grantor deposited a deed with a third party to be delivered upon payment of the purchase money, and not otherwise. And a delivery by the depositary was held ineffective. Here, the mortgagors had already received the mortgage money. There, the deed was not to become operative until the purchase money was paid. Here, we think it was intended to be instantly operative as security. There, there was no delivery by the grantor, or by his authority. Here, as we have already stated, we think there was.

The defendants have no interest in the question whether there was any consideration for the assignment by Jordan to the plaintiff. The assignment is under seal, and that imports a consideration, if it were necessary to show one. But Jordan might make the assignment as a gift, if he chose. The defendants could have no legal cause to complain. And certainly they have none, if Jordan, instead of paying the money, which he had agreed to pay to the plaintiff, gave him the mortgage, and the plaintiff so accepted it.

Exceptions overruled.

BRIAN E. MCDONOUGH, In Review *vs.* FRED A. BLOSSOM.

Cumberland. Opinion September 11, 1913.

Attachment. Entered by Special Leave of Court. Entry. Jurisdiction. Motion to Dismiss. Order of Service. Petition for Review. Revised Statutes, Chapter 91 Section 9. Revised Statutes, Statutes, Chapter 84, Section 1. Writ of Review.

1. The statute, R. S., chapter 91, section 8, requires that writs of review be served "as other writs."
2. A writ of review, on which no attachment nor service has been made, cannot be entered in court, with or without leave.
3. If a writ of review on which no attachment nor service has been made be entered in court improperly, the court gets no jurisdiction, even to order notice; and if notice is ordered, the order is improvident, and the notice ineffective. Upon motion seasonably made the writ must be dismissed.
4. Neither R. S., chapter 84, section 1, nor the Public Laws of 1911, chapter 149, confers jurisdiction upon a justice of the court to order notice, in term time or vacation, on a writ on which there has been neither attachment, nor service.

On exceptions by defendant. Exceptions sustained. Writ of review dismissed.

This is an action of review. The defendant here, who was the plaintiff in the original action, recovered judgment against the plaintiff here, who was defendant in said original action. The plaintiff brought a petition for review, which was granted. This writ of review was sued out, dated October 7, 1912, and made returnable to a term of court which was begun on the following day, and which was the next term after the review was granted. There was no attachment made on said writ and no service of same before entry in court. On the return day, the defendant appeared specially and moved to dismiss the action for want of proper legal service. This motion was overruled and the defendant excepted. The case is stated in the opinion.

Carrol W. Morrill, B. F. Cleaves, for plaintiff.

Symonds, Snow, Cook and Hutchinson, M. P. and H. P. Frank, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, PHILBROOK, JJ.

SAVAGE, C. J. The defendant here, plaintiff in the first instance, recovered judgment against this plaintiff, then defendant. The plaintiff brought a petition for review which was granted. *McDonough* v. *Blossom,* 109 Maine, 141. A writ of review was sued out, dated October 7, 1912, and made returnable to a term of court which was begun on the following day, and which was the next term after the review was granted. The defendant was a resident of this State, but no service of the writ was made on him. No attachment was made. No attachment could be made. R. S., ch. 91, sect. 9. On the eighth day of the term, the writ was entered by "special leave" of the court. Later in the term, on motion of the plaintiff, personal service was ordered on the defendant, the order being made returnable at the next succeeding term of court, and service was made as ordered. On the return day, the defendant appeared specially, and moved to dismiss the action for want of proper legal service. The motion was overruled, and the defendant excepted.

The question thus presented is whether a writ of review can legally be entered in court, with or without leave, when there has been no service whatever upon the defendant. For we shall assume that if such a writ is properly entered, and is properly in court, the court may order notice to the adverse party, as provided in R. S., ch. 84, sect. 1. But unless the proceeding, which is a writ, sued out of court like other writs, is properly pending in court, the court has no jurisdiction to order notice.

In the original statute respecting writs of review, Public Laws of 1821, ch. 57, sect. 4, no specific provision was made for the form of such a writ, nor for its service. But in the general revision of 1841, ch. 124, sect. 2, it was provided that "it shall not be necessary, in the writ of review, to recite at length the writ and proceedings

in the original suit, but it may merely contain a summons to the defendant to appear and answer to the plaintiff in review of an action," and so forth. And in section 3 of the same chapter, it was provided that "such writ of review may be served in the same manner as other writs." And in section 5 it was further provided that "the plaintiff in review shall enter the action at the next term after it is granted, unless for special reasons the court on motion grant leave to enter it at the second term." In the revision of 1857, ch. 89, sect. 6, the provisions for the form of the writ, and for service were condensed so as to read as follows: "The writ shall contain a summons to appear and answer to the plaintiff in review, and it may be served as other writs." And in this form the statute has remained until now. R. S., ch. 91, sect. 8.

If writs of review, which must be served "as other writs," follow the analogy of other writs, it would seem that they must be served before entry in court. As to other writs, it was so held in *Searles* v. *Hardy*, 75 Maine, 461. In the writ in that case, the defendant was described as an inhabitant of the State. No attachment was made. No service was made or attempted. The writ was entered in court, and an order of notice was obtained. In sustaining a motion to dismiss, the court said:—"An action such as this was cannot properly be entered in court without any service of the writ whatever, or any attempt to serve it, if the defendant is an inhabitant of the State, and no property has been attached upon the writ. If property has been attached upon the writ, or the service is defective without the fault of the plaintiff or his attorney, the action may be entered and an order of notice obtained. But when no property is attached, and no service of any kind attempted, the action cannot properly be entered and an order of notice obtained. And if such an order is improvidently made and complied with, the action will nevertheless be dismissed on the defendant's motion, if the motion is seasonably made."

But the plaintiff contends that the rule in *Searles* v. *Hardy* has been changed by two statutes which have become effective since *Searles* v. *Hardy* was decided. The two statutes are R. S., 1883, ch. 82, sect. 1. (Now R. S., ch. 84, sect 1.) and the Public Laws

of 1911, ch. 149. In the former, it was provided that "when it appears that a defendant has not had sufficient notice, the court may order such further notice as it deems proper. Any Justice of the Supreme Judicial or of either Superior Court may order notice concerning any civil proceeding, in or out of term time." The latter provides that "when it appears that the defendant has not had sufficient notice, the court may order such further notice as it deems proper. Any Justice of the Supreme Judicial or of either Superior Court may order notice concerning any court proceeding in or out of term time. . . . Any order of notice that the court may grant may be ordered by a Justice in vacation." These two statutes seem to cover the same ground, in the same way, and to the same extent. It may be said in passing that the words "order or notice" is probably a misprint for "order of notice." For the context leads us to think that the Legislature did not intend to give to Justices out of court the power to transact so much of the proper business of the court in session, as would be true, if a Justice out of court could make any order that the court could make. This would include almost everything done in court except the actual trial of issues of law or fact. But the phrase referred to can have no significance in this case, for here the order of notice was made by a Justice in term time.

It is conceded in argument, and properly, that the provisions in these statutes that the court may order "further notice" when the defendant has not had "sufficient notice" apply only in cases where service has been attempted, but is for some reason defective, and not in cases where no service at all has been made. But the plaintiff relies upon the other provisions empowering the court to order notice "concerning any civil proceeding," or "concerning any court proceeding" in or out of term time. It will be noticed that these statutes do not in any way, in terms, relate to the entry of writs, or change by any direct expression the rule in *Searles* v. *Hardy*. That rule is, to state it again, that a writ without attachment or service cannot be entered. It necessarily follows that if entered improperly, the court gets no jurisdiction to order notice, and if notice is ordered, the order is improvident and the notice ineffective. If that rule is to be regarded as changed by these statutes, it must be

by construction, and not by expression. We think the rule is not changed. We think that the power of the court to order notice on writs does not extend to writs which are not properly in court, as writs on which no service has been made, and no property attached. While for some purposes, a writ is said to be pending from the time it is made with an intention of service, yet if it is not served, and if no attachment is made, it is no longer pending, and is not in court. There are indeed many civil proceedings where the cause is not in court when an order of notice is granted. The party is seeking to get into court. Such are petitions for a review, petitions for leave to take or enter a probate appeal, and many others. *Sproul* v. *Randall,* 107 Maine, 274. These are not writs sued out of court.

But the plaintiff seeks to differentiate writs of review from other writs, and argues that even if the rule in *Searles* v. *Hardy* still applies to ordinary writs, sued out without leave of court, it does not apply to writs of review, which he says are special writs, and which can be issued only on previous authority had from the court.

A writ of review like other writs is sued out of court, under the seal of the court, with the teste of a Justice of the court. The statute requires that it contain a summons to the defendant to appear and answer. And it must be served. We can think of no ground on which such a writ, which must be served "as other writs," can be taken out of the category of writs in general, as to service and entry, unless it can be deemed to be a part of previous proceedings, as the original writ or the petition for a review, and that those proceedings in some way are still in court. If such were the case, it might perhaps be argued that the court retained jurisdiction, and could order notice in the new proceeding. But such an argument would seem to be counter to the provisions of the statute that the defendant be summoned to appear and answer, and that the writ be served. It was said in *Bradstreet* v. *Partridge,* 59 Maine, 155, that a writ of review is a "new and independent action," and "is to be regarded as the foundation of the action, and the case is to be entered, heard and determined on that writ." Judgment was rendered in the original suit. The parties were then out of court. The petition for a review did not disturb the judgment. The granting of

the petition did not disturb it. It remained in full force as a judgment, though execution might be stayed. If the plaintiff in review is successful he obtains a judgment which may be set-off against the old judgment, or if that has been paid, the new judgment stands and is to be collected as any original judgment may be. R. S., ch. 91, sects. 11 and 12; *Bradstreet* v. *Partridge,* supra. And as in the case of the original judgment, the case is finished and the parties out of court before review can be sought, so the petition for a review must be ended in a final judgment, and the parties be again out of court, before a writ of review can be issued. *Bradstreet* v. *Partridge,* supra. Then the defendant is to be summoned to appear and answer to the new writ. We cannot help concluding that the statute makes it what the court has called it a new and independent proceeding, to be begun and proceeded with according to the provisions of the statute which affords the remedy.

But even if a writ of review were to be regarded as supplemental to and a continuance of the original action, as is suggested in *Jackson* v. *Gould,* 74 Maine, 564, the case is in no better plight for the plaintiff, for it was held in that case that the review can be sustained only in accordance with the statute creating it, or some other statute applicable. Upon the whole we can perceive no good ground for saying that the statute does not mean just what it says, namely, that the writ of review is to be "served as other writs," that is, in the present particular, served before entry. There is no provision for entry without service. If not served, it cannot properly be entered, and the court has no authority to order notice.

It is urged in argument that a review is essentially an equitable proceeding, and that technical rules should not obtain. Whatever may be said of the petition for a review, the review when granted is a strict legal remedy regulated by statute, and the requirement for service is not a technical rule, but a plain statutory provision, as we understand it. The statute, we think, requires service before entry, even in case of a non-resident defendant, for it provides that service in such case may be made on the defendant's attorney in the original suit. And to the suggestion that there may be cases where the review may not be granted in season to have service of the writ made for the next term, it is only necessary to say that the statute permits an entry at the second term by leave of court, a

leave which would never be refused in such a case. R. S., ch. 91, sect. 7. *Look* v. *Ramsdell,* 68 Maine, 479.

In this case, the writ not having been served before entry "as other writs" without attachment, the motion to dismiss should have been granted.

Exceptions sustained.
Writ of review dismissed.

HAROLD C. ROLLINS *vs.* CENTRAL MAINE POWER COMPANY.

Kennebec. Opinion September 11, 1913.

Demurrer. Due Care. Exceptions. Negligence. Proximate Cause.

The plaintiff, an electric car conductor, alleged in his declaration, that, in the course of his duty, and in the exercise of due care, he was attempting to turn the trolley pole on his car from one end to the other, and that in so doing, "the trolley pole suddenly, with great force and violence, came in contact with the glass globe of an arc light negligently located by the defendant, breaking the globe so that a portion of it falling struck him in the eye, and entirely destroyed the sight of it."

Held; on demurrer, that the proximate cause of the injury, as alleged in the declaration, was the negligent act of the defendant, and not the plaintiff's act in turning the pole.

On exceptions by defendant. Exceptions overruled.

This is an action on the case in which the plaintiff seeks to recover damages for an injury to one of his eyes, alleged to have been caused by the negligence of the defendant in locating, erecting and maintaining an electric arc lamp less than fourteen feet from the ground, and so placed with reference to the stopping place of the car of which the plaintiff was conductor, that in turning the trolley pole to prepare for the return trip, it came in contact with glass globe around the lamp, breaking same and causing pieces of the glass to hit him in one of his eyes, destroying the sight of same.

The defendant filed a general demurrer to the plaintiff's declaration and the presiding Justice overruled the same. To this ruling, the defendant excepted.

The case is stated in the opinion.

B. F. Maher, H. H. Murchie, for plaintiff.

H. D. Eaton, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, PHILBROOK, JJ.

SAVAGE, C. J. Exceptions to the overruling of the defendant's demurrer. In the declaration it is alleged in substance, among other things, that the plaintiff on the day of the injury complained of was a conductor on one of the cars of an electric railway; that Depot Square in Gardiner was the terminal point of his car; that the defendant company had previously located and was then maintaining an electric arc lamp less than fourteen feet from the ground, and so placed with reference to the stopping place of the plaintiff's car, that in turning the trolley pole to prepare for the return trip there was great danger of the pole's breaking the glass globe around the lamp; and that in so placing the light the defendant was negligent. It is further alleged that the plaintiff on the day in question, in the course of his duty was attempting "to turn the trolley pole on the car from one end to the opposite end, and while so doing, and while in the exercise of ordinary care, the trolley pole suddenly, with great force and violence came in contact with the glass globe of the arc light negligently located as aforesaid, breaking the globe so that a portion of it falling struck him in the eye, and entirely destroyed the sight of it."

The point taken under the demurrer is that, even if the defendant was negligent, the declaration shows on its face that its negligence was not the proximate cause of the plaintiff's injury. It is contended that the plaintiff's own act by which the trolley pole struck the globe with "great violence" was the true proximate cause. We do not think the point is well taken.

Of course, if the plaintiff negligently handled the trolley pole so as to cause or allow it to strike the globe, he cannot recover in this suit. But that is a question which cannot be settled on demurrer.

The plaintiff alleges that he was in the exercise of due care. And the fact that the trolley pole struck the globe with great violence may have been due to the plaintiff's negligence, and it may not have been. That can be determined only upon a trial on the merits.

Upon the allegations, we think that the turning of the pole by the plaintiff should be called the occasion, and not the proximate cause, of his injury. *Pollard* v. *Maine Central R. R. Co.,* 87 Maine, 51. It is no more an intervening cause than is the walking of a man who steps into an unguarded hole in a sidewalk, or the act of a workman in his work who comes in contact with a buzz-saw. Suppose the lamp had been hung so low that a motor man driving his car, or a traveler driving in the street, had hit it. Can it be said that the driving in either case was the intervening, efficient cause? By no means. Here nothing intervened. The turning of the trolley pole furnished the occasion for the true proximate cause, the alleged position of the lamp, to become operative.

The two cases cited by the defendant, *Nelson* v. *Narragansett Electric Lighting Co.,* 26 R. I., 258, and *Leeds* v. *N. Y. Telephone Co.,* 178 N. Y., 118, are not in point. In each of the cases, the intervening cause which was held to be the proximate cause of the injury, was the wrongful, negligent act of a third party. See, also, *Currier* v. *McKee,* 99 Maine, 367.

Exceptions overruled.

ANDREW CLARK *vs.* ANDREW R. HOLMES and Trustee.

Washington. Opinion September 11, 1913.

Acceptance. Assent. Assignment. Creditors. Disclosure. Parties to Assignment. Signatures to Assignment. Trustee.

1. Unless an assignment for the benefit of creditors provides otherwise, the assent of a creditor may be shown by any conduct or language which indicates that he consents to it. In such case, his signature upon the instrument is not essential.

2. Where an assignment for the benefit of creditors contained also an offer to pay a special percentage to all creditors who should become parties to the assignment within a certain time, the creditors who accepted the offer thereby assented to the assignment.

Report on agreed statement of facts. Trustee charged for $44.58, less his costs legally taxed.

The defendant on the 10th day of April, 1911, made a common law assignment for the benefit of his creditors to Leo D. Lamond, wherein he offered 25 per cent to all creditors who became parties to said assignment. The plaintiff in this action did not assent to said assignment, but on the 12th day of May, 1911, commenced this action and summoned said Lamond as trustee, and made it returnable to the Municipal Court for the city of Eastport. By agreement of parties, and upon an agreed statement of facts, the case was certified to the Chief Justice in accordance with Private Laws of 1903, chapter 219, section 11, for the determination of the law question whether those creditors who wrote letters to Lamond, stating that they would accept the 25 per cent offered, thereby became "parties to the assignment" within the meaning of that phrase in the assignment.

The case is stated in the opinion.

A. D. McFaul, for plaintiff.

R. J. McGarrigle, for trustee.

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

SAVAGE, C. J. The defendant, on April 10, 1911, made a common law assignment of all his estate for the benefit of all his creditors who should become parties to the same to Leo D. Lamond, who has been summoned as trustee in this action. The assignee notified the several creditors of the debtor of the assignment and offered to pay twenty-five per cent to all creditors who became parties to the assignment. No creditor signified his assent by signing the assignment. Four creditors in reply to the notice from the assignee wrote to him as follows:—One Frye & Co. on April 20 wrote, "Yours of the 17th Re A. R. Holmes at hand and note your remarks. . . . We are willing to accept 25 per cent cash to settle the account." A second, on April 20, Perkins Box Factory, wrote, "We are sorry to note by your favor of the 17th, the failure of A. R. Holmes. We enclose you an itemized . . . amount of our claim. We think if you get 25 per cent you will do pretty well." A third, Dennysville Lumber Co., on April 21, wrote, "Our claim against A. R. Holmes is $102.54, and we will settle for 25 per cent provided we receive settlement for same in 60 days." A fourth, Calais Box & Lumber Co., on May 9 wrote, "Replying to your favor of the 17th ult. in regard to our account against Andrew R. Holmes, we are enclosing you bill of the account as per our books and hereby express our willingness to accept 25 per cent of the same in settlement. . . ."

This action was brought by a non-assenting creditor on May 12, 1911, and was served on the assignee as trustee on the following day. The trustee discloses that he had in his hands two hundred and fifteen dollars of the Holmes estate at the time the writ was served, that the claims of the creditors whose letters have been referred to amounted to $265.66; that he claims to deduct from the amount on hand, 25 per cent of these claims, or $66.42, and his own account for services and expenditures, amounting to $104.00, leaving in his hands the sum of $44.58.

The question to be decided is whether the creditors who wrote these letters thereby became "parties to the assignment" within the meaning of that phrase in the assignment. If they did, their claims

which exceed in amount the sum disclosed by the trustee will exhaust the same, and, but for the fact that they have agreed to accept 25 per cent of their claims, nothing would be left to which the trustee process can apply. Whether strictly they would be entitled to more under the assignment, if the estate turned out to be able to pay more, we need not consider, for only 25 per cent is now claimed.

Within the meaning of the phrase "parties to the assignment," the creditors who wrote the letters became "parties" to it, if they assented to it. Unless such an instrument of assignment provides otherwise, it is not necessary that a creditor's assent be evidenced by his signature to the instrument, or that it appear upon the instrument. It need not be in writing even. It need not be formal and express, but may be implied. *Wiley* v. *Collins,* 11 Maine, 193. It may be qualified or conditional. *Deering* v. *Cox,* 6 Maine, 404. Any act, conduct or language on the part of a creditor indicating that he has consented to an assignment made for his benefit will constitute a sufficient assent. *Nutter* v. *King,* 152 Mass., 355; 4 Cyc., 141, and cases cited.

But it is contended in argument that the creditors did not, by word or conduct, assent to the assignment, but rather did assent to the composition offer of 25 per cent, and, among other things, it is suggested that the case does not show that the creditors were even asked to become parties to the assignment. We think this contention is not sound.

The offer was not to pay the 25 per cent to all creditors, but only to all creditors who should become parties to the assignment. Therefore these creditors who agreed to accept the 25 per cent offer thereby impliedly agreed to the condition upon which the offer was made, and that condition was that the creditors assent to the assignment and become parties to it. We think a sufficient assent is shown, and that the plaintiff by this trustee process can hold no more than the surplus which will remain in the hands of the assignee after satisfying the percentage agreement of the assenting creditors, and a reasonable deduction for his services and expenses. The reasonableness of the assignee's charges is not disputed in this case. The certificate will be,

Trustee charged for $44.58, less his costs legally taxable.

BROOKS HARDWARE CO. *vs.* GREER and Trustee.

Kennebec. Opinion May, 1911.

Held for Rehearing, until August, 1913.

Army and Navy. Jurisdiction of State Court. Soldiers' Home. Trustee Process.

1. The principle that the sovereign cannot be sued is predicated upon the condition that it has not consented to be sued, which it may do.
2. The National Home for Disabled Volunteer Soldiers, established under Act of Congress, March 21, 1866, chapter 21, Sections 1-14, United States Revised Statutes Section 4825, et seq., U. S. Comp. Statute, 1901, page 3337, is not subject to trustee process in an action brought in a state court; the institution not being properly regarded as having its place of business "within the state" within the trustee process statutes, since the State ceded to the United States jurisdiction over the lands on which the Home is situated.

On exceptions by the plaintiff. Overruled.

This is an action of assumpsit on an account annexed, in which the National Home for Disabled Volunteer Soldiers is summoned as trustee. The principal defendant was defaulted and it was admitted that the alleged trustee had entered into a written contract with the principal defendant for the complete construction of the improvements of the sewerage and drainage system of the eastern branch of the National Home for Disabled Volunteer Soldiers, located at Chelsea, in the County of Knnnebec. The preliminary question presented to the court was whether the National Home could be legally charged as trustee in this action. The Justice presiding ruled that it could not be so charged, because it was a disbursing agent of the United States government. To this ruling, the plaintiff excepted.

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Robert Treat Whitehouse, U. S. Attorney specially for trustee.

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

KING, J. This is an action of assumpsit, on an account annexed, brought in the Supreme Judicial Court for Kennebec County, Maine, in which the National Home for Disabled Volunteer Soldiers is summoned as trustee. The principal defendant was defaulted. It was admitted that the alleged trustee had entered into a written contract with the principal defendant for the complete construction of the improvements of the sewerage and drainage system of the eastern branch of the National Home for Disabled Volunteer Soldiers, located at Chelsea, in said county of Kennebec, and the plaintiff introduced evidence tending to show a balance due the principal defendant in the hands of the treasurer of the Home at the time of the service of the writ upon the alleged trustee. The case was heard by the presiding Justice upon the preliminary question whether the National Home could be legally charged as trustee in this action, and the Justice ruled that it could not be so charged, because it was a disbursing agent of the United States government. The case is before this court on plaintiff's exceptions to that ruling.

The question thus presented leads at once to an inquiry as to the creation and constitution of the National Home for Disabled Volunteer Soldiers, and its character and functions. It was established under the provisions of an act of Congress, approved March 21, 1866, and now embodied in R. S., U. S., sec. 4825 et seq. Section 4825 is as follows:

"The President, Secretary of War, Chief Justice, and such other persons as have been or from time to time may be associated with them, shall constitute a board of managers of an establishment for the care and relief of the disabled volunteers of the United States army, to be known by the name and style of 'The National Home for Disabled Volunteer Soldiers,' and have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto." U. S. Comp., St. 1901, p. 3337.

In the other sections of the act, and in the subsequent statutory amendments and additions, it is provided, in substance, and so far as seems material here, that nine managers of the Home (the number was subsequently increased) shall be elected from time to time, as vacancies occur, by joint resolution of Congress; that the managers shall have authority to select sites for branch Homes and have the necessary buildings erected; that the general treasurer shall give bond to the United States "faithfully to account for all public moneys and property which he may receive," and the treasurer of the branch Homes shall give bond to the general treasurer; that no money shall be appropriated or drawn for the support and maintenance of said Home, "except by direct and specific annual appropriations by law." In the original act it was provided that the managers should make an annual report of the condition of the Home to Congress on the first Monday of every January, and that they should audit the accounts of the treasurer; but later provisions in this respect, and as to the limit and regulation of expenditures, were more exacting and explicit, and are important as showing the relation of the "establishment" so created by Congress to the general government.

By the Act of March 3, 1887, c. 362, 24 Stat., 539, (U. S. Comp., St. 1901, p. 3348) it was required that "all of the expenditures of the said home, including the expenses of the board of managers, shall be made subject to the general laws governing the disbursements of public moneys, so far as the same can be made applicable thereto, and shall be audited by the proper accounting officers of the treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury."

By the Act of March 3, 1891, c. 542, 26 Stat., 984, (U. S. Comp., St. 1901, p. 3348), it was provided: "That the accounts relating to the expenditures of said sums, as also all receipts by said Home from whatever source, shall, in addition to the supervision now provided for, be reported to and supervised by the Secretary of War."

By the Act of March 3, 1893, c. 210, 27 Stat., 653, (U. S. Comp., St. 1901, p. 3349), it was provided that: "The Secretary of War shall hereafter exercise the same supervision over all receipts and

disbursements on account of the Volunteer Soldiers' Homes as he is required by law to apply to the accounts of disbursing officers of the army."

And by the Act of March 3, 1901, c. 853, 31 Stat., 1178, (U. S. Comp., St. 1901, p. 3350), it was provided: "That the accounts relating to the expenditures of all public moneys appropriated for the support and maintenance of the National Home for Disabled Volunteer Soldiers shall be audited by the board of managers of said Home in the same manner as is provided for the accounts of the various departments of the United States government, and thereupon immediately transmitted directly to the proper accounting officers of the Treasury Department for final audit and settlement."

The Home can make no contract not authorized by Congress, or under an appropriation adequate to its fulfillment. Expenditures must be applied solely to the objects for which they are appropriated, and are not to exceed such appropriations. With some small exceptions, all the means for the establishment and support of the Home are provided by Congress.

A consideration of the provisions of the act of Congress of March 21, 1866, which created and provided for the perpetual maintenance of the National Home for Disabled Volunteer Soldiers, as a great national charity to be supported by appropriations from the national treasury, together with an examination of the many subsequent acts of Congress which have explicitly defined the purposes, limited the powers, regulated the management, and controlled the expenditures of the Home, leads us to the conclusion that the essential character and functions of this "establishment" are those of an agency—an instrumentality of the United States government.

It was the United States that had the purpose to establish this great public charity, and that was to provide the means for its perpetual maintenance from its treasury. To effectuate that purpose, it created this "establishment" as its agency to execute its will. The money appropriated by Congress from the national treasury for the support of this charity is the money of the United States, and not the money of the Home, and it so remains until expended for the purposes intended. This is clearly apparent from

the explicit congressional provisions and requirements as to its expenditures, and especially that requiring the treasurer of the Home to give bond to the United States "faithfully to account for all *public moneys* and property which he may receive."

But the plaintiff contends that, if the National Home for Disabled Volunteer Soldiers is to be regarded as an agency or instrumentality of the United States, it is, nevertheless, subject to this trustee process, which is in effect a suit against it, because the act which created and established the Home expressly provided that it could "sue and be sued in courts of law and equity."

The application of the well-settled principle that the sovereign cannot be sued is, of course, necessarily predicated upon the condition that the sovereign has not consented to be sued, which it may do.

It has been held that this power conferred upon the Home, to sue and be sued, is not to be construed as a consent that it may be sued in tort. *Overholser* v. *National Home,* 68 Ohio St., 236. 67 N. E., 487, 62 L. R. A., 936, 96 Am. St. Rep., 658. But no case has been called to our attention (except, perhaps, *Foley* v. *Shriver,* 81 Va., 568), and we have found none, in which the question has been considered whether the Home can be sued in the state courts in actions ex contractu. *Foley* v. *Shriver,* supra, was an action in the State Court in which it was sought to charge the Home as trustee—precisely the same question as here presented—and the court there held (1) that the federal government had exclusive jurisdiction of the territory of the Home under the ceding act of the state of Virginia, excepting only that civil and criminal processes of the state courts could be served there, and (2) that the officers of the Home were disbursing officers of the United States government, and that the funds in their hands as such cannot be attached under trustee process. The court did not consider, or at least comment, as to the effect to be given to the provision that the Home could "sue and be sued."

Whether this provision of the act imposing upon the Home the liability to be sued must be construed as a consent by Congress that this governmental agency may be sued in the state courts, and if so, upon what causes of action, is an inquiry not necessary to be

decided, we think, in the determination of the question now before us, for in this case the plaintiff regards the alleged trustee as an independent corporation, and as such seeks to charge it as a trustee of the principal defendant. And assuming, but not admitting, that it is such an independent corporation, the question presented is whether it is within the provisions of the statute of this State authorizing corporations to be summoned as trustees; that statute provides that: "All domestic corporations, and all foreign or alien companies or corporations established by the laws of any other state or country, and having a place of business, or doing business within this state may be summoned as trustee." Rev. St., chap. 88, sec. 8. Our court, then, did not have jurisdiction to summon this National Home as trustee, unless the Home, which is not a domestic corporation, had a place of business, or was doing business, within this State. It is not contended that the Home as a corporation had any place of business, or was doing business at any place, in this State, other than upon the territory of the eastern branch of the Home in Kennebec county. The question then is whether this "establishment," irrespective of whether it is an independent corporation or not, had a place of business "within this state."

The title to the land comprising the Home is not in the United States, but in the "establishment," as it is called in the act of Congress, which was empowered to take and hold title to real estate. That title was acquired by the consent of Maine, expressed in chapter 66 of the Public Laws of 1867. In that act it was provided: "And jurisdiction over said lands is hereby granted and ceded to the United States; provided that this state shall retain a concurrent jurisdiction with the United States in and over said lands; so far that all civil processes, and such criminal processes as may issue under the authority of this state against any person or persons charged with crimes or offenses committed outside of said lands, may be executed thereon, in the same manner as though this cession and consent had not been granted; and provided further, that no change shall be made in the location of highways over said premises without the consent of the county commissioners of Kennebec county." If by this act of cession the territory ceded ceased to be territory over which the State of Maine has jurisdiction, and

became territory over which the United States has exclusive jurisdiction and supremacy, then it follows that the Home has no place of business, and is not doing business, "within this state," for the import of those words as used is "within the jurisdiction of this state." The language used in this ceding act is practically identical with that used in the ceding acts passed by other states, where land has been purchased by the United States for public purposes, from which fact it is reasonable to infer that the use of such uniform language of cession was at the instance of the United States; and an examination of the cases in which this language has been construed discloses the reason for its use to be in the fact that its construction, by both federal and State Courts, has been definite and consistent from an early date.

It is provided in article 1, sec. 8, of the United States Constitution, that: "The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings." In the decisions construing ceding acts, where land has been purchased by the United States with the consent of the State, and determining the extent of the jurisdiction of the United States over such ceded territory, regard has been had to this constitutional provision.

In *Commonwealth* v. *Clary,* 8 Mass., 72, involving the question of jurisdiction over lands at Springfield, purchased by the United States, with the consent of the State, for erecting thereon arsenals, etc., the court, by the Chief Justice, said: "On the facts argued in this case we are of opinion that the territory on which the offense charged is agreed to have been committed is territory of the United States, over which Congress have the exclusive power of legislation. The assent of the commonwealth to the purchase of this territory by the United States, had this condition annexed to it, that civil and criminal process might be served therein by the officers of the commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals."

In *Mitchell* v. *Tibbetts,* 17 Pick., (Mass.), 298, the same construction was put upon the same language in the ceding act of the territory for the Charlestown Navy Yard.

In 1841 the House of Representatives of Massachusetts requested the opinion of the Justices of the Supreme Court of that State whether persons residing on lands in that State, purchased by or ceded to the United States for navy yards, arsenals, dockyards, forts, etc., were entitled to the benefits of the State common schools for their children in the towns where such lands were located, and the Justices answered in the negative saying: "Where the general consent of the commonwealth is given to the purchase of territory by the United States for forts and dockyards, and when there is no other condition or reservation in the act granting such consent but that of concurrent juisdiction of the State for the service of civil process and criminal process against persons charged with crimes committed out of such territory, the government of the United States has sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence, with the single exception expressed." Accordingly it was there held that the persons residing on such territory were not entitled to the benefits of the common schools for their children in the towns in which such lands are situated; that they are not subject to taxation by said towns; that residence upon such territory for any length of time will not give such person a "legal inhabitancy" of such towns; and that such persons were not entitled to any elective franchise in such towns. Opinion of Justices, 1 Metc., 580.

In *Ft. Leavenworth R. R. Co.* v. *Lowe,* 114 U. S., 525, 5 Sup. Ct., 995, 29 L. Ed., 264, the question of the jurisdiction over lands within a State, acquired by the United States with the consent of the State, is exhaustively considered, and the authorities as to the construction of the uniform language of the ceding acts are collated, showing "the consistency with each other of the decisions on the subject by federal and state tribunals, and of opinions of the Attorneys General." It is there said: "When the title is acquired by purchase by consent of the Legislature of the state, the federal jurisdiction is exclusive of all state authority. . . . The reservation which has usually accompanied the consent of the state,

that civil and criminal process of the state courts may be served in the place purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice."

The Ft. Leavenworth case was an action to recover back the amount of a tax paid, which the State of Kansas had assessed against the plaintiff upon its railroad property upon the military reservation. The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and for many years prior to the admission of Kansas as a state the territory of the reservation had been reserved from sale. After the admission of Kansas, the Legislature of the State passed an act ceding to the United States jurisdiction of the land of the reservation, containing substantially the same language as in other ceding acts, providing for the right to serve civil and criminal processes in the territory, and also "saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property on said reservation." The court held that this reservation was valid and that the tax could not be recovered back. As we understand the opinion, it states the reason for the decision of the court, on the precise question involved, to be that the land of the reservation was not purchased by the United States with the consent of Kansas, and that the subsequent cession of jurisdiction to the United States was not exclusive, containing a saving clause of the right to tax the railroad, and that the exercise of the right under that saving clause did not interfere with the use of the reservation by the United States; and hence the right to tax the railroad existed in the State the same as before the cession. But the paramount idea of the opinion, as the conclusion of the court, after a review of the authorities, manifestly is that the effect of a cession of jurisdiction over certain territory within a state to the United States, by consent of the state, reserving to the state only concurrent jurisdiction to serve civil and criminal processes therein, is to put that territory under the exclusive jurisdiction and dominion of the United States, with the single exception expressed, at least when the property is purchased for the constitutionally specified purposes.

The following cases involved the question as to the jurisdiction over lands purchased, with the consent of the states, for sites for branches of this National Home. *Sinks* v. *Reese,* 19 Ohio St., 306, 2 Am. Rep., 397; In re O'Connor, 37 Wis., 379, 19 Am. Rep., 765; *Foley* v. *Shriver,* 81 Va., 568; In re Kelley (C. C.) 71 Fed., 545. It will be seen that these cases are to some extent conflicting.

In *Sinks* v. *Reese,* supra, the Supreme Court of Ohio had before it the question of the legality of votes cast at an election of a county officer by inmates of the branch of the National Home located in that State, and the conclusion there reached is that the legislative cession of jurisdiction to the United States operated to fix "the exclusive jurisdiction of the general government over this institution, its lands, and its inmates, 'in all cases whatsoever,' except as to the execution of process issuing under state authority." Speaking of a person who becomes an inmate of the Home, the court said: "He becomes, subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the State of Indiana or Kentucky, or the District of Columbia."

The court holds that: "Asylums for the disabled soldier in no substantial sense differ from hospitals in a fortress or in the field. All are alike necessary, and the power to erect and maintain them is incidental to the war power of the government;" and hence that the land was acquired for a purpose reasonably within the constitutional purposes.

In *Foley* v. *Shriver,* supra, an action of foreign attachment against the Home, hereinabove referred to to some extent, the court of Virginia seems to regard the constitutional provision giving to the United States power to exercise exclusive jurisdiction over lands within a State, purchased by the United States with the consent of the State, as applicable to the question before it.

The court said: "In this case the state Legislature having given the required consent and the United States having purchased the land in question, the United States have acquired, under the federal Constitution, exclusive jurisdiction over the ceded land, and they are no longer a part of the state of Virginia and are not subject to the jurisdiction of the state courts." It was also held, as hereinbefore stated, that the officers of the Home were disbursing

officers of the United States government, and for that reason not subject to trustee process. It is thus seen that in the Ohio and Virginia cases it is held that the lands acquired for the branch Homes, under the ceding acts of the respective States, are under the exclusive jurisdiction of the United States.

In the two Wisconsin cases, however, the conclusion was reached that the State Courts had at least jurisdiction over criminal offenses committed on the land on which the branch Home in that State was located.

In re O'Connor the question was whether the State Court had jurisdiction to try an inmate of the Home for an alleged assault and battery committed upon another inmate upon the grounds of the Home. The court held in favor of such jurisdiction, treating the ceding act of the State as void, because the land was not purchased directly by the United States, a feature of the decision commented upon somewhat adversely in the latter case of In re Kelley, which arose in the United States Circuit Court of the same State.

In re Kelley, supra, the question was reversed from that in the O'Connor case, and was whether the Circuit Court had jurisdiction to try and punish the petitioner charged with the commission of a crime upon the grounds of the Home, and the court held that it did not have such jurisdiction. In the opinion the learned District Judge reasons and holds that the constitutional provision giving the Congress power to exercise exclusive jurisdiction over lands purchased with the consent of the State in which the same is situated, is only applicable to cases where there is an actual purchase, with the consent of the State, for the constitutional purposes, and when that is the fact all jurisdiction passes to the United States by virtue of the constitutional provision, and irrespective of any express cession of jurisdiction, other than an unqualified consent by the State that the purchase be made. He seems to regard the purposes of the establishment and maintenance of the National Home as not within the letter of the constitutional purposes, but he says: "But, whatever may be the rule pronounced when that question arises, it appears indisputable that all State jurisdiction is not excluded from every parcel of land purchased by the general government in a State with legislative consent, irrespective of its use;

and therefore that, if the purpose is not one of those distinctly named in this clause of the Constitution, the act of Congress which provides for the purchase and requires the legislative consent must in some unequivocal terms declare that exclusive jurisdiction is intended and necessary for the proposed use, or at least the purpose stated must be one of which it is manifest that any exercise of co-ordinate or other jurisdiction would be incompatible therewith." And he further says: "I am therefore of opinion that this clause of the Constitution, upon which the Ohio and Virginia decisions mainly rest their view of the state enactments, respectively, is not applicable to this Wisconsin case, and cannot be invoked to exclude the exercise of state jurisdiction over the crime charged against the petitioner."

Passing to the consideration of the effect of the ceding act, he says: That "has impressed me as presenting the greatest difficulty" but the conclusion is reached "that the purpose was not one for which exclusive legislation was prescribed, either by the Constitution or by congressional enactments; the omission of the word "exclusive" or some equivalent is material, and in my opinion the act must be interpreted, as ceding—that is, yielding or surrendering—to the United States such jurisdiction as Congress may find necessary for the objects of the cession, and for the exercise of which there must be clear enactments to that end within its powers."

This decision In re Kelley is the only expression of the federal courts, so far as we are advised, touching the question of jurisdiction over the sites of the branch Homes, and for that reason we have referred to it at some length. It seems very clear to us that the question involved in that case whether the United States had such exclusive judisdiction over the territory owned by the Home as would take from the State jurisdiction over crimes committed thereon is entirely different from that involved in the Virginia case, and in the case now before us. In the Wisconsin cases the question of jurisdiction was respecting only a person on the territory of the Home, and his acts committed there, but forming no part in the execution of the functions of the Home. But the question here presented is whether the United States has the exclusive jurisdiction over the Home itself—the "establishment" created by Congress for the sole purpose of maintaining and carrying on, under explicit con-

gressional regulations, a great national charity supported by appropriations from the treasury of the United States. We do not understand the federal decision to hold, even by implication, that the United States does not have such exclusive jurisdiction. Such jurisdiction over the Home itself, over the impersonal entity, created by the general government to execute its purposes as expressed in the congressional enactments establishing the Home, and providing for its perpetuation and maintenance, must have been intended, for, in the language of the Kelley case, "it is manifest that any exercise of co-ordinate or other jurisdiction (over the Home itself) would be incompatible therewith." Such exclusive jurisdiction is obviously necessary for the proper execution of the functions of the Home. And we are of opinion that, under the purchase of this territory in Maine, on which the eastern branch of the Home is located, the title to which was taken in the name of the Home, but which was paid for from the national treasury, and under the ceding act passed by the Legislature of Maine, expressly consenting to the purchase, "for the purpose of locating, erecting, and maintaining thereon an asylum for disabled volunteer soldiers" and ceding to the United States "jurisdiction over said lands," excepting only that civil and criminal processes issued from the state courts might be served thereon, the United States has the exclusive jurisdiction over the Home itself as the "establishment" which Congress created, and that the "establishment," though regarded as a corporate existence and having the right to sue and be sued, does not have its place of business "within this state," and is not subject to trustee process issued from the courts of this State.

We do not here undertake to decide the question as to what jurisdiction the state courts may have over crimes committed on the territory of the Home, or over rights arising between individuals residing on the territory, or between them and persons residing elsewhere in the State, or any of the many other questions that might arise involving jurisdiction over the territory. Those questions are not now presented.

For the reason above stated, the entry must be,

Exceptions overruled.

SEWALL C. RIPLEY *vs.* INHABITANTS OF HARMONY.

Cumberland. Opinion September 12, 1913.

Amendments. Attachment. Exceptions. Exempt. Motion. Original Summons. Property of a Town. Revised Statutes, Chapter 84, Section 10. Revised Statutes of 1820, Chapter 63. Revised Statutes of 1841, Chapter 114, Section 25. Revised Statutes, Chapter 63, Section 2. Title. Writ.

1. The real estate of a town, not exempted by statute, and not used by the town in the performance of its municipal functions, may be attached in a suit against it.
2. An action against a town may be begun by writ of summons and attachment, and not necessarily by writ of summons only.

On exceptions by the defendant. Exceptions overruled.

This is an action of assumpsit on an account annexed to the writ to recover the sum of five hundred and twenty-three dollars. The action was commenced against the town with a writ of summons and attachment, and the property of said town attached thereon. On the entry day of said action, the defendant filed a motion to dismiss said action on the ground that said writ should have been one of original summons only, instead of one of summons and attachment combined. The presiding Justice overruled the motion to dismiss and the defendant excepted.

The case is stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Merrill & Merrill, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, PHILBROOK, JJ.

SAVAGE, C. J. This action against a town was commenced with a writ of summons and attachment, that is, the will commanded the officer to attach the property of the defendant, and to summon it to appear. The defendant seasonably filed a motion to dismiss, on the

ground that the writ should have been one of original summons only, and not of summons and attachment combined. The motion to dismiss was overruled, and the defendant excepted. The question is of no practical importance, because if the writ is faulty, as claimed, it is amendable, under our statute of amendments, R. S., ch. 84, sect. 10, by striking out the command to attach. And if necessary amendment is made, it cannot in the end be abated.

The defendant's point is that the property of a town cannot lawfully be attached on a writ, and that a writ which commands an unlawful act is bad in form, and abatable. In support of this contention *Thayer* v. *Comstock,* 39 Maine, 140, is cited. Assuming the doctrine of that case to be correct, we go back to inquire if the defendant's premise is also correct, that is, that the property of a town is necessarily non-attachable. If property of a town may be attached on a writ against it, then a writ of attachment may be issued in a suit against a town.

In the forms of writs prescribed in chapter 63 of the Laws of 1820 are found writs of original summons, without attachment, writs of attachment, and provisions for a separate summons when property has been attached. The writs of summons and the writs of attachment were distinct. But by R. S., 1841, ch. 114, sect. 25, it was first provided that the writ of attachment and of summons may be combined in one. That is what was done in the present case. The forms authorized by these statutes have remained in force until the present time. Revised Statutes, chap. 83, sect. 2, provides that "all civil actions . . . shall be commenced by original writs . . . framed to attach the goods and estate of the defendant . . . or as an original summons, with or without an order to attach, . . . and where goods or estate are attached . . . the writ and summons may be combined in one." Towns are not excepted in terms from the provisions of this statute. It says "all actions." But the defendant argues that in legal effect, towns are excepted, as to writs of attachment, because the property of towns cannot be attached.

There is no statute which forbids the attachment of the property of a town. And although it is not to be questioned that public policy will not permit the attachment and sale on execution of buildings

and land owned and used solely for public purposes, and not for pecuniary profit, (See *Goss Co.* v. *Greenleaf,* 98 Maine 436) yet we can conceive of no reason of policy which should exempt from attachment the land of towns, not used for public purposes. A town may own property, not only for public uses, but also under some conditions as a private owner may, for sale, or pecuniary profit. Suppose a town, as the statute permits, bids in land sold at tax sale, and thereby in time acquires an indefeasible title to it, or suppose that it acquires title to land by levy on execution issued on a judgment in its favor. Such land is not, on that account alone, considered as used for public purposes. The town may sell it. While it owns it, it may rent it or use it for profit. Its relation to the land is that of a private owner. To attach it in no way interferes with or interrupts the execution of the proper municipal functions of the town.

But without discussing further the question of policy, we say that the question in issue seems to be answered by the statute. It is provided, R. S., ch. 78, sect. 1, that real estate attachable may be taken to satisfy an execution. The implication necessarily is that real estate not attachable cannot be so taken. Revised Statutes, ch. 86, sect. 30 provides that "all executions against towns shall be issued against the goods and chattels of the inhabitants thereof, and against the real estate situated therein, whether owned by such town or not." This must mean that the execution may be levied upon real estate owned by the town. The provision that executions shall be issued against the town's real estate as well as that of others, has no meaning otherwise. If the land can be taken on execution, it would seem to follow logically that it may be attached. And we so hold. This conclusion is aided by the language of R. S., ch. 78, sects. 1 and 32, which declare that real estate attachable may be levied upon and set off or sold on execution. Here, we think the necessary implication is that only attachable real estate may be levied upon. So that, if it may be levied upon, it is attachable.

In this discussion, we have not overlooked the defendant's contention that the provision in chapter 86, section 30 that an execution against a town "shall be issued . . . against the real estate situated therein, whether owned by such town or not," is susceptible of a different interpretation from that which we have given to it.

The general provisions for the issuing and satisfying executions against towns, now found in section 30, seem to have been enacted first in chapter 64, section 3, of the Laws of 1833. And in that section the language used is "that all executions . . . against any town shall run, or be issued, . . . against the real estate situated therein, whether said real estate be owned by inhabitants or other persons." No reference was made to ownership by the town. In the revision of 1841, chapter 117, sect. 42 the language was changed so as to read "shall be issued . . . against the real estate situated therein whether the same is owned by the town or not," substantially as it reads in the present statute. It is contended that the new phraseology in 1841 should be deemed merely a change in expression, and not a change in meaning. If the words "other persons" in the Act of 1833 was intended to include the town itself, then there was no change of meaning by the use of the language quoted in the revision of 1841. It was simply more explicit, and made the meaning clearer. But if towns were not included in the Act of 1833, then the meaning was changed in the revision, for certainly they were expressly included in that revision, and are now. Language cannot be clearer and more definite.

In conclusion, we hold that real estate belonging to a town may be attached on a writ against the town, under some conditions, as when it is not exempted by statute, and when it is not used by the town in the performance of its public functions. It follows that a writ of attachment may be issued against a town. And a writ so issued is not abatable on that ground. The ruling below was correct.

Exceptions overruled.

HENRY B. LAWRENCE, Petr. *vs.* HENRY RICHARDS et als.

Kennebec. Opinion September 12, 1913.

Discrimination. Exceptions. Extensions. Mandamus. Peremptory Writ. Private and Special Laws of 1903, Chapter 82. Private and Special Laws of 1905, Chapter 89. Trustee. Water Systems.

1. Exceptions lie, in matters of law, to the denial of a writ of peremptory mandamus.
2. The charter of the Gardiner Water District provides that "all the affairs of said water district shall be managed by a board of trustees composed of three members to be chosen by the municipal officers of the city of Gardiner;" the trustees are empowered "to issue bonds to an amount sufficient to procure funds . . . for further extensions, additions and improvements," and "to establish rates sufficient to provide, among other things, for revenue for . . . such extensions and renewals, as may become necessary." On mandamus to compel an extension, *held:*—

a. That the trustees are charged with the performance of all duties which the law imposes upon the District, and are vested with the right to exercise their discretion in all matters in which the District could exercise its discretion.

b. That the petitioner, a resident within the limits of the District, has no vested legal right to have the District water main extended to his house, a distance of about five miles.

c. That the trustees, except as far as they are limited by statute, are vested with discretionary powers in the matter of extensions of the system, with the exercise of which the court cannot interfere.

3. Mandamus does not lie to compel the performance of acts necessarily involving the exercise of judgment and discretion, on the part of the officer or board at whose hands performance is desired.

On exceptions by the petitioner. Exceptions overruled.

This is a petition for mandamus against the defendant as trustees of the Gardiner Water District wherein the petitioner seeks to compel the defendants to extend the water main of said District to the petitioner's residence in South Gardiner, and supply him with water. The cause was heard before a single Justice, who denied the peremptory writ, and the petitioner excepted to that ruling.

The case is stated in the opinion.

Henry H. Sawyer, for petitioner.

George W. Heselton, Will C. Atkins, and Hon. William P. Whitehouse, with them, for respondents.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HANSON, PHILBROOK, JJ.

SAVAGE, C. J. This is a mandamus proceeding brought against the defendants as trustees of the Gardiner Water District, wherein it is sought to compel the defendants to extend the water mains of the District to the petitioner's residence in South Gardiner, and supply him with water. The cause was heard before a single Justice who denied the peremptory writ, and it comes before us on exceptions to that ruling.

The defendants, in the first place, interpose the objection that exceptions do not lie, when a peremptory writ of mandamus is denied. And they rely upon the language found in R. S., chap. 104, sects. 17 and 18. Section 17 reads as follows: "A petition for a writ of mandamus may be presented to a justice of the supreme judicial court in any county in term time or vacation, who may, upon notice to all parties, hear and determine the same, or may reserve questions of law arising thereon, upon exceptions or otherwise, for the determination of the full court, which may hear and determine the same as hereinafter provided; but in all cases where exceptions are alleged to any rulings, findings or decrees made upon such petition, the case shall be proceeded with as if no exceptions had been taken, until a decision shall be had and the peremptory writ shall have been ordered, so that the overruling of such exceptions would finally dispose of the case. . . ." In section 18 it is provided that "after judgment and decree that the peremptory writ be granted, the justice of said court before whom the proceedings are pending shall forthwith certify to the chief justice for decision, all exceptions which may be filed and allowed to any rulings, findings or decrees made at any stage of the proceedings." Then follow provisions for the time within which the "excepting party" and the "adverse party" shall file their arguments with the court.

It is true that the language is that the case shall proceed as if no exceptions had been taken until the peremptory writ is ordered, and that there is no literal provision for certifying exceptions to the Chief Justice until after the peremptory writ is granted. But in no other part of either section is there any restriction upon the right of exceptions, or any discrimination between the parties. And the question is, was it the legislative intent that a petitioner should be bound by the decision of the single Justice, in case it was against him, but that the respondents might take exceptions to the decision, in case it was against them? Such a discrimination does not seem consonant with the principles of justice and fair play. And we think the statute should not be so construed as to permit such discrimination, unless the statute read as a whole clearly requires it.

It will be noticed that if the interpretation sought to be put upon the statute is the correct one, a petitioner will never have occasion to reserve exceptions in any case, for if he prevails he will not need them, and if he is defeated he cannot use them. But the language of the statute, aside from the two phrases already quoted, is general. It places no restrictions upon the power of the single Justice to "reserve questions of law upon exceptions" whether he rules for or against the petitioner. Again, if the proposed construction be correct, only a respondent could be an "excepting party" and only a petitioner could be an "adverse party." Yet the statute uses these expressions as general terms, and gives no hint, in this connection, that either party may not be an "excepting party." The very manner in which these terms are used seems to indicate that the legislative thought was that either party might except, in which case the other party would be the "adverse party." We think the legislative intent becomes quite clear when we consider the legislative reason for requiring that when exceptions are reserved the case shall nevertheless proceed, as if exceptions had not been taken, to a final decision. The reason expressed is, "so that the overruling of such exceptions would finally dispose of the case." Mandamus is a direct and forceful process, and in many instances public or private necessity may require a speedy determination of the issues involved. This is recognized in the other provisions of the statute requiring the exceptions to be "forthwith" certified to the Chief Justice, and

limiting the times for argument to short periods. And we think the evident purpose of the clause under discussion was, not to deprive a petitioner of the right of exceptions which the preceding general clause seems to have given him, but to prevent a respondent from delaying the proceeding by interposing interlocutory objections, and carrying exceptions to adverse rulings thereon to the Law Court in advance of a hearing and decision on the merits. Accordingly we are of opinion that the petitioner's exceptions are properly before us for consideration.

The Gardiner Water District is a quasi-municipal corporation, created by chapter 82 of the Private and Special Laws of 1903. It is about six miles long northerly and southerly and about one and five-eighths wide on the average. Territorially it includes only a part of the city of Gardiner, but it does include the village of South Gardiner, in which the petitioner's house is situated. The primary object of the charter was to enable the District to acquire the ownership of the existing water system of the Maine Water Company in Gardiner, Pittston, Randolph and Farmingdale, by condemnation or otherwise. For, although power was granted to it to take and hold water of the Cobbosseecontee river, and to take land for dams, reservoirs and so forth, yet section 13 of the Act provided that this grant of power should be inoperative unless the District should first acquire the plant and franchises of the Maine Water Company. At the time the charter was granted, and at the time the District acquired the plant of the Maine Water Company, its system was extended only through the more congested and thickly settled portions of the city of Gardiner, and not into the outlying parts of the District. The area of service lay mostly within a circle one mile in diameter. It did not then extend to South Gardiner, which is about five miles from the city proper. Nor has it since been extended in the direction of South Gardiner more than a few hundred feet.

The charter of the District provides, in section 5, that "all the affairs of said water district shall be managed by a board of trustees composed of three members to be chosen by the municipal officers of the city of Gardiner." In the original Act, section 9, the District, by its trustees, was authorized to issue bonds to an amount sufficient to procure funds to pay the expenses incurred in the acquisition of

the property of the Maine Water Company, and the purchase thereof, and for further extensions, additions and improvements of said plant. And it was provided, by reference to R. S., 1883, chap. 46, sect. 55, that such bonds should be a legal obligation of the District for the payment of which the property of the inhabitants of the District might be taken on execution. The trustees were empowered to establish rates, section 10, which should at least be sufficient to provide revenue for (1) the payment of current expenses, and for such extensions and renewals as might become necessary; (2) the payment of interest on the indebtedness of the District, and (3) to provide annually an amount equal to four per cent of the indebtedness, to be added to the sinking fund. Any surplus remaining at the end of a year might be paid to the municipalities supplied, in proportion to their respective contributions to the gross earnings.

By chapter 89 of the Private and Special Laws of 1905, the power of the District to issue bonds was limited, so that "when the cost of renewals, extensions, additions or improvements proposed during any one fiscal year of said water district shall be estimated by the trustees at more than ten thousand dollars," the issue of bonds to provide funds for the payment of the same must first be approved by a majority of the legal voters in the district voting at a special election. But when the expense will not exceed $10,000 during the year, the trustees by this Act were authorized to issue bonds to procure funds for making such extensions as may seem necessary to them. In this case the expense of extending the water mains from Gardiner city to South Gardiner is variously estimated at from $45,000 to $70,000. In any event it would be more than $10,000. No issue of bonds for such an extension has been approved by the voters, nor in fact has the question of such an issue been submitted to them.

Before passing to an inquiry into the issues of law involved, we make one further comment upon the powers and duties of the trustees. Neither of the statutes referred to makes any provision for corporate action by the voters themselves, except in the matter of approving or disapproving issues of bonds. There is no provision for meetings of the voters to shape the policy of the District or to give directions to the trustees, nor are the trustees subject to official control by the municipal officers of Gardiner. The District is a sepa-

rate, independent entity, and "all" its affairs are to be managed by the trustees. The trustees are, therefore, for the time being, potentially, the District itself. They have power to do all that the District may lawfully do. They are charged with the performance of all duties which the law imposes upon the District. If the District has the right to use its discretion in any situation, the trustees may exercise that same discretion.

The petitioner alleges that the trustees have neglected and refused to extend the water mains to South Gardiner, and to supply the residents of that village with water for domestic purposes, and the city of Gardiner within the village with water for municipal purposes. And particularly he alleges that they have neglected and refused to supply his residence in South Gardiner with water for domestic purposes, though such service has been demanded. The refusal is admitted. The demand is not questioned.

The respondents, in their return to the alternative writ, set up, in brief, (1) that under the charter of 1903, and the amendment of 1905, the District was not bound to supply all of the inhabitants thereof with water, (2) that the trustees are vested with the right to use their discretion in the matter of extensions, (3) that under the Act of 1905 the right to make extensions according to their discretion was limited to such as should cost not exceeding ten thousand dollars in any one fiscal year, and that an extension to South Gardiner would cost more than that sum, and (4) that they have exercised their discretion wisely.

The petitioner, under his answer to the return, contends (1) that it is the legal duty of the District to supply him with water (2) that the trustees are not vested with any discretion in the matter, and (3) that chapter 89 of the Private and Special Laws of 1905, which purports to limit the powers of the trustees to issue bonds for extensions and thus practically prevents extensions which will cost more than $10,000, unless the bond issue to provide funds for the same is approved by the voters, is unconstitutional and void, in that it impairs the obligation of a contract. And thus arise the issues to be determined.

It is well settled that mandamus does not lie to compel the performance of acts necessarily involving the exercise of judgment and discretion on the part of the officer, board or commission at

whose hands performance is desired. The court may under proper circumstances require an inferior tribunal to exercise its discretion, but not prescribe how it shall exercise it. The domain of discretionary powers conferred upon municipal bodies will in no case be invaded by the court. The court cannot substitute its own judgment for that of the tribunal to which it was committed by law. *Bangor* v. *County Commissioners,* 87 Maine, 294; Spelling on Extraordinary Remedies, sections 687, 1384. This principle is admitted in argument by the petitioner.

But the petitioner contends that the trustees have no discretion in the matter, and that, by force of the original Act of 1903, he has a clear, legal and vested right, even a contract right, to have water supplied at his house,—a right which the Legislature could not impair by the amendment of 1905. He bases his contention on the ground that the District is bound to supply every inhabitant of the District with water. If this contention has real merit, the consequence is that the trustees, acting for the District, are legally bound to supply water to all inhabitants, no matter how large the cost of the undertaking, nor how small the revenue, and no matter how ruinous and destructive the result might be to the financial ability of the District to carry on its operations. That this contention is not sound is, we think, easily demonstrable. The area of the District outside of the city proper and South Gardiner is scatteringly settled. The elevation in some places is considerably higher than the system's reservoir. It does not need the testimony of expert engineers to satisfy a reasoning mind that under such conditions the expense necessarily to be incurred in performing the duty, as it is claimed to be, of supplying every inhabitant of the District with water would practically be destructive of the purposes of the charter. It would create a burden too heavy to be borne. Did the Legislature contemplate and intend such a possible result? Did the Legislature intend, when it empowered the cities of Lewiston and Bangor to own their water systems, with powers and duties with respect to the water supply similar to those of the Gardiner Water District, that those cities were bound to furnish water over the entire extent of their territorial areas? We do not think so. It is a matter of common knowledge that water systems in towns or cities containing both an urban and a rural population, whether the systems be owned

privately or municipally, never have been in fact, and are not now, anywhere, extended beyond the more compact parts of the town into and through the rural parts. It is practicable in the rural parts for inhabitants to supply themselves. In the thickly settled parts it gradually becomes inconvenient, impracticable and sometimes impossible for the inhabitants to do so. Sources of supply become exhausted or defiled, and the need for more water, which the inhabitant cannot well furnish for himself, becomes imperative. Organized action, either public or private, becomes necessary, and the individual then pays for a service which he can no longer perform for himself.

We think then there was nothing in the situation existing in Gardiner which gives color to the contention that the Legislature intended the District to be bound to supply all the inhabitants within its limits with water, or to operate and extend the system beyond the ordinary limits to which similar systems are operated and extended. The system which the District was authorized to acquire was limited in Gardiner in fact to the urban portion of the city. This system the trustees were empowered to extend and improve, but we do not think that the statute thereby required them to extend to all parts of the District, to the parts which did not need the water as well as to those which did; even, if the petitioner's theory is correct, to extend to the individual who might reside in the remotest rural portion of the town, if he demanded it. To place such a construction upon the statute, which alone imposed duties upon the trustees, seems unreasonable, and there is nothing in the language of the statute which requires such a construction. In fact there is an implication otherwise in the statute. By section 10, it was provided that the water rates established by the trustees should be such as to provide revenue . . . "for such extensions and renewals as *may become necessary.*" This clearly does not mean extensions all over the District.

We think then that the contention that as a matter of law every individual in the District has the right to have the water brought to him cannot be sustained. But if the District is not in law bound to supply all, who is to determine to what extent the system shall be extended, and who shall thereby be supplied? The power to do this must necessarily be vested in the trustees. It is not given to

any other person or body. In making the determination, they must use their judgment and exercise their discretion, and the exercise of that discretion is not reviewable on mandamus.

It is true that the situation of the petitioner in the village of South Gardiner may not be the same as that of the farmer in the rural part of the town with his spring, or well, or brook. But once grant, as we must, that the trustees are vested with a discretion not to extend to every part of the District, it follows that some power must decide the limits of extension. There is no dividing line in the exercise of the discretion. There is no ground for saying that the trustees have discretion as to part of the District, and have none as to another part. They must have discretion as to all extensions or none. If they abuse their discretion, the remedy does not lie in the power of the court, but in the wisdom of the Legislature.

It follows from what we have said that the petitioner has no vested legal right, whether it be in the nature of contract or otherwise, to have the District's water main extended to his house. His only legal right is that the trustees shall exercise their discretion. That they have done, adversely to the petitioner.

It is proper to say that the case of *Robbins* v. *Railway Co.,* 100 Maine, 496, on which the petitioner strongly relies, is easily distinguishable from this case. There the main was already extended by the petitioner's house, and mandamus was granted to compel the defendant to permit water to be conducted from the main to the house. There was no question of extending a main, nor was the defendant in that case vested with any such discretion as we think these defendants are. The court in that case held that a public service corporation was bound to serve all impartially, fairly and without discrimination, but it did not hold that such a corporation authorized to supply water to the public was bound at all hazards, without regard to expense or revenue, or the exercise of good business judgment, to extend its mains to every individual of the public who might demand it. But what the duties of a public service corporation may be in a particular case are not involved in this case, and we do not need to consider them now.

It is unnecessary to consider the other questions raised. Our conclusion is that the Gardiner Water District is a municipal corporation created for a special purpose, that its trustees are vested

with discretionary powers in the matter of extensions of the system, and that the court cannot interfere with the exercise of their discretion.

Exceptions overruled.

LISTMAN MILL COMPANY *vs.* J. T. DUFRESNE.

Kennebec. Opinion September 28, 1913.

Cancellation. Contract. Exceptions. Instructions. Rescission. Sale.

1. If renunciation of an executory contract is accepted, and it is thereby rescinded, the party accepting the renunciation may at once sue for and recover the value of whatever has been done by him in performance of the contract.
2. If, renunciation made by a party be not accepted, the other party may consider the contract in force and bring suit only when the time for performance has arrived.
3. Though the party to a contract who received a renunciation may still treat the contract as subsisting, he cannot generally, thereafter continue in performance of the contract and thus enhance the damages recoverable of the other party.
4. A general contract cannot be rescinded, unless by the consent of both parties, and the acquiescence in the renunciation must be as patent as the purpose of the latter.

On exceptions by the defendant to the refusal of the Judge of the Superior Court for Kennebec County to give certain requested instructions. Exceptions overruled.

This is an action of assumpsit upon an account annexed to recover $315.13, being balance claimed to be due plaintiff on a lot of flour, shipped by plaintiff to the defendant at Augusta on or about April 30, 1910. There is also a count for the refusal by defendant to receive and pay for said flour, and also the common counts. The defendant plead the general issue and filed a brief

statement, alleging in substance that defendant, by notice in writing, addressed to plaintiff and deposited in the mail, with legal postage thereon, terminating and renouncing said contract. The jury rendered a verdict for the plaintiff for $263.81.

During the trial, the defendant requested the presiding Justice to give to the jury certain instructions, which the Justice refused to do, and the defendant excepted to such refusal.

The case is stated in the opinion.

Philbrook & Andrews, and Thomas Leigh, for plaintiff.

B. F. Maher, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HANSON, JJ.

BIRD, J. This case is before this court upon exceptions by defendant to the refusal of requested instructions by defendant and to a portion of the instructions given.

The bill of exceptions, of which none of the evidence is made part, is most meagre in its statement of the case and the issues involved. From it, aided by the portions of the charge of the presiding Justice not objected to, we conclude that on the eleventh of February, 1910, the parties entered into a contract in writing by which the plaintiff contracted to sell to defendant a car load of flour and to ship it to him on or about the thirtieth day of April, 1910, and the defendant on his part undertook to receive and pay for the same; that there was evidence tending to prove that on the twenty-third day of February, 1910, defendant, before plaintiff had in any part performed its undertaking, wrote "certain words" upon the face of his part of the contract "cancelling this order" and duly dispatched it by mail to plaintiff at its home office at LaCrosse, Wisconsin; and that there was also evidence tending to prove that defendant never received the alleged "cancellation;" that some days after the thirtieth day of April, 1910, the plaintiff shipped the flour to defendant, which he refused to receive, and that plaintiff re-sold the flour for account of defendant. In this suit plaintiff seeks the recovery of the difference between the contract price and the price realized on re-sale together with sundry expenses. The verdict was for plaintiff for $263.81.

The defendant requested the following instruction: If defendant in fact cancelled the contract on the 23rd day of February, 1910, then the cancellation would be an immediate breach for which an immediate right of action arises and the damages are fixed as of that time, and the measure of damages is the difference between the contract price and the then market price.

By reason of the confusion of terms employed in the record and its failure to indicate the "certain words" which constituted the written "cancellation" we are in doubt whether the renunciation of the contract claimed to have been made by defendant was distinct and unequivocal or simply an indication of an intention not to perform. See *Dixon* v. *Fridette,* 81 Maine, 122, 125; *Dingley* v. *Oler,* 117 U. S., 490, 501, 503; *Vittum* v. *Estey,* 67 Vt., 158, 161. But assuming that the written words employed by defendant were an unequivocal renunciation of the contract distinct and absolute, (See *Wells* v. *Hartford etc. Co.,* 76 Conn., 27, 35) the requested instruction is predicated upon a renunciation effective or rescission complete upon the day when the renunciation was written and hours, if not days, before the renunciation could reach the plaintiff in due course of mail. Authorities are abundant that in general a contract cannot be rescinded unless by the consent of both parties; Chit. on Cont., 812; *Wells* v. *Hartford Manila Co.,* 76 Conn., 27, 35, 37 and the acquiescence in the renunciation must be as patent as the purpose of the latter. Two familiar exceptions to the rule are rescissions for fraud and for breaches by reason of certain failures to perform by the other contracting party which latter constitute in strictness rather an abandonment of the contract than a rescission. *Anvil Mining Co.* v. *Humble,* 153 U. S., 540, 551, 552; *Daley* v. *People's etc. Assoc.,* 178 Mass., 13, 18. While it is true that, if a renunciation of an executory contract is accepted, and it is thereby rescinded, the party accepting the renunciation may at once sue for the recovery of the value of whatever has been done by him in performance of the contract: *Dixon* v. *Fridette,* 81 Maine, 122, 125; (See also *Ballou* v. *Billings,* 136 Mass., 307, 308, 309; *Brady* v. *Oliver,* 125 Tenn., 595; 28 Ann. Cases, 376) it is equally true that, if the renunciation made by a party be not accepted, the other party may consider the contract in force and bring suit only when time for performance has arrived, and recover damages as of that time; *South Gardiner, etc. Co.* v. *Bradstreet,* 97 Maine, 165, 172; *Kadish*

v. *Young*, 108 Ill., 170; 48 Am. Rep. 548; See also *Roehm* v. *Horst*, 178 U. S., 1. But although a party to a contract who receives a renunciation may still treat the contract as subsisting, he cannot, generally, thereafter continue in performance of the contract and thus enhance the damages recoverable of the other party: *Sutherland* v. *Wyer*, 67 Maine, 64, 69; *Danforth* v. *Walker*, 37 Vt., 239, 244; *Speirs* v. *Union etc. Co.*, 180 Mass., 87, 92; *Davis* v. *Bronson*, 2 N. Dak., 300, 302; 16 L. R. A., 655, 657. There was, therefore, no error in the refusal of the requested instruction, nor in its refusal even if it be construed to relate to the date when the renunciation was, if so found, received by plaintiff: See *York* v. *Athens*, 99 Maine, 88, 99; See also *Dow* v. *Harkin*, 67 N. H., 383, 384; *Philpotts* v. *Evans*, 5 M. & W., 475, 477.

The second requested instruction was as follows: After renunciation of a contract by cancellation, then neither party can increase the damages after that date. And if in this case you believe the defendant cancelled the contract on the twenty-third day of February, 1910, damages would be fixed by the breach thus occasioned as of the time of the receipt of the cancellation and not of any later time and the plaintiff could not increase damages by shipping the flour.

This instruction was properly refused, in view of our conclusion regarding the first requested instruction; See *York* v. *Athens*, 99 Maine, 88, 99. Moreover, it does not appear affirmatively from the bill of exceptions that defendant was aggrieved by the refusal.

This portion of the charge as given is the subject of exceptions by defendant: "If you come to the conclusion that such a cancellation was received and acted upon by the plaintiff corporation, that there was under that a revocation of this contract, actually cancelled it, then the rule of damages might be different than that insisted upon by counsel for the plaintiff." And the presiding Justice in continuation said "And in order that all the rights of the plaintiff may be preserved, I will give you this rule: If as I say you come to the conclusion that the plaintiff corporation did receive this cancellation through the mail from Mr. Dion for Mr. Dufresne, that the contract was revoked at that time, there is a rule of damages that he is entitled to recover the difference between the contract

price of the flour and the market value of the flour at the time when the revocation took place."

The instructions were sufficiently favorable to defendant.

The exceptions are overruled.

HOYT TARBOX EXPRESS COMPANY *vs.* ATLANTIC SHORE RAILWAY.

Kennebec. Opinion October 2, 1913.

Carrier. Contract. Custom. Damages. Defect. Exceptions. Fire. Form of Action. Instructions. Negligence.

A carload of merchandise, while being carried by defendant company from Kennebunk Maine, by way of South Berwick to Dover, New Hampshire, on the 30th day of November, 1911, was destroyed by fire. The contract for transporting plaintiff's merchandise was in writing, the eleventh paragraph of which is as follows: "the party of the second part (Express Company) is to assume all legal liability to the owners of any and all express matters collected, forwarded and distributed, except for such damages as are attributable to the negligence of the party of the first part, from imperfection in its cars, its tracks, its motive power, or negligence of the motorman running the said car."

The defendant excepted to the refusal of the presiding Justice to instruct the jury that "the plaintiff under its contract had no right to leave goods in the express cars over night, or upon holidays, and at the time in question, the defendant owed no duty to the plaintiff, such as is claimed in the writ, with reference to these particular goods so left in Car No. 101, as testified to by the various witnesses."

Held: 1. That the requested instruction was properly withheld.

2. That, if given, the effect would have been equivalent to a nonsuit.

3. That in such cases, exceptions do not lie.

On motion and exceptions by defendant. Motion and exceptions overruled.

This is an action on the case to recover damages claimed to have been sustained by the plaintiff in consequence of fire which destroyed

a carload of merchandise, which the defendant company was carrying over its railway from Kennebunk, Maine, to Dover, New Hampshire, on the 30th day of November, 1911. It is claimed by the plaintiff that through the negligence of the defendant company and its agents, said merchandise was burned and destroyed, on account of the defective condition of the stove in the car.

The defendant excepted to the refusal of the presiding Justice to give a requested instruction, which is fully stated in the opinion. The jury returned a verdict for the plaintiff for $2,312.64 and the defendant filed a motion for a new trial.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

Allen & Willard, and B. F. Cleaves, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HANSON, JJ.

HANSON, J. This is an action to recover damages sustained by the plaintiff corporation by reason of the destruction by fire of a carload of merchandise which the defendant railway company was carrying in its usual course of business over its railway from Kennebunk, Maine, by the way of South Berwick, to Dover, New Hampshire.

The plaintiff recovered a verdict for $2,312.64, and the case comes to the Law Court on exceptions, and motion for a new trial.

The plaintiff was conducting its business on and over the defendant's railroad under a written contract between the parties, dated February 1, 1911. The controversy arises over paragraph eleven of the contract, which provides that "the party of the second part (the express company) is to assume all legal liability to the owners of any and all express matters collected, forwarded and distributed, except for such damages as are attributable to the negligence of the party of the first part, from imperfection in its cars, its tracks, its motive power, or negligence of the motorman running the said car."

It was the custom of the defendant to leave its cars at its car barn at night, on Sundays and holidays. The car barn was located at South Berwick. On the night before Thanksgiving, 1911, car 101 of defendant company, which contained the merchandise in question, was left at the car barn by the motorman and expressman.

to be there held until the morning after Thanksgiving, and then taken to Dover. It was taken into the barn that evening by defendant's servants, and remained there until about 5 o'clock on Thanksgiving, when it was moved out on a side track, where it was burned with its contents some eight hours later. From five o'clock P. M. on the day before Thanksgiving until the time of the fire, the car in question was under the exclusive charge of the defendant and its agents. It was heated by a coal stove similar to those in use in other cars of the defendant company, and a fire was kept in the stove during Thanksgiving day at least, and was replenished by defendant's servant just before placing it on the side track on the day of the fire.

The plaintiff contends that the loss by fire was due to the defective condition of the stove, and the negligent acts of defendant in making and keeping a fire in the car while on a side track at night, without proper safeguards, and without proper care and attention on the part of defendant's watchman, and insists that under the contract the defendant was not relieved from the exercise of due care while the car was held at the car barn over night or on holidays.

The defendant claims that it was not negligent, but was well within its rights in leaving the car on a side track at night with a fire burning in the stove, because it had been the custom to do so, and the plaintiff and its agents had knowledge of the custom; that holding the car at the car barn over night was for the benefit of the plaintiff, and that while there the goods were in storage, and not in transit, and consequently the defendant owed no duty to the plaintiff under its contract for transportation; and further that the stove was not defective, and if imperfect the plaintiff had knowledge thereof and did not inform the defendant, and therefore cannot recover in the present form of action.

The plaintiff founded its action upon negligence and assumed the burden of establishing it by proof. The evidence justified submitting the case to the jury. The issue was clearly stated to the jury, with appropriate instructions, and we do not think their verdict is so clearly wrong as to require us to set it aside.

Exception is taken to the refusal of the presiding Justice to rule, that "the plaintiff under its contract had no right to leave goods in the express cars over night or upon holidays, and at the time in

question the defendant owed no duty to the plaintiff such as is claimed in its writ with reference to these particular goods so left in car No. 101, as testified to by the various witnesses."

We think the defendant's requested instruction was properly withheld. If given, the effect would have been equivalent to a nonsuit. Exceptions do not lie in such cases. *Auburn* v. *Water Power Company,* 90 Maine, 71, and cases cited; *Dudley* v. *Paper Company,* 90 Maine, 257.

The entry will be,

Motion and exceptions overruled.

CORNELIUS HORIGAN *vs.* CHALMERS MOTOR COMPANY, and Trustee.

York. Opinion October 4, 1913.

Acceptance. Accord and Satisfaction. Breach. Contract. Defect. Guaranty. New Contract.

1. On exceptions to the direction of a verdict, the only question is whether any other inference than the one implied by the direction could reasonably have been drawn by the jury; if not, the verdict directed must stand.
2. The parties to the suit were in controversy, whether defendant was liable under its guaranty, for certain bearings, alleged to be defective in the automobile purchased by plaintiff, of defendant. The defendant wrote to the plaintiff: "we will be willing, in addition to replacing, gratis, the one crank shaft bearing that had a broken ball, to send you the other bearings and simply charge you with the actual cost of the same." The plaintiff in reply telegraphed to defendant: "Ship first express, complete set bearings through sub-agent C. A. Welch for my car." The bearings were accordingly shipped and received by the plaintiff.
3. *Held,* in suit on the guaranty, that defendant's offer and plaintiff's telegram constituted an accord, and the shipping and receipt of the new bearings, a satisfaction of the plaintiff's claim under the guaranty, and that no other inference is admissible.
4. When only one inference can reasonably be drawn from the evidence, the question is one of law, and for the court, and not for the jury.

On exceptions by plaintiff. Exceptions overruled.

This is an action to recover damages for breach of contract of guaranty in writing, that the automobile purchased of defendant should be free from defects in material and workmanship, for one year from date of delivery. The plea was the general issue and a brief statement in substance that subsequent to the quaranty, the defendant entered in to a new contract with the plaintiff for the sale and delivery to him of certain new parts, which said parts and appliances, when delivered, were to be paid for by the plaintiff and were not furnished under the contract of guaranty.

At the conclusion of the plaintiff's evidence, the presiding Justice directed a verdict for the defendant, to which direction the plaintiff excepted.

The case is stated in the opinion.

Robert B. Seidel, for plaintiff.

Franklin R. Chesley, for defendant.

SITTING: SAVAGE, C. J., SPEAR, CORNISH, BIRD, PHILBROOK, JJ.

SAVAGE, C. J. Action for breach of a contract of guaranty. The plaintiff purchased an automobile of the defendant company, and as a part of the trade received its guaranty of freedom from defect in material and workmanship for one year from date of delivery. At the conclusion of the plaintiff's evidence, the presiding Justice directed a verdict for the defendant, to which direction the plaintiff excepted.

The case turns on a single point. The plaintiff claimed that he discovered certain defects in the car, which were covered by the guaranty, and so notified the defendant. The parts claimed to be defective were various bearings, in one of which, the crank shaft bearing, a ball was broken. The parts alleged to be defective were shipped to the defendant, in accordance with the terms of the guaranty. The defendant denied any liability whatever, except possibly for the crank shaft bearing. Several letters passed between the parties, in which the plaintiff insisted that his claim was valid, and the defendant insisted with equal force that it was not. Finally the defendant wrote the plaintiff a letter in which, after arguing the question from its standpoint, it said: "It is not your fault,—

neither is it ours—but we are taking a broad view of the matter, simply with a desire to help you as a Chalmers owner, out of your troubles at a minimum of expense to you, for you have been put in wrong by the people who worked on your car, and if it is possible for you to do so, we would suggest that you make them stand the brunt of the charges. Simply with this desire to help you, we will be willing, in addition to replacing gratis the one crank shaft bearing that had a broken ball, to send you the other bearings and simply charge you with the actual cost of the same. We do not know of a more liberal offer we could make you under the conditions, and we feel sure that after reading this letter you will appreciate that this is simply done for you and no one else.

"If we followed out the terms of our guaranty we would not do anything whatever in the matter, for one of the conditions of our guaranty is as follows: 'This guaranty is such that our liability under it ceases when parts claimed as defective are replaced outside the Chalmers factory, or the shops of Chalmers dealers.' . . . If you accept our offer, and we feel sure you will, we would request that we be authorized to ship these bearings either to you or to our sub-dealer in your city, Mr. C. A. Welch." In reply to this letter the plaintiff telegraphed to the defendant as follows: "Ship, first express, complete set bearings through sub-agent C. A. Welch for my car." The bearings were shipped accordingly, and billed to the plaintiff in accordance with the terms of the offer.

The defendant contends that the telegram of the plaintiff was an acceptance of its offer, and that the offer and the telegram constituted an accord, and the shipping and receipt of the new bearings, a satisfaction of the claim of the plaintiff under the guaranty, that it was, in effect, the substitution of a new contract under such conditions as to be a waiver of the claim under the guaranty.

The plaintiff, on the other hand, contends that the language of the defendant's offer was so vague, general and indefinite as not clearly to convey to the plaintiff the impression that if he accepted the offer it would be a settlement of his claim, and that the plaintiff was not bound so to understand it. And further that, in any event, a jury would be warranted in drawing the inference that the plaintiff did not understand, and was not bound to understand, that the offer was made as an offer of settlement.

Since the presiding Justice directed a verdict, we are only to consider whether any other inference than the one implied by the verdict could reasonably have been drawn. When only one inference can reasonably be drawn from the evidence, the question is one of law, and for the court, and not for the jury. Otherwise the inference of fact to be drawn by the jury. *Fuller* v. *Smith,* 107 Maine, 161.

The case of *Fuller* v. *Smith* is one cited and relied upon by the plaintiff. It states the law accurately, and we quote from it such statements of law as are applicable to this case. The court said: "An accord and satisfaction is an executed agreement, whereby one party gives and another receives, in satisfaction of a demand, liquidated or unliquidated, some money or other valuable consideration, however small. No invariable rule can be laid down as to what constitutes such an agreement, and each case must be determined on its own peculiar facts. The agreement need not be express, but may be implied from the circumstances and the conduct of the parties. It must be shown, however, that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such." "When a person tenders his creditor the exact amount of his undisputed debt, but intends that if it is accepted it shall also be in satisfaction of another demand, fairness and justice require that he should make his intention known to the creditor in some unmistakable manner. The proof should be clear and convincing that the creditor did understand the condition on which the tender was made, or that the circumstances under which it was made were such that he was bound to understand it."

The question then is, is any other inference reasonable and permissible than that the plaintiff did understand, or under the circumstances was bound to understand and ought to have understood, that the defendant's offer was made as a proposition of settlement of his claim? If not, then the proof of an accord is "clear and convincing," in the language of *Fuller* v. *Smith.*

There can be no doubt, as we have already stated, that the plaintiff's telegram was in answer to the defendant's letter containing the offer. He ordered the goods to be shipped through C. A. Welch, as suggested in the letter. Therefore, he accepted the offer with all

the consequences which might follow from what he understood, or was bound to understand, the offer to mean.

We are unable to escape the conclusion that the defendant intended the offer as a settlement and end of the whole controversy. There had been an extended correspondence between the parties in which their varying contentions had been threshed out. The defendant had denied all liability, but in this letter had expressed a willingness to replace the crank shaft bearing, gratis, to give a customer "the benefit of the doubt." The offer itself was to replace the crank shaft bearing without charge, and that would be a compliance with the plaintiff's demand so far. Then as to the other bearings which were the subject of complaint, the defendant offered, not to replace them without charge as the plaintiff demanded, but to supply new ones at cost, without profit. It is difficult to see how the plaintiff could understand the offer to mean that he was to take the new bearings and pay for them at cost, and still leave the controversy open, still leave to himself the right to recover back the same sum so paid, which so far as the case shows would be the measure of damages, if he recovered. It seems to us that such a conclusion would be contrary to reason and ordinary business sense.

The defendant's offer was so clearly intended as a proposition of settlement that the plaintiff was bound, under the circumstances, so to understand it. We think no inference to the contrary is admissible. The direction of a verdict for the defendant was right.

Exceptions overruled.

INHABITANTS OF RUMFORD

vs.

THE BOSTON GROCERY COMPANY, et als.

Oxford. Opinion October 6, 1913.

Bona Fide. Bond. Breaches. Colorable. Exceptions. Gambling. Lease. License.

1. A bond given by the keeper of a pool room, under Revised Statutes, chapter 31, section 5, when he receives his license, remains in force only so long as he continues to keep the room under his license.
2. He ceases so to keep it, if he actually rents it to another party, reserving no interest in it.
3. Only the defendant company could keep the room under that license. If it ceased to keep the room, it no longer acted under the license, and the purpose for which the bond was given ceased.
4. The question whether the renting was actual or colorable was one of fact and should have been submitted to the jury.

On exceptions by the defendants. Exceptions sustained. Judgment for the defendants.

This is an action of debt on a bond given under section 5, of chapter 31 of the Revised Statutes. The defendant company was licensed on May 6, 1912, by the municipal officers of Rumford, to keep a pool room, and said license was to expire May 1, 1913. The conditions of the bond were that licensee should not permit gambling in or about the premises, or permit the pool room to be opened or used between ten o'clock in the evening and sunrise. The plaintiffs claimed breaches in both of these conditions. The defendants claimed that prior to the alleged breaches, it had rented the pool room, tables and paraphernalia connected therewith to one Cohen, and that thereafter it did not keep the pool room and had no interest in or control over it. The defendants pleaded the general issue and filed a brief statement.

At the conclusion of the testimony, the presiding Justice directed a verdict for the plaintiff, with the stipulation, agreed to by the parties, that if the Law Court should determine that the direction was erroneous, judgment should be rendered for the defendants. The defendants excepted to the direction.

The case is stated in the opinion.

James B. Stevenson, for plaintiffs.

Albert Beliveau, for defendants.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HALEY, PHILBROOK, JJ.

SAVAGE, C. J. Debt on bond. On May 6, 1912, the defendant company was licensed by the municipal officers of Rumford to keep a pool room. By its terms, as well as by statute, R. S., ch. 31, sect. 4, the license was to expire May 1, 1913. The defendants gave the bond required by section 5 of the same chapter, which is the bond in suit. The bond was conditioned that the licensee would not permit gambling . . . in or about the premises, or permit the pool room to be opened or used between ten o'clock in the evening and sunrise.

The plaintiff claims that there were breaches of both of these conditions during the term of the license. The defendant company did not deny the facts which the plaintiff claims constituted the breaches, but contended, and offered evidence tending to show, that prior to the alleged breaches it had rented the pool room, pool tables, and paraphernalia connected therewith to one Cohen, and that after such renting it did not keep the pool room, and had no interest in the business, nor control or management of it. To this the plaintiff's reply is, first, that the renting or transfer to Cohen was colorable only, and not bona fide, and, secondly, that, even if the renting to Cohen was real and bona fide, it did not relieve the defendants from liability for breaches of the bond during the entire period of the license, which ended May 1, 1913.

At the conclusion of the testimony, the presiding Justice directed a verdict for the plaintiff, with a stipulation, agreed to by the parties, that if the Law Court should determine that the direction was erroneous, judgment should be rendered for the defendants. The defendants excepted.

If the renting to Cohen was colorable merely, and the defendant company afterwards continued to be the real proprietor of the pool room, keeping it under the license, the case shows indisputably that the plaintiff is entitled to recover, and that the verdict was properly directed. But whether the renting was real, or merely colorable, was a question of fact, and there was sufficient evidence upon this issue of fact to go to the jury. So that, so far as the plaintiff's right to recover depended upon this issue, the presiding Justice erred in taking the case from the jury; and the exceptions must be sustained, unless the plaintiff's second point is tenable, namely, that the defendants are liable in any event for breaches during the term of the license, whether the defendant company continued to keep the pool room itself, or rented it to another.

We think this latter point cannot be sustained. The company was licensed to keep a pool room. At the time it received its license it gave the bond. The two went together. The bond itself did not specify the period during which it should remain in force. That period is specified in the license. The bond was to remain alive so long as the license was alive, and being used. The bond was to secure the performance of the conditions of the license while, and so long as, the pool room was kept under the license. The license was not transferable. Only the defendant company could keep the room under that license. If it ceased to keep the room, it no longer acted under the license, and the purpose for which the bond was given ceased.

We therefore hold that a bond given by the keeper of a pool room, under R. S., ch. 31, sect. 5, when he receives his license, remains in force only so long as he continues to keep the room under his license, and that he ceases so to keep it, if he actually rents it to another party, reserving no interest in it. The ruling below having been in effect contrary to these views, the exceptions must be sustained, and in accordance with the stipulation, judgment must be rendered for the defendants.

Exceptions sustained.
Judgment for the defendants.

WILLIAM E. DYER *vs.* SOUTH PORTLAND.

Cumberland. Opinion October 6, 1913.

Agents. Catch-basins. Drainage. Intention. Legislature. Municipal Duties. Revised Statutes, Chapter 21, Section 18. Servants. Sewer. Repair.

1. A town is not liable under R. S., chap. 21, sect. 18, for damages caused by surface water, which is prevented from entering a sewer by the clogged and obstructed condition of catch-basins, and which in consequence flows upon adjoining land and does damage.

2. Surface water is not entitled to passage through a sewer, within the meaning of R. S., chap. 21, sect. 18.

3. Whether, in the absence of a statute, there would be a common law liability to one who had paid for the privilege of entering a sewer, for failure to keep catch basins open so that surface water may flow into them is not decided. There is a statutory provision in this State for liability in general, and that liability must be regarded as exclusive of all others.

On motion and exceptions by the defendant. Exceptions sustained. Motion for a new trial sustained.

This is an action on the case to recover damages alleged to have been sustained by the plaintiff, by reason of the failure of the defendant to maintain and keep in suitable repair a certain sewer, to which the plaintiff was connected; in consequence of the defective condition of said sewer, it became obstructed and the water which should have passed into and through the sewer flowed into the plaintiff's cellar, causing the damage complained of.

The plea is the general issue. The jury returned a verdict for the plaintiff for $297.00. The defendant filed a general motion for a new trial and had exceptions to various rulings by the presiding Justice.

The case is stated in the opinion.

Gurney, Sturgis & Chaplin, for plaintiff.

Reynolds & Sanborn, and Scott Wilson, for defendant.

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

SAVAGE, C. J. Action on the case for failure to maintain and keep in repair a certain sewer, whereby it became obstructed, was not usable, and did not carry off the drainage entitled to pass through it, in consequence of which water which should have passed into and through it flowed into the plaintiff's cellar, doing damage. While three of the four counts in the writ charge a failure to properly maintain and keep in repair the sewer, in general terms, the case shows that the specific complaint is that the defendant permitted certain catch-basins connected with the sewer proper to become so clogged with dirt, snow and ice, that the surface water flowing in the street and gutters could not flow into the sewer, with the result that it flowed into the plaintiff's cellar. The trouble arose on the occasion of a very severe rain-fall in winter.

The plaintiff had a verdict, and the case comes before us on the defendant's motion for a new trial, and exceptions to various rulings by the presiding Justice.

The defense is two fold: First, that the city was not bound to keep the catch-basins open for the reception of surface water, and is under no legal liability for failure to do so; secondly, that, even if the law be otherwise, the damage was due, not to the condition of the catch-basins, but to the insufficient size of the sewer as originally planned and built; in other words, that the sewer was already full, and could not have received the surface water, if the catch-basins had been opened.

As we view the case, it will be necessary only to determine the merits of the first ground of defense.

It may be said at the outset that towns, which are merely subdivisions of the State, are not in general liable for the defaults or negligence of their agents and servants in the performance of municipal or public duties which they perform as agencies of the State, unless the liability is created by statute. *Mitchell* v. *Rockland,* 52 Maine, 118; *Frazer* v. *Lewiston,* 76 Maine, 531; *Bulger* v. *Eden,* 82 Maine, 352. Whether in case there were no statute of liability, the same rule of non-liability would apply to the care of sewers, for which individuals have paid for the privilege of entering, we need

not consider, for there is a statute. So that whether the maintenance and repair of sewers lawfully constructed is strictly a municipal and public duty, or not, *Allen* v. *Boston,* 159 Mass., 324; *Bates* v. *Westborough,* 151 Mass., 174, we think there is no liability upon a town for a failure to perform this duty when a liability is fixed by statute, except such as is given by the statute. The statutory provision for liability in this State, we think, must be regarded as exclusive of others. We think the Legislature intended to cover the whole subject. And because the extent of such a liability depends upon the construction of our own statute, the decisions of other courts respecting municipal liability afford but little assistance in determining what is the law here.

The plaintiff here relies upon section 18, chapter 21, of the Revised Statutes, which reads as follows: "After a public drain has been constructed and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it. . . . If any town does not so maintain and keep it in repair, any person entitled to drainage through it may have an action against the town for his damages thereby sustained."

The case shows that the sewer in question was lawfully constructed, that some persons had paid for connecting with it, and that the plaintiff was entitled to drainage through it. There is no dispute as to the formal prerequisites to a suit.

It is not claimed that a town is bound, when it undertakes to build a sewer, to construct catch-basins to carry off the surface water, nor is it denied that when a catch-basin has once been constructed, the town may disconnect it from the sewer, and remove it. *Collins* v. *Waltham,* 151 Mass., 196. But the plaintiff contends that when it has been built and while it remains connected with the sewer, it is a part of the sewer which the town is bound to maintain and keep in repair, and that surface water, under such conditions, is "drainage entitled to pass through it."

In the first place it is not easy to see why a town should be liable for failure to keep in repair a catch-basin which it may lawfully abandon and remove. But if we assume the correctness of the contention that a catch-basin while it remains is part of a sewer to be kept in repair, we are then face to face with the decisive issue in the

case. It hinges upon the legislative meaning of the phrase "drainage entitled to pass through it."

It is, of course, undeniable that towns may construct catch-basins for a lawful purpose, entirely disconnected from the protection of abutting owners from surface water. They may do so for the protection of the ways, which they are bound to maintain and keep in repair. So that the fact that the construction of a catch-basin is lawful and authorized does not necessarily lead to the conclusion that the town by constructing it comes under a duty to owners of land connected with the sewer to keep it open for surface water.

Now what is the statutory duty of the town, for failure in the performance of which the town is made liable? It is to maintain a sewer so as to afford sufficient and suitable flow for "all drainage entitled to pass through it." Did the Legislature mean to make towns which have catch-basins liable for failure to keep them in such condition that surface water can pass through them into the sewer, or merely for failure to keep the sewer proper, within the limits of its capacity, in such condition that drainage or sewage from lands of persons who have paid to connect with it may pass through it? In the first place, is surface water "drainage" within the meaning of the statute? The term itself affords no certain indication. Drainage, doubtless, includes sewage, and it may mean more. What the Legislature intended it to mean in this instance must be gathered from the context and the general purposes of the statute.

Assuming that the word drainage may in a proper connection include surface water, the question is, does it mean so here? The statute does not say that the town must maintain the sewer so as to afford passage to all drainage, but only to such drainage as is "entitled" to pass through it. Under what circumstances is drainage *entitled* to passage through a sewer? And what drainage is entitled? Going back over the sections previous to section 18 in chapter 21, we find that section 2 provides in the most general terms for the construction of sewers. Sections 3 and 4 relate to the taking of land and the assessment and payment of damages therefor. Then follow sections 5 to 14 inclusive, and 16 and 17 (section 15 is immaterial), and altogether they prescribe how an adjoining land owner may become entitled to connect with a sewer, what assessments he

must pay, upon what terms he may become entitled to a permit, how the price he must pay for a permit is fixed originally or on appeal, and how he may be punished if he connects with the sewer without a permit, or if he violates the conditions of his permit. These sections relate to nothing else. They are concerned only with the machinery by which the abutter may become entitled to connect with the sewer so that he can flow his drainage or sewage, whichever it be called, from his land to the sewer. Not in the remotest degree is there any reference to any other drainage. Then follows the language of section 18: After a public drain has been constructed and any person has paid for connecting with it, it must be maintained so as to afford a flow for all drainage *entitled* to pass through it. We think the conclusion is almost irresistible that by the use of this phrase in this connection the Legislature meant, merely, all drainage which was entitled to passage through the sewer upon compliance with the provisions of the preceding sections respecting permits, connections and payments. When an abutter has paid an assessment, or has received a permit and has connected with the sewer, he is entitled to have *his* drainage pass through it, and the town is bound to keep the sewer in such repair, up to its limit of capacity, that his drainage, so entitled, may pass through it.

We hold therefore that a town is not liable under R. S., ch. 21, sect. 18, for damages caused by surface water, which is prevented from entering a sewer by the clogged and obstructed condition of catch-basins, and which in consequence flows upon adjoining land and does damage. The rulings to which exceptions were taken were not conformable to this view, and the exceptions must be sustained. The action is not maintainable, and therefore the verdict for the plaintiff must be set aside.

Exceptions sustained.
Motion for a new trial sustained.

LILLA J. JORDAN, Appellant

vs.

TRUST ESTATE OF ARVILLA B. JORDAN.

LILLA J. JORDAN, Appellant

From Decree of the Judge of Probate.

Androscoggin. Opinion October 6, 1913.

Appeal. Cestui Que Trust. Income. Investment. Jurisdiction. Principal Probate Court. Trust. Trustee. Will.

1. It was the duty of the trustee to follow the directions in the will appointing him trustee, and administer the trust according to the terms upon which the property was devised to him in trust.
2. A farm that during the seven years it was held by the trustee, did not return income enough to pay the taxes and necessary expenses, cannot be called safe and productive property. It was not the kind of property the trustee was directed to invest the funds in.
3. It was not Harry E. Jordan's judgment that the testatrix wished to control the property, and testimony of how he desired the trust estate managed was inadmissible to excuse the trustee for the non-performance of the clear and unmistakable intent of the testatrix as expressed in the clause of the will creating the trust.
4. By the terms of the will, the trustee was entitled to, and it was his duty to receive from the executor, the balance of the estate in money, and having taken in discharge of the executor's liability property instead of money, the farm must be regarded as an investment made by the trustee.
5. If the trust fund is invested in land, and the land increases in value from its situation, or from the use and necessary improvements made by the tenant for life, such increased value becomes carpital and belongs to the remainderman.
6. The investment of the funds of the estate in the unproductive farm by the trustee not being such as he was directed by the will to invest the funds in, the trustee should be charged for the improper investment a reasonable income from the time he took the title to the death of Harry E. Jordan.

On exceptions by appellant. Exceptions sustained.

Arvilla B. Jordan, late of Auburn, deceased, in her will directed the executor thereof to convert her estate into money and after payment of debts, funeral charges, and expenses of administration, to pay over to James P. Hutchinson, trustee, all the residue and remainder of said estate, to be by him held in trust and be invested in safe and productive property. A part of said estate consisted of a farm valued at $5500, which was conveyed by the executor to said trustee and by him held for seven years after the death of Harry E. Jordan, and then sold for $6500. The administratrix of Harry E. Jordan filed in Probate Court a petition in equity asking the court, among other things, to decree that the trustee pay the increase of $1000 as shown by the sale of the farm to her as administratrix of Harry E. Jordan, and the trustee filed an answer to said bill, stating that he had retained the title to said farm at the request of Harry E. Jordan. He also filed a petition setting forth his acts as trustee, etc. Upon hearing, the petition filed by the administratrix was dismissed and upon the petition of the trustee her claim was disallowed, and the trustee ordered to distribute the balance of the trust fund to the residuary legatees under the will. From both decrees, the administratrix of Harry E. Jordan appealed to the Supreme Judicial Court. At the hearing in Supreme Judicial Court at Auburn, the Justice presiding ruled as matter of law that said appeals could not be sustained, to which rulings the administratrix excepted.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for appellant.

John A. Morrill, for J. P. Hutchinson.

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

HALEY, J. Arvilla B. Jordan, late of Auburn, died December 16, 1899, testate, and in the first paragraph of her will disposing of her property she used the following language, "As soon as may be after my decease I direct my executor hereinafter named, to convert my estate into money," and in the same paragraph directed her executor after payment of debts, funeral charges and expenses of administration, to dispose of her estate by item one of said will as follows:

"First, all the rest, residue and remainder of my said estate, I direct my Executor hereinafter named to pay over to James P. Hutchinson, of said Auburn, to be held by him in trust for the following purposes, to wit: Upon the receipt thereof from my said Executor, he shall invest the same, in safe and productive property, and from the income thereof, pay all necessary expenses and charges incurred in the proper management of said trust, and dispose of the net income thereof as follows, to wit: If my said son, Harry E. Jordan, shall live to the age of fifty-five years, then this trust is to continue till that time, and the net income thereof of said trust estate is to be paid to him, in each year in equal quarterly payments, until he shall arrive at the age of fifty-five years, at which time, I hereby direct my said Trustee or his successor in said trust, to pay over and to convey to him, the said Harry E. Jordan, the principal and income of said trust estate then remaining in the name of said trustee; but if my said son, Harry E. Jordan, shall decease before he arrives at the age of fifty-five years, then this trust is to terminate at his decease, and I direct my said Trustee or his successor in said trust to pay over to Lilla J. Jordan, if she be then living, the sum of one thousand ($1000) dollars, and to Mabel I. Jordan, if she be then living, the sum of one thousand ($1000) dollars, and I direct my said Trustee or his successor in said trust, to distribute the remainder thereof one-half part thereof in equal shares to my brothers and sisters then living, and to the legal heirs of any of my brothers and sisters, then deceased, by right of representation. And the other half part thereof in equal shares to the brothers and sisters of my late husband, James S. Jordan, then living, and to the legal heirs of any of his brothers and sisters, then deceased, by right of representation."

In January, 1902, George A. Allen was appointed guardian of Harry E. Jordan by the Probate Court of Androscoggin County, and continued to act as such guardian until the death of said Harry E. Jordan, who died August 8, 1909, without having attained the age of fifty-five years. May 2, 1902, the executor delivered to James P. Hutchinson, the trustee named in the will, all the estate remaining in his hands, included in which was the homestead farm appraised in the inventory of the executor at $5500, which the executor did not convert into cash as directed in the will, and at

the time he turned the property over to Mr. Hutchinson, as trustee, he deeded the farm to him as trustee, as of the value of $5500, which sum was agreed to by the executor and trustee. At that time the farm contained some sixty acres of standing timber and wood.

The trustee retained the title to the farm until after the death of Harry E. Jordan, a period of seven years, before which time the executor had retained the title to the farm in the estate for two years and four and a half months. The trustee leased the farm to Mr. Allen, the guardian of Harry E. Jordan, for $225 per year, and it is claimed that the trustee retained the title to the farm at the request of Harry E. Jordan and his wife, and that it was leased to the guardian for the use of said Harry E. Jordan, who lived upon it a part of the first year and a few weeks of another season.

During the seven years that the trustee held the title to the farm, during the lifetime of Harry E. Jordan, the $225 which he charged the guardian of Harry E. Jordan for the use of the farm, and the guardian charged Harry E. Jordan in his guardianship account for the use of the farm, did not pay the taxes and other necessary charges against the farm by $65.46, and the income of the other trust property that should have been paid to the guardian of Harry E. Jordan was used to pay that deficiency, and also to make up the $225 yearly rental of the farm, which was only paid and received by the entries upon the books, no money passing from the guardian to the trustee, or from the trustee to the guardian, and Harry E. Jordan only living upon the premises a short time, as above stated.

After the death of Harry E. Jordan, the trustee sold the farm for $6500. The administratrix of Harry E. Jordan filed in the Probate Court a petition in equity, R. S., ch. 70, sect. 10, setting forth the above facts, and alleging that the farm was non productive, and that the trustee had, by retaining the title, deprived Harry E. of the income of that $5500; that the increase in value as shown by the sale represented the growth of the timber and wood upon the farm, and asked that the court decree that the trustee pay the increase, viz., $1000, to her as the administratrix of Harry E. Jordan. The trustee filed an answer to said petition, stating therein that there remained in his possession of the trust estate the sum of $15,145.62, and alleged that in all things connected with said trust estate he had conformed to law and the directions of the will, and

that he retained the farm as a part of the trust estate at the request of said Harry E. Jordan and his wife; that he had filed his final account, and asked that the petition be dismissed because the parties named in his answer (residuary legatees) were entitled to the fund in his hands under the terms of said will; that these parties were interested, and should have been made parties to the petition of the administratrix. He also filed a petition setting forth his acts as trustee, the termination of the trust, the names of the parties that he understood were entitled to the trust fund (residuary legatees), and also that the administratrix had filed the petiton as above, and asked that notice of said petition be given to said administratrix and the parties alleged to be entitled to the fund, and that the court decree final distribution. Upon this petition said administratrix appeared and set forth the above facts and claimed that the $1000 should be treated as the income of said $5500, and decreed to her as administratrix of said Harry E. Jordan. Upon hearing, the petition filed by her was dismissed, and upon the petition of the trustee her claim was disallowed, and the trustee ordered to distribute the balance of the trust fund in his hands to the residuary legatees under the will. Thereupon the administratrix of Harry E. Jordan appealed from both decrees to this court. The appeals were heard at the April term, 1912, of this court at Auburn, at which hearing the administratrix of Harry E. Jordan contended:

1st. That the trustee was not justified as a matter of law, in receiving from the executor $5500 worth of the trust estate invested in said farm in the form of real estate instead of in money.

2d. That said farm was not such property as the trustee was authorized by the will to keep any of the funds of said trust estate invested in.

3d. That there was no competent evidence of an agreement or waiver justifying the trustee in keeping the fund of said estate invested in said farm.

4th. That the increase in value of the farm, due to the growth of the timber and wood thereon, should be treated as a matter of law as belonging to the cestui que trust as an increment of the trust fund, rather than as belonging to the remainderman as an increment of real estate.

The trustee claimed that the homestead farm was retained by him as an investment in part at least, because of the expressed wish

and request of Harry E. Jordan, cestui que trust, and his wife, Lilla J. Jordan, and testimony was admitted, subject to exception, showing that both Harry E. Jordan and his wife requested the trustee to retain the title to the farm. This evidence was objected to, because said Harry E. Jordan was not sui juris, and not competent to waive his rights in the matter, and because his wife had no interest in the trust fund. The court overruled the above claims and contentions of the administratrix, and ruled as matter of law that said appeals could not be sustained, and ordered both appeals dismissed and the estate distributed as prayed for by the trustee, to which rulings the administratrix excepted, and the case is before this court upon her exceptions.

1st. It was the duty of the trustee to follow the directions in the will appointing him trustee, and administer the trust according to the terms upon which the property was devised to him in trust. The will directs "Upon the receipt thereof from my executor, he shall invest the same in safe and productive property . . . and the net income thereof of said trust estate is to be paid to him (Harry E. Jordan) in each year in equal quarterly payments until he shall arrive at the age of fifty-five years." A farm that, during the seven years it was held by the trustee, did not return income enough to pay the taxes and necessary expenses, cannot be called "safe and productive property," or such property as that from which the cestui que trust could receive a quarterly income. It was not the kind of property the trustee was directed to invest the funds in; it was not safe and productive, and was not such property as trustees, unless so directed by the instrument creating the trust, are authorized to invest funds in. First exception sustained.

2d. The second exception for the above reasons must be sustained.

3d. The trustee claimed that Harry E. Jordan and his wife requested him to keep the title to the farm, instead of complying with the terms of the trust, and that he was justified in keeping the trust funds invested in the farm. It was the duty of the trustee to execute the trust according to the terms of the will creating the trust. The testator conveyed the property to the trustee, instead of to her son Harry E. Jordan, because she did not want the son to have the control of it. It was not Harry E. Jordan's judgment that

she wished to control the trust property. Harry E. Jordan was under guardianship, and in law incompetent to manage his own estate, and testimony of how he desired the trust estate managed was inadmissible to excuse the trustee for the non performance of the clear and unmistakable intent of the testator, as expressed in the clause of the will creating the trust. The testimony that the wife of Harry E. Jordan consented or requested the trustee to ignore the terms of the trust was inadmissible, because she had no interest in the trust fund, and it was not her judgment that the testator depended upon to have her wishes as expressed in the will carried out, but it was the judgment of the trustee. The trustee had no right, by agreement or understanding with the cestui que trust, or his wife, to change the expressed wish of the testator in regard to the trust estate. The exceptions to the admission of the testimony tending to show the consent and request of Harry E. Jordan and his wife that the trustee retain the farm as a part of the trust estate must be sustained.

4th. The fourth exception that the increase in value of the farm, due to the growth of the timber and wood thereon, should be treated as a matter of law as belonging to the cestui que trust as as increment of the trust fund, rather than as belonging to the remainderman as an increment of the real estate, must be overruled.

By the terms of the will the trustee was entitled to, and it was his duty to receive from the executor, the balance of the estate in money, and having taken in discharge of the executors liability property instead of money, we must regard the farm as an investment made by the trustee, *Maddocks* v. *Moulton,* 84 *Maine,* 550, and when the trustee took the title to the farm it was a mere change in the form of the corpus of the fund. The farm remained the principal of the fund from which the cestui que trust was to receive the income, and the sale by the trustee of the farm was simply a conversion from one form of property into another. The money received by the trustee was not income, it was principal, the increased price was caused by the natural causes, accretions to the trust estate, caused by the growth of timber or the increased value of the real estate in the vicinity of the farm, and became a part of the principal and passed at the death of the cestui que trust to the remainderman.

"If the trust fund is invested in land, and the land raises in value from its situation, or from the use and necessary improvements made by the tenant for life, such increased value becomes capital and belongs to the remainderman." Perry on Trusts, secs. 545, 546.

"If the will had required the trustee to invest in real estate, the rents, increase and profits of which were made payable to the life tenant with remainder over, it cannot be questioned but that any increase of the value of the land from natural causes would have been an accretion to the capital, and inured to the benefit of the remainderman." In re Gerry, 103 N. Y., Rep. 445; In re Cutler, 52 N. Y., 842.

"The remainderman could not thereby be deprived of a natural accretion to the fund however invested, or the life tenant become entitled to an increase which, if the fund had been lawfully invested, would not have accrued to him." In re Gerry, supra.

The remaining exceptions are to the rulings of the court dismissing both appeals. Those rulings were undoubtedly predicated upon the rulings to which exceptions were taken, which exceptions have already been considered, but it is necessary to examine the statute under which these proceedings are held as well as the evidence given at the hearing, which is reported as a part of the exceptions, and to determine whether the cases shall be remanded for further hearing or not; because if the exceptions which have been sustained are immaterial, and the cases do not disclose a state of facts that calls for the court to charge the trustee, then the exceptions dismissing the appeals should be overruled.

Section 10 of chapter 70, R. S., provides that the Probate Court and the Supreme Judicial Court "may hear and determine, in equity, all other matters relating to the trust is herein named." The subject matter of the petitions in these cases are mentioned in said chapter, and are matters of which the Supreme Judicial Court and the Probate Court have jurisdiction.

Section 10, under which the petitions were brought, gives the Probate Courts jurisdiction which they did not have before the statute in cases relating to trusts. There has been no case reported since the enactment of that statute in which the Probate Court has taken jurisdiction of cases in equity relating to trusts. The proceedings under this statute should be according to the equity practice

of the Supreme Judicial Court as far as it is applicable to the Probate Court. The bill, although addressed to the Probate Court, should be framed as prescribed by the equity rules; all parties having an interest in the subject matter should be made parties, and notice given to them according to the equity practice and not according to the probate practice. At the return day of the process, under chapter 25 of the Laws of 1911, the court may fix such time, or times, for filing answer, plea or demurrer, or replication, or for the hearing of the case as justice may require. To expedite the hearing the court should at the return term fix the times as specified by the Laws of 1911. In this case, the prayer of the administratrix of Harry E. Jordan is that the court will decree a reasonable income for said $5500 so improperly invested in said farm to be distributed to her out of the balance shown by the trustee's account, or that the court will decree that the profit of $1000 realized from the sale of said farm be decreed to her as and for the net income of said $5500 for said period.

The trustee in his answer to the petition of the adminsitratrix set forth the names of the residuary legatees under the will of Arvilla B. Jordan and alleged that they were necessary parties, and asked that the petition be dismissed as they had not been made parties to the bill. We are unable to tell from the record what was done with that motion. The printed case does not show that it was relied upon or called to the attention of the court who heard the appeals. It was not argued or insisted upon in the briefs at the hearing before this court, and the copy of the decree filed by the Judge of Probate does not refer to it. Whether the objection was remedied by making the residuary legatees parties, or whether they appeared and voluntarily became parties, we are unable to state. Under the prayer of the administratrix's petition that the court will decree that the profits of $1000 realized from the sale of said farm be decreed to her as and for the net income of said $5500, they are necessary parties, and unless the residuary legatees have become parties to the bill, the petition of the administratrix should be amended by striking out that prayer. The trustee's petition asks the court to determine in equity who are entitled to said estate, and their respective shares therein . . . , and to order the said fund to be distributed accordingly. Before the court can do that the

claim of the estate of Harry E. Jordan against the trustee must be settled. The same question that the administratrix raised by her petition is open to her upon the trustee's petition and it is immaterial upon which petition the question is decided.

As the trustee was entitled, and it was his duty to receive from the executor the balance of the estate in money instead of which he took the title to the unproductive farm, we must regard the farm as an investment made by him with the funds of the estate. *Maddocks* v. *Moulton,* supra. And it not being an investment in the kind of property he was directed by the will to invest the funds in, viz., "safe and productive property" that would enable him to pay an income for the support of Harry E. Jordan, as it produced no income, and was a burden to the other trust funds, the trustee should be charged for the improper investment a reasonable income for the amount of the trust funds invested in said farm from the time he took the title to the death of Harry E. Jordan. This charge should not be deducted from the principal of the trust funds in his hands, but a charge against him personally for the improper management of the trust funds. Whether the amount should be more than 4%, the amount paid by savings banks during the period that the trustee held the trust funds so invested, must be settled by the Justice who hears the case, as the case not being before us upon appeal we are not authorized to revise, modify or confirm the decree of the Justice who heard the case; but as the exceptions are sustained must remand the case for further proceedings in accordance with this opinion.

Exceptions sustained.

CARRIE M. MILLER *vs.* CHARLES H. WARD.

In Equity.

Penobscot. Opinion October 6, 1913.

Abandoned. Account. Agent. Allegations. Amendment. Equity. Expenditures. Foreclosure. Insurance. Liens. Loans. Mortgage. Possession. Rents and Profits. Tender.

The defendant completed the work on the mortgaged house which the plaintiff had abandoned, and rented it. The plaintiff claims that the defendant had no authority to charge her with the expenditures so made.

1. A mortgagee in possession should make necessary repairs and improvements to prevent the property from waste, and if he neglects so to do, upon redemption of the mortgage he may be charged with waste, and for rents and profits that, with the exercise of reasonable care and attention, he would have received from the mortgaged premises.
2. The mortgagee has no authority to make the estate better at the expense of the mortgagor, but is bound to use reasonable means to preserve the estate from loss and injury.
3. He cannot charge the mortgagor with expenditures for convenience or ornament.
4. He is entitled to allowance for all improvements and repairs necessary for the preservation of the estate, or to make the premises tenantable.
5. It was the duty of the mortgagee, having taken possession of the mortgaged property, with a house nearly finished, but untenantable, and left in that condition by the mortgagor, to protect the interests of the mortgagor, and that the finishing the house, thereby changing it from unproductive property to rent producing property was proper management of the mortgaged premises by the mortgagee.

On report. Bill sustained with costs.

This is a bill in equity in which the plaintiff seeks to redeem certain real estate from a mortgage given to defendant by the plaintiff, dated September 3, 1908, for $1300, to be used in the erection of a dwelling house. On January 23, 1909, the defendant advanced $600 in addition to the $1300 to plaintiff and took from her a second mortgage on said property. The plaintiff abandoned the house in an unfinished and untenantable condition, and on March 8, 1909,

the defendant took possession of the premises and finished the house practically as the plaintiff had planned it. The mortgage for $600 became due January 23, 1910. In October, 1910, the plaintiff made a demand upon the defendant for an account, of amount due on said $600 mortgage, and on October 27, 1910, defendant furnished the plaintiff with an itemized statement of amount claimed to be due on the mortgage, which included the amount of lien claims which defendant agreed to pay as the consideration for the $600 mortgage and also included the amounts paid out by him in finishing the house. December 1, 1910, plaintiff made a tender to defendant of $707.29 and demanded a discharge of the $600 mortgage, and the defendant refused to accept said tender. The defendant filed an answer to the bill and the plaintiff filed a replication. At the conclusion of the evidence, the cause was reported to the Law Court on so much of the foregoing evidence as is legally admissible; the Law Court is to determine all questions of law and fact, and render such judgment as the rights of the parties require.

The case is stated in the opinion.

E. C. Ryder, and I. O. Bragg, for plaintiff.

Manson & Coolidge, for defendant.

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

HALEY, J. Bill in equity to redeem real estate from a mortgage given to defendant by the plaintiff, and reported to this court to determine all questions of law and fact to render such judgment as the rights of the parties require.

The first of September, 1908, the husband of the plaintiff applied to the defendant for a loan of money, to be used in the construction of a dwelling house, in Newport, which the plaintiff had begun to construct. The husband was at that time, and continued until after the defendant took possession of the premises in dispute, the agent of his wife as far as transactions concerning the property mortgaged were concerned. The husband represented that the house to be erected would be similar to a house pointed out by him to the defendant as costing about $4000. The defendant agreed to make the loan, and September 3, 1908, advanced to the plaintiff $1300 and took four promissory notes aggregating that amount and a mortgage of the real estate mentioned in the bill as security for the loan. The

mortgage contained, after the description of the mortgaged premises, the following: "Together with the buildings to be constructed and built thereon, and to cover all said buildings in process of construction, and the material as furnished for the same, and to cover said buildings when completed. The said sum is loaned said Miller to enable her to build said buildings, and is to be advanced from time to time as needed for the purpose, she to satisfy the said Ward that all lien claims are paid."

At the time of the loan the cellar for the house was completed, and some work done upon the frame. The plaintiff continued to work upon the house until late in December, 1908, or the first of January, 1909, when the work upon it was stopped. At that time the buildings were practically completed outside, but the outside doors were not hung and a number of windows had not been supplied. The first story was lathed and plastered, in the second story two rooms were lathed and plastered. In January, 1909, a number of creditors threatened to enforce their lien claim against the property, and the plaintiff furnished the defendant a list of those claims amounting, with an item for insurance, which had not been paid, to $597.40, and January 23, 1909, the plaintiff gave to the defendant her note for $600, and the defendant agreed to pay said claims, and at the same time the plaintiff secured the payment of said $600 note by a second mortgage of the same premises. March 8, 1909, the defendant took possession of the premises, purchased material, employed workmen and finished the dwelling house practically as plaintiff had planned it, the only change of importance being that he finished it for two tenements, an upstairs and a down stairs tenement, while the plaintiff intended to have but one tenement. The down stairs tenement was as the plaintiff had planned it; up stairs the plaintiff had planned to have a space divided by a partition and one part used as a bath room and one part as a sleeping room. The defendant did not put up the partition dividing that space, but finished it as one room to be used as a kitchen. In completing the house the defendant purchased some of the material the plaintiff had selected, and purchased all material at reasonable prices.

The defendant completed the work upon the house and rented it April 1st, 1909, from which date he collected the rents from both tenements. The mortgage for $600 became due January 23, 1910, and the defendant began foreclosure proceedings by publication

February 10, 1910. In October, 1910, the plaintiff made a demand upon the defendant for an account of the amount due upon the $600 mortgage, and October 27, 1910, the defendant furnished the plaintiff an itemized statement of the amount claimed by him to be due upon said mortgage, giving credit for rents collected, showing a balance of $1207.17, which sum included the amount of the lien claims and an insurance bill not specified in the claims that the defendant agreed to pay as consideration for the mortgage of $600, and included the amounts paid out by him in finishing the house, and charges for the taxes and the foreclosure proceedings, and a commission of five per cent on the rents collected, interest on each of the items in the account for finishing the house, with a credit for the rents collected. December 1, 1910, the plaintiff made a tender to the defendant of $707.29, and demanded a discharge of the $600 mortgage. The tender included $600 as the principal of the mortgage, interest to the date of tender, taxes for 1909, the interest on the taxes, the attorney fee for foreclosing, and interest on the attorney fee. The defendant refused to accept said tender. Thereupon, the plaintiff brought this bill to redeem the premises from said $600 mortgage, and in the bill alleged a demand for an accounting, and a tender of the $707.29, and that that covered all there was due upon said $600 mortgage.

It is necessary to first determine whether the tender made by the plaintiff to the defendant was of a sufficient sum to reimburse the defendant for all he was entitled to receive as payment of the $600 mortgage. The tender did not include any money expended by the defendant in repairing or finishing the buildings after he took possession in March, 1909. The plaintiff claims that the expenditures by the defendant for that purpose were not authorized by her, and were not necessary repairs and improvements, and that the defendant had no right to charge her for them when she sought to redeem the premises from the $600 mortgage. If the defendant did not have that right, the tender was of a sufficient amount; if the defendant had that right, it was not of a sufficient amount. The testimony shows that when the defendant took possession of the premises water had run into the cellar and frozen, and the cellar wall was damaged by frost; that water did not run out of the cellar, because the sewer was not properly screened and had become

clogged, that the plastering, by reason of the cellar wall having been affected by the frost, had cracked to quite an extent, and that the defendant repaired those defects, and that in the finishing of the house he completed it as near as he could, with the exceptions above stated, namely, that of making one room in the second story where the plaintiff had intended to have a bath room and a sleeping room. No claim is made that the work was not done in a workmanlike manner, and at a reasonable expense, and the question is, had the defendant, as mortgagee in possession of the property, situated as this mortgaged property was, a right to make such repairs and improvements as were made to the property and charge the mortgagor therefor? The rule holding that the mortgagee in possession has no right to make improvements at the expense of the mortgagor, is a rule to protect the interests of the mortgagor, and to prevent the mortgagee from rendering it more difficult for the mortgagor to redeem the premises; but the rule holds the mortgagee in possession should make necessary repairs and improvements to prevent the property from waste, and if he neglects so to do, upon the redemption of the mortgage he may be charged with waste, and for the rents and profits that, with the exercise of reasonable care and attention, he would have received from the mortgaged premises, Jones on Mortgages, sec. 1123, not unnecessary repairs and improvements made for ornamentation or convenience, or to improve the property so that it is rendered more difficult for the mortgagor to redeem but repairs that are beneficial and necessary to the estate. "He has no authority to make the estate better at the expense of the mortgagor, but is bound to use reasonable means to preserve the estate from loss and injury. He cannot charge the mortgagor with expenditures for convenience or ornaments, . . . but he may properly, under some circumstances, go beyond this, and supply things that are wanting at the time of the entry; as where the doors or windows of a house are gone, he is justified in supplying these in order to put the estate in condition for occupation. What is a proper expenditure must depend upon the circumstances of each case." Ibid., sec. 26. As said by the court in *Bradley* v. *Merrill,* 88 Maine, 27: "He is entitled to allowance for all improvements and repairs necessary for the preservation of the estate, or to make the premises tenantable." The property in question at the time the

defendant took possession was not tenantable. The doorways were boarded up; no doors had been hung, twelve windows were lacking, the lower story was not finished, no upper floors had been laid in either story, only a small part of the second story had been lathed and plastered. In the few months it had been left in that condition the elements had injured the cellar wall, the plastering and cellar windows, and unless some work was done the property would rapidly depreciate in value. The plaintiff had invested at least $1900 in the buildings, and it was the duty of the defendant, being in possession, to so manage the property that the interest of the plaintiff would not further depreciate, and that he could only do by making repairs. If he made only such repairs as were rendered necessary by the frosts of one winter, the property would continue to depreciate in value, and further repairs would soon be necessary. To properly protect the interests of the plaintiff it was necessary to do something whereby the $1900 that the plaintiff had invested in the buildings and which was producing no income, would produce an income and the property cease to depreciate. In order to protect the plaintiff's interests, situated as this property was, it was necessary to make the house tenantable, there being no other way in which the property could be made to earn an income. By completing the house the defendant changed the property of the plaintiff, which was producing no income, into property producing an income of $284 per year.

We think that, by the rule stated in *Bradley* v. *Merrill,* supra, and authorities cited, it was the duty of the defendant, having taken possession of the mortgaged property, with a house nearly finished but untenantable, and left in that condition by the mortgagor, to protect the interests of the mortgagor, and that the finishing of the house, as the evidence discloses in this case and thereby changing it from unproductive property to income producing property, was proper management of the mortgaged premises, that such repairs and improvements were necessary and beneficial to the estate, *Rowell* v. *Jewett,* 73 Maine, 365; Jones on Mortgages, sec. 1129, and that the money expended, as shown in this case, was a proper charge against the property, which the plaintiff should pay, together with the mortgage debt, to redeem the property, and that the tender of $707.29 by the plaintiff in December, 1909, was not a sufficient

tender of the amount due the defendant upon the mortgage, and that the bill cannot be maintained upon the allegations in the bill of a tender of the amount due upon the mortgage.

Section 15 of chapter 92, R. S., provides that a mortgagee shall render a true account in writing of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any, and if he unreasonably refuses or neglects such an account in writing, or, in any other way by his default prevents the plaintiff from performing or tendering performance of the conditions of the mortgage, the mortgagor may bring his bill for a redemption of the mortgaged premises. It is contended by the plaintiff that the defendant did not render a true account of the sum due upon the mortgage, as required by statute, that in the state ment of the account furnished by the defendant there is an item under date of February 3, 1909, to paid Parks Brothers insurance, $31.65, and that that item is not a proper charge against the plaintiff or the mortgaged property. The mortgage given by the plaintiff to the defendant contained an agreement that the plaintiff would keep the property insured, and it appears in evidence that the plaintiff did procure from Parks Brothers insurance to the amount of $2500 upon said premises, and that the insurance was procured upon credit, and in the list of claims that made up the amount for which the second mortgage was given as security, that debt appears as $36.40 due for the insurance, and the defendant, when he accepted the second mortgage for $600, agreed to pay that bill with the others. He did not do so, but took out a new policy in his own name. It is claimed that the policy procured by the plaintiff was cancelled by the insurance agent by the authority of the plaintiff, but his right to do this is denied by the plaintiff and her witnesses, and the evidence does not prove that the plaintiff authorized the policy to be cancelled, and no notice was given as required by law, that justified the agent in cancelling it. The defendant agreed to pay the debt owed by the plaintiff for the policy procured by her. He did not pay the debt, and while he would undoubtedly have had the right, if the plaintiff had neglected to insure the property, to have procured insurance and charged it to the plaintiff in an accounting, because the mortgage contained a covenant that the plaintiff would keep the premises insured, yet, as the plaintiff had it insured and the policy

was never legally cancelled and as the defendant did not pay the debt of the plaintiff for the insurance which he agreed to pay, and which was a part of the consideration for the mortgage, that item was not a proper charge against the plaintiff in accounting for the amount due upon his mortgage; therefore, the defendant did not render to the plaintiff a true account of the amount due upon the mortgage, as required by statute, and the plaintiff would be entitled to maintain her bill for that reason if it contained the necessary allegations; but the bill contains no allegation that the defendant did neglect or refuse to render a true account of the amount due upon said mortgage; but as the account furnished the plaintiff by the defendant of the amount due upon the mortgage contained the item for insurance which was not a proper charge, the defendant did not render a true account in writing, as required. There being no dispute in regard to that fact, an allegation that the defendant neglected to render a true account would be supported by the evidence, and as the time to redeem the premises has expired, unless the plaintiff is allowed to amend her bill by inserting the allegation that the defendant did unlawfully refuse to account, she is without remedy, and it would seem just and proper that she be allowed to amend the bill by inserting the necessary allegations, upon such terms as the Justice who shall sign the final decree shall deem equitable. *Munro* v. *Barton,* 95 Maine, 262. After the amendment the defendant should account from the date of his former account to the date of the decree, the former account being taken as true, with the exception of the item charged for insurance, which should be deducted. The accounting may be had before the Justice who signs the final decree.

Bill sustained with cost.

EDWIN B. JONAH, Admr. in Equity, *vs.* ANDREW CLARK, et al.

Washington. Opinion October 6, 1913.

Administrator. Consideration. Equity. Exceptions. Mental Capacity. Partnership. Referees. Report. Sale.

The bill in this case alleged that the bills of sale were obtained by fraud and undue influence and were void, and the answer denied that the bills of sale were obtained by fraud.

Held:

1. The allegations of the bill and of the answer put in issue the title to the vessels.

2. The rule of reference referred the action to the determination of the referees named, and it was the duty of the referees to decide all material matters in issue between the parties.

3. The award must follow the agreement of submission and must determine the questions submitted.

On exceptions by Andrew Clark. Exceptions sustained.

This is a bill in equity brought by Edwin B. Jonah, as administrator of the goods and estate of Lewis D. Clark, against defendants, in which the court is asked to set aside certain Bills of Sale of certain boats and an assignment made by Lewis D. Clark to Andrew Clark and to order Andrew Clark to render an account of certain goods and property in his hands. This cause was referred to Hon. William P. Whitehouse, Hon. Arno W. King and Hon. George M. Hanson. The report of the above named referees was offered for acceptance in court on May 1, 1913, and objections made by Andrew Clark. Upon hearing before the Justice presiding, the objections were overruled and said report ordered to be accepted. To this order, the defendant excepted.

The case is stated in the opinion.

J. F. Lynch, and H. H. Gray, for plaintiff.

A. D. McFaul, and W. R. Pattangall, for defendant.

SITTING: SAVAGE, C. J., CORNISH, BIRD, HALEY, PHILBROOK, JJ.

HALEY, J. At the January term, 1912, of this court, held at Machias, there was pending a bill in equity wherein Edwin B. Jonah, administrator of the goods and estate of Lewis D. Clark, was plaintiff, and Andrew Clark and Judson Clark, of Eastport, were defendants. The bill alleged that Lewis D. Clark died May 19, 1909, and in his lifetime was engaged in business as a member of the co-partnership composed of said Lewis D. Clark, Andrew Clark and Judson Clark, under the firm name of L. D. Clark & Sons; that Andrew Clark and Judson Clark, as surviving partners, had been cited by the Probate Court to give bond and settle the co-partnership estate, and had neglected and failed to do so, and that thereupon the plaintiff was appointed administrator of the estate of Lewis D. Clark; that after the death of said Lewis D. Clark, said Andrew Clark and Judson Clark had conducted the co-partnership business until the filing of the bill in equity; that said co-partnership owned and used in its business certain personal property and equipment in their sardine factory, and certain boats and personal property situated outside of said factory, a large quantity of sardines, packed and ready for sale, and there was due said co-partnership large sums of money for sardines already sold, and also that there were large deposits of money in banking institutions in the name of said co-partnership, and that in December, 1908, Andrew Clark procured of Lewis D. Clark bills of sale of all his interest in the sardines of the firm of L. D. Clark & Sons; also his right and interest in and to all personal property used and occupied by said L. D. Clark & Sons; and also his right, title and interest in and to all boats and gearing connected therewith used by said L. D. Clark & Sons in the sardine business at Eastport; that when said bills of sale were executed said Lewis D. Clark had not sufficient mental capacity to execute legal conveyances of his said property; that said Lewis D. Clark was unduly influenced by said Andrew to make the conveyances; that said conveyances were given without sufficient and valuable consideration, and procured by the said Andrew Clark in fraud of said Lewis D. Clark, his estate and his legal representative, and asked that the conveyances be declared null and void, and that said property be reconveyed to complainant as administrator,

and that the defendants be ordered to give an account of said co-partnership property, funds, and rights and credits on said nineteenth day of May, 1909, and of the business earnings and income of the said copartnership from the death of said Lewis.

An answer to the bill was filed, denying that said Lewis D. Clark had not sufficient mental capacity to make legal conveyances of said property; that he was unduly influenced by said Andrew to make said conveyances, and alleged that said conveyances were made for a good and valid consideration; that said conveyances were not procured by fraud, and alleged that on the first day of December, 1909, said Lewis D. Clark retired from said firm and sold all his interest in said firm to said Andrew Clark; that said Lewis had no interest in said firm from that date, and that, as said Lewis had no interest in said co-partnership, it was not necessary for them to account. At the said January term of court the action was referred to three referees, and a rule of reference issued. The referees made their report, and the report was offered for acceptance or rejection at the April term, 1913, for Washington County, at which time Andrew Clark objected to the acceptance of the report. The Justice ordered that the report be accepted and allowed exceptions to his ruling, if exceptions were allowable, and the case is before the court upon the exceptions. Several reasons are urged in argument in support of the exceptions. It is only necessary to consider one.

It is urged that the referees did not decide all matters submitted to them. The referees decided in their report the title to the co-partnership property, and that the defendants should account for the co-partnership transactions, and for the property belonging to the co-partnership at the death of said Lewis D., and give an account of the business earnings and income of the said co-partnership from the death of Lewis D. Clark on the nineteenth of May, 1909, but did not decide as to the title to the boats and gearing. The bills of sale of the two vessels, one the "Sasia B" and the other the "Hulloneon," were duly recorded in the Custom House at Eastport, December 3, 1908, and the bill of complaint alleged that the bills of sale above referred to were obtained by fraud and undue influence and were void, and asked that the title to the vessels should be reconveyed to the plaintiff as the representative of Lewis D. Clark. The answer denies that the bills of sale were obtained by fraud or

undue influence, and alleges that they were given for a good, sufficient and valid consideration. The allegations of the bill and of the answer put in issue the title to the vessels. The rule of reference referred the action to the determination of the referees named; the referees did not make any report or finding as to the title of, or the allegations in the bill and answer referring to, said vessels. It was the duty of the referees to decide all material matters in issue between the parties. The case was referred to them to have the rights of the parties settled, and the title to all property in issue in the case should have been settled by the referees. Until the matters in controversy in the bill were settled, the referees had not performed the duty which the parties had agreed they should perform. It was the intention of the parties and the court that the judgment of the referees should end all controversies in issue, and to do that it was necessary to settle the title to the vessels. The parties were entitled to the judgment of the referees as to all matters in issue, and unless the referees did pass upon all the material issues raised by the bill and answer, their report was not complete; they had not performed the duties for which they had been selected, and the report should not have been accepted.

"It is undoubtedly law that the award must follow the agreement of submission. It must determine the question submitted." *Wyman* v. *Hammond,* 62 Maine, 537.

"His duty (referee) was to determine all the issues, and to report the result of his findings." *Hecker* v. *Fowler,* 69 U. S., 123.

"It is undoubtedly true that an arbitrator or referee must award on all matters submitted, if they are within the terms of the submission, and a neglect to do so will render the award void." *Fuller* v. *Wright,* 10 Vt., 512.

"We are of opinion that the judgment cannot be sustained. The referee was appointed to hear and determine all the issues in the action, and it was his duty to have disposed of the whole controversy." *Pinsker* v. *Pinsker,* 60 N. Y. Suppl., 902.

The Nineveh Fed. case No. 10276, Lowell, J., states: It is equally clear that the award which had been made cannot be accepted, it does not decide the rights of the parties, but is in its nature and on the face a mere preliminary finding,—and amounts only to an order or direction to the parties to do certain acts and

prepare certain evidence before the next hearing. The question of damages form an essential part of the submission, and both parties are entitled to a judgment of their chosen tribunal upon it, as much so as upon the preliminary point of the responsibility of the respective parties." In the above case the referees reported that the damages, cost and expense of the collision should be borne equally by the parties, that they should ascertain the damages, and if they could not agree they were to submit the proof at another hearing.

The case of *Garezynski* v. *Russell et al.*, 27 N. Y. Suppl., 458, was a case in which the questions involved were what interest the estate of Mrs. Russell had in the real estate mentioned in the complaint by reason of having paid a mortgage or otherwise, and how much she in fact paid toward railroad stocks and other property which stood in her name. The case was sent to a referee. The court say: "The referees report, and the judgment entered in pursuance of it, directed that these important matters shall be referred to another referee to hear and determine after the entry of an interlocutory judgment, which is, in many respects, inconsistent with such a reference. The learned referee, to whom this action was referred, instead of taking the accounting, and determining the amount of the property, if any, which came into the possession of the estate of Lucy G. Russell, for which it was liable to account to the plaintiffs, under the facts as found by him, held, as a conclusion of law, that the plaintiff was entitled to have a fair and full accounting, as stated in the demand of the complaint relating to that subject. . . . The referee should have heard and determined all the issues made by the pleadings, and if, under the proof before him, the plaintiff was entitled to an accounting, he should have taken and stated the account. It was not the intention of the parties, or of the court, that only a portion of the questions involved in the case should be determined by the referee, and that those remaining should be determined by another and different referee, to be subsequently appointed. It is obvious that the court and both parties intended that such a determination of the case should be made by the referee as would entitle the party succeeding to a final judgment in the action. We know of no authority to justify a referee in determining only a portion of the questions referred to him, and then to direct an interlocutory judgment, and that the court appoint

another referee to complete the hearing, where the whole case is referred to him by the consent of the parties. In this case, no reason is apparent why the referee could not have taken the accounting demanded in the complaint as well as another referee, to be subsequently appointed. The subject of the accounting related, not to matters which might arise in the future, so that a supplemental hearing and report might be necessary, but entirely to transactions which were past, and as to which he might well have taken an accounting. It was the duty of the referee, on the trial, to take the proof of the respective parties, take an accounting of the matters referred to, settle and determine the acccount upon the trial before him, and thus complete the hearing and determination of the case. His report was not only informal, but incomplete. We think it was proper for the special term to set aside the report, and send the case back to the same referee, so that a final judgment might be entered, as was plainly contemplated by the court and parties when the reference was ordered. *Maicas* v. *Leony,* 113 N. Y., 619, 20 N. E., 586. The orderly method of trying this case, as well as the rights of the defendants, under their stipulation, and the order appointing the referee, required that the whole case should be fully tried and determined by him. Therefore, the special term, instead of settling the judgment upon the report as it stood, and providing for another reference, not contemplated by the defendants, should have sent the case back to the referee, to complete the trial thereof. . . . We think that where, as in this case, all the facts which relate to the accounting existed at the time of the trial, so that the whole case can be disposed of as well, and with less expense to the parties, than before another referee, it is the duty of the referee to complete the trial, and state the account between the parties in his report, so that a final judgment may be entered thereon. It was said by Daniels, J., in *Mundorff* v. *Mundorff:* 'Ordinarily, where the whole issue is referred, it is no doubt the duty of the referee to take, state, and adjust the accounts of the parties, on the basis on which, by his decision, he may settle their rights; for, as a portion of the issues, that is included within the reference provided for.' "

From the above authorities, it would seem that the award of the referees in this case was void. They did not pass upon all questions submitted to them; the title to the two vessels and gearing were

submitted, and the bill also prayed for an accounting of the partnership affairs. The defendants denied that the partnership existed, as alleged, and denied the liability for an accounting. The referees found that the partnership did exist, and ordered the defendants to give an account of the property, funds, rights and credits belonging to the said co-partnership on the 19th of May, 1909, and to give an account of the business earnings and income of said co-partnership since the death of Lewis D. Clark on said 19th day of May, 1909, and, as stated above, it was the duty of the referees to make findings and a report that would end the case. They were the tribunal selected by the parties to pass upon all matters in issue in the bill and answer. They did not pass upon the issue of the ownership of the vessels and gearing; they did not determine the amount that was due upon an accounting of the co-partnership affairs, if the defendants were liable to account, as found by the referees. Therefore, under the above authorities, their report should not have been accepted. It was void for the reasons stated, and the ruling was subject to exceptions, because, as a matter of law, the report itself shows that no valid judgment could be entered upon it.

Exceptions sustained.

BENJAMIN F. WARNER *vs.* MAINE CENTRAL RAILROAD CO.

GEORGE B. WARNER *vs.* MAINE CENTRAL RAILROAD CO.

Androscoggin. Opinion October 8, 1913.

Admissions. Admissibility of Letter. Agent. Evidence. Exceptions. Negligence. Principal. Res Gestae. Revised Statutes, Chapter 52, Section 73.

The chief issue at the trial was whether the fire that destroyed the plaintiff's buildings was communicated thereto by the defendants' locomotive engine. In the course of the trial, a letter written by the defendants' station agent at Leeds Junction, where the fire occurred, and sent to the General Manager of defendant Company, was offered by the plaintiff, admitted and read to the jury.

Held:

1. The rule governing the admission of declarations of an agent as evidence against his principal is founded upon the idea of the legal identity of the agent and the principal, which presupposes authority from the principal to the agent to make the declaration.
2. Authority to make some specific declaration may be given, or it may be decided by implication from authority given to the agent to do a certain act for the principal.
3. The agent is the principal, while acting within the scope of his authority, and in the execution of it, and his declarations and representations in reference to and accompanying his act are admissible in evidence against the principal in the same manner, or if made by the principal himself.
4. In writing this letter, the next day after the fire, the agent was doing no act for the defendant which formed a part of the particular transaction from which its liability arose, and was inadmissible against the defendant.
5. It is not within the scope of the authority of a station agent of a railroad company to bind the railroad by an admission of such a liability as is alleged in this action.
6. If authority in him to make an admission is claimed, it should be shown by competent proof.

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

The actions of *Benjamin F. Warner* v. *Maine Central Railroad Company* and *George B. Warner* v. *Maine Central Railroad Company* were tried together. They were actions to recover damages to property by fire, alleged to have been communicated by one of the defendant's locomotive engines and are based on chapter 52, section 73, R. S. The action of Benjamin F. Warner was for damages for a building which was burned; the action of George B. Warner was for damages to the contents of said building. The general issue was pleaded in both actions. In the course of the trial, the plaintiff offered in evidence a letter copied in full in the opinion, and the Justice presiding admitted the same. To the admission of said letter, the defendant excepted. The jury rendered a verdict for Benjamin F. Warner for $600, and for George B. Warner for $2300, and the defendant filed a motion for a new trial in both cases.

The case is stated in the opinion.

Ralph W. Crockett, for plaintiff.

White & Carter, for defendant.

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

KING, J. These actions were tried together. They were brought under the provisions of sec. 73, c. 52, Revised Statutes to recover damages to property by fire alleged to have been communicated by a locomotive engine of the defendant. The first, that of Benjamin F. Warner, was for damage to the buildings burned, and the second, that of George B. Warner, for damage to the contents of the buildings. The insurance on the buildings having been paid the jury deducted the amount thereof from the damages to the buildings and returned a verdict in that suit for $600, and a verdict in the other suit for $2300. The cases come before the Law Court on defendant's exceptions and motion for a new trial. The chief issue at the trial was whether the fire was communicated by the defendant's locomotive engine. The buildings burned were situated at Leeds Junction Station, so called, northerly of the defndant's railroad, and about 80 feet therefrom.

Ernest J. Hayes, the first witness for the plaintiff, whose house was situated about 60 feet northerly from the Warner buildings, testified that he was the defendant's station agent at Leeds Junction.

and that on the day after the fire he made a report of it to the defendant by letter, as he supposed it was his duty to do. Thereupon, against objection, that letter was admitted, as follows:

"Leeds Jct., Me.

Oct. 7th, '12.

Morris McDonald,

Vice-President & Gen'l Manager,

Dear Sir,

For your information, I beg to report that about 6.05 P. M. last night Mr. G. B. Warner ran over to my house, calling that his buildings were on fire.

Upon going out on my piazza I saw flames coming up from the east side of the barn roof, went over and opened barn door, saw that the fire was on top of hay, which I could see up through the pitching hole in scaffolding, and could also see that the east side of roof had a ten or twelve foot hole burned through.

In an hour the entire building was flat, with a good part of the furniture and all store goods as well as nearly all articles of clothing burned also.

The damage to my house was all on the end and side, paint being badly blistered. Also two apple trees and two elm trees killed.

From appearances and past circumstances of the same kind when the station buildings were catching fire frequently, I am safe in saying that Ex. 505 set the roof of Mr. Warner's barn on fire.

Yours truly,

E. J. HAYES,

Agent.

Copy to F. E. Sanborn, Supt."

We are of opinion that the letter was both incompetent and prejudicial to the defendant and should not have been received in evidence.

The rule governing the admission of declarations of an agent as evidence against his principal has been frequently stated by courts and text writers, though in somewhat varying language. It was

founded upon the idea of the legal identity of the agent and the principal, which presupposes authority from the principal to the agent to make the declarations. That authority may be expressly given, as to make some specific declaration, or it may be derived by implication from authority given to the agent to do a certain act for the principal, in the doing of which the declaration is made. While acting within the scope of his authority and in the execution of it, the agent is the principal, and his declarations and representations in reference to and accompanying his act are therefore admissible in evidence against the principal in the same manner as if made by the principal himself.

The language of Sir Wm. Grant in the leading case of *Fairlie* v. *Hastings,* 10 Ves., 123, is often quoted as a correct statement of the principles upon which the declarations of an agent can be received as evidence against his principal. In that opinion he said: "What the agent has said may be what constitutes the agreement of the principal; or the representations or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So in regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party therefore to be bound by the act must be affected by the words. But except in one or the other of those ways I do not know how what is said by an agent can be evidence against his principal."

Prof. Greenleaf says: "It is to be observed, that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal; and therefore they bind only so far as there is authority to make them. Where this authority is derived by implication from authority to do a certain act, the declarations of the agent, to be admissible, must be a part of the res gestae." Greenleaf on Ev. 15 ed., section 114.

Mr. Mechem, in his work on Agency (section 714) states: "And (3) the statements, representations, or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction. Or, to use the common expression, they must have been a part of the res gestae. If, on

the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible. In such case they amount to no more than the narrative of a past transaction, and do not bind the principal."

Our own court has said: "The declarations, representations or admissions of an agent authorized to make a contract made as inducements to or while making the contract, are admissible as evidence against his principal. They are also admissible as evidence against him, when made by his agent accompanying the performance of any act done for him. They are not admissible and do not bind the principal, when not made as before stated, but at a subsequent time." *Franklin Bank* v. *Steward,* 37 Maine, 519, 524.

In *Packet Company* v. *Clough,* 20 Wall (U. S.), 528, 540. The Supreme Court, by Mr. Justice Strong, said: "It is true that whatever the agent does in the lawful prosecution of the business intrusted to him, is the act of the principal, and the rule is well stated by Mr. Justice Story, that 'where the acts of the agent will bind the principal, then his representations, declarations and admissions respecting the subject matter will also bind him, *if made at the same time and constituting part of the res gestae.*' A close attention to this rule, which is of universal acceptance, will solve almost every difficulty."

Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was that the defendant's locomotive engine emitted sparks or cinders by which the buildings burned were set on fire. That, and that alone, constituted the alleged cause of action. That was the res gestae. The station agent, Hayes, had no part in that. In writing the letter, the next day after the fire, he was doing no act for the defendant which formed a part of the particular transaction from which its alleged liability arose. His statements contained in the letter amount to no more than his narrative and opinion of a past transaction, and for that reason could not affect his principal.

But it is contended that the letter was admissible because the agent in writing it was performing a duty required of him by the company to report such occurrences. Granted that he was, upon what principle could it be held that the defendant would be bound

by his statements and admissions contained in the report, without proof that it adopted those statements and admissions as its own, except for the purpose of charging it with notice thereof? As stated in *Carroll* v. *East Tennessee, V. & G. Ry. Co.*, 82 Ga., 452, 10 S. E., 163, "It surely cannot be sound law to hold that by collecting information, whether under general rules or special orders, and whether from its own officers, agents and employees, or others, a corporation acquires and takes such information at the peril of having it treated as its own admissions should litigation subsequently arise touching the subject matter."

In that case, which was an action to recover damages for personal injuries alleged to have been caused by the defendant's negligence, reports of the accident, made to the general manager of the company, by the superintendent and by the conductor of the train, supported by his affidavit and that of several others, embracing the engineer, fireman, flagman and brakeman, were admitted in evidence on behalf of the plaintiff, over the defendant's objection. But it was held on exceptions that they were inadmissible.

Further, it needs no argument to sustain the proposition that Mr. Hayes had no authority by virtue of his office as station agent to bind the railroad company by an admission of its liability as alleged in this case. If authority in him to make such an admission is claimed it should be shown by competent proof, for it cannot be inferred as within the scope of his authority as station agent.

In the case of *Randall, Ex'r* v. *Northwestern Tel. Co.*, 54 Wis., 140, 11 N. W., 419, which was a suit to recover damages for an injury occasioned, as alleged, by the negligence of the defendant in not keeping its line in proper repair whereby the plaintiff while travelling along the highway became entangled in its wire and was injured, the admission of the following telegram from the superintendent of the telegraph company was held reversible error. "To Gen. George C. Ginty: Many thanks for your kind words for us to the gentlemen who were hurt by our old wire. I hoped to be with you tomorrow and see them, but I must go home. Have them make a bill and send me. We will pay any reasonable bill. My instructions, if obeyed, would have prevented the accident, but the repairman neglected his duty, and we must pay the penalty." The court there said: "In the absence of any proof showing that the

superintendent was authorized by the company to bind it by his admissions, we do not think the court was justified in assuming that he had such power. He was a competent witness for the plaintiff, and though holding a high position as an agent of the defendant, he was still only an agent, and for the purpose of admitting away the rights of the defendant he cannot be presumed to have all the powers of the corporation. . . . The authority to make the admission for the principal or corporation is not to be inferred from the position or rank of the party making the same. If such authority is alleged to exist, it must be shown by competent proofs."

In the case at bar the letter was introduced by the plaintiff as affirmative evidence against the defendant as an admission of liability binding upon the defendant. But according to well established principles of law it was incompetent for such purpose, and we are constrained to the opinion that its admission was prejudicial to the defendant. We must hold, therefore, that there was reversible error in admitting the letter in evidence. This conclusion makes it unnecessary to consider the other exceptions or motion.

In each case the entry will be,

Exceptions sustained.

MARIA DAME, By Her Next Friend, *vs.* GEORGE J. SKILLIN.

Cumberland. Opinion October 8, 1913.

Assumption of risk. Experience. Failure of Duty. Instructions. Intelligence. Machinery. Negligence. Obvious Danger.

The plaintiff, a girl sixteen and one-half years old, was injured by having her hand caught and drawn in between the revolving cylinder rolls of a steam mangler, at which she was working in the employ of the defendant. She had worked in defendants' laundry about one year and a half, most of the time operating a steam mangle, and had operated the mangle on which she was injured about six weeks.

Held:

1. That laborers engaged in operating unguarded machinery assume those risks and dangers that are obvious and apparent, and readily discoverable to a person of average intelligence.
2. That an employer is not required to inform his servant of those risks and dangers incident to the employment which the servant already knows, or which a person of the servant's experience and capacity, by the exercise of ordinary care and attention, might have known.
3. The extent of the employer's obligation to give instruction is to be determined with reference to the plaintiff's duty to exercise her senses and faculties in order to discover and comprehend the dangers incident to her work.

On motion by defendant. Motion sustained.

This is an action on the case to recover damages for an injury occasioned by the negligence of the defendant in not sufficiently instructing her as to the danger incident to operating the steam mangle on which she was working at the time of the accident. The plaintiff, who was a girl sixteen and a half years old, had worked in the defendant's laundry for about one and one-half years, most of the time operating a steam mangle, and for six weeks prior to the injury operating the steam mangle on which she was working at the time of the accident. The plaintiff was injured by having her right hand drawn in between the steam heated cylinder and the large roll above it. The plea was the general issue.

The jury returned a verdict for the plaintiff for $1500, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

Wilson & Bodge, for defendant.

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

KING, J. This is an action to recover damages for injuries received by the plaintiff while in the employ of the defendant and engaged in operating a steam flat-piece ironer or mangle. The action is based on the alleged negligence of the defendant.

The plaintiff was sixteen and a half years old at the time of the accident. She had worked in defendant's laundry about a year and a half, most of the time operating a steam mangle, and she had operated the mangle on which she was injured about six weeks—all the time after it was put in the laundry up to the 24th day of August, 1911, when she was injured.

This mangle is an approved type of flat-piece ironer commonly used in laundries. We may not be able to describe it well without the aid of the photograph put in evidence. It consists of a large steam-heated cylinder about eight feet long, placed horizontally, over which are two or more heavy rollers of the same length covered with canvass. The cylinder and rollers revolve in opposite directions, and are so close together that sheets, pillow slips, towels and other articles to be ironed are drawn in between the cylinder and rollers as they revolve and are ironed as they pass through. A horizontal shelf or feed plate, so called, about ten inches wide, is placed lengthwise of, and as close to the surface of the cylinder as practicable and not be in contact with it, the line of its plane striking the cylinder some distance below its top. In front of the feed plate is the feed roll which revolves in the same direction with the cylinder. Ten ribbons, or strips of fabric, called "feed-strips" or "apron-strips," pass up around the feed roller and across the surface of the feed plate and in between the cylinder and rollers. These feed-strips move as the feed roll and cylinder move, and pass around and around through the machine. The article to be ironed is placed smooth on

the apron-strips and as these move it is carried along and in between the cylinder and rollers. There is also a guard roll extending the length of the machine and placed in front of the point of contact of the cylinder and upper roller. This guard roll appears to be 4 or 5 inches in diameter, and is covered with canvass like the larger rolls. It rests at either end and revolves in bearings on swinging arms which permit it to be lifted up bodily around to the top of the first roll, if necessary, keeping always its relative distance from the surface of that roll. This guard roll is so hung that, unless lifted by some force, it touches the apron strips, and its top is about an inch and a half from the surface of the larger roll above it—it being somewhat under the larger roll, so that a perpendicular line dropped down by the front side of the larger roll would strike near the center of the guard roll. The guard roll revolves downward and inward, and is turned by the friction of the apron-strips passing under it, and also by the force and effect of several (seventeen) twine strings placed at equal distances apart and drawn tight down over the upper rolls and under the guard roll. As the larger rolls revolve the strings move, turning the guard roll as they pass under it. The way in which the guard roll is hung, on the movable arms, permits some upward movement of it should articles passing under it be or become of uneven thickness. Its purpose is to prevent articles from going into the machine crooked and uneven, for unless the articles are smooth and even when they reach this guard roll they will not pass under it on the apron-strips, but bunch up in front of it, and the operator can safely take them away and smooth them out. If the guard roll does not revolve then the articles, though smooth and even, will not pass under it, but bunch up in front of it. It appears from the evidence that if a considerable number of the strings are broken (and they frequently break being of ordinary twine) the guard roll will stop revolving. The distance from the center of the top of the guard roll to the steam-heated cylinder beyond is "between five and five and a half inches."

The plaintiff was injured by her right hand going in over the top of the guard roll and being drawn in between the steam-heated cylinder and the large roll above it. It appears that at the time of the accident so many of the strings were broken that the guard roll bothered and did not revolve constantly. The plaintiff thus stated

how the accident occurred: "Well, I took my pillow slip and I put it here and it went as far as that little roll right here, and it would not go any further because it bunched all up, and I pulled it back and laid it again, and it went as far as that little roll, and when it did go as far as that, I put my hand on that little roll here, just my fingers, and pulled it toward me so the pillow slip would go in. That is just how I done it that night." (Indicating on photograph.)

It seems evident that the plaintiff put her finger so far into the little space between the top of the guard roll and the larger roll above it that her hand was drawn in between that roll and the steam-heated cylinder.

The chief claim in her behalf at the trial was that she was not sufficiently instructed as to the danger incident to operating this machine, or, to be more specific, of the danger in turning the guard roll with her hands.

It is alleged in her writ "that she was entirely inexperienced in laundry work and in the operation and handling of any kind of machinery." That allegation is not sustained by the evidence. On the other hand she had worked in this laundry for about a year and a half, operating a steam mangle most of the time, and had operated this particular mangle for six weeks. It is also alleged that she was of immature intelligence. But no evidence was offered to support that allegation, and we do not think such a conclusion is justified by her own testimony, for that shows her to have been a girl of at least average intelligence for one of her age and circumstances. Indeed it was she who operated the old mangle for about a year and a half, and who was put in charge of the new one when it was installed; and when two girls worked at the mangle it was the plaintiff who had the right hand side of the machine and operated the lever in starting and stopping it. That does not indicate that she was regarded by her employer, or those who worked with her, as a person of immature intelligence.

If it did not so appear in evidence, it would still be reasonable to infer that the plaintiff, both from observation and actual experience in operating a mangle for a year and a half, must have obtained knowledge of the method of its operation, and must have had full opportunity to ascertain and appreciate any risks incident to the use of such a machine. But it does so appear in evidence. In her

testimony the plaintiff discloses that she understood clearly how the machine operated in doing its work. She knew that the cylinder within was heated, and that there was a similar heated cylinder in the old mangle; that it revolved in contact with the large rolls over it, and that the guard roll was placed in front of the point of contact of the cylinder and rolls for protection, to prevent articles from being drawn in between the cylinder and rolls when they ought not to go in there.

She testified in substance and effect that the heated cylinder inside was revolving so near the guard roll that as soon as an article passed under the guard roll it was drawn between the cylinder and the big revolving roll above it, and that the top of the guard roll was "right near" the big roll—and the big roll was revolving all the time in plain sight. Seeing that big roll revolving inward over and so near the top of the guard roll, it would be obvious to any person of average intelligence, and plainly was so understood by the plaintiff, that if anything came in contact with the surface of the big roll as it revolved inward over the top of the guard roll it would propably be drawn into the machine. That she did so understand is shown in her explanation of how her hand was caught. "I put it right on the little roll. The big roll is so near that little roll, the tops of my fingers got caught on the big roll and it drew my hand in."

It is an established doctrine, repeatedly examined and carefully considered in the recent decisions of this court, that laborers engaged in operating unguarded machinery assume those risks and dangers that are obvious and apparent, and readily discernible to a person of average intelligence. And it is likewise a well settled doctrine that an employer is not required to inform his servant of those risks and dangers incident to the employment which the servant already knows, or which a person of the servant's experience and capacity by the exercise of ordinary care and attention might have known. In *Wiley* v. *Batchelder,* 105 Maine, 536, it was well said: "The extent of the obligation resting upon the employer to give instruction must be determined with reference to the reciprocal duty resting upon the plaintiff to exercise the senses and faculties with which she was endowed in order to discover and comprehend these dangers for herself."

Applying these doctrines to this case, what is the necessary conclusion? The danger which the plaintiff did not avoid, and which she contends the defendant should have instructed her to avoid, was that incident to putting her hand upon or over the top of the guard roll so that it would come in contact with the revolving heavy roll above it and be thereby drawn into the machine. But that was an obvious and apparent danger. It was entirely open and readily discernible to even casual observation. For six weeks the plaintiff had been operating that machine, and looking at that heavy roll revolving inward "right near" the top of the guard roll—"so near" that when she put the tips of her fingers on the little roll, as she says, "it drew my hand in." The conclusion is inevitable that the plaintiff knew, or is chargeable with knowledge, that if she put her hand over the top of the guard roll and in contact with that heavy roll revolving inward her hand would probably be drawn into the machine, and that the only way to avoid that risk was to keep her fingers and hands away from that place. Having knowledge of the risk and how to avoid it, she needed no instruction from the defendant concerning it. He was not bound to inform her of what she already knew.

But there was evidence that she was instructed as to the operation of this machine, and was warned against this particular risk. She admits that Mr. Woodrow, who installed this machine, gave her some instructions as to operating it, but denies that he warned her not to put her hands on the guard roll to turn it when the big roll was revolving. Mr. Woodrow testified that he gave instructions how to operate the machine to the girls in the laundry, and particularly to the plaintiff, because the superintendent "pointed her out and said she was the one to run this machine, and I was to give her instructions," and that he specially warned her never to put her hands on the guard roll to turn it when the machine was going, "that if they got caught in there, it would surely spoil their hand."

Bessie May Miller worked more or less on this mangle with the plaintiff and was working with her at the time of the accident. She testified that the guard roll stopped quite a lot during that evening and they started it with their hands, but "I told her I would not start is any more" . . . "Q. Did you have any fear of getting injured? A. Well, I knew it was a dangerous machine if you put

your hands too close starting that roll. Q. Did Maria continue to start the roll? A. Yes, sir." This testimony, which was not contradicted, shows that the risk of being injured by putting her hands on the guard roll to turn it was clearly presented to her mind just before the accident.

Her physician testified that about a week after her injury, in answer to his inquiry how the accident happened "She said she was going to put the cloth in and the machine did not work right, and she said, 'Darn the thing, I will make it go' and gave a shove and her hand caught." She denied that she made that statement.

Upon consideration of all the evidence, examined in the light most favorable to the plaintiff's contentions it is the opinion of the court that there was no failure of duty on the part of the defendant in respect to warning the plaintiff of the risk of being injured if she put her hands on the top of the guard roll, so near the surface of the large revolving roll above it. That risk was obvious and apparent to her, and she must have known and appreciated it. In putting her hand there she assumed the risk of such an injury as resulted to her.

Moreover, the conclusion seems irresistible, that the unfortunate accident to the plaintiff was the result of a failure on her own part to exercise ordinary care. She may have been too impatient, and she was without doubt too venturesome.

Motion sustained.

L. M. JONES *vs.* CO-OPERATIVE ASSOCIATION OF AMERICA.

Androscoggin. Opinion October 8, 1913.

Damages. Exceptions. Negligence. Injuries. Instructions. Interest. Verdict.

1. In an action to recover damages for personal injuries received by the plaintiff and instruction to the jury to reckon interest at six per cent from the date of the writ on the amount, they should find the plaintiff was entitled to recover for her injuries and include that interest in the amount of the verdict, is erroneous.

2. The compensation of the plaintiff was not limited to the damages resulting to her, up to the date of the writ, but included such damages as had resulted to her from her injuries up to the trial, and also such future damages as the evidence made reasonably certain will result to her from those injuries.

On motion and exceptions by the defendant. Motion overruled. Exceptions overruled if within thirty days after the rescript of this decision is filed, the plaintiff remits all of the verdict, in excess of $3,487.15; otherwise, exceptions sustained.

This is an action on the case to recover damages for personal injuries, received by the plaintiff, by being thrown from an elevator, operated by the defendant, and is based on the negligence of the defendant. The defendant pleaded the general issue. In the first trial of this case, a nonsuit was ordered, with the stipulation that if that ruling should not be sustained, the question of damages only, should be submitted to the jury. At the second trial of the case, the jury returned a verdict for the plaintiff for $4,136.75. The Justice presiding, in the course of his charge to the jury, instructed the jury to reckon interest at six per cent from the date of the writ on the amount they should find the plaintiff was entitled to recover for her injuries, and include that interest in the amount of the verdict. To this instruction the defendant excepted, and also filed a motion for a new trial, on the ground that the damages awarded are excessive.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

KING, J. This action was commenced March 14, 1910, to recover damages for personal injuries received by the plaintiff by being thrown from an elevator operated by the defendant.

At a former trial a nonsuit was ordered with the stipulation that if that ruling should not be sustained the question of damages only should be submitted to the jury. The case has been again tried resulting in a verdict of $4,136.75 for the plaintiff, and it is now before this court on the defendant's exceptions, and motion for a new trial on the ground that the damages awarded are excessive.

THE EXCEPTIONS.

The jury were instucted to reckon interest at 6% from the date of the writ on the amount they should find the plaintiff was entitled to recover for her injuries and include that interest in the amount of the verdict.

That instruction was erroneous. Such is not the rule in actions to recover damages for personal injuries. The plaintiff's compensation was not limited to the damages resulting to her from the injuries complained of up to the date of her writ, but included all the damages that had resulted to her from those injuries up to the trial, and also such future damages as the evidence made reasonably certain will result to her from those injuries. The effect of the instruction was to give the plaintiff interest from the date of the writ on compensation for damages that had not then resulted to her.

But the defendant was injured by the erroneous instruction to the extent only of the amount of interest improperly included in the verdict. That can be determined by computation with reasonable accuracy. The learned counsel for the defendant states the amount of the verdict, less the interest, as $3,487.15. Our computation gives practically the same result, and shows that sum to be at least safe and conservative. Accordingly it is the opinion of the court that if the plaintiff remits so much of the verdict returned as is in excess

of $3,487.15, justice will not require that a new trial should be granted because of the instructions complained of. See *Moulton* v. *Scruton,* 39 Maine, 287, 291.

THE MOTION. The amount of damages was the only issue.

The plaintiff was injured September 10, 1909. She was then 67 years old and weighed 207 pounds. She and her daughter, having lunched in the defendant's store at Lewiston, Maine, came down the elevator to the first floor. The daughter stepped out, and just as the plaintiff was in the act of stepping out, and before her feet reached the floor, the elevator was negligently permitted to start up with a jerk whereby she was thrown head long and helplessly to the floor striking on her right side, shoulder and head. The head of her right arm, the humerus near the shoulder, was fractured, and her leg, knee and ankle were bruised. She was immediately taken to the house of Dr. Garcelon, who reduced the fracture and properly attended to her other injuries. On account of anticipated swelling her arm was at first swathed in soft bandages, and after a few days a permanent dressing of silicate of soda, which when dry becomes hard and brittle, and is called a "glass bandage," was put on. By this her whole right side from the neck down was bandaged, the arm being bound to the side, the bandage extending to the wrist. On Tuesday, following the accident on Friday, she was taken to her home in Cambridge, Massachusetts.

Shortly thereafter, on September 21st, Dr. Coggswell was called. He found the plaintiff in bed, "a good part of the time crying, and evidently very nervous." He visited her ten times in the course of thirteen weeks, his last visit being December 14th. The glass bandage was removed about the middle of October—five weeks and a half from the time of the injury. Dr. Coggswell, the fairness of whose testimony the defendant's attorney commends, testified, that during the four weeks after he first saw her, and while she had the bandage on, there was a complaint at every visit of pain, especially bothering her at night, so that she was unable to sleep well; that at the time the bandage was removed, there were the remains of a large abrasion of the tissues on the front of the shoulder, a bruise extending down, especially on the inside of the upper arm, and some on the outside, and on the side of the chest; that on taking the bandage off the shoulder was rigid, and that Mrs. Jones herself could not move it

in any way, and any effort of others to move it caused her much pain; that the arm was then put in a sling and carried there night and day; that an effort was made by him and her daughters to move the arm so as to limber the tissues around the broken joint. On the 18th of November he saw her in company with Dr. Chase, a physician sent by the defendant to examine her. At that time her arm was still in the sling and she was able to move it up not quite to a horizontal position and was unable to move it back of her side. On December 14th, the time of his last visit, she could move her arm a little more, and she still complained of the pain in her shoulder and extending down into the arm. He was also present at an examination of the plaintiff by several physicians at the time of a former trial of this case, in January, 1913, and as to her condition then as compared with what it was over three years before, he said: "I should say she had more free use of it now, a little more, but not much." And, finally, after describing her nervous condition as it was during the first four weeks, and after the bandage was removed, he said: "and subsequently she showed there was something wrong medically with the nerves here around the seat of the injury."

It was claimed that the plaintiff has neuritis caused by her injuries, and some of the physicians called in her behalf expressed their opinion to that effect, while others thought her symptoms, subjective and objective, may indicate a neuritic condition of the nerves, or that such a condition is developing. On the other hand Dr. Chase, called by the defense, who examined her in November, 1909, and was present at her examination in January, 1913, testified that he discovered nothing in her condition to lead him to believe that she was suffering from neuritis. That disease is admittedly serious and probably incurable.

All the physicians agree that the plaintiff is now suffering from a condition known as a hardening of the spinal cord. Such a condition may be the result of some previous disease, or of exposure to cold and hard work, or of an injury. It develops more commonly after middle life. In the absence, in this case, of any evidence of a previous disease, or of such exposure and hard work as might have caused it, her physicians were inclined to the opinion that it may be the result of her injuries. But Dr. Chase testified that when he examined the plaintiff in November, 1909, about a month after her

injuries, he found clear evidences that she was then suffering from hardening of the spinal cord, and that it must have had its origin long before the time of her injuries, because it develops slowly. And we think the weight of the medical testimony is, that, assuming the plaintiff showed clear symptoms of hardening of the cord in November, 1909, the disease probably had its origin prior to the accident, notwithstanding the plaintiff herself did not realize it, but felt that she was perfectly healthy.

We do not think, however, that the determination of the question whether the amount of the damages awarded the plaintiff was excessive necessarily depends on whether the evidence would justify the conclusion that the hardening of the spinal cord from which she is suffering had its inception as the result of her injuries on September 10, 1909. If that disease, though undiscovered, was existing or developing before the accident, it may have been, and probably was, accelerated in its development and progress on account of the accident and the injuries resulting to the plaintiff from it.

There was evidence sufficient to justify the jury in finding, that prior to the accident the plaintiff thought she was, and that she appeared to her family and friends to be, a well and strong person; that since the accident, which happened more than three years before the trial, she has been practically an invalid, has suffered much pain in her right shoulder and arm, and has had practically no use of that arm.

As to her helplessness since the accident her daughter testified: "We have to help her dress; we have to help her comb her hair; we have to help her wash herself; we have to help her at the table, because if we pass her anything she is apt to drop it out of her hands. We have to help her in a thousand ways where before she helped herself that now she is not able to do." And we think the conclusion is reasonably justified by the evidence, that the condition of the plaintiff's shoulder and arm will continue to cause her pain and inconvenience, and perhaps never be much improved.

The plaintiff is also unsteady in her walking, and liable to fall, requiring assistance when she goes upon the street; and she is unable to go up stairs naturally, but puts one foot on a stair and draws the other up beside it, and so on up. No doubt these last named infirmities, and many others with which she is afflicted, are the result of the

hardening of the spinal cord. But that disease, though it may not have been the result of the accident, may have been accelerated and increased by it.

The plaintiff has been greatly disabled, and has suffered much pain and distress in body and mind since the accident. She is now in a serious and quite helpless and hopeless condition. Who can determine precisely to what extent that condition is not the result of the accident to her on September 10, 1909? As to that the physicians disagreed.

It was for the jury to determine the amount of compensation the plaintiff was entitled to as the damages resulting to her from her injuries. The verdict, less the interest, or $3,487.15, represents their judgment as to the amount.

We have examined and considered the evidence with care and are not convinced that the amount awarded is so manifestly excessive that it ought not to be permitted to stand. Accordingly it is the opinion of the court that the motion should be overruled.

The entry will therefore be,

Motion overruled.

Exceptions overruled if within thirty days after the rescript of this decision is filed the plaintiff remits all of the verdict in excess of $3,487.15; otherwise, exceptions sustained.

E. A. STROUT FARM AGENCY *vs.* EDITH I. MCTEER, Admrx.

Kennebec. Opinion October 11, 1913.

Contract. Listed and Advertised. Mortgage. Sale. Sale by Mortgagee. Withdrawal.

A farm subject to mortgage containing a power of sale was placed in a farm agency for sale. The agency contract contained the following agreement, signed by the owner,—"Should I withdraw the said estate from your hands before you have procured a purchaser, I will 'pay a withdrawal fee.'"

Held:

That a sale under the power of sale in the mortgage was not a withdrawal within the meaning of the terms of the contract.

On report upon an agreed statement of facts. Judgment for defendant.

This is an action of assumpsit upon a written contract to recover the sum of three hundred and forty dollars, designated in said contract as a withdrawal fee. On the 24th day of May, 1907, Cornelia S. Rogers owned certain real estate which she placed in plaintiffs' hands for sale. The contract which was in wrting contained among its provisions the following: "Should I withdraw the said estate from your hands before you have procured a purchaser, I will, in consideration of your having listed the property, pay you forthwith $20 or two per cent of the asking price if above $1000, to be known as the withdrawal fee."

At the time this contract was made, there was a mortgage on said real estate which contained a power of sale upon breach of conditions in said mortgage. Subsequently the mortgagee sold the property for the breach of said condition. The case was reported to the Law Court upon an agreed statement of facts.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

A. J. Dunton, for defendant.

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

SAVAGE, C. J. This case comes before the court upon an agreed statement of facts. The defendant's intestate placed certain real estate in the hands of the plaintiff for sale, and it was "listed" and advertized by the plaintiff. One clause in the contract, which was in writing, and signed by the owner, was in these words: "Should I withdraw the said estate from your hands before you have procured a purchaser I will in consideration of your having listed the property, pay you forthwith $20, or two per cent of the 'asking price' if above $1000, to be known as the 'withdrawal fee.'" At the time the contract was made, the real estate was subject to a mortgage containing a power of sale upon breach of condition. Subsequently, the mortgagee sold the property for breach of condition in the mortgage. Thereupon, the plaintiff brought this suit to recover the withdrawal fee stipulated in the contract. It claims that the sale under the mortgage was a withdrawal within the meaning of the terms of the contract. It is not claimed that the owner in any other way withdrew the property from sale.

The decision of the case, therefore, depends upon the interpretation of the word "withdraw" in the contract. Is the sale under the mortgage to be deemed a withdrawal by the owner, upon a fair construction of the contract? We think not. In construing a written contract the words used are to be taken in the ordinary sense, unless the contract shows that the parties intended to use them in a different sense. *Strout Co.* v. *Gay,* 105 Maine, 108. The language used in this contract seems to relate to a voluntary act on the part of the owner, and in this sense the owner had a right to understand it.

It does not seem to us broad enough to cover the contingency of a sale under mortgage. The plaintiff's right to recover rests solely in the contract. If it had wished to have the right to recover the withdrawal fee depend on the happening of other contingencies than that of a voluntary withdrawal, it might have insisted on having the right expressed in the contract.

Judgment for the defendant.

PETER ALEZUNAS, et al.

vs.

GRANITE STATE FIRE INSURANCE COMPANY.

Androscoggin. Opinion October 11, 1913.

Design. Fraud. Insurance. Overvaluation. Policy. Procurement. Proof of Loss. Waiver.

In an action on a fire insurance policy.

Held:

1. That the fact that the proof of loss did not state "the persons by whom the building insured or containing property insured, was used," as required by the policy, did not prevent recovery because the defendant had waived that provision. It received the proof without protest and did not ask for additional information. The objection comes too late.
2. Nor is recovery precluded by the fact that the proof of loss was signed by Alezunas alone and not by one Brimijoin, although both names appeared in the policy as the parties insured. The legal title was in Brimijoin and the equitable in Alezunas, so that although the contract of insurance was joint, the interests involved were severable, and Brimijoin conveyed his interest to a representative of the defendant Company, soon after the fire. The neglect, failure or refusal of a nominal party to sign a proof of loss cannot defeat the rights of the real party.

On motion and exceptions by defendant. Motion and exceptions overruled.

This is an action on a fire insurance policy of the standard form for $1500 issued by the defendant company upon plaintiffs' two story frame dwelling house, situated in Lisbon, in the county of Androscoggin, on the second day of August, 1910, for the term of four years. The fire which destroyed the house occurred April 24, 1912, and the proof of loss was furnished the defendant on June 21, 1912. The defendant plead the general issue and filed a brief statement, in which it is claimed that the fire originated by the voluntary act, design and procurement of the plaintiff, and, secondly, that

plaintiff, in his proof of loss, knowingly, wilfully and intentionally, overvalued the property destroyed by fire. The jury returned a verdict for the plaintiff for $1576.50.

During the trial, the plaintiff introduced a paper called a proof of loss, which the court ruled was in form within the requirements of the Revised Statutes. To this ruling, the defendant excepted. The defendant filed a motion for a new trial.

The case is stated in the opinion.

George S. McCarty, for plaintiff.

George C. Wing, George C. Wing, Jr., and L. A. Jack, for defendant.

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

CORNISH, J. Action on a fire insurance policy of standard form in the sum of $1500. A verdict having been rendered in favor of the plaintiff the case comes to this court on motion and exceptions.

MOTION.

The defendant raised two issues of fact before the jury, first that the fire originated by the voluntary act, design and procurement of the plaintiff Alezunas; and second, false and fradulent overvaluation of the property in the proof of loss.

The jury found against the defendant on both issues and a thorough and painstaking study of the evidence fails to convince us that either of these findings was manifestly wrong. There were certain suspicious circumstances connected with the origin of the fire but the defendant failed to connect them with the plaintiffs. A detailed statement of the facts or of the reasons that have led to our conclusion is needless and is therefore omitted. It is sufficient to say that the motion should not prevail.

EXCEPTIONS.

These pertain to the sufficiency of the proof of loss furnished by Alezunas to the company and raise two points.

First, that the proof did not state "the persons by whom the building insured, or containing the property insured, was used," as required by the policy.

The answer to this is waiver on the part of the company. The fire occurred April 24, 1912, the proof of loss was sent to the company on June 21, 1912, and stated that "the property was used as a dwelling." It was received by the company without protest. This technical point was not raised, nor was Alezunas asked to furnish the additional information. The objection comes too late. *Patterson* v. *Ins. Co.*, 64 Maine, 500; *Hilton* v. *Assurance Co.*, 92 Maine, 272.

Second. The second objection to the proof of loss is that it was signed by Alezunas alone and not by Brimijoin, although both names appeared in the policy as the insured and the policy requires that the proof shall be "signed and sworn to by the insured."

This point also lacks merit. It appears from the case that when the policy was issued on August 2, 1910, Brimijoin held the legal title to the premises and Alezunas held a bond for a deed, given him by Brimijoin on June 28, 1909, by the terms of which, conveyance was to be made to Alezunas when he had paid the full consideration of nineteen hundred dollars.

Five hundred dollars were paid down and Alezunas was to keep the building insured for Brimijoin "in a sum not less than $1400." At the time of the fire on April 24, 1912 there was a balance due of $1080. So that although the contract of insurance was joint, the interests involved were severable, the legal interest being in Brimijoin and the equitable in Alezunas. On May 18, 1912, Brimijoin conveyed to George E. Macomber, the general agent of the defendant company, all his right title and interest in the premises subject to the equitable rights of Alezunas. When, therefore, the proof of loss was made on June 21, 1912, Brimijoin had ceased to hold any interest in the premises, a fact that must have been well known to the defendant company because its agent had taken the title and presumably for its benefit.

Alezunas could not be deprived of his right of action because Brimijoin did not sign a proof of loss for property in which the latter had no interest. Suppose Brimijoin should refuse, would Alezunas thereby lose all his rights? Clearly not. It is true that Brimijoin was, by amendment, made a party to the writ; but he was a nominal party merely, the real party in interest being Alezunas. The neglect, failure or refusal of a nominal party to sign a proof of loss cannot defeat the rights of the real party.

Moreover the defendant was in full possession of all the facts. It accepted the proof signed by Alezunas without objection. It was neither deceived nor misled thereby. The technical formality, if ever required, was waived. To hold under all these circumstances that the plaintiff Alezunas could not recover in this action would be to convert a proof of loss, the purpose of which is to assist the insurer, into an instrument of destruction to the rights of the insured. The authorities forbid it; *Patterson* v. *Ins. Co.*, 64 Maine, 500; *Biddeford Savings Bank* v. *Ins. Co.*, 81 Maine, 566; *Hilton* v. *Assurance Co.*, 92 Maine, 272; *Guptill* v. *Ins. Co.*, 109 Maine, 323.

Motions and Exceptions overruled.

CLARENCE W. PEABODY et al. *vs.* HENRY J. CONLEY and Trustee.

Cumberland. Opinion October 11, 1913.

Accounts. Allegations. Assumpsit. Declaration. General Demurrer. Interest. Items. Professional Services. Special Demurrer.

In an action of assumpsit on an account annexed for legal services, the defendant filed a general demurrer.

Held:

1. That as the account annexed contained three items, two of which are conceded to be properly stated, a general demurrer will not lie. The defendant should have demurred specially to the first item instead of generally to the whole account and declaration.
2. That even on a special demurrer the first item must be held to have been sufficiently stated. The plaintiffs set forth with unusual minuteness the various services that entered into the preparation and trial of a case in the lower court and the argument before the Law Court, carrying out a lump sum for the whole. This was sufficient. It was not necessary to place a price upon each detail.
3. That the slightest variance between the total amount claimed as set forth in the declaration and in the account is not the subject of demurrer. The amount stated in the account controls, and a misrecital of that amount in the declaration, whether through a mathematical or a typographical error does not vitiate the writ.

On exceptions by plaintiff. Sustained.

This is an action of assumpsit upon an account annexed to the writ to recover the sum of one hundred and seventy-seven dollars and eighty-two cents, for legal professional services rendered to and on behalf of the defendant by the plaintiff. The defendant filed a general demurrer, which the Judge presiding sustained, and the plaintiff excepted to said ruling sustaining the demurrer.

The case is stated in the opinion.

Fred V. Matthews, for plaintiff.

Henry J. Conley, pro se.

Symonds, Snow, Cook & Hutchinson, for trustee.

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

CORNISH, J. This is an action of assumpsit brought to recover the sum of one hundred and seventy-seven dollars and eighty-two cents according to the account annexed to the writ. The account contains three claims of charge; the first for various services connected with the preparation and trial of the case of *Conley, assignee,* v. *Murdock,* in the Superior Court of Cumberland County, and with the subsequent preparation of brief and the argument in the same case before the Law Court. The details are given as to the nature of the services and the various dates on which they were rendered between April 1, and June 28, 1909, with a lump sum of one hundred and sixty dollars for the combined charges. A credit of fifteen dollars is given this charge leaving the balance due one hundred and forty-five dollars. The second item is for interest on the foregoing item from October 1, 1909, to date of writ at six per cent, amounting to twenty-six dollars and eighty-two cents; and the third is a charge for services at the December Term, 1909, of the Superior Court in examining rescript and obtaining assignment for trial, six dollars.

The defendant filed a general demurrer, which was sustained by the presiding Judge, and the case is before the Law Court on plaintiffs' exceptions to this ruling.

Under the well known rules of pleading the defendant cannot prevail because it is conceded that the second and third items in the

account are properly stated. The defendant therefore should have demurred specially to the first item and not generally to the whole account and declaration. The general demurrer cannot be sustained. *Blanding* v. *Mansfield,* 72 Maine, 429; *Wills* v. *Churchill,* 78 Maine, 285.

But it is unnecessary to meet technicality with technicality because item one was well and sufficiently stated, and should stand even against a special demurrer.

The first objection raised by the defendant is that this charge is not sufficiently itemized, and that each minute detail making up this item, should itself have been a separate item of charge. This contention is without foundation. The defendant relies upon *Bennett* v. *Davis,* 62 Maine, 544, but the account in that case was "To groceries as per bill of particulars rendered $58.52," and the court held this was clearly demurrable because a sufficient declaration must contain all the allegations necessary to make out the plaintiff's case without reference to a paper not attached. That case has no application to the one at bar.

Here the plaintiffs set forth with unusual minuteness the various services that entered into the preparation and trial of the case in the lower court and the argument before the Law Court with the dates on which they were respectively rendered. Had they omitted these details and simply made a change for professional services in the preparation and trial of the case in the Superior Court and in the preparation of the brief and the argument in the Law Court it would have been sufficient. The fact that they gave the defendant fuller details of the services rendered did not compel them to place a price upon each detail.

"The office of a declaration is to make known to the opposite party and the court the claim set up by the plaintiff," *Wills* v. *Churchill,* 78 Maine, 285. The account annexed, which is a part of the declaration, comes within the same general rule and its adequateness must be tried by the same test. Hence it is that in *Turgeon* v. *Cote,* 88 Maine, 108, an account annexed "for balance due on account, for labor performed and materials furnished as contractor for wood work for the erection and construction of the above building as per agreement, $725" was held bad on general

demurrer because it did not allege the price of the work contracted for, nor what any or all of the items were, that constituted the balance due on account. "The defendant is entitled to know what these particulars are, before he can be required to determine whether he will admit or contest the claim." A similar defect existed in *Bennett* v. *Davis,* supra.

In the case at bar, however, the defendant was fully apprised of the nature and amount of the claim against him and the required test was as fully met, as the nature of the employment would permit. There is a marked distinction between an account for merchandise, or one for ordinary labor and the professional services of an attorney in the preparation and trial of a case. The former have a well known and fixed market value, while the latter, from their very nature, cannot have. Many different elements affect their value, such as the skill and standing of the person employed, the nature of the controversy, the amount involved, the time and labor bestowed, and the ultimate success or failure of the litigation. A litigated case in fact is so nearly a unit that it should be considered in its entirety when determining the value of services rendered in its prosecution or defense. To require an attorney to set a separate price upon each hour of study or each day of labor, either in or out of court, would be to demand the impracticable, if not the impossible, and it is not the policy of the law to require either.

In recognition of this distinction of the reasonable rule that should prevail, the court in *Aub* v. *Hoffman,* 120 N. Y. App. Div. 50, 104 N. Y. Supp., 913, ordered the plaintiff attorney to file a bill of particulars covering the services rendered but not to place a valuation upon each detail.

It is therefore our opinion that item one in the plaintiff's account annexed was not demurrable.

But the defendant sets up as the second ground of his demurrer the fact that the account annexed shows the total amount due to be one hundred and seventy-seven dollars and eighty-two cents, while in the body of the writ the amount is alleged to be one hundred and seventy-eight dollars and eighty-two cents, a variance of one dollar. So trivial a matter scarcely deserves attention. It is sufficient to say that the amount stated in the account annexed

controls. That is the basis of the plaintiff's claim and a misrecital of that amount in the declaration, whether through a mathematical or a typographical error does not vitiate the writ.

Exceptions sustained.
Declaration adjudged good.

CLARA C. COOMBS et als., in Equity, *vs.* LENOX REALTY COMPANY.

Androscoggin. Opinion October 13, 1913.

Discretion. Equity. Injunction. Jurisdiction. Laches. Nuisance. Trespass.

Bill in equity to compel defendant to remove building which encroaches upon plaintiffs' land about one and one-half inches.

Held:

1. That, in general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiffs' property, or to interfere with his rights, and had changed the condition of the real estate, he is compelled to undo, so far as possible, what he had wrongfully done affecting the plaintiffs and pay the damages.
2. Where, by an innocent mistake, erections have been placed a little upon the plaintiffs' land, and the damages caused to the defendant by the removal would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order them removed, but will leave the plaintiff to his remedy at law.

The doctrine applied by the court in equity, in cases of this kind, call for a consideration of all the facts and circumstances which help to show what is just and right between the parties.

On appeal by defendant from decree of sitting Justice. Bill dismissed. Appeal denied.

This is a bill in equity wherein it is alleged that the brick wall of the defendants' building, eighteen feet from the ground, between the second and third floors and continuing to the roof and shows a maximum overhanging upon plaintiffs' premises of about one and

one-half inches. The plaintiffs pray that so much of building and wall of said building as extends over and beyond the northerly line of plaintiffs' land and encroaches thereon may be adjudged a nuisance to the plaintiffs and that said defendant be ordered to remove the same forthwith. The defendant filed an answer and the plaintiffs replications.

At the hearing of this cause upon bill, answer and proof before the Supreme Judicial Court for Androscoggin County, at the January Term, 1913, the Justice presiding ordered, adjudged and decreed that the bill be dismissed. From said decree, the plaintiffs appealed.

The case is stated in the opinion.

George C. Webber, for plaintiffs.

Harry Manser, for defendant.

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

SPEAR, J. This is a bill in equity in which the plaintiffs allege that the brick wall of the defendant's building, eighteen feet from the ground, and between the second and third floor and continuing to the roof shows a maximum overhang upon the plaintiffs' premises of about one and one-half inches; and prays that the encroachment upon the plaintiffs' land occasioned thereby may be adjudged a nuisance and that the defendant may be ordered and required to remove it forthwith.

The case comes up on appeal from the decree of the sitting Justice. In this decree the law and the facts are so fully stated that the court feels fully justified in adopting it as a proper declaration of the law. If we were to write an opinion, it would necessarily be but a restatement of the law found in the decree, as we fully endorse both the reasoning and the result therein announced. The decree is as follows:

"This case came on to be heard on bill, answer and proof, and was argued by counsel. And now after mature deliberation, I make the following findings of fact, and rulings in law.

"The defendant in the winter of 1911-1912 erected a four story brick apartment building on Turner Street, Auburn, on land adjoining the plaintiffs' land. At the bottom, the wall next to the plaintiffs'

land was built about one inch in from the division line, and was so continued up to the second story. At a point between the second and third stories, owing it is said to the freezing of the mortar nights in extreme cold weather, the wall gradually bulged out as it was built up, until it was in a place or places two inches over the line. The trouble was then noticed by the contractor, and the wall was gradually drawn in until at the top it projected over the line about a quarter of an inch. The result was that when the wall was completed there was an area on its side, towards the easterly end, 20 to 30 feet high and 30 to 40 feet long, which overhung the plaintiffs' land, and the overhang was two inches at the most, and from that down to a point at the bottom, and a quarter of an inch at the top.

"It is not shown that any of the defendant's officers or agents knew of the bulging until after the building was completed. The contractor testified, and I find, that although he knew of the bulging before the wall was completed, he did not think it was over the line. The plaintiffs have not been guilty of laches, and have in no sense acquiesced.

"It is not disputed that the plaintiffs, owning the soil in fee, owned also ad usque coelum, and the overhang of the wall is an invasion of their rights. They have already brought two successive actions of trespass quare clausum fregit for the trespass, and have recovered judgment in each. The plaintiffs now bring this bill for a mandatory injunction to compel the defendant to remove the overhang of the wall which is over their line.

"The plaintiffs have a three story wooden tenement building on their lot, standing so near the offending brick wall of the defendant, that it will be impossible to remedy a very considerable portion of the overhang, by working on the outside. The wall will have to be torn out from the inside, and rebuilt, if abatement is ordered. The plaintiffs are sustaining no pecuniary damage at the present time, and will not so long as their present use of their property is unchanged.

"It is not disputed that equity has jurisdiction to order the invasion of the plaintiffs' premises to be abated. The grounds of such jurisdiction, as usually stated, are the want of a complete remedy at law, since full compensation for the entire wrong cannot be

obtained in an action at law for damages, (see 4 Pomeroy's Eq. Juris. sect. 1357 and note) and to prevent a multiplicity of actions, since a plaintiff might be compelled to bring a succession of action in order to obtain relief. See 1 Pomeroy's Eq. Juris. sect. 252 and 5 do. sects. 496, 516.

"But it does not follow that a writ of mandatory injunction should be granted in all cases. It is a discretionary writ. The discretion, however, is not an arbitrary one, but is to be exercised in accordance with settled rules of law. The rules by which I think this case must be tested are stated in *Lynch* v. *Union Institution for Savings,* 159 Mass., at page 308, in these words: 'In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he had wrongfully done affecting the plaintiff, and pay the damages. In such a case a plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property. . . . On the other hand, where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damages caused to the defendant by removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law. The doctrines applied by the court in equity in cases of this kind call for a consideration of all the facts and circumstances which help to show what is just and right between the parties.'

"I think the case at bar falls within the second class of cases mentioned in the Massachusetts case. Here there was no intention nor attempt to appropriate the plaintiffs' property. The contractor made a mistake. The injury to the plaintiffs is now trivial, and at no time can it be so great that it would not be many times outweighed by the expense, damage and loss which would necessarily be occasioned to the defendant if it should be compelled to remove the overhang of its wall. I do not think that equity requires or permits the court to use its strongest arm to produce a result so inequitable. I think the bill should be dismissed, but, under the circumstances, without costs. For further discussion, see *Meth.*

Epis. Soc. v. *Akers,* 167 Mass., 560; *Harrington* v. *McCarthy,* 169 Mass., 492; *Levi* v. *Worcester Consolidated St. Ry.,* 193 Mass., 116; *Kendall* v. *Hardy,* 208 Mass., 20; *Kershishan* v. *Johnson,* 210 Mass., 135; *Hunter* v. *Carroll,* 64 N. H., 572.

"It is therefore ordered, adjudged and decreed that the bill be dismissed."

Appeal denied.

EMERY H. SYKES, Ex'r., *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion October 13, 1913.

Contributory Negligence. Demurrer. Due Care. Engineer. Exceptions. Flagman. Motion. Negligence. Revised Statutes, Chapter 51, Section 71. Warning.

This action was for the death of Theda C. Sykes, the plaintiff's decedent, alleged to have been caused by the negligence of the defendant, in which a nonsuit was ordered on motion of the defendant.

Held:

1. That this motion is in the nature of a demurrer to the evidence and raises every question of law arising in the course of the trial, regardless of particular exceptions.
2. It cannot be said, as a matter of law, that it is negligence for a railroad to omit the use of a flagman at a crossing, unless requested to employ one under Revised Statutes, chapter 51, section 71.
3. That if a team is in sight of the train and the train is in sight of the team, the engineer has a right to assume that the occupants of the team will observe the law in looking and listening for the train and that they will not attempt to cross the track.

On exceptions by plaintiff. Exceptions overruled.

This is an action on the case brought in the Superior Court for the County of Cumberland to recover damages for the instantaneous death of Theda C. Sykes, which occurred at Gray, in said

county, and alleged to have been occasioned by the negligence of the defendant corporation. Plea, general issue.

At the conclusion of plaintiff's testimony, the presiding Judge, upon motion, ordered a nonsuit, and the plaintiff excepted to said order.

The case is accepted in the opinion.

George C. Webber, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SPEAR, J. This case was tried in the Superior Court in Cumberland County. Upon the completion of the plaintiff's testimony the presiding Judge, upon motion, ordered a nonsuit. This motion is in the nature of a demurrer to the evidence and raises every question of law arising in the course of the trial, regardless of particular exceptions.

The plaintiff's decedent was crossing the railroad track at Gray, in the rear seat of a carriage driven by Mr. Isaac Lord. It is unnecessary to state the situation in detail since, upon the evidence, the contributory negligence of Mr. Lord seems quite conclusive. Yet, whether the decedent was in the exercise of due care, Lord's negligence not being imputable, raises a question for the jury, under proper instructions. Accordingly, the one question for determination is whether the defendant was in the exercise of due care. We think the evidence fails to show negligence.

The plaintiff, however, contends that the defendant was negligent upon two grounds: First, because it had no flagman to inform travellers of approaching trains; second, because the fireman when he first saw the team did not inform the engineer that he might impede the progress of the train or stop it. Under the evidence the only question here involved is that of subsequent negligence, or last chance doctrine.

Upon the first proposition, we do not think it can be said, as a matter of law, that it is negligence for a railroad to omit the use of a flagman at a crossing, unless requested to employ one under R. S., ch. 51, sec. 71. No evidence of such request appears. But upon

this point the plaintiff offered to show that the defendant had, and did, upon the passage of certain trains employ a flagman, and that Mr. Lord, the driver of the team had been so informed, as bearing upon the question of Mr. Lord's contributory negligence. But as Mr. Lord's contributory negligence could not be imputable to the decedent, and as no attempt was made to bring this information home to her, it became immaterial, as the issue, under the order of nonsuit, is whether the due care of the decedent should have been submitted to the jury; and we have found, if the defendant was negligent, it should.

Upon the second proposition the plaintiff contends that the defendant was negligent through the failure of the fireman to communicate to the engineer the presence of the Lord team when he first saw it, and the consequent failure of the engineer to retard or stop the train. The only evidence upon this issue is that of the fireman, John Frank, called by the plaintiff. While the photographs show the relative locations of the places and objects involved in the accident, it may yet be well to give a brief description. The two tracks at this point are located north and south; the station is on the east side of the track; the platform is located between the station and the track and extends south, past the south end of the station, one hundred and two feet. The team was standing at the end of this platform facing the track, the horse's head being "very near over the track" as stated by Mr. Lord. The train was coming from the north. The highway crossed the track some little distance south of the end of the platform so that it was necessary for the team to travel south parallel or nearly so with the track this distance before making the turn over the track.

The evidence as a whole will show that when the fireman first saw the team moving, there was sufficient time to check or halt the train before it reached the place of accident. Upon this situation the fireman testified as follows: Q. How were they travelling at the time that you first saw them? A. Apparently away from the platform and away from the railroad track. Q. Now were you going fast? A. They were. Q. What did you think in relation to them when you first saw them? A. My first thought was they were going up over the hill and away from the station and railroad. Q. You mean up this road here (indicating on chalk)? A. I mean

that way, yes. Q. Was the horse headed for this road here? A. No, he wasn't, but he made a turn for that road. The first step that he took, he turned his head in that direction. Q. Did you sound any signal? A. I had nothing to do with the sounding of the whistles, other than to warn the engineer. Q. Did you warn the engineer? A. I did. Q. Immediately? A. Immediately I discovered they were going to cross the track. Q. When you first saw the team did you notify or warn the engineer? A. No.

Upon this testimony was the defendant negligent? It must be conceded that trains to make their time must have a right to expect an unobstructed right of way; that, when the approaching train can be clearly seen 650 feet from a crossing the engineer and fireman cannot be expected or required to anticipate that any team will attempt to cross the track in front of that train; that if a team is in sight of the train and the train in sight of the team the engineer has a right to assume that the occupants will observe the law in looking and listening for the train and that they will not attempt to cross the track. *Marlow* v. *Railroad Co.*, 85 Maine, 519. We think the engineer and fireman in the case at bar, under the testimony, had a right to assume that the team would not attempt to cross the track, with the approaching train in full view, however near the team might drive to it. Accordingly the only question is, was the engineer guilty of negligence in his management after he saw that the team was actually going to attempt to cross in front of the train? The fireman says that "immediately" when he discovered this to be the situation, he notified the engineer but the case is devoid of evidence to show that this warning was in season to enable the engineer to avoid the accident.

We are unable to discover any evidence that would warrant a jury in finding that the defendant was negligent.

Exceptions overruled.

EMMA MONROE CARTER et al.

Appellants from Decree of Judge of Probate.

Knox. Opinion October 13, 1913.

Amendment. Appeal. Bond. Decree. Exceptions. Motion. Reasons for Appeal. Revised Statutes, Chapter 65, Section 29. Motion.

1. A probate appeal is not a common law procedure. It is a matter of statutory prescription and gives no latitude for construction as the language is plain and unambiguous.
2. In this State, it is well settled that an instrument, although purporting to be a bond, not sealed, cannot be regarded as a bond in contemplation of Revised Statutes, chapter 65, section 29.
3. The appeal bond which had no seals upon it cannot be amended by adding seals to it, because to permit the addition of seals to a bond filed by the appellants would be equivalent to allowing them to file a new bond.

On exceptions by appellants. Decree below affirmed with additional costs.

This is an appeal from the decree of the Judge of Probate for the County of Knox to the April Term of Supreme Judicial Court, 1913, admitting to probate the will of Harriet A. Monroe. At the January Term, 1913, of the Supreme Judicial Court for Knox County, leave was granted to enter an appeal from the decree complained of. The appellants took their appeal on February 1, 1913, and filed their appeal and reasons therefor on March 1, 1913. The appellants also filed an instrument in the form of a bond, which had no seals upon it, dated February 24, 1913.

At the hearing in the Supreme Judicial Court at the April Term, 1913, the Justice presiding ordered and decreed that the appeal be dismissed. To this decree, the appellants excepted.

The case is stated in the opinion.

Coggan & Coggan, for appellants.

R. I. Thompson, for executor.

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

SPEAR, J. The case is stated in the ruling of the presiding Justice as follows:

In this case, which is an appeal from the probate of a will, leave was granted to these appellants, at the January Term, 1913, of this court, to take and enter an appeal from the decree complained of. No conditions were named, nor terms imposed. No time was fixed within which the appeal should be taken. No bond was in terms required, and it follows that no penal sum for the bond, nor time for filing the same was fixed.

The appellants took their appeal, dated February 1, 1913, and on March 1, 1913, the appeal and reasons for appeal were ordered to be filed and recorded, by the Judge of Probate for this county. The appellants also filed an instrument in the form of an appeal bond in the penal sum of two hundred dollars. This instrument was dated February 24, 1913. There were no seals upon it, but it was approved by the Judge of Probate on March 1, 1913.

The appeal was taken to the April Term of this court, and notice thereof was served on the executor named in the will and other interested parties, on March 10, 1913.

The appeal was entered on the first day of this term. On the same day the executor filed an objection to the entry of the appeal, on the ground that the appellants had filed no appeal bond; and on the same day the executor filed a motion to dismiss the appeal, on the ground that it did not "appear from said alleged appeal that any lawful appeal was taken from the decree of said Judge of Probate for said county as required by law, nor within the time required by law."

On the second day of this term, the appellants filed their motion for leave to amend their appeal by affixing seals to the signatures on the instrument, filed as an appeal bond, or by filing a new bond, "upon such conditions as the court may order." This motion was overruled.

To this ruling the case comes up on exceptions. We think the ruling was right. A probate appeal is not a common law procedure. It is a matter of statutory prescription and gives no latitude for construction, as the language is plain and unambiguous. R. S.,

chapter 65, section 29, relating to the requirements of probate bonds in case of appeal provides as follows: "Within the time limited for claiming an appeal, the appellant shall file, in the probate office, his bond to the adverse party, or to the judge of probate for the benefit of the adverse party, for such sum and with such sureties, as the Judge approves; conditioned to prosecute his appeal with effect."

It is sufficient to say that this statute is clear and plain and means precisely what it says. Within the time limited for filing an appeal, which means at or before the appeal is entered, the appellant must file a bond in order to make the appeal effective. While in the present case the appeal was entered by leave of court, under section 30, it was, nevertheless, a probate appeal "to be entered and prosecuted with the same effect as if it had been seasonably done." That is, there is no difference in the procedure in an appeal from the Probate Court, whether entered directly from that court or by leave of the Supreme Court, and no reason seems to appear why there should be any difference. All the proceedings in the prosecution of the appeal in the two cases are alike and under the same statutes; and the bond required is for precisely the same purpose. Entry by leave of court was not intended to enlarge the rights of the appellant. Accordingly, section 29 applies to the present appeal, although entered by leave of court. By virtue of this statute, a bond was required to be filed before or at the time of entering the appeal.

At this juncture of the proceedings two questions arise: (1) Was a bond filed in accordance with the requirements of the statutes? (2) If not, was the instrument purporting to be a bond, amendable? Upon the first inquiry it may be said that it seems to be well settled in this State that an instrument, although purporting to be a bond, if not sealed, cannot be regarded as a bond in contemplation of the above statute. *Boothbay* v. *Giles,* 68 Maine, 160; *Warren* v. *Lynch,* 5 Johns, 238. For the decisive effect of a seal, or want of one, see *Wheeler* v. *Nevins,* 34 Maine, 54; *Wing* v. *Chase,* 35 Maine, 260; *Baker* v. *Freeman,* 35 Maine, 485.

Upon this proposition the conclusion is plain that the instrument filed by the appellants with their appeal, although in all other respects formal, but lacking a seal, was not a bond under the statute, and, if the case stopped here, would render the appeal void. But

the appellants moved to amend the bond by adding seals. This brings us to the second proposition, was the amendment allowable? We think not. It is contended, however, by the appellants that R. S., chapter 84, section 10, providing for amendments, is sufficiently broad to include an amendment to a bond in a probate appeal by permitting the addition of seals. But to permit the addition of seals to a bond filed by the appellants would be equivalent to allowing them to file a new bond, inasmuch as the addition of seals would make a new contract between the obligors and the sureties in the bond, and the obligee. *Wheeler* v. *Nevins,* 34 Maine, 54; *Wing* v. *Chase,* 35 Maine, 260; *Baker* v. *Freeman,* 35 Maine, 485.

The filing of a proper bond is a condition precedent to the entry of an effective probate appeal; an instrument without seals, although perfect in all other respects, is not a bond under the requirements of the statute; the bond in the present appeal was not sealed. It therefore follows that the appeal was not effective; consequently no appeal was pending in the Supreme Court of Probate in which an amendment of the bond could be offered. In *Moore* v. *Phillips,* 94 Maine, 421, it is said: "The statute has prescribed the conditions upon which an appeal may be claimed, and until these have been complied with, no right of appeal exists and no appeal can be entertained in the appellate court. In the hearing of a probate appeal the first duty of the appellant is to establish his right to appeal."

For the reasons above stated, the entry should be,

Decree below affirmed with additional costs.

JOHN W. KNIGHT et als. *vs.* MOXLEY BLUMENBURG.

Cumberland. Opinion October 13, 1913.

Assignment. Assumpsit. Consideration. Lease. Money Had and Received. Rent. Statute of Frauds.

An action of assumpsit on an account annexed for rent under lease from Waterville Motor Company to plaintiffs and assigned by plaintiffs to the defendant, with an oral agreement on the part of defendant to pay said rent to said Motor Company, which he did not do, and plaintiffs paid same. The defense is the Statute of Frauds.

Held:

That the transfer of the premises by the assignment of the lease was a completed transaction and the assumption of the rent by the defendant was a material part of the consideration. The question of title or interest in real estate was no more involved than if it had been a suit to recover the consideration for real estate transferred by deed, for which it is well established assumpsit will lie.

On motion for new trial by defendant. Motion overruled.

This is an action of assumpsit, upon an account annexed to the writ to recover the sum of $533.32, paid by plaintiffs for defendant at his request for rent of building on College Avenue in Waterville, for four months from May 1, 1912. The plaintiffs leased, in writing, of the Waterville Motor Company said premises for the term of three years, from September 1, 1911, at a rental of $1600 per year. On the 22d day of April, 1912, the plaintiffs transferred all their right, title and interest in said lease to the defendant, the consideration being the payment of said rent to said plaintiffs; or, as a matter of convenience, to said Waterville Motor Company. The agreement by the defendant to pay said rent was not in writing. The plea was the general issue and brief statement invoking the Statute of Frauds.

The jury rendered a verdict for the plaintiff for $533.32, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

F. P. Pride, for plaintiffs.

Henry H. Sawyer, for defendant.

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

SPEAR, J. This is an action of assumpsit in which the plaintiffs seek to recover of the defendant the sum of $533.32. The declaration contains an account for money had and received and an omnibus count. The account annexed is as follows: "Moxley Blumenburg to J. W. Knight, A. L. Knight and Otis Trafton, Dr., for money paid by the plaintiffs for the use of said defendant, at his request, for four months' rent from May 1st, 1912, to September 1st, 1912, paid to Waterville Motor Company, under lease to said plaintiffs and assigned by them to said defendant, which the defendant assumed and agreed to pay, but which the defendant did not pay and the plaintiffs were obliged to pay by operation of law and by the condition of the consent to the assignment, by the lessor. $533.32."

The case grows out of the following facts: On the 11th day of April, 1911, the Waterville Motor Company, a corporation, leased to J. W. Knight, A. S. Knight and Otis Trafton, the plaintiffs, the second story of a brick block to be erected by the lessor on College Avenue in the city of Waterville.

The lease was to begin October 1, 1911. April 22, 1912, was entered upon the lease an endorsement in writing by the lessor of permission to the lessees to assign the lease to Moxley Blumenburg, the defendant, but not releasing the lessees for the rent. On the same day the lessees in writing assigned to the defendant all their right, title and interest in the lease. April 23rd a supplemental agreement, with reference to certain improvements and changes, was made between the lessor and the original lessees, and on the same day assigned in writing to the defendant. The consideration expressed in the assignment of the lease was one dollar. But the rent on the premises was at the rate of $1600 a year, which the plaintiffs contend the defendant assumed and agreed to pay to them, and for the sake of convenience, pay it directly to the Motor Company. This he omitted to do and the plaintiffs, not being released from liability, were legally obliged to pay the rent for May, June, July and August. Upon this issue the plaintiffs offered evidence to prove the alleged oral agreement on the part of the

defendant to pay the rent to them by paying it directly to the lessor, as a matter of convenience. The jury found the issue in favor of the plaintiffs, which must be regarded as having established the fact of such an agreement. But the defendant, even admitting the agreement, says it was not in writing and therefore within the statute of frauds, which he has pleaded.

It is not in controversy that the plaintiffs paid the Motor Company $533.32 for four months' rent, which the defendant agreed to pay, as found by the jury. Accordingly, the only question is, was the agreement within the statute of frauds? Clearly it was not. The transfer of the premises by the assignment of the lease was a completed transaction. The assumption of the rent by the defendant was a material part of the consideration. All that remained to be done was the payment of the rent by the defendant, as he had agreed to do. The question of title or interest in real estate was no more involved than if it had been a suit to recover the consideration for real estate transferred by a deed, for which, it is well established assumpsit will lie.

Nor upon the facts presented do we think the verdict can be disturbed. The jury saw and heard all the witnesses, and passed upon their credibility, and the value of their testimony, and must have been afforded a better opportunity to arrive at a proper conclusion, than can be afforded the court from the cold type of the record.

Motion overruled.

HERBERT W. HAWES, Petr., *vs.* CHARLES E. NASON, et als.

Lincoln. Opinion October 21, 1913.

Creditor. Demurrer. Execution. Partition. Plea. Redemption. Sale. Sheriff's Deed.

A judgment creditor who has received a sheriff's deed under execution sale of real estate, held by his debtor in common with third persons, cannot maintain a petition for partition of the estate against such third persons, until after the expiration of one year, within which the debtor may redeem.

On exceptions by Herbert W. Hawes, petitioner. Exceptions overruled.

This is a petition for partition of certain real estate dated March 18, 1913, by Herbert W. Hawes, against Charles E. Nason, Jesse H. Nason and Carrie F. Nason. The real estate of which partition is sought was owned in common and undivided between said Charles E. Nason, Jesse H. Nason and Carrie F. Nason. On the 22d day of January, 1913, all the right, title and interest, which the said Jesse H. Nason had in and to said undivided premises, was sold on execution at a sheriff's sale to the petitioner, Herbert W. Hawes. Jesse H. Nason, at the April term, 1913, filed his plea to the said petition, in which he said that the petitioner had no interest in said land sufficient to bring said petition prior to January 22, 1913; that his interest was only an attachment on a writ, etc.

To this plea, the petitioner demurred, and the Justice presiding overruled the demurrer and adjudged said plea good, to which ruling the petitioner excepted.

The case is stated in the opinion.

Charles L. Macurda, for petitioner.

Carl M. P. Larrabee, for Respondent Jesse H. Nason.

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

CORNISH, J. The question involved in this case is whether under the statutes of this State a judgment creditor who has received a

sheriff's deed under execution sale of real estate, held by his debtor in common with third persons, can maintain a petition for partition of the estate against such third persons, until after the expiration of one year within which the debtor may redeem.

In our opinion he cannot.

The statute provisions are as follows:

"Persons seized or having a right of entry into real estate in fee simple or for life, as tenants in common or joint tenants, may be compelled to divide the same by writ of partition at common law." R. S., chap. 90, sec. 1.

"Persons so entitled, and those in possession or having a right of entry for a term of years, as tenants in common, may present a petition to the Supreme Judicial Court held in the County where such estate is," etc. R. S., chap. 90, sec. 2.

Section one covers the now almost obsolete common law writ of partition, while section two, provides for the customary petition for partition, such as is employed in this case.

Taking this language at its full dimension and without modification it might seem sufficiently broad to cover the pending case, because as between the parties seizin is transferred by levy, *Woodman* v. *Bodfish,* 25 Maine, 317; *Clark* v. *Pratt,* 55 Maine, 546; and the creditor may treat the debtor as disseizor at his election and maintain a writ of entry, *Bryant* v. *Tucker,* 19 Maine, 383; *Burnham* v. *Howard,* 31 Maine, 569, and an execution sale by the sheriff has the same legal effect as a levy, R. S., chap. 78, sec. 32-36.

But this broad meaning is modified by R. S., chap. 90, sec. 28, which reads: "A person having a mortgage, attachment or other lien, on the share in common of a part owner, shall be concluded by the judgment, so far as it respects the partition, but the mortgage or lien remains in force on the part assigned or left to such part owner." This section first appeared in the Revision of 1841, chap. 121, sec. 38.

Taking this section in connection with sections one and two, first quoted, the intention of the Legislature is clear, namely that the rights of partition belong to the holder of the equity of redemption in case of a mortgage and to the debtor in case of an attachment or execution sale, until, in the one case, the title in the mortgage is rendered indefeasible by perfected foreclosure and, in the other, in

the judgment creditor by perfected levy or sale. So long as the right of redemption exists the statute, by clear implication, makes the holder of that right the proper party, plaintiff or defendant, in partition proceedings and both the mortgagee and the creditor are protected by having their mortgage and their lien attach to the part assigned, in case such mortgagor or debtor is the party plaintiff, or to the part that is left in case such mortgagor or debtor is the party defendant.

As between mortgagor and mortgagee the title passes to the mortgagee, and yet the mortgagor may maintain a real action against all parties except the mortgagee and those claiming under him. *Huckins* v. *Straw,* 34 Maine, 166; *Stinson* v. *Ross,* 51 Maine, 556. The mortgage is regarded as security for the debt and until the title has become indefeasible by expiration of the time for redemption, the mortgagor is, to all intents and purposes, the owner of the property and so seized of the estate as to enable him to convey it or to maintain a real action, counting on his own seizin, *Wellington* v. *Gale,* 7 Mass., 138. His interest is subject to attachment, as real estate, and the mortgagee's interest passes upon his death, not to his heirs or devisees, but to his executor or administrator.

It was therefore held, even prior to the enactment of R. S., 1841, chap. 121, sec. 38, that a mortgagor before foreclosure could maintain a petition for partition, *Upham* v. *Bradley,* 17 Maine, 423, but not after the mortgagee had entered for condition broken, *Call* v. *Barker,* 12 Maine, 320.

In like manner the attachment of real estate is simply security for the debt and a levy or execution sale is but another step in perfecting the security. The debtor can redeem at any time before the expiration of the year, and until that time, he is regarded as the owner of the estate. The estate remains as a pledge, and by the statute that pledge attaches to the moiety in case of partition, instead of to the undivided interest.

In Massachusetts, under a statute giving the right of maintaining a petition for partition to "any person who has an estate in possession" it was held in *Ewer* v. *Hobbs,* 5 Met., 1, that the mortgagee, before perfected foreclosure, could not maintain a petition against the holders of other mortgages given at the same time. In the course of the opinion Chief Justice Shaw says: "Before fore-

closure, the estate is, to most purposes, in the mortgagor; he may redeem and make it his own, by paying the debt or performing such other condition as it was intended to secure. The entry to foreclose is a mere step in the process towards a legal foreclosure, and the estate does not therefore cease to be a pledge for the security of the debt. An entry to take the rents does not affect the right to redeem. It merely adds to the fund pledged for the security of the debt. Until foreclosure, the interest of the mortgagee, as well after as before entry to take the rents and profits or to foreclose, is rather a right to acquire an estate in the land, than an actual estate. When the foreclosure does take effect, the mortgaged premises become the absolute estate of the mortgagee; it is thenceforth indefeasible, and pays the debt or debts for which it was mortgaged, in full, if of sufficient value, otherwise pro tanto, in the proportion which its actual value bears to the amount of the debt. The estate is acquired at that time, although it relates back to the time of giving the mortgage; as an estate acquired by levy of execution relates back to the time of attachment on mesne process, (if there was one), to avoid mesne incumbrances."

In *Phelps* v. *Palmer,* 15 Gray, 499, the precise question that we are considering was raised, and the court held that the petition could not be maintained by a judgment creditor holding under a levy until the year of redemption had expired and the redeemable, defeasible and fluctuating interest had become fixed. After discussing the reasoning in *Ewer* v. *Hobbs,* supra, the court continues:

"We think these objections strongly apply to the case of a judgment creditor who has levied on the real estate of his debtor, and who, before the debtor's right of redemption has expired, seeks to have partition made between himself and a person holding as tenant in common with his debtor.

"The estate of the petitioners was certainly a defeasible estate for the period of one year after the levy. The proceedings, if pending, might at any stage of the case be arrested and defeated by the debtor's redeeming the estate, and this without any act on the part of the petitioner. The interest of the creditor in a title acquired by levy is a qualified title, the statute reserving to the debtor a right to redeem within one year, which right should be preserved to him in an unimpaired and unembarrassed state. It is true that the levy

puts the creditor into possession with the right to take the rents and profits, but the creditor is obliged to account with the debtor for all such income if the same be more than the interest on the debt levied, and he is only authorized to make reasonable expenditures in repairing and improving the premises; all looking to the estate as one which may be resumed and over which no absolute title has as yet vested in the creditor.

"In the opinion of the court, the right to maintain such petition for partition does not attach to a levy by a judgment creditor on the real estate of his debtor, until the estate becomes absolute in the creditor by the neglect of the debtor to redeem the same within one year from the date of such levy."

See also *Newton Bank* v. *Hall,* 10 Allen, 144; *Norcross* v. *Norcross,* 105 Mass., 265, and note to *Nichols* v. *Nichols,* 28 Vt., 228, in 67 Am. Dec. 699 at p. 708.

The doctrine of these cases is founded on reason and workable in its application and we adopt it as the rule in this State.

Exceptions overruled.

WAYLAND J. PHILBRICK *vs.* WILLIAM B. KENDALL, et al.

Penobscot. Opinion October 22, 1913.

Breach of Contract. Contract. Damages. Exceptions. Fertilizers. Implied Warranty. Manufacturer. Warranty.

1. Words in a contract of sale descriptive of the subject matter of the contract do not in strictness import a warranty and prevent the annexation to the contract of warranties implied by law.
2. When a manufacturer, or dealer contracts to supply an article which he manufacturers or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, the law implies a promise on his part that the article so made and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose to which it is to be applied.
3. When a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.
4. When a manufacturer or dealer undertakes to supply a known and described article manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article.

On motion and exceptions by the defendant. Exceptions sustained. New trial granted.

This is an action of assumpsit to recover damages for an alleged breach of warranty in the sale of certain fertilizer by the defendant that it contained the necessary ingredients to make it suitable to use to grow potatoes. The plea is the general issue. The jury returned a verdict for the plaintiff for $812.50. The defendant had various exceptions, and filed a general motion for a new trial.

The case is stated in the opinion.

Hudson & Hudson, for plaintiff.

Williamson, Burleigh & McLean, and Fletcher & Conners, for defendant.

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

BIRD, J. This action is brought for the recovery of damages for breach of contract for the sale of fertilizer. The jury found for plaintiff. The case is before this court upon numerous exceptions and a general motion for new trial.

In the spring of 1909, the plaintiff, a farmer, ordered of defendants, manufacturers of fertilizers, eleven tons of fertilizer. The order was transmitted through the selling agent of the defendants, who manufactured as adapted to the growth of potatoes four fertilizers known as "4-6-10," "3-6-10," "Special Potato" and "Aroostook." They also manufactured six other brands of fertilizer, two for corn, two for grass and grain, one for general purposes and another, the purpose of which does not appear. The expression 4-6-10 indicated that the fertilizer so described, contained as chemical constituents 4 per cent ammonia, 3.29 per cent nitrogen, 6 per cent phosphoric acid and 10 per cent actual potash, together with a certain amount of filler consisting of inert substances. The plaintiff purchased of defendants a quantity of 4-6-10 fertilizer in 1907 or 1908 which he used upon the potatoes raised by him in 1908 evidently to his satisfaction. In making his purchase of 4-6-10 fertilizer to be applied to the crop of 1909, it does not appear from the record that he made any statement to the agent of defendants of the purpose for which he desired it. Plaintiff applied the fertilizer so purchased in 1909 to a field of potatoes adjoining the acreage upon which the crop of 1908 was raised. The yield was very markedly less than that of the preceding year and there was evidence tending to prove that the fertilizer purchased by plaintiff in 1909 did not contain the chemical constituents in the proportion indicated and that this defect was latent.

Among other things the jury were instructed by the Justice presiding, "I cannot give you the instruction that when a man buys a fertilizer as this plaintiff bought it in the market by name, 4-6-10 for instance, that there is no accompanying implied warranty that that fertilizer will fertilize . . . There may be an express warranty with those brands which contain the preparation of the three different elements, the tag or stamp on them, but there is also going along with them, I instruct you, an implied contract that they are

reasonably fit and suitable for the use to which they are to be put, and to which the seller knows they are to be put . . .

"In this case, if you find that the defendants knew that this fertilizer was to be used for fertilizing potatoes, and that their customers throughout the State would buy it for that purpose, then it was ordered by the buyers for a special purpose known to the sellers, and if so, there is an implied warranty that it was reasonably fit and suitable for the purpose for which it was ordered or sold . . .

"It is not confined to a guarantee of just such a per cent of one element, and such of another, and such of another, but there is an implied warranty that the whole mixture as a mixture is reasonably adapted to the purpose."

In support of the exceptions to these instructions, the defendants urge that there can be no implied warranty because "the words 4-6-10," by which description the goods were ordered and sold, constitute an express warranty, invoking the familiar rule that where there is an express warranty the law will imply no other warranty of the same kind, that is, that an express warranty of quality will exclude any other warranty of quality by implication.

It is undoubted law that where an express warranty of quality is made upon a sale, no other warranty touching quality will be implied: *Lombard Co.* v. *Paper Co.*, 101 Maine, 114, 120; *Deming* v. *Foster*, 42 N. H., 165, 175; *DeWitt* v. *Berry*, 134 U. S., 306, 313, 314. It is also true that words in a contract of sale descriptive of the subject matter of the contract have been held to be express warranties: *Henshaw* v. *Robins*, 9 Met., 83, 87, 88; *Edwards* v. *Marcy*, 2 Allen, 486, 489; *Borrekins* v. *Bevans*, 3 Rawle, 23, 43; see also *Morse* v. *Moore*, 83 Maine, 473, 479, 489, while other authorities hold them implied warranties; *Walcott et als.* v. *Mount*, 36 N. J. L., 262, 266; *Jones* v. *George*, 61 Tex., 345, 349; *Catchings* v. *Hacke*, 15 Mo. App., 51, 53; see also *White* v. *Miller*, 71 N. Y., 118, 129-131. Strictly, however, such words do not constitute a warranty, either express or implied. They are evidence of no undertaking collateral to a contract. They constitute the contract itself and without them there would be no contract. See *Warner* v. *Arctic Ice Co.*, 74 Maine, 475, 478; *Chanter* v. *Hopkins*, 4 M. & W., 399, 404; *Bagley* v. *Cleveland etc. Co.*, 21 Fed., 159, 162. Difference in terms can make no change in the principles of law and whether held a condition pre-

cedent or an express warranty, such words do not prevent the annexation to the contract of sale of warranties implied by law as in the case of goods ordered of the manufacturer, without opportunity of inspection or where there is a defect in the goods not discoverable by inspection, that the described goods are merchantable. See *Hoe* v. *Sanborn,* 21 N. Y., 552, 566; *Randall* v. *Newson,* 2 Q. B. D., 102; *Swett* v. *Shumway,* 102 Mass., 365.

The inquiry is, therefore, was there under the circumstances and terms of the contract of sale, an implied warranty of the fitness of the described article. It is also well established that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, the law implies a promise on his part that the article so made and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose to which it is to be applied, but where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In the latter case the purchaser relies upon his own judgment in making the selection, and not upon that of the manufacturer or dealer: *Lombard* v. *Paper Co.,* 101 Maine, 114, 120; *Seitz* v. *Brewers' Refrigerating Co.,* 141 U. S., 510, 518, 519. In the case before us there is no evidence that defendants or their agent were informed that the fertilizer bought of defendants by its descriptive name was ordered for a specific purpose and to be used in a particular way. See *West End Mfg. Co.* v. *Warren Co.,* 198 Mass., 320, 325.

But there is a further familiar rule of law that where a manufacturer or dealer undertakes to supply a known and described article manufactured by himself or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. That is, not only must the goods answer the specific description but they must also be salable or marketable under that description. *Warner* v. *Arctic Ice Co.,* (Symonds, J.) 74 Maine, 475, 478, 479: And in this case the court cites with approval "The fundamental under-

taking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or circumstances, what in or according to the contract is the real mercantile or business description of the thing which is the subject matter of the bargain of purchase and sale, or, in other words, the contract. If that subject matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable: *Randall* v. *Newson,* 20 B. Div., 102." "There being no stipulation in the contract that the goods were to be of the first quality, the law does not imply a warranty that they should be of the first quality, but does imply a warranty that they should be of fair merchantable quality and of good workmanship." And the court, among the definitions of merchantable enumerates "at least of medium quality or goodness," "good and sufficient in its kind," "free from any remarkable defect." *Warner* v. *Arctic Ice Co.,* ubi supra.

The court is of the opinion that the language of the instructions excepted to may have been susceptible of an understanding of the law by the jury not conformable to established principles in that the instructions were appropriate to the sale of an article for a specific purpose to be used in a particular manner, in reliance upon the judgment of the seller, rather than to a sale by the manufacturer of a known and described article by name, as in the present case. See *Walker* v. *Pue,* 57 Md., 155, 167; *Rasin* v. *Conley,* 58 Md., 59, 65, 66.

The rule of damages, whether the breach of contract shown be a failure to furnish goods reasonably fit for a specific purpose, or to deliver goods of a certain description, no opportunity for effective inspection being afforded, or to perform a contract of carriage as in *Hadley* v. *Baxendale,* 9 Ex., 341, is that adopted and recognized by this court, namely, that the damages "should be such as may fairly be considered either arising naturally, i. e. according to the usual course of things from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of

the breach of it." *Lumber Co.* v. *Bradstreet,* 97 Maine, 165, 174: *Milford* v. *B. R. & E. Co.,* 104 Maine, 233, 241, 242; 106 Maine, 316, 325; *Leavitt* v. *Fiberloid Co.,* 196 Mass., 440, 445-6; *Dushane* v. *Benedict,* 120 U. S., 630, 636, 637. See *Hammond* v. *Bussey,* 20 Q. B. Div., 70, 88; *Leonard* v. *Telegraph Co.,* 41 N. Y., 544, 566-7. This is substantially the rule of damages given. There was evidence tending to prove, or from which the jury might infer, that the fertilizer sold to plaintiff was part of a lot in the manufacture of which some of the active chemical constituents used had been subjected to the action of fire and water and that by reason of their use the fertilizer did not contain these constituents in substantially the proportions required and also that a fertilizer so constituted would not only not be as effective as that made by formula but might be injurious to potato plants. It is clear that there was evidence from which the jury might find that it was in the contemplation of both parties to the contract that the fertilizer purchased would be used in raising potatoes. If so found and if the known, defined and described fertilizer was not actually supplied as ordered, or was not merchantable as before defined, the damages recoverable are the difference in value between the crop actually raised and the crop that might have been raised had there been compliance with the contract.

As the exceptions first considered are sustained, it is unnecessary to consider the other exceptions or the motion.

Exceptions sustained.
New trial granted

CHARLES F. JOHNSON et al. Receivers of the Waterville Trust Co.

vs.

HELEN M. LIBBY.

Kennebec. Opinion October 29, 1913.

Assets. Assessment. Charter. Contingent Liability. Contract. Corporation. Decree. Depositors. Injunction. Liabilities. Receivers. Revised Statutes, Chapter 48, Section 86. Section 6, Chapter 401, Private and Special Laws of 1889. Shareholder. Stockholder. Trust Company.

1. Every person, who voluntarily becomes a shareholder in a corporation, thereby agrees to the terms of its charter, and assumes those obligations which the laws of the State creating the corporation imposes upon such shareholders.
2. It is well settled that the obligation which the shareholder assumes by becoming a member of the corporation is contractual in its nature, and does not abate at his death but survives, and his estate becomes chargeable therefor.
3. The obligation which the shareholder assumes, though statutory in its origin, is contractual in its nature, and as such not local but transitory. It goes with him wherever he goes and is enforceable in any court of competent jurisdiction.
4. An executor or administrator of the estate of a deceased stockholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representative of the deceased.
5. Where the estate of the deceased shareholder is fully administered and distribution made by the personal representative, the heirs or next of kin are assessable to the extent of the assets which they have received from the ancestor's estate, for the payment of calls subsequently made upon shares of stock belonging to his estate.

On report. Judgment for plaintiffs for $500, with interest from the date of the writ.

This is an action of assumpsit on an account annexed to the writ, and a special count to recover the sum of five hundred dollars, being

an assessment of one hundred per cent by the plaintiffs, upon five shares of the capital stock of the Waterville Trust Company, of the par value of one hundred dollars each, and owned by defendant's intestate. The plea, general issue. The case was reported to the Law Court upon an agreed statement. Upon so much of the evidence as is legally admissible, the court will render such judgment and assess such damages, if any, as the law and the evidence require.

The case is stated in the opinion.

Johnson & Perkins, for plaintiffs.

Manson & Coolidge, for defendant.

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

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

July 1, 1909, the Waterville Trust Company of Waterville, Maine, by decree of the Supreme Judicial Court of Maine, was enjoined from further prosecuting business, and the plaintiffs were then appointed its receivers and duly qualified.

At that time Bertha L. Libby of Pittsfield, Maine, was the owner of record of five shares of the capital stock of said Trust Company of the par value of $100 each. April 3, 1910, she died, intestate, leaving a surviving husband, and the defendant, Helen M. Libby, as her sole heir. Her estate was settled by her husband, who was appointed as administrator in April, 1910, and he settled his final account in October, 1911, showing a balance of the estate of $3,592.95, which was distributed, one-third to the surviving husband, and two-thirds to the defendant.

Thereafter, April 29, 1912, upon the petition of the receivers against the corporation, and after notice and hearing, it was adjudged and decreed by a Justice of the Supreme Judicial Court that there was due the depositors of said Trust Company the sum of $107,058.90 in excess of the amount that could be realized from all its assets, and

"That an assessment of one hundred per cent upon the whole capital stock of said Waterville Trust Company, amounting to $100,000, is necessary to be made to meet the claims of said depositors.

"And that the said Charles F. Johnson and Harry L. Holmes in their said capacity as receivers of said Waterville Trust Company be hereby authorized and directed to collect from each owner of record of the stock of said Waterville Trust Company on the first day of July, 1909, the date when the receivers were appointed by this court, a sum equal to the par value of his stock to be used in payment of the claims of said depositors when ordered by the court.

"And that the said Charles F. Johnson and Harry L. Holmes in their said capacity as receivers aforesaid be authorized and directed to institute all necessary proceedings in law or equity to collect the same and enforce this decree."

This action was begun September 27, 1912 to collect of Helen M. Libby the sum of $500 as the assessment of 100 per cent on the five shares of said stock owned by Bertha L. Libby at the time of her death.

The plaintiffs base their right to recover on these propositions: that at the time of the death of Bertha L. Libby there was a contingent liability resting upon her as a shareholder in said Trust Company to pay a sum equal to the par value of her shares if required for the payment of the debts and engagements of the corporation; that that obligation was contractual in its nature and survived her death and became a contingent obligation against her estate; that by the decree of the court of April 29, 1912, that obligation became an absolute liability for a specific amount which then became due and payable from her estate; that her estate having been previously settled and a distributive part thereof received by the defendant, as the only heir of said Bertha L. Libby, in excess of the amount due under that obligation, the defendant became liable therefor; and that the receivers are authorized and empowered to enforce the defendant's liability in this action.

Bertha L. Libby, as a shareholder in the Waterville Trust Company, became liable for the debts and engagements of the corporation to an amount equal to the par value of her shares in addition to the amount invested in those shares. Such an additional liability was expressly provided for in the charter of the corporation. Sec. 6, ch. 401, Private and Special Laws, 1889. It was also imposed by statute. Section 86, ch. 48, R. S., before its amendment in 1905, was as follows: "The shareholders in a trust and banking company

shall be individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of said corporation, to a sum equal to the amount of the par value of the shares owned by each in addition to the amount invested in said shares." This section was amended by chapter 19, P. L., 1905, by adding thereto the following: "Whenever in liquidating the affairs of such a corporation it appears that its assets are not sufficient to pay its indebtedness the receiver thereof, under proper orders of the court, shall proceed to enforce such individual liability of shareholders in any appropriate action at law or in equity, in his own name or in the name of the corporation for the benefit of the creditors."

Every person who voluntarily becomes a shareholder in a corporation thereby agrees to the terms of its charter, and assumes those obligations which the laws of the State creating the corporation impose upon such shareholders. *Pulsifer* v. *Greene,* 96 Maine, 438, 445 and cases cited.

It does not appear whether Bertha L. Libby became the owner of the five shares of the stock of said trust company before or after the amendment of 1905. But that is immaterial, because, if she was a shareholder before, by continuing as such thereafter she thereby accepted the effect of the amendment so far as it applied to her liability as a shareholder. *Flynn* v. *Banking & Trust Co.,* 104 Maine, 141, 145. Moreover, if she was a shareholder before the amendment, it in no manner increased her liability as such. Its only purpose and effect was to provide a different remedy, a different course of procedure, by which the shareholders' liability could be enforced. The Legislature has power to modify or change a remedy, provided no substantial right is thereby impaired. And a shareholder in a corporation has no vested right in a particular remedy by which his liability as such may be enforced against him. A change of remedy, whereby no substantial right is affected, is not obnoxious to the fundamental law which forbids the impairment of contracts.

It may be regarded as well settled that the obligation which the shareholder assumes by becoming a member of the corporation is contractual in its nature, and does not abate at his death but survives, and his estate becomes chargeable therefor. This court in *Pulsifer* v. *Greene,* supra, speaking of such liability said: "The obligation which he thereby assumed though statutory in its origin

was contractual in its nature, and as such not local but transitory. It goes with him wherever he goes, and is enforceable in any court of competent jurisdiction."

In Cook on Corporations (5th Ed.) Vol. 1, Sec. 248, it is said: "The estate of a deceased person is liable upon stock held and owned by the decedent in the same way and to the same extent that the stockholder was liable in his lifetime. Accordingly an executor or administrator of the estate of a deceased stockholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representative of the deceased. The cause of action against a stockholder arising from his statutory liability, is not defeated by his death. The action may proceed against his estate." See also *Richmond* v. *Irons,* 121 U. S., 27; *Fidelity Ins. Trust & S. D. Co.* v. *Mechanics' Sav. Bank,* 97 Fed., 297; *Douglass* v. *Loftus,* 119 Pac., 74, 78 (Kan.). In 3 Thom. Corp., Sec. 3325, the author says: "Where the estate of the deceased shareholder is fully administered, and distribution made by the personal representative, the heirs or next of kin are assessable to the extent of the assets which they have received from the ancestor's estate, for the payment of calls subsequently made upon shares of stock belonging to his estate."

But, conceding the liability of Bertha L. Libby, as claimed, to an assessment on the shares owned by her, and that the defendant, as her heir and a distributee of her estate, might have been made liable therefor, it is contended that the necessary proceedings were not taken to make an assessment which is binding upon her, and that no sufficient order of court was made authorizing the receivers to bring this suit against her. We think these contentions in behalf of the defendant are not sustainable.

In construing the decree of the court of April 29, 1912, all its recitals and provisions are to be considered in order to ascertain its full scope and effect. It recites that it was made upon the petition of the receivers against the corporation, asking the court to ascertain and determine the value of the assets of the corporation remaining in the hands of the receivers, and "to ascertain and determine whether any assessment should be ordered and decreed upon the capital stock of said Waterville Trust Company, and the amount of said assessment." And it shows that after notice and hearing, the

court did ascertain and determine explicitly the amount due the depositors, the cash remaining in the receivers' hands, the value of the unsold assets, and that both the cash and value of the unsold assets would be insufficient to pay the depositors in the sum of $107,058.90. It was then ordered and decreed by the court as hereinabove quoted.

We entertain no doubt that by that decree a valid assessment was made of 100 per cent upon the whole capital stock of the Waterville Trust Company, including the five shares which stood in the name of Bertha L. Libby at the time of her death.

It has been repeatedly held that when, in proceedings for the liquidation of the affairs of a corporation, and for the payment of its debts and engagements, an assessment is necessary to be made upon unpaid stock subscriptions and upon the additional liability which its shareholders have assumed by becoming members of the corporation as shareholders, the court may make such assessment in proceedings therefor against the corporation without the presence of, or personal service upon, the individual shareholders. In such proceedings the representation which a shareholder has by virtue of his membership in the corporation is all that he is entitled to. *Bernheimer* v. *Converse,* 206 U. S., 516, 532; *Howarth* v. *Lombard,* 175 Mass., 570, 577; *Converse* v. *Spargo,* 184 Fed., 324, and *Spargo* v. *Converse,* 191 Fed., 823. The case last cited is very similar to the one at bar. In that case, as in this, the assessment was made after the death of the shareholder, and it was contended in defense of a suit by the receiver against the executor of the shareholder, that the assessment was invalid because the proceeding in making the assessment was conducted in the same manner it would have been had the shareholder been alive. But that contention was not sustained, the court holding the assessment valid against the shareholder's estate, though made after his death. We think that conclusion rests in sound reasoning and well established principles.

It has already been noted that it is the accepted theory that in proceedings for liquidating the affairs of a corporation the shareholders are sufficiently represented by the corporation itself. Its presence in theory carries with it the presence of its shareholders. Prior to the death of Bertha L. Libby the Waterville Trust Company had become insolvent and proceedings had been begun against

it under the statute to liquidate its affairs. Her liability as a shareholder in that corporation, under the terms of its charter and the laws of the State, became fixed by those proceedings which were binding upon her. She was then liable to pay such assessment not exceeding the par value of her shares, as the court should determine to be necessary to satisfy the debts and engagements of the corporation. The assessment itself was but the determination by the court in those proceedings, commenced in the lifetime of the shareholder, of the deficiency in the assets of the corporation, and hence the amount to be apportioned to each share of stock as the additional sum to be paid by those legally liable therefor. Had Bertha L. Libby been living at the time that part of the proceedings was had to determine the amount of the assessment, she would have been bound thereby without previous personal notice. And as her liability to pay such an assessment as should be made against her shares in those proceedings survived her death, and became a liability of her estate, we perceive no reason why her personal representative or heirs are not likewise bound by the assessment made subsequent to her death without previous notice to them.

It is provided by statute in this State (R. S., ch. 89, secs. 16, 17 and 18) that when an action on a contract or covenant does not accrue within the eighteen months provided for the presentation of claims against an estate, the claimant may file his demand within that time in the probate office, and thereupon the Judge of Probate shall direct that sufficient assets, if such there be, shall be retained by the executor or administrator, unless the heirs or devisees give bond to pay whatever is found due on said claim. And the statute further provides (sec. 18) that, "When such claim has not been filed in the probate office within said eighteen months, the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due, and not against the executor or administrator."

The liability of Bertha L. Libby at the time of her death to an assessment, as a shareholder in the trust company, did not accrue until April 29, 1912, when the court decreed that a resort to the statutory liability of the shareholders was necessary and fixed the amount thereof. *Flynn* v. *Banking & Trust Co.*, supra. That was after the expiration of the eighteen months during which claims

could have been presented against the estate of Bertha L. Libby. Nor was any demand, under said contingent liability, filed in the probate office within said eighteen months. But this action is brought, as provided for in said sec. 18, ch. 89, against the heir of Bertha L. Libby within one year after the decree of April 29, 1912, fixing the amount of the assessment.

Finally, the defendant says, that the decree of the court of April 29, 1912, authorized the receivers to collect the assessment of those persons only who were owners of stock of record on the first day of July, 1909, and therefore that the receivers have no authority to maintain this action against her, notwithstanding her liability for such assessment as the heir and distributee of her mother's estate.

We think such a construction of the decree is too narrow and limited. To sustain it would require a holding that the decree did not impose an assessment upon the whole capital stock of the trust company, for if by the decree the whole capital stock was assessed, then this suit is abundantly authorized by the last paragraph of the decree wherein the receivers were authorized and directed "to institute all necessary proceedings in law or in equity to collect the same and enforce this decree."

But we have already stated the opinion of the court to be that this decree reasonably construed, giving effect to all its parts, did impose an assessment upon the whole capital stock of the trust company. And we need here only add that it appears from the decree itself that in the proceedings to liquidate the affairs of this banking corporation the court was called upon to determine the necessity for and the amount of an assessment upon the capital stock of the corporation to pay the claims of its depositors, and that it did judicially ascertain and expressly decree that "an assessment of one hundred per cent upon the whole capital stock . . . is necessary to be made to meet the claims of said depositors." Such determination and decree, we think, may reasonably be construed to be in effect such an assessment. No other construction would be consistent with the adjudged necessity in the premises, and the manifest purpose of the decree. It was clearly so intended by the Justice who signed it.

Moreover, it is expressly provided by sec. 86, ch. 48, R. S., amended by chapter 19, P. L., 1905, as hereinbefore quoted, that

whenever in liquidating the affairs of a trust and banking company "it appears" that its assets are not sufficient to pay its indebtedness "the receiver thereof, under proper orders of the court, shall proceed to enforce such individual liability of shareholders in any appropriate action at law or in equity, in his own name or in the name of the corporation for the benefit of the creditors." Under the provisions of this section the receivers in the case at bar were not only authorized but commanded to enforce the defendant's liability, under proper orders of the court, in any appropriate action at law or in equity. Considering the provisions of this statute in connection with the decree of April 29, 1912, it seems a reasonable conclusion that the receivers of the Waterville Trust Company were authorized to bring this action against the defendant.

Accordingly it is the opinion of the court that the plaintiffs are entitled to judgment against the defendant for $500 with interest from the date of the writ.

So ordered.

ESSEX FERTILIZER COMPANY *vs.* GEORGE O. DANFORTH.

Waldo. Opinion October 30, 1913.

Burden of Proof. Checks. Evidence. Letters. Motion. Payment. Verdict.

Assumpsit to recover balance of $50 claimed to be due on fertilizer sold to the amount of $750 and claimed by defendant to have been paid in full.

Held:

1. The defendant's original liability for the fertilizer bought having been admitted, the burden was on him to prove the payments therefor which he claimed to have made.

2. That the defendant failed to sustain that burden by a preponderance of the evidence.

On motion by plaintiff for new trial. Motion sustained. New trial granted.

This is an action of assumpsit upon an account annexed to the writ to recover a balance due for fertilizer sold defendant. The defendant claimed that he had made payment in full. Plea, general issue. The jury returned a verdict for the defendant and the plaintiff filed a general motion for a new trial.

The case is stated in the opinion.

C. W. Hussey, and Arthur Ritchie, for plaintiff.

Dunton & Morse, for defendant.

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

KING, J. Action to recover a balance of $50 claimed to be due on an account annexed to the writ.

The account debits the defendant with fertilizer sold to the amount of $750 (which was admitted), with an item of $8.12 interest, making a total charge of $758.12, and he is credited with $708.12, showing the balance of $50 claimed to be due.

The defense was payment in full; and, to be more specific, the precise issue was, whether the defendant sent the plaintiff one or two $50 checks. The jury returned a verdict for the defendant, and the case is before this court on the plaintiff's motion for a new trial.

The defendant's original liability for the fertilizer bought having been admitted the burden was on him to prove the payments therefor which he claimed to have made. We think he failed to sustain that burden by a preponderence of the evidence.

On March 25, 1911, the defendant procured a check of the Freedom Lumber Co. for $50 payable to the plaintiff's order. On March 30, 1911, he wrote the plaintiff saying: "Please find check for fifty dollars for which please place to my credit. Will send you the balance of my bill soon." That letter was stamped by the plaintiff as follows: "Mail Department April 3, 1911." "Amount received Apr. 4, 1911, I. H. W. 50." "Acknowledged Apr. 6, 1911, R. E. W." The indorsements on the back of the Freedom Lumber Co. check show that it was deposited by the plaintiff (whose place of business was in Boston) in a Boston bank, and passed through the Boston

Clearing House. It was stamped on its face "Paid Apr. 5, 1911. The City National Bank Belfast, Me." The plaintiff's contention was that it was the Freedom Lumber Co. check that was sent by the defendant in his letter of March 30, 1911, and that it received no other $50 check from him.

On the other hand, the defendant contended and testified that he sent the Freedom Lumber Co. check to the plaintiff on the day it was written, March 25, 1911, and that he sent another check for the same amount with his letter of March 30. And the treasurer of the Lumber Co., who drew the check, testified that he saw the defendant put the check into an envelope and deposit that in the letter box in the post office on the day the check was dated, but he did not know to whom it was directed. No letter, or copy of letter, from the defendant dated March 25th, 1911, is shown, and the defendant did not testify as to the contents of any letter then sent, nor did he testify that any letter was in fact sent with the check. But it would be quite remarkable if the check was sent without any accompanying letter of explanation, inasmuch as it was drawn by another party payable directly to the plaintiff.

If the $50 check sent with the defendant's letter of March 30 was not the Freedom Lumber Co. check, whose check was it? Where did the defendant get it? And what became of it? It is a most significant fact that the defendant could give no information whatever touching those questions. Indeed it is quite unbelieveable that this defendant could procure a $50 check from some one and send it to his creditor and not be able afterwards to recall at least enough about the transaction to enable him to discover some evidence as to whose check it was, or where he procured it.

Moreover, the defendant's contention that the check of the Freedom Lumber Co. was not sent to the plaintiff in the letter of March 30, but that another $50 check was, is utterly refuted, we think, by the defendant's own letter to the plaintiff of April 25, 1911. In this letter he said: "Yours of April 21 received and in reply will say that in your statement you have not allowed my last check that I sent you drawn in your favor March 25 on Freedom Lumber Co., for fifty dollars which you acknowledged April 4. Please look this up and let me know and I will send you the balance due." This letter, we think, shows beyond question that the contention of the

defendant at the trial was wrong, for in this letter, written only twenty-five days after the letter of March 30, 1911, he stated with unmistakable clearness that the "last check" he sent the plaintiff was the one "drawn in your favor March 25 on Freedom Lumber Co., for fifty dollars which you acknowledged April 4."

When this positive statement of the defendant in writing, that the *last check* he sent prior to April 21, 1913, was the Lumber Co. check, is considered in connection with the fact that he was unable to give any information whatever as to when or where or from whom he procured the other $50 check that he claimed to have sent, the conclusion seems irresistible that the Freedom Lumber Co. check was the one that was sent in the letter of March 30, 1911, and that the defendant was mistaken in his contention at the trial.

It is therefore the opinion of the court that the verdict was not justified by the weight of the evidence, and that justice requires that it should be set aside and a new trial granted.

Motion sustained.
New trial granted.

MATTHEW MCLEOD, Appl't., *vs.* MARTIN AMERO and Trustee.

Oxford. Opinion November 3, 1912.

Assumpsit. Exceptions. Mutual Consent. Notice. Repairs. Tenancy. Termination. Use and Occupation.

Assumpsit for use and occupation of tenement, heard before the presiding Justice without the intervention of a jury.

Held:

1. That exceptions do not lie to the decision of a presiding Justice on questions of fact unless the only inference to be drawn from the evidence is a contrary one.
2. A tenancy at will may be determined, either by thirty days' notice in writing for the purpose, or by mutual consent.
3. No statutory notice in writing having been given, the burden of proof was on the defendant to show that the tenancy was determined by mutual consent, or that the plaintiff had resumed possession under an agreement which discharged the defendant from further liability for rent.

On exceptions by defendant. Exceptions overruled.

This is an action of assumpsit for use and occupation of a certain tenement situated in Mexico, in the County of Oxford, for one month from September 1, 1912, to October 1, 1912. The action was brought in the Rumford Falls Municipal Court and returnable at the November Term of said court, 1912. The defendant plead the general issue and judgment was rendered by said court for the defendant for his costs of suit, from which judgment the plaintiff appealed to the March Term, 1913, of the Supreme Judicial Court for said County. At the May Term, 1913, this action was submitted by agreement of counsel to the presiding Justice, without the intervention of a jury, with the right of exceptions by either party.

At the conclusion of the evidence, the presiding Justice ordered a verdict for the plaintiff for the sum of fifteen dollars and interest from the date of the writ, to which order of said Justice the defendant excepted.

The case is stated in the opinion.

Lucian W. Blanchard, for plaintiff.

Albert Beliveau, for defendant.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, PHILBROOK, JJ.

CORNISH, J. This is an action of assumpsit for use and occupation of a certain tenement from September 1, 1912, to October 1, 1912. By agreement of parties the case was heard by the presiding Justice, without the intervention of a jury, and with right of exception, which, of course, means right of exception in matters of law.

The defendant claimed that the tenancy was terminated by mutual consent on August 31, 1912, when he vacated the premises and delivered the key to the plaintiff, and further that the plaintiff had accepted possession of the premises by entering to make repairs during the latter part of September.

On both these issues the presiding Justice found in favor of the plaintiff and on the defendant's exceptions to these findings, the case is before this court.

The exceptions must be overruled because it is elementary law that the decision of a presiding Justice on questions of fact submitted to him is conclusive and exceptions do not lie to his findings, unless the only inference to be drawn from the evidence is a contrary one. *Hazen* v. *Jones,* 68 Maine, 343; *Pettengill* v. *Shoenbar,* 84 Maine, 104; *Shrimpton* v. *Pendexter,* 88 Maine, 556; *Water Co.* v. *Steam Towage Co.,* 99 Maine, 473

It is proper, however, to add that an examination of the evidence and of the carefully prepared findings of the presiding Justice convinces us of the correctness of those findings under the well established principles of law.

A tenancy at will may be determined either by thirty days' notice in writing or by mutual consent. R. S., chap. 96, sec. 2. The creation of the tenancy being admitted in this case, the defendant was prima facie liable for the month's rent, and no statutory notice having been given, the burden of proof was on him to show that the tenancy was determined by mutual consent or that the plaintiff had resumed possession under an agreement which discharged the defendant from further liability for rent. *Whitney* v. *Gordon,* 1 Cush., 266; *Thomas* v. *Steamship Co.,* 71 Maine, 548.

The evidence, instead of establishing either of these contentions, tends to prove the contrary. The finding of the presiding Justice was correct. *Withers* v. *Larrabee,* 48 Maine, 570; *Oldewurtel* v. *Wissenfield,* 97 Md., 165, 54 At., 969.

Exceptions overruled.

JAMES A. CLARKE, in Equity, *vs.* ARTHUR E. MARKS, et al.

Cumberland. Opinion November 5, 1913.

Allegations. Answer. Cancellation. Corporation. Demurrer. Equity. Exceptions. False Representations. Remedy. Stock. Stockholders.

The plaintiff in his bill alleges in substance that he bought capital stock in a corporation of one J. B. C. who was treasurer of the corporation, that he was informed and believed that there were no outstanding obligations of the corporation, that the treasurer then held the note of the corporation, issued to himself without authority and without consideration, that J. B. C. afterwards transferred the note to the defendant, after maturity, that the defendant brought suit on the note, and obtained a decision in his favor, but that the case was taken to the Law Court on motion and is still pending there. He does not allege that J. B. C. made any misrepresentations as to the outstanding obligations, when he bought the stock. His prayer is to have the defendant enjoined from prosecuting further his suit on the note, and that the note be surrendered.

Held:

1. That viewed as a stockholders' bill it is demurrable for want of allegation that it was brought for the benefit of all the stockholders or the corporation, and for want of allegation that the corporation and its officers have been requested to act, and have neglected or refused to do so, or that application to them would be useless.
2. That viewed as a bill for the relief of the plaintiff individually it is demurrable for want of allegation, that he was deceived by false representations made by J. B. C. as to outstanding obligations of the corporation.
3. That while a case is pending in the Law Court on exceptions or motion, the issue tried below is not res adjudicata.
4. That after a corporation has been defeated in an action against it, neither the corporation nor its stockholders, for the corporation, can have the other party enjoined from reaping the fruits of his victory, without showing some special equitable ground for restraint.
5. That J. B. C. is not an indispensable party to the bill.

On appeal and exceptions by respondent, Arthur E. Marks. Exceptions sustained. Demurrer sustained. Bill dismissed with costs, but without prejudice.

This is a bill in equity in which the plaintiff, James A. Clarke seeks to secure the cancellation of a certain promissory note dated April 1, 1908, for $17,500, payable to the order of John B. Candy and signed, "Prospect Realty Company, J. B. Candy, Treasurer," on the ground that said note was executed without authority, and was without consideration, and also to enjoin the further prosecution of an action at law thereon.

The defendant, Arthur E. Marks, demurred to said bill, and filed a plea in bar thereto. The presiding Justice overruled the demurrer and the plea in bar, to which ruling the defendant, Arthur E. Marks, excepted. The case was then heard before a jury upon bill, answer, replication and proofs and final decree in accordance with the prayer of the plaintiff was entered, from which decree the defendant Arthur E. Marks appealed to the Law Court.

The case is stated in the opinion.

Henry H. Sawyer, for complainant.

Charles J. Nichols, and William C. Eaton, for Arthur E. Marks.

Walter B. Clarke, for Prospect Realty Co.

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

SAVAGE, C. J. This is a bill in equity to secure the cancellation of a promissory note and to enjoin the further prosecution of a suit thereon. The allegations in the bill are, that the Prospect Realty Company, one of the defendants, is a corporation with a capital stock of 1000 shares of the par value of $10 each, all issued; that John B. Candy was treasurer and one of the directors of the corporation from its organization until July 16, 1912; that the only asset of the corporation is real estate in Cape Elizabeth of the value of $20,000; that on November 28, 1911, the plaintiff purchased of John B. Candy 997 shares of the stock, and gave in payment therefor his note for $10,000, running to said Candy and payable in three years from that date; that the plaintiff was informed and believed, and still believes, that there were no outstanding obligations against the corporation, except current taxes, and that the corporation was not indebted to Candy or any other person upon any note or other obligation; that defendant Marks, on April 6,

1912, instituted an action at law against the corporation, upon a promissory note for $17,500, dated April 1, 1908, payable on demand after date to his own order by the corporate name by "J. B. Candy, Treasurer," and by Candy endorsed without recourse to Marks; that in Ooctober, 1912, the decision of the court in the said action was rendered in favor of Marks for $17,500 with interest, to which decision the corporation filed a motion for a new trial, and the case is still pending in court; that the said $17,500 note was executed by Candy, as treasurer, without consideration and without authority, and without the knowledge of the directors of the corporation, and that it is null and void; that the plaintiff first learned of the existence of the said note on or about June 20, 1912; and that if the property of the corporation is sold under an execution obtained upon a judgment rendered in said action of Marks against the corporation the plaintiff will suffer irretrievable loss and damage, for which he has no adequate remedy at law. There are no other material allegations in the bill. The prayer is that the note be declared null and void, and that Marks be directed to surrender the same to be cancelled; that Marks be required to release an attachment made by him in his suit; and that he be enjoined from further prosecuting his said action, and from enforcing the judgment that may be obtained thereon. The bill is dated March 10, 1913.

To the bill the defendant Marks filed a general demurrer, which was overruled. He also filed a plea in bar, setting up, as res adjudicata, the decision of the court in the suit of Marks against the corporation, referred to in the bill. In the plea it is alleged that the writ in that case was duly served on the corporation, that it appeared by counsel and pleaded the general issue, and that the hearing was had before the court, sitting without a jury. Otherwise the plea merely restates the allegations in the bill. The plea was overruled. Then the defendant Marks answered the bill denying all allegations except the existence of the corporation, the fact that Candy was treasurer and director, and the institution and decision of his action against the corporation. The corporation answered admitting all the allegations in the bill, and joined in the plaintiff's prayer for relief. The case coming on for a hearing, issues of fact were framed and submitted to a jury, who answered (1) that the plain-

tiff did purchase 997 shares of the stock from Candy and gave his $10,000 note in payment, (2) that the $17,500 note was executed by Candy, without authority, and (3) that the corporation received no consideration for the $17,500 note. And a decree was thereupon entered in accordance with the plaintiff's prayers. The case is now before us upon defendant Mark's exceptions to the overruling of his demurrer and plea in bar, and upon his appeal from the decree.

Under his demurrer, the defendant Marks contends that this is a stockholder's bill, and that it is faulty and demurrable, because it does not allege that it is brought for the benefit of all the stockholders, nor that either the corporation or the directors have been requested to act and have neglected or refused to do so, nor that application to them would be useless. In other words, the point is that a single stockholder cannot act for the corporation, and maintain a bill for its relief and the protection of its stockholders, unless the corporation itself and its proper officers are unwilling or unable to seek the appropriate relief, and that the neglect or refusal of the corporation or its officers must be alleged and proved. Such is the general rule. *Ulmer* v. *Maine Real Estate Co.*, 93 Maine, 324. And this case is not an exception. And such a bill must be brought for the benefit of all who are in like situation, and that must also be alleged.

But these defects, if open on general demurrer, are amendable, and since the case is before us on appeal also, we should be slow to dismiss the bill for want of proper formal allegations, or to send it back for amendment without a consideration of the merits, but would instead, if the necessary facts appeared in proof, permit formal amendment on terms, before the final decree is entered. But, viewed as a stockholders' bill, there is another and fatal defect in the bill, namely, want of equity. The case stated by the bill is simply this. A corporation was sued upon a note, and defended unsuccessfully, for the time being at least. Then a stockholder undertakes to retrieve the fortunes of the corporation by having the plaintiff enjoined from proceeding further with the suit, on the grounds that the note was unauthorized and was without consideration. These grounds, if tenable, were open to the corporation in defense to the suit on the note. It is not alleged that the corporation did not defend. The entire issue was presumably before the

court in the action at law. The corporation had the power to use every defense. And it needs no citation of authorities to sustain the proposition that a corporation represents the stockholders, and that they are concluded by its action. The corporation itself, after defeat in an action at law, cannot then have its adversary restrained from reaping the fruits of his victory, without showing some special equitable ground for restraint. *Clark* v. *Chase,* 101 Maine, 270. No such equitable consideration is alleged in this bill. If an unsuccessful corporation cannot obtain equitable relief in such a case, no more can one of its stockholders.

But the plaintiff in argument says that this is not a stockholders' bill, that he does not bring the bill as stockholder for the benefit of the corporation and the protection of the stockholders, but for his own personal relief. He says that when he bought his stock of Candy, Candy, then treasurer, represented to him that there were no outstanding obligations against the corporation, and that he purchased in reliance upon that representation, that the representation was false in that Candy then held the $17,500 note against the corporation, that under such circumstances Candy would be equitably estopped from taking by judicial proceedings in satisfaction of the note a greater part, or at least a substantial part of all the property of the corporation which made the stock of any value, and that the estoppel might be made effectual by injunction; and further that Marks, who, says, is not a holder for value before maturity, stands in no better position than Candy would be in.

The defendant Marks in reply contends that the position now assumed by the plaintiff is an afterthought, conceived when it was discovered that the bill could not be sustained as a creditors' bill, and that the bill is demurrable, even on the present theory of the plaintiff, for want of proper allegation and proper parties. First, it is urged that the allegations in the bill, which are to be taken as true on the demurrer, disprove the present claim. It is alleged in the bill that the note is null and void, and from this it is argued that the representation as to obligations of the corporation, even if made, was not false, because a void note is not an obligation. This point we do not consider at present. Again it is claimed that Candy is a necessary party. We do not think so. No relief is sought against him. Neither his rights nor his liabilities will be affected, if the defendant prevails, while if the plaintiff prevails, the dam-

ages for which he may be liable for the false representation will be diminished. It is true that equity seeks to gather in all the parties whose interests may be affected, though they might not otherwise be bound by the judgment. It seeks so far as may properly be done to settle all matters that may grow out of this subject matter of the controversy. But it often happens that persons who may be proper parties are not indispensable parties. If, for instance, it is true, as the evidence seems to indicate, that Candy was beyond the jurisdiction of the court so that he could not be brought in as a party, we do not think the plaintiff should be deprived of relief against the only party who now has the power to harm him. Assuming, but not deciding, that Candy might be a proper party, we do not think that he is an indispensable party, as a matter of law.

But there is no allegation in the bill that any false representations were made to the plaintiff *by Candy*. This is vital. Such an allegation is indispensable. It is the very gist of the plaintiff's claim. If Candy did not misrepresent, then he would not have been estopped on that ground to enforce payment of the note, and should not be enjoined. And so of Marks, who stands in his shoes. On this ground the demurrer must be sustained.

The question now is whether the bill should be retained for amendment, or decided upon such evidence as we have, with amendment to be made below before decree, or dismissed. It is true that the plaintiff testified as to the representation now claimed, but the question whether Candy made any such representation was not in issue under the pleadings. But passing by, for the moment, the defect in pleading, the case does not seem to have been heard upon this issue. Although it was the foundation of the plaintiff's claim, this question of fact was not submitted to the jury, and does not appear to have been noticed by the Justice who heard the case. In view of these facts, and in view of the further fact that the bill will need to be reframed in several particulars to present properly the plaintiff's present claim, we think it advisable to dismiss the bill, but without prejudice.

The certificate will be,

Exceptions sustained.
Demurrer sustained.
Bill dismissed with costs, but without prejudice.

ANNIE CRANDALL ARNOLD *vs.* MARCELLUS L. HUSSEY, et als.

Piscataquis. Opinion November 5, 1913.

Due Care. Evidence. Exceptions. Hearsay Evidence. Ice. Negligence, Private Diary. Public Records. Sidewalks. Water From Roof.

Upon the question, whether the weather conditions on the day of the accident were such as to congeal the water flowing from the roof of the building and thus form the ridge of ice complained of, or whether the weather was so warm as to avoid the conclusion that the ice could thus form, the defendant introduced the private diary kept by James Ham, then deceased, which purported a record of the weather.

Held:

1. That entries of deceased persons in books kept by them, but not connected with the suit in question, and not made in the performance of any duty, nor in the course of their own business, are inadmissible.
2. That an entry made by a person in the ordinary course of his business, or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded.
3. The diary offered and admitted was a book of private memoranda, whose entries were not made by the owner in the performance of any duty, nor in the regular course of his own business and were inadmissible.

On exceptions by plaintiff. Exceptions sustained.

This is an action on the case to recover damages from the defendants, owners of a certain building situated in Guilford, in the County of Piscataquis, and known as the Braeburn Block, for injuries received in consequence of the careless and negligent manner in which the said defendants managed and controlled said building, or Braeburn Block, so called. That on account of said negligent and careless management of said building, the rain, ice and snow fell from said building upon the sidewalk rendering it slippery. The plaintiff, while travelling on said walk, slipped and fell upon the ice, causing the injuries complained of. Plea, general issue. In the course of the trial, the defendants introduced, and were allowed to read to the jury, extracts from the private diary of one James Ham, deceased, purporting to be a record of the weather conditions.

The plaintiff excepted to the admission of said evidence. The jury returned a verdict for the defendants.

The case is stated in the opinion.

J. S. Williams, and C. W. Hayes, for plaintiff.

Hudson & Hudson, for defendants.

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

SPEAR, J. This case comes to the Law Court upon exceptions, which are stated as follows: This is an action brought for the purpose of recovering against the defendants, as owners of the Braeburn Block in Guilford, for negligence in so constructing and maintaining said block that the water from the roof was precipitated upon the sidewalk, wholly on the private property of the defendants, so that a ridge of ice naturally would be formed, and the plaintiff alleges actually was formed on said walk in front of the postoffice which was in said building. Evidence was introduced which tended to show that a ridge of ice was formed in front of the said postoffice, and that the plaintiff in the exercise of due care and in the prosecution of lawful business, stepped upon said ridge of ice, and slipped, breaking her leg, which was the injury sued for.

The defendants introduced evidence which tended to deny the fact that there was any ice there at the time of the injury, and for the purpose of showing that the weather on the afternoon of the day on which the accident happened was too warm for the formation of ice, offered to be read to the jury extracts from the diary of one James Ham. Evidence in regard to said diary was adduced by the defendants from their witness, Ernest Ham, which is as follows: Q. What is your residence? A. Guilford. Q. Your father's name? A. James Ham. Q. When did he die? A. The 6th of November. Q. Have you in your possession a record of the weather in his handwriting? A. Yes, sir. Q. Do you know that he kept a record of the weather there in Guilford village? A. Yes, he always did. Q. Will you let me see his book? I show defendant's exhibit No. 1, and calling your attention to a page at the top of which are the words "Thermometer, Saturday, Jan. 21, 1911," and "weather," and to the handwriting directly thereunder, ask you if that is the handwriting of your father? A. Yes, it is.

Mr. HUDSON: We offer that. Mr. HAYES: We object. THE COURT: A private diary, was it? Mr. HUDSON: Yes, your honor. THE COURT: Not kept as a part of any employment or duty. Mr. HUDSON: Simply a matter of custom. THE COURT: Do you dare risk it? Mr. HUDSON: Yes, your honor. THE COURT: Admitted. Mr. HAYES: Exceptions? THE COURT: Certainly. Q. Do you know how many times a day he took the temperature? A. Twice a day, at six in the morning and six at night. Mr. HUDSON: "Saturday, Jan. 21, 1911, 10 above. Cloudy, S. W. P. M." S. W. means wind southwest. That was in the A. M. "P. M. 36 above."

The exceptions raise a question upon the competency of one class of hearsay evidence, upon which the authorities are not in full accord. When a deceased person, who is a stranger to the transaction has made entries in a book, which become relevant to the proof of some fact in issue in the case on trial, such entries with certain limitations may be admitted in evidence, and although not made in the presence of the parties, and not directly concerning their transactions, yet they may be pertinent and even conclusive proof of coeval facts.

But just what the limitations are is where the authorities divide. Yet there seems to be but one qualification that differentiates the decisions. All agree that such entries to become admissible must be made "in the ordinary course of business." Some hold that they must also be made against the interest of the parties making them; others, that this is not essential. Accordingly the result to be reached is not whether this kind of testimony is competent, but what are the limitations to its admissibility. As suggested, the important division of the courts upon the limitations is confined to the one question, whether the entries made must be against interest. But this limitation has been rejected by our court, as will appear below.

While no Maine cases are cited by plaintiff's counsel, yet the Maine reports, in several opinions, contain as comprehensive and satisfactory a solution of the question as we have been able to find. *Augusta* v. *Windsor,* 19 Maine, 317, very early announced the rule on this subject, in harmony with the leading cases of that time, confirmed by the weight of authority since, and consistent with both reason and authority now. The principle here enunciated for the

government of the admission of this class of testimony is found in this language, adopted from *Nichols* v. *Webb,* 8 Wheat, 337: "We think it a safe principle, that memoranda made by a person in the ordinary course of his business of acts or matters, which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." In the next paragraph the opinion in terms rejects the limitation, found in some states, that the entry must appear to have been made against the interest of the party making it, saying: "This court is not satisfied with the reasoning upon which that limitation was introduced, and does not feel obliged to adopt it."

With the statement of this rule, which has not been modified or repealed, we might well sustain the exceptions without further citation, but as no recent opinion, that we are aware of, has had occasion to discuss this precise question, where it was directly raised, and became the pivot upon which the decision of the case turned, it may be well to collate the few decisions that are found, and note the different forms of expression in which the rule is announced. We have already referred to *Augusta* v. *Windsor* in the 19th Maine. The next case, in which the point is considered is *Dow* v. *Sawyer,* 29 Maine, 117, which uses this language: "Contemporaneous entries made by third persons in their own books in the ordinary course of business, the matter being within the knowledge of the parties making the entry and there being no apparent motive to pervert the fact, are received as original evidence." This case also holds that such entries may be received without extraneous proof, if upon inspection of the books they appear to have been fairly kept and contain entries respecting the matter in issue. The next case is *Old Town* v. *Shapley,* found in 33 Maine, 278, which states: "A minute in writing made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence. And such a minute is competent, where it is one of a chain or combination of facts, and the proof of one raises a presumption, that another has taken place." See also cases cited. In *Lord* v. *Moore,* 37 Maine, 208, it is stated this way: "To make such entries in books of a private character admissible, the books in which they are made must have been fairly

and regularly kept, the entries must have been made by a deceased person whose duty it was to make them, or in the regular course of business, who had personal knowleged of the subject matter entered, and whose situation was such as to exclude all presumption of his having any interest to misrepresent the fact recorded." See also *Pike* v. *Creahore,* 40 Maine, 503. In Wigmore on Evidence, Vol. 2, sec. 1523, the author says relating to this class of testimony: "The first general requirement is that the entry must have been made in the regular course of business. The judicial phrasings of this requirement vary in terms. The entry must have been, therefore, in the way of business." In *Leask* v. *Hoagland,* 215 N. Y., 171, 98 N. E., 395, is found this expression: "The reason for receiving statements or entries made in the course of business as an exception to the rule (hearsay rule) is that they were made as a part of the regular course of ones livelihood or profession." In *Kennedy* v. *Doyle,* 10 Allen, 161, we find this conclusion: "In the United States, the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded." From these varied expressions of the rule, it seems to be well established that the entries of deceased persons in books kept by them, but not connected with the suit in question and not made in the performance of any duty, nor in the course of their own business, are inadmissible; and we fail to find any cases in which a contrary rule is declared. On the other hand, the cases are numerous where entries not made in accordance with the rule herein stated have been rejected.

While public records, kept in the discharge of public duties, when produced by the proper custodian, tending to prove the facts therein contained, are admissible, such as entries made in books kept by the weather bureau, this question is not here involved and requires no discussion.

It very clearly appears from the exceptions that the diary offered and admitted was a book of private memoranda, whose entries were not made by the owner in the performance of any duty nor in the regular course of his own business and were therefore inadmissible.

It was argued that, even if the exceptions were sustainable, the

admission of the entries in the book were not prejudicial. We are not able to concur in this view. The very question at issue, was whether the weather conditions on the day in question, were such as to congeal the water flowing from the roof of the building, and thus form the ridge of ice complained of, or whether the weather was so warm as to avoid the conclusion that ice could thus form.

Exceptions sustained.

STATE OF MAINE *vs.* FRED M. BLACKINGTON.

Knox. Opinion November 5, 1913.

Allegations. Counts. Exceptions. Extortion. Indictment. Motion. Threats.

This is an indictment charging extortion, based on Revised Statutes, chapter 119, section 23.

1. The gravamen of the charge contained in this statute is an intent to extort money, and the threat is the manner in which this is to be accomplished.
2. In this indictment, it is alleged that the respondent verbally, did feloniously and maliciously threaten to accuse one Hewett of the crime of selling intoxicating liquor, with intent to extort money.
3. The indictment in this case is held to be sufficient, as it specifically alleged the offense charged and apprised the respondent of what he was accused.
4. The form of the language in which the threat was made is not material. If required to be set out, it might defeat the very purpose of the statute. The statute never intended the words should be alleged as in the case of a libel or slander.

On exceptions by the defendant. Exceptions overruled.

This is an indictment in which it is alleged that Fred M. Blackington, at Rockland, on March 26, 1913, verbally did feloniously and maliciously threaten to accuse one E. L. Hewett of the crime of selling intoxicating liquor, with intent thereby to extort money from

said Hewett. The defendant was tried on said indictment at the April Term, 1913, of the Supreme Judicial Court for the County of Knox, and the jury rendered a verdict of guilty. The defendant thereafter, before judgment in said case, filed a motion in arrest of judgment in said case. The Justice presiding denied said motion, and the defendant excepted to said denial.

The case is stated in the opinion.

Philip Howard, County Attorney, for the State.

M. A. Johnson, for respondent.

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

SPEAR, J. This case involves an indictment charging extortion and comes up on exceptions. The indictment contained two counts. But the first count only is in question, and reads as follows: "The Grand Jurors for said State upon their oath present that Fred M. Blackington, of Rockland in the County of Knox, and State of Maine, on the 26th day of March, 1913, at Rockland, in said County of Knox, verbally did feloniously and maliciously threaten to accuse E. L. Hewett of a certain crime, to wit: the crime of selling intoxicating liquor, in violation of law, with intent thereby to extort money from him the said E. L. Hewett."

After a verdict of guilty the respondent through his counsel filed a motion in arrest of judgment for the following causes: "First, because the first count in the indictment upon which the respondent was placed on trial does not set out either the exact words of the respondent or the substance of the words used by him, and that said count does not conform to the requirements of the law. Second, because under the indictment, as framed and returned, it is insufficient under the law to charge him with the offense alleged, as required by law, and that he was not bound to answer to said indictment." This count was evidently drawn under R. S., chapter 119, section 23, which provides. "Whoever, verbally, or by written or printed communication maliciously threatens to accuse another of a crime or offense, or injures his person or property, with intent thereby to extort money or to procure an advantage from him . . . shall be punished," etc. The gravamen of the charge contained in this statute is an intent to extort money. The threat is the

manner in which this is to be accomplished. We think the present indictment is sufficient. It specifically alleged the offense charged, and apprised the respondent of what he was accused—an intent to extort money. It definitely alleged the crime threatened, and informed him of what it consisted—selling intoxicating liquors. The respondent, under this indictment was made fully aware of the charges he was required to meet. The form of the language, in which the threat was made, is not material. If required to be set out, it might defeat the very purpose of the statute. There might be a variety of expressions in which an ingenious mind could convey threats without using any definite phraseology. Yet, they would be effective, if sufficient to so impress the mind of the person threatened as to accomplish the end in view. The statute never intended the words should be alleged as in the case of libel or slander. The language in which the threat is made was intended as a matter of proof and not of pleading. The respondent is not charged with libel or slander, but with a threat to accuse of a certain offense. The question is not whether his language is libelous, but whether, whatever the form of expression, it contains a malicious threat to accuse of the offense charged. It, therefore, seems clear that the interpretation of the language used, in conveying an alleged threat, is a question of fact for the jury. If, regardless of its form, it is sufficient to prove the threat, then the offense threatened is established. If the language is insufficient, then the proof fails.

This, however, is but a restatement of the view expressed in *State* v. *Robinson,* 85 Maine, 195. This case involved an indictment for extortion and the count in the indictment which was held to be good is so analogous to the count under consideration that it may be regarded as a precedent. In this case it was held: "We think the first count sufficient. It is a matter where considerable generality of allegation is permissible. The same rule of strictness does not apply as in actions or indictments for libel, a class of prosecutions not very much favored by the law. The gist of the present offense is the malicious threat to extort money. The defendant is notified of his utterances that are relied on, and also of the nature of the accusation which he has threatened to make. If more particularity of averment than this be required, the purpose of the statute would be defeated in many instances of criminal threats.

See cases cited." *Commonwealth* v. *Moulton, et al.,* 108 Mass., 308, is a case in which it is specifically held: "The precise words of the threat need not be set out. It is enough if the substance is stated. If the indictment attempted to give the words used, yet it would only be to prove the allegation substantially. The gist of the offense is the intent to extort money by a malicious threat to accuse of some crime. The words used do not constitute the offense without the accompanying intent to extort." The language of the indictment in this case will be found to be very similar to the language in the indictment before us.

The respondent further contends that the indictment sets out no offense, inasmuch as an allegation in the indictment "with intent to extort money" is not sufficient because "a more specific designation than the mere generic term is required in the description of money." Upon this contention the respondent cites many cases with reference to indictments charging the larceny of money. But extortion and larceny are entirely distinct offenses. The former offense is a charge of a threat to accuse of a crime to extort money. It is not money that the defendant has already taken, the amount and denomination of which may be known; it is money which he seeks to obtain, the amount and denomination of which is unknown, and may be a matter of indifference to him, unless too small. It would seem to be impossible to penetrate the defendant's mind and determine just what kind of money would be satisfactory to him under a threat of extortion. If the indictment alleged that he wanted gold, he might testify that he wanted silver; if it alleged that he wanted bank notes, he might reply that he would take only greenbacks; and as it would be impossible to furnish any proof except his own statement as to the kind of money which he sought to extort, it is evident that the contention of the defendant upon this point—if carried into effect—would absolutely nullify the statute.

Without further comment, if precedents were required, we think *State* v. *Robinson* and *Commonwealth* v. *Martin,* supra, are sufficient to establish the sufficiency of the indictment. The exceptions to denying the motion in arrest of judgment must be overruled.

EXCEPTIONS TO THE EXCLUSION OF TESTIMONY.

During the course of the trial, the respondent, who in March was elected to the board of aldermen and duly qualified, claimed that

rumors of graft, carried on by the previous city government, had been circulated throughout the city; that he pledged himself if elected, to stop the graft and close up the places of vice; that as soon as elected he proceeded to fulfil his promises; that in consequence of this action the police committee and "rum sellers framed up this complaint" to stop his efforts in closing them up and on the question of intent and to show that the complaint was a frame up, the respondent offered the following evidence in cross-examination of Frank C. Norton, chairman of the police committee, regarding his relations with E. L. Hewett, who, the exceptions claim, "was by his own confession at one time in the business. Q. You knew the E. L. Hewett Company, didn't you? A. I did. Q. Did you make any search down there? THE COURT: Excluded. Q. You know their business? THE COURT: Excluded. We are not trying this man.

It was further claimed that it was the duty of the respondent, being an alderman, to see that something was done with reference to the enforcement of the law, as he was elected for that purpose, "and that Mr. Norton knew that that is the cause of this complaint in here." Upon this contention by counsel quite a number of questions were put and excluded.

It was further claimed that the respondent, upon the question as to whether his acts were malicious and made with intent to extort money, "had a right to show all the facts" and offered evidence of statements made by the respondent to a witness, which was excluded on the ground that it was self-serving. The testimony offered was clearly of this character. To the offer and exclusion of the testimony upon each of these contentions exceptions were taken and allowed. The ruling of the presiding Justice upon all these questions was clearly within the rule of the elementary law of evidence, and must be sustained.

Exceptions overruled.

ALICE SAVOY *vs.* JAMES MCLEOD.

Penobscot. Opinion November 5, 1913.

Accidents. Automobile. Chauffeurs. Contributory Negligence. Damages. Danger. Diligence. Due Care. Highways. Negligence. Owners.

1. It is a matter of common knowledge that all adults of ordinary prudence do not always immediately do the right thing, or exercise the best judgment in cases requiring quick thought and quick action.

2. In view of this habit, due to the inherent frailties of human nature, the law requires that degree of diligence which constitutes due care, to be commensurate with the danger to be avoided.

3. A driver of an automobile, in the public highways constantly traveled by pedestrians and teams, and occupied by children, should, to establish due care, exercise so high a degree of diligence in observing the rights of foot passengers, or teams, when approaching them, as to enable him to control it or stop it if neeessary, to avoid collision, which cannot be regarded as a pure accident or due to contributory negligence.

4. Drivers of automobiles should be required to do everything that human agency can do to avoid taking human life.

On motion by the defendant. Motion overruled.

This is an action on the case to recover damages for personal injuries sustained by the plaintiff in consequence of the negligence of the defendant. The accident occurred on the 22d day of September, 1912, on Center Street, in the City of Bangor. The plaintiff claimed that while riding in a carriage on said street, the defendant, riding on and along said street in an automobile, ran into and against the carriage in which she was riding, overturning the same and throwing her out of said carriage on to the ground, causing the injuries complained of. The defendant plead the general issue.

The jury returned a verdict for the plaintiff for $975, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

D. I. Gould, and Edgar M. Simpson, for plaintiff.

Fellows & Fellows, for defendant.

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

SPEAR, J. It would be of little avail to analyze the testimony in this case on the question of liability. The report shows that there was ample room for the defendant to have guided his machine safely past the team in which the plaintiff was riding, had he been paying proper attention to the rights of the team.

In view of the accidents and tragedies that are daily occurring in the operation of automobiles, the present case seems an available opportunity for a statement of the familiar rules of law with more definite application than has yet been announced in this State, to the duty of persons who undertake to drive upon the public highways, the engine of power and peril, now represented in the mechanism of the automobile. If not strictly a matter of judicial notice, it is a matter of common knowledge, that death and injury are of daily occurrence due to the inefficiency, negligence or reckless conduct of those who are permitted to engage in the operation of these powerful machines. A mania for speed seems to have seized the minds and dominated the action of many of the automobile operators, whether owners or chauffeurs. This class of drivers apparently assume that the foot passenger or team will, upon their approach, so hastily change its course, as to relieve the operator from any diminution of speed, that he may have his machine under control, and avoid accident, if the unexpected happens, and the passenger or vehicle or child does not, as quickly as anticipated, o' ey the mandate of his whistle or horn.

It is also a matter of common knowledge that all adults of ordinary prudence do not always immediately do the right thing, or exercise the best judgment, in cases requiring quick thought and quick action. This failure of men to act alike, under like circumstances, is so general in its application, that it must be regarded as a habit, which all persons, coming in contact with human action, must be held to anticipate as an existing condition. In view of this habit, due to the inherent frailties of human nature, and the rule of law, that the degree of diligence deemed in law sufficient to constitute due care, is always commensurate with the danger to be avoided, it is the opinion of the court that the driver of an automobile in the

public highways, constantly travelled by pedestrians and teams and occupied by children of all ages, should, to establish due care, exercise so high a degree of diligence in observing the rights of a foot passenger or team when approaching them, as to enable him to control it, or stop it if necessary, to avoid a collision, which cannot be regarded as a pure accident or due to contributory negligence.

But it may be claimed that this rule of diligence renders the operation of automobiles impracticable. If so, let the business stop. They should be required to do everything that human agency can do to avoid taking human life. This court declared in *Cameron* v. *Street Railway,* 103 Maine, 482, that "the court should establish as a law the rule which prevents injury or loss of life rather than that which invites or even permits it. This rule is based upon reason and public policy." But the claim of impracticability is not well founded. Prudent drivers neither kill children nor injure men, except at very rare intervals, and then only in cases of unavoidable accident or contributory negligence. But whatever the result, these requirements are essential to an effective rule of safety, and are in harmony with the rights of travelers upon the highway, and of children in the streets, however they may come there.

But no new principles of law have been evolved for express application to the operation of automobiles. We have simply endeavored to apply the well known principles of law in a specific way to this class of cases, as has been done in the case of steam roads and electric cars. The foundation of every principle of law invoked is found in what might be regarded as a legal maxim—the very foundation of the rule underlying the doctrine of due care and negligence—that in all human action involving hazard, the law imposes the duty of using such diligence, as is commensurate with the danger to be avoided. This rule applies to the operation of steam railroads upon the ground of public policy and safety, and finds expression in *Libby* v. *Maine Central R. R. Co.,* 85 Maine, 34, in this language: "This law requires common carriers of passengers to do all that human care, vigilance and foresight can, under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers. To require anything less would be to leave the lives of persons in the hands of the reckless, and unprotected against the negligent and incautious."

The same rule applies to the operation of street cars and automobiles, except that the degree of diligence required is varied to correspond with the diminished danger. *Marden* v. *Street Railway,* 100 Maine, 41; *Towle* v. *Morse,* 103 Maine, 250; *Gurney* v. *Piel,* 105 Maine, 501. It requires no further citations to show that it is a well established rule that great danger requires great vigilance.

That the modern motor car, equipped with engines developing from twenty to eighty horse-power, capable of reaching a speed of from twenty to eighty miles an hour, and moving with such force that no ordinary obstacle can resist it, is a mechanism, the operation of which in the public streets is of a highly dangerous character, is so apparent that the mere statement of the facts is equivalent to proof.

Upon the application of these rules of law to the case before us, the conduct of the defendant, in operating his automobile, as he did, was the approximate cause of the accident and an act of negligence. The road was amply wide to enable him to pass the team without collision. The team was moving slowly towards him and in full view. According to his own testimony when within thirty-five to seventy-five feet of the team he requested it to give him a little room. His wife says that when they noticed the team coming he "gave two blasts of the horn, hollered to them to get out of the way, and they didn't pay any attention to it." Notwithstanding this situation, as disclosed by the defendant's own testimony, he drove directly in collision with the team in which the plaintiff was riding. His own evidence also shows beyond question, that his car was under such control when approaching this team, that, had he so willed, he could have stopped it several times, if need be, in the distance of thirty-five feet.

In view of the momentum of a machine as against that of a team, it was the duty of the defendant to observe the action of the team, and, even if it did not turn out at all, or became stationary, if he did not have room to pass, to have stopped his car and requested the team to turn out, rather than keep on driving and come in collision with it.

The jury, upon the evidence, had a right to find that the team pursued a direct course; that it did not suddenly swerve into the machine; that it did nothing to mislead the defendant as to its

course; that it was plain to ordinary observation that the team was not turning out; that there was ample room for the car to pass without its turning out; that the team had a right to assume that the car would avail itself of the ample opportunity to pass in safety; and that, under the circumstances, the team was not guilty of negligence in keeping a direct course along the street. The verdict upon the question of liability was amply warranted.

The question of damages presents a more difficult task. Yet, upon a careful investigation of the evidence, we do not feel authorized to say that the verdict is so excessive as to warrant the intervention of the court. The assessment of damages in this class of cases is always an estimate, based upon the good judgment of the jury or of the court, as the case may be. There are no fixed rules that can be applied to the determination of such an assessment. Probably no two juries would assess the same amount of damages in any given case. Nor is it at all improbable that the members of the court might materially disagree as to what would be a proper measure of damages in a given case. A verdict, however, must within reasonable limits, be based upon the testimony. We think the jury acted within the rule, if they believed the testimony of the plaintiff and her witnesses, and cannot be regarded as having been influenced by bias, prejudice or mistake in awarding the verdict rendered.

And it should be here remarked, in view of the defendant's medical testimony, that the jury could not be accused of bias, prejudice or lack of judgment in discarding it as evidence of sufficient value to influence their minds upon the question of damages. It is certainly a source of much regret that medical men of high standing and great learning, will often assume a position on the witness stand, as medical experts, that brands their testimony as absurd, if not ridiculous. In the testimony of one of the defendant's physicians were found the following questions and answers: Q. Doctor, if you knew that a woman was thrown out, or thrown down from a buggy on to the hard ground, as it is between the rails of an electric road, and you were called to attend her immediately after the accident, say in the neighborhood of an hour, and you found her vomiting, and she continued to do so intermittently for two days, what would you attribute that to? A. Wouldn't know what the cause was. Q. You wouldn't know what caused it? A. No. Q. But

there would be in your mind some cause for it? A. I imagine there was, yes. Q. Now, Doctor, suppose that this woman described in my previous question, up to the time of this accident had been well and rugged, and a large, corpulent woman, and had not been vomiting, and you knew that when you called to see her, what would you attribute the vomiting to. A. She hadn't been vomiting? Q. No, hadn't been vomiting before the accident, big, strong, rugged woman; but when you called you found her vomiting? A. I don't know what would cause it. Q. Would it be probable that the accident caused it? A. I imagine it might have shaken her up or something like that, that caused her to vomit.

Comment is unnecessary. Res ipsa loquitur. Such evidence is so absurd and unnatural, that neither the court nor the jury would be justified in according to it any particular value in an effort to ascertain, from the testimony, the real injuries inflicted upon the plaintiff by the accident.

Notwithstanding this testimony, we have no doubt that the immediate symptoms manifested by the plaintiff were the result of the injuries caused by the accident. But whether the pelvic conditions disclosed by the operation were thus caused, we have grave doubts; and it is clear that the jury had similar doubts, else the verdict would have been much larger. However this may be, it seems quite evident that, even if the conditions found were chronic, the injuries operated as an exciting cause to produce immediate results that, without the injury might have slumbered indefinitely. The medical testimony fairly establishes this conclusion. Much force must also be given to the undisputed evidence that the plaintiff immediately, and for a long time, prior to the injury was in average health and well nourished, weighing 175 pounds. If this be true, and the condition in which it is conceded she was found, succeeding the accident, can be attributed to the injuries then received, the court does not feel justified in revising the action of the jury.

Motion overruled.

JOHN M. WARD *vs.* ARTHUR M. JACKSON.

Waldo. Opinion November 19, 1913.

Declaration. Demurrer. Description. Exceptions. Mortgage. Plea in Abatement. Real Action.

Real action to foreclose a mortgage. Defendant filed a plea in abatement on ground of pendency of another action for same cause between same parties, but did not set out or enroll in or with his plea, the record or declaration of the pending action on which he relied.

Nearly half a century ago, our court substantially adopted the early English practice which required such setting out or enrollment, and thus far that practice has been adhered to.

On exceptions by plaintiff. Exceptions sustained. Plea overruled. Judgment for plaintiff as of mortgage, in accordance with stipulation.

This is a real action to foreclose a mortgage; the writ being dated March 6, 1912, and returnable at the April Term, 1912, of the Supreme Judicial Court for Waldo County. On June 3, 1911, the plaintiff brought a real action to foreclose the said mortgage, returnable to said court at the September Term, 1911. The declaration in the first named writ contained no description of the land involved. At the January Term of said court, the defendant filed a demurrer which the plaintiff joined. At the April Term, 1912, the demurrer was sustained and at the September Term, the action was dismissed. Before that action was dismissed, the plaintiff brought the action at bar. At the return term of this action, the defendant filed a plea in abatement on the ground of the pendency of another action for the same cause between the same parties. To this plea the plaintiff made replication, and to the replication the defendant demurred. In the plea the defendant did not set out, or enroll in or with, his said plea the record or declaration of the pending action, on which he relies. At the September Term, 1912, the Justice presiding sustained the plea in abatement, and the plaintiff filed exceptions to said ruling. By agreement of parties, it was stipulated that if exceptions are sustained and plea in abatement is overruled, the plaintiff to have judgment as of mortgage.

The case is stated in the opinion.
F. W. Brown, Jr., for plaintiff.
Reuel W. Rogers, for defendant.

SITTING: SAVAGE, C. J., CORNISH, BIRD, HALEY, PHILBROOK, JJ.

PHILBROOK, J. On June 3, 1911, the plaintiff sued the defendant in a real action to foreclose a mortgage, but the declaration contained no description whatever of the land which was involved in the suit. The writ was entered at the September Term, 1911. At the January term, 1912, the defendant filed a demurrer, which the plaintiff joined. At the April Term, 1912, the demurrer was sustained; and at the September Term, 1912, the action was dismissed.

Before that action was dismissed, the plaintiff again sued the defendant in a real action to foreclose a mortgage, his second writ, the one in the case at bar, being dated March 6, 1912, returnable at the April term, 1912. The writ in the second suit contained a description of land. At the return term of the second action, the defendant seasonably filed a plea in abatement on the ground of the pendency of another action for the same cause between the same parties. To this plea, the plaintiff made replication and to that replication defendant demurred; the replication and demurrer being filed also at the return term of the writ. At the September Term, 1912, the entry was made, "Defendant's plea in abatement sustained."

The defendant did not set out or enroll, in or with his plea, the record or declaration of the pending action on which he relies. Nearly half a century ago our court substantially adopted the early English practice which required such setting out or enrollment of the record or declaration, and thus far we have not adopted the practice of referring to the files and records of the court in which the alleged prior action might be pending. *Brastow* v. *Barrett,* 82 Maine, 166. The plea in abatement should have been overruled, and the exceptions in the case must be sustained. By virtue of the stipulation on the docket, plaintiff is also to have judgment as of mortgage.

Exceptions sustained.
Judgment for plaintiff
as of mortgage.

WILLIAM LEADER *vs.* EXELIA LAFLAMME, et als.

Androscoggin. Opinion November 19, 1913.

Conveyance. Damages. Easement. Equity. Fee. Private Nuisance. Restriction.

The plaintiff and defendant owned adjacent lots facing on Lincoln Street, in Lewiston, each lot having a frontage on said street of twenty-five feet, and in each deed was this clause: "Subject to the restriction that no buildings erected thereon shall be placed nearer the line of Lincoln Street than twelve feet.

Held:

1. That the restriction, or reservation, was a servitude in the nature of an easement for the benefit of all the lots and would run with each lot in the hands of the grantees of the Franklin Company, or in the hands of subsequent grantees.

2. That the plaintiff has a remedy at law, and the evidence discloses no abandonment of his rights by him or his predecessors in title.

On report. Judgment for plaintiff. Damages assessed at $200.00.

This is an action on the case to recover damages of the defendant for erecting a building on her lot, located on the west side of Lincoln Street, in Lewiston, and adjacent to plaintiff's lot, nearer to the line of said street than twelve feet. The defendant derived title to her lot by deed dated May 9, 1900, containing the following language: "Subject to the restriction that no buildings erected thereon shall be placed nearer the line of Lincoln Street than twelve feet." Plea, general issue.

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 Law Court is to render such judgment as the legal rights of the parties require.

The case is stated in the opinion.

Newell & Skelton, for plaintiff.

McGillicuddy & Morey, for defendants.

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

PHILBROOK, J. The plaintiff owns a parcel of land and buildings thereon situate on the westerly side of Lincoln Street in the city of Lewiston. The conveyance by which he holds title is dated March 24, 1871, was given by the Franklin Company, and contains the following language: "Subject to the restriction that no buildings erected thereon shall be placed nearer the line of Lincoln Street than twelve (12) feet, with all the privileges and appurtenances thereto belonging." The defendant Laflamme also owns a parcel of land with buildings thereon situate on the westerly side of said Lincoln Street, it being southerly from plaintiff's land and contiguous thereto. The conveyance by which Mrs. Laflamme holds title is dated May 9, 1900, was given by Emma J. Dana et al., and contains the following language: "Subject to restriction that no buildings be placed nearer the line of Lincoln Street than twelve feet." The Dana title comes also from the Franklin Company which conveyed defendant land to Honora O'Donnell January 29, 1867, "subject to the restriction that no buildings erected thereon shall be placed nearer the line of Lincoln Street than twelve (12) feet, with all the privileges and appurtenances thereto belonging." All the mesne conveyances from Mrs. O'Donnell to Mrs. Laflamme contain this restriction. On January 19, 1910, Mrs. Laflamme gave to defendant Dube a bond to convey her Lincoln Street lot and inserted the same restriction in her bond. Before the deed was given by Mrs. O'Donnell a building had been erected on the land coming out to a line which was twelve feet from the line of Lincoln Street. After Dube got his bond he erected an addition on the front end of the building which came out to the street line. Plaintiff claims that his property is thereby damaged and brings this action to recover those damages.

The defendant raises three contentions in defense; first, that no damages to the plaintiff arose from the addition to the defendant's building; second, that the plaintiff cannot maintain this action, if there were any damages, because there was no restriction in the deed to Mrs. Laflamme, or in the bond for a deed to Dube, which limited the use of defendant's lot so far as plaintiff was concerned;

and, third, that if any action would lie a bill in equity to abate a private nuisance is the only form of action which the plaintiff can maintain.

As to the first contention the case discloses enough to satisfy this court that the plaintiff naturally and inevitably sustained some damage from the acts of the defendants.

The second contention is met by the claim of the plaintiff that all the deeds of lots on the west side of Lincoln Street given by the Franklin Company, except two, contained a uniform building restriction, which was intended to run with the land and be perpetual.

In *Peck* v. *Conway,* 119 Mass., 546, E, being the owner of adjacent lots A and B, occupying A as a homestead, conveyed lot B to H, who was the owner of lot C, also adjacent to B, and in the deed used the language "with this express reservation, that no building is to be erected by the said H, his heirs or assigns, upon the land herein conveyed." The court there said, "The reservation creates an easement, or servitude in the nature of an easement, upon the land conveyed. If this easement was created for the benefit of the adjoining lot, of which the grantor in the deed remained the owner, and not for the personal convenience of the grantor, and was intended to be annexed to such lot, it would be appurtenant thereto and would pass to grantees thereof. The question whether such an easement is a personal right, or is to be construed as appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances."

In *Hano* v. *Bigelow,* 155 Mass., 341, the court said, "It has often been held that where an owner divides a tract of land into building lots and, as a part of a general scheme for its improvement, inserts in the deeds of sale of all the several lots uniform restrictions as to the purposes for which the land may be used, such provisions inure to the benefit of the several grantees who may enforce them in equity, each for himself against the others," The court also held in that case that the fact that the grantor had conveyed two lots without restrictions, was not very significant.

In *Bacon* v. *Sandberg,* 179 Mass., 396, the court said, "While it has been often held that where an owner divides a tract of land into building lots and, as a part of a general scheme for its improvement,

inserts in the deeds of sale of all the several lots uniform restrictions as to the purposes for which the land may be used, such provisions inure to the benefit of the several grantees, who may enforce them in equity, yet the criterion in this class of cases is the intent of the grantor in imposing the restrictions, whether they are intended for his personal benefit or for the benefit of the lot owners generally; and his intention is to be gathered from his acts and the attendant circumstances. If this sufficiently appears, the fact that as to some lots there are no restrictions simply takes those lots out of the general scheme, and it is not necessary that the restrictions should be exactly the same in all the deeds." In the case last cited one of the defences was that the common grantor had sold all her interest in the lots and that one of the lot owners could not maintain a bill in equity against the others, but the court held otherwise.

In *Herrick* v. *Marshall,* 66 Maine, 435, our own court, in a case where the restrictions were, "with the restriction and reservation that no building hereafter erected on the above lot shall be erected within ten feet of the easterly line of the said Murray's house lot," adopted the views of the Massachusetts court in the cases above referred to and quoted from Washburn on easements the following: "In respect to whether the reservation is of a perpetual interest, like a fee in the easement reserved, the question seems to turn upon whether it is a personal right, an easement in gross, or one for the benefit of the principal estate and its enjoyment, whoever may be the owner. In the latter case it is held to be a permanent right appurtenant to the principal estate in the hands of successors and assigns without words of limitation."

The evidence in this case discloses that the Franklin Company held all the land on both sides of Lincoln Street and plotted it into narrow lots of only twenty-five feet frontage. For the benefit of all the lots, apparently, a reservation was made in all the deeds of lots on the westerly side of the street, except two, as to the distance from the line of the street that buildings might be placed. Under the authority of the cases above cited we hold that this reservation was a servitude in the nature of an easement for the benefit of all the lots and would run with each lot in the hands of the grantees of the Franklin Company, and in the hands of subsequent grantees.

The defendant further urges that the restrictions have been abandoned. No evidence of legal abandonment by the Franklin Company, or by this plaintiff has been satisfactorily pointed out.

The third and final contention of the defendant cannot be sustained, since an action at law may be maintained for damages in cases like the one at bar. *Herrick* v. *Marshall,* 66 Maine, 435; *Tracy* v. *Leblanc,* 89 Maine, 304; *Bliss* v. *Junkins,* 107 Maine, 425.

The evidence relating to the amount of the damages sustained by the plaintiff is not very clear and satisfactory but from a careful reading of such evidence as does appear in the case it is our opinion that the damage amounted to at least two hundred dollars.

Judgment for plaintiff.
Damages assessed at $200.00.

JOEL P. HUSTON et al. in Equity *vs.* CHARLES F. DODGE et als.

Lincoln. Opinion November 22, 1913.

Bill in Equity. Construction. Income. Jurisdiction. Life Estate. Residuary Estate. Revised Statutes, Chapter 20, Section 13. Termination of Trust. Testator. Trustees. Vacancy. Will.

1. A trustee has no interest in the construction of the will under which he is acting, except as it concerns his powers and duties in the administration of his estate.

2. When a testator, by his will, gave his wife "ten thousand dollars, to have and to hold the same, and the income thereof, only during her natural life," the income became hers absolutely, but she had no right to spend the principal.

3. The beneficiary under a testamentary trust having died before the testator, the trust never became operative, and the trustees did not take title to the trust fund.

4. When a testator in his will provided that "in case of the death or resignation of either of my trustees, I ask that the proper court appoint to fill the vacancy whoever may be nominated by the surviving trustees," the power of nomination was not limited to the trustees named in the will, but extends to their successors.
5. When a testator, by his will, directed the trustees of the residuary estate to set apart a certain sum to be used forever in beautifying and caring for his burial lot, the town in which the lot is situated may be appointed trustee of the fund by the Probate Court, under the provisions of Revised Statutes, chapter 20, section 13 and the fund may be transferred to it.

On report. Bill sustained. Decree in accordance with the opinion.

This is a bill in equity, brought by the trustees of the residuary estate, under the will of Isaac Dodge, late of Newcastle, in the County of Lincoln, praying for a construction of the will and for instructions. The heirs of Isaac Dodge, the beneficiaries under the will and the executor of the will of Arabella Dodge, widow of testator, are parties defendant. Answers by defendants were filed and replication thereto by plaintiffs. At the close of the hearing, the cause was, by agreement of parties, reported to the Law Court upon bill and answer, it being agreed that the facts stated in the bill are true, upon which case the Law Court is to determine the rights of the parties.

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

William T. Hall, for defendants.

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

SAVAGE, C. J. Bill in equity brought by the trustees of the residuary estate under the will of Isaac Dodge, late of Newcastle, praying for a construction of the will and for instructions. The heirs of Isaac Dodge, the beneficiaries under the will, and the executor of the will of his widow, Arabella Dodge, are parties defendant. The case comes up on report. No evidence is reported, but it is stipulated that "the facts stated in the bill are true."

Some of the questions presented in the prayer of the bill do not concern the administration of the trust by the trustees, but relate to

matters which are as yet contingent, in regard to which the trustees may never be called to act; or, if they are, possibly not until after the lapse of many years; or they relate to matters which concern only the heirs among themselves. Such questions are now moot questions.

This court has jurisdiction under R. S., ch. 79, sect. 6, Par. VIII upon a bill by testamentary trustees, to instruct them as to the proper mode of executing their trust, and to construe a will so far as necessary for that purpose. A trustee has no interest in the construction of the will under which he is acting except as it affects his powers and duties in the administration of his trust. *Burgess* v. *Shepherd,* 97 Maine, 522. And we do not think it wise, nor within the intent of the statute, to assume jurisdiction to advise trustees, and to construe wills for their guidance until the time comes when they need instructions. The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until the anticipated contingency arises, or at least until it is about to arise, until it is imminent. Then if the trustee needs present advice to know how to meet the contingency, it will be given to him. Then the parties interested in the issue can be heard under the conditions and circumstances as they may exist at that time. They should not be prejudiced. Nor should there be any judgment until there is occasion for it.

Isaac Dodge died January 28, 1895, leaving a large estate. In his will he made many bequests and devises, some to his wife, some to his brothers and sisters, and some to his nephews and nieces. Some of the bequests were absolute, some for life only, and some were in trust. By item 29 he disposed of his residuary estate in these words: "All the rest, residue and remainder of my estate both real, personal and mixed, including all rights of reversion and remainders, I give, devise and bequeath to Thomas C. Kennedy, Arabella Dodge, both of Newcastle, Me., and William A. McKenney of Boston, Mass., but in trust nevertheless for the uses and purposes hereinafter named, viz.: If the necessity arises that either of my brothers or sisters, nephews or nieces, who may survive me, may require a larger amount of money than I have by this will given and bequeathed to them, in order to insure in sickness or old age their proper care, victualing, clothing, nursing and medical attendance,

it is my will that my said trustees, Thomas C. Kennedy, Arabella Dodge, and William A. McKenney, at once fully provide for their necessities, from this amount so willed and held in trust for them."

Thomas C. Kennedy named as trustee declined to act. Ezekiel Ross was appointed in his stead. Ross resigned, and the plaintiff Huston was appointed. Arabella Dodge has deceased, and no successor has been appointed in her place.

At the argument, the heirs and beneficiaries expressed a strong desire to have the trust terminated, and the trust fund distributed, and the trustees professed themselves not averse to it. But whether this can be done, we have no occasion to consider, since this question is not raised by the bill.

We will now consider the questions asked seriatim.

1. By his will, Item 2, the testator gave to his wife, Arabella, "ten thousand dollars, to have and to hold the same, and the income thereof, only during her natural life." This bequest was paid to Mrs. Dodge wholly or largely by the assignment and transfer of western mortgage loans, selected by her. These loans were collected by her, and the proceeds so mingled with her own absolute property, that at the time of her death it was impossible to identify the property received, or the proceeds thereof. Nor was it possible to determine what disposition she had made of the same. The question is whether this sum of ten thousand dollars should be collected from the estate of Mrs. Dodge, and be accounted for by the trustees as a part of the residuary estate in their hands. Ordinarily such a question as this should not be answered, except in some appropriate proceeding for collection, between the parties interested. But since one of the trustees here is himself the executor of Mrs. Dodge's will, a fact which may prove embarrassing so far as this question is concerned, we will answer the question.

This clause in the will apparently does not give a clear expression of the testator's intention. He gave both principal and income to his wife, but for life only. There being no specific provision for the remainder over, it would fall into the residuum. *Torrey* v. *Peabody*, 97 Maine, 104. But the testator did not in terms prescribe the purpose of the gift, the uses to which it might be put, nor any limitation on the uses. Still we think that he had an intention, and that it is not difficult to discover it. Though he made no distinction

in terms, and though his wife was "to have and to hold" both the principal and the income during life, yet we think the difference in the nature and incidents of principal and of income suggests, and in this case requires, a difference in interpretation. In the gift of a mere life estate with remainder over, there is no implication of a right to spend and diminish the principal. The right to do so must rest upon more than a mere implication from the gift. But a gift of income from a life estate is absolute, unless the use be limited. If the testator had given his wife merely the income of a fund for life, without limiting the uses, the income as she received it would have been hers absolutely, and she would have had a life estate in the fund, but not the right to spend it. *Sampson* v. *Randall, 72* Maine, 109. In the clause in question, interpreted by the foregoing rules, he gave her a life estate in the fund, and gave her absolutely the income from it during her life. Did he by his will go any further? We think not. He gave her ten thousand dollars to have and to hold during her life, in order that she might gather therefrom the income which he intended should be hers. He did not express any intention that the principal was to be hers to spend or absorb. In a previous paragraph he had given her twenty thousand dollars, with other property, absolutely; and in a later clause, for life, the house and lot where they lived. We are persuaded that he meant to give her in addition, only the income of ten thousand dollars, and to put in her hands the means of producing it. This ten thousand dollars therefore belongs to the residuary estate of Isaac Dodge. It is immaterial whether Mrs. Dodge mingled this money with her own, or spent it. Though she had a life estate, she was trustee of the remainder, and her estate is accountable for it to the trust residuary estate.

2. By Item 3 of the will, the testator gave his wife the house and lot where they lived, "to have and to hold the same during her natural life." She having deceased, the question now is whether upon her death the reversion passed to the testator's heirs, or fell into the residuum. Undoubtedly the latter. No resort to construction is necessary. The will itself provides that all rights of reversion and remainders shall be included in the residuary estate.

3. By Item 5, the testator gave one thousand dollars to trustees "for the use and benefit" of his sister, Rachel Reed. The trustees

were to keep the fund invested, and to pay to the beneficiary, from time to time such sums as her necessities or condition might require. Mrs. Reed died before the testator. The question is whether the trustees under this trust took title or not. They did not. The trust never became operative. *Harlow* v. *Bailey,* 189 Mass., 208; 40 Cyc., 1818.

4. The testator by Item 21 devised to his nephew, Bert E. Dodge, a certain farm for life, remainder over to Bert's son, Isaac W. in tee. But the will further provided that if Isaac should die before his father, the remainder should go to the then living children of Bert, in fee. The questions are where will the remainder go, in case Isaac and all the other children of Bert shall die before Bert dies? also, in case Isaac only shall die before Bert, whether the remainder will go to Bert's children living at the time of his death, or to those living at the time of Isaac's death. These questions cannot be answered now. In the latter question the trustees have no interest whatever; in the former, no interest at present, and none at all, except whether the remainder may at some future time fall into the residuum. The contingencies suggested by the devise have not yet arisen. Perhaps none of them will ever arise. So far as the bill shows, Bert and Isaac and all the "other children" are now alive. Besides, the "other children" have a right to be heard. They are not parties to the bill. Indeed, for aught that we know, or can prophesy, some of the children, who may be living at the time of Isaac's death, may not yet be born.

5. By Item 22, the testator devised a farm to his nephew, Manfred C. Dodge, for life, remainder over "to the then living children" of Manfred. The question is, where will the remainder go in case Manfred shall leave no children surviving him? This question is premature. The contingency has not arisen. Whether Manfred will leave children surviving him or not, no one now knows.

6. By Item 26, the testator gave five thousand dollars to the "Second Congregational Church of Newcastle," with directions that it be invested, that the principal should not be encroached upon or diminished, and that the income should be "applied yearly to aid in having the gospel preached and the sacred scriptures expounded in the Second Congregational Church edifice in Newcastle," and not

diverted to any other purpose. The will further provides that if the Church "suffers or allows this gift and bequest to be diverted or used for any other purpose than herein willed and directed, then it is my will that the above gift and bequest revert to my heirs for their use and benefit forever." We are asked to say whether the Church is required to render an account to the testator's heirs, or to the trustees of the residuary fund,—whether the income must be used in the year in which is accumulates, whether in case the principal becomes impaired, it must be made good out of the income, and whether if *at any future time* there shall be a forfeiture of said bequest, the same will become a part of the residuary estate, or go directly to the heirs. We answer that the testator gave the fund to the Church. It is not and cannot become a part of the residuary estate. The trustees have nothing whatever to do with the administration of the fund. That is a matter which concerns only the Church and the testator's heirs.

7. By Item 27 the testator directed the trustees of the residuary fund "to set aside the sum of two hundred dollars from my (his) estate, and safely invest the same; the interest of which sum of two hundred dollars to be used forever in beautifying and keeping my burial lot, in the Haggett Cemetery, from year to year in good repair and neat appearance." The trustees desire to know if they may turn over the amount of this bequest to the town of Newcastle, in which we understand the Haggett Cemetery is situated, to be held, invested and used for the purpose specified. We think they may. The will does not expressly impose upon the trustees any duty, except to set apart the fund and invest it, though undoubtedly they are impliedly empowered to execute the entire trust. There is nothing, however, to show that the testator placed any special confidence or trust in the personal discretion of the trustees. Moreover he must have foreseen that the time would come when the duties of this trust, intended to be a perpetual one, would not and could not be performed by the persons whom he named as trustees, for necessarily in the course of time the residuary fund would be distributed and that trust terminated. By Revised Statutes, chapter 20, section 13, a town "without giving bond therefor may be appointed by the probate court testamentary trustee for the purpose of holding forever in accordance with the provisions of this section

and the terms of the devise any fund desired for the purposes aforesaid," that is, for insuring proper care and attention to a burial lot. We think this provision is applicable to the circumstances of this case. If the town is appointed trustee, it simply works a change of trustees, and that is not improper. And upon the appointment by the Probate Court of the town of Newcastle as testamentary trustee of this fund, these trustees will be authorized, and are hereby authorized, to transfer the fund to the town for the purposes named in the will.

8. We are asked next to say whether the residuary estate is given for the benefit of all the nieces and nephews of the testator, or only of those who are otherwise mentioned in the will, and whether the trustees are the sole and absolute judges as to the bestowal of benefits under the residuary item. We think the will answers the first question. The trust was created expressly for the benefit of brothers or sisters, nephews or nieces surviving him whose necessities may require *"a larger amount of money than I have by this will given and bequeathed to them."* This, we think, includes only those nephews and nieces to whom he had made bequests in the will. The purpose evidently was to give them, if their necessities required it, the benefit of "a larger amount of money" than he had otherwise bequeathed to them. This language does not embrace those to whom he had given nothing.

The interpretation of the "necessities" of these beneficiaries for the relief of which he thus provided is somewhat limited by the terms of the will. The necessity which will justify the giving of "a larger amount of money" to beneficiaries arises when it is needed to insure their proper care, victualing, clothing, nursing and medical attendance "in sickness and old age." The will relates to the individual necessities of the beneficiaries. Some may need more, some less, and perhaps some none at all. The trustees are limited to the relief of necessities, the necessities specified, "of sickness and old age." The will invests them with the right to use their discretion, to use their own judgment, in determining whether or not the necessities, such as are specified in the will, exist or not in fact, and as to how much relief may properly be given. And so long as they act, within their powers, honestly and in good faith, their determination is conclusive. They may use, but must not abuse, their trust.

9. The ninth paragraph of the prayer in the bill asks if the trust in the residuary estate exists and is valid, how long it shall continue, to whom the property remaining on the termination of the trust will go, and what are the duties of the trustees upon the termination of the trust. That the trust exists is manifest. And in argument no one has questioned its validity. We can see no reason why it should be questioned. The trust will continue until its expressed purposes have been fully accomplished, unless all the beneficiaries shall sooner release or waive their right to claim under it.

To whom distribution shall be made when the trust is terminated is a question that does not press for an answer. And, for reasons already stated, we think it should not be answered until an exigency arises which may make the answer useful to the trustees.

10. Finally, we are asked to construe Item 30, which provides that "in case of the death or resignation of either of my trustees, I ask that the proper court appoint to fill the vacancy whoever may be nominated by the surviving trustees." One question is whether the power of nomination, in case of vacancy by death or resignation, is limited to the original trustees named in the will, or whether it may be exercised by their successors. We think the power is unlimited and extends to successors. The testator thought best to have this estate administered by three persons. The estate was large, and the administration might call for the exercise of sound judgment and discretion in many instances. To that end, as we may suppose, he wished for a board that would be independent, and whose members would be likely to act in harmony with one another. That result he conceived, as we think, would be more certainly accomplished by confiding the power of nomination to the surviving trustees who best knew the situation and needs of the estate than to leave the appointment entirely to what might be contending claims and arguments of the numerous beneficiaries, whose interests were such as might naturally lead to opposing views. If this was his purpose, we think he must have intended the power of nomination to be continuous, otherwise it might soon be exhausted by the death or resignation of the named trustees. When there is a vacancy, as there is now, it is the duty of the remaining trustees to nominate a proper person to be appointed to fill the vacancy. It should be added however that the appointing tribunal will not be bound by the nomina-

tion. The court, in its discretion, may disregard the nomination, if the interests of the estate require it.

Another question is, what tribunal has jurisdiction to appoint successors? Revised Statutes, chapter 70, section 17, provides that "when a trustee under a written instrument declines, resigns, dies or is removed . . . the probate court or supreme judicial court, shall, after notice to all persons interested, appoint a new trustee to act alone or jointly with the others, as the case may be." A will is a written instrument within the meaning of this statute. For if not, there would be no occasion for giving Probate Courts jurisdiction to make appointments. See *Williams* v. *Cushing,* 34 Maine, 370. While the Supreme Judicial Court may, and in proper cases will assume jurisdiction to appoint testamentary trustees, the more appropriate tribunal is the Probate Court which has statute jurisdiction over testamentary trusts and trustees. R. S., ch. 70, sects. 1-12. And this is particularly true in a case where the Probate Court has already taken jurisdiction of the trust estate, by allowing the accounts of trustees, and so forth.

The heirs in their answer, and in argument, deny that one of the plaintiffs, Huston, has been legally appointed trustee to fill a vacancy. But the stipulation in the report is, as already recited, that "the facts stated in the bill are true." And one of the facts is "that the said Joel P. Huston was by the probate court for said county of Lincoln duly and legally appointed to said trust." This question, therefore, is not open to controversy in this case.

Reasonable solicitors' fees and expenses, to be paid out of the residuary estate, will be allowed by the Justice who settles the final decree, to all parties who have appeared.

Bill sustained.
Decree in accordance with the opinion.

HOLMES B. ROUNDS *vs.* EDWARD B. HAM.

HATTIE M. GARRITSON *vs.* EDWARD B. HAM.

ALMON D. TOLLES *vs.* EDWARD B. HAM.

CHARLES O. NASON *vs.* EDWARD B. HAM.

ELMER E. BLOOD *vs.* EDWARD B. HAM.

York. Opinion November 22, 1913.

Boundaries. Calls. Deeds. Intention. Line. Location. Lots. Road. Wrought and Traveled.

1. When the line of a road is referred to in a deed as a boundary, and the road actually traveled lies wholly or in part outside of the limits of the way as laid out, it is a question of intention whether the reference be to the road as laid out, or as traveled and used; and it is to be determined as a question of fact. In these cases the court find that such a reference was to the road as traveled.
2. When the calls of a deed are applied to the face of the earth, and it is doubtful which of two objects or places is meant by the language of the deed, parol evidence showing intention may be resorted to.
3. Where a call in a deed began "seven rods and twenty-two links northwesterly from" a certain road, the court finds in these cases that the distance is to be measured from the site of an old wall, which had marked the physical boundary of the road as it was traveled.

On report. Judgment in each case for the plaintiff.

These are real actions to recover certain parcels of land situate at and fronting on Long Sands Beach, in the town of York, in the County of York. The only question in issue is, where upon the face of the earth is the rear line of the plaintiffs' lots, and this depends substantially upon the location of the road mentioned in the deeds of the plaintiffs. The plaintiffs contend that the road referred to in their deeds is the road used and traveled by the public for many years prior to 1874, while the defendant claims that the road

referred to in the deeds means the road as it was limited and bounded by the county commissioners in 1894. The defendant plead the general issue and filed a brief statement.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiffs.

F. A. Fox, for defendant.

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

SAVAGE, C. J. These are real actions, and all depend upon substantially the same state of facts. They come before us on report. The plaintiffs are the owners of cottage lots fronting on Long Sands Beach in York. The defendant's land abuts the lots on the rear. The single question in issue is, where is the line of the rear ends of the plaintiffs' lots? The lots are all a part of a tract of land conveyed by Jeremiah Donnell to Lebbeus Hill by deed dated November 10, 1874, and the titles of the plaintiffs come by mesne conveyances from Hill. In the deed from Donnell to Hill the front, or southeasterly line of the tract, towards the beach, was described as running "southwesterly by the northwesterly side of the road leading across 'Long Sands Beach,' forty rods, to the northeasterly corner of my pasture, as now walled in." The rear, or northwesterly, line was described as parallel with the front line, and "seven rods and twenty-two links" distant therefrom.

There is before us no record of the laying out of the original road across Long Sands Beach, and no evidence of the location of its boundaries as laid out. But that there was such a road, recognized as a legal highway, may be assumed, we think, from the fact that in 1889 the county commissioners, upon the petition of the municipal officers of York to locate and define the limits and boundaries of the way in accordance with R. S. (1883) chap. 18, sect. 11, on the ground that the boundaries were "doubtful, uncertain or lost," did define the boundaries of the way as a two rod road; and from the further fact that in 1894, upon a petition representing that the road was narrow and not safe nor, convenient for public travel and praying that it be widened and straightened, the county commissioners straightened the road and widened it to three rods. The

northwesterly line of the road as thus defined in 1889 has not been delineated upon the plan in the case, nor have we any means of determining whether it was coincident with the northwesterly line as determined in 1894. The latter line appears upon the plan.

The Donnell tract was cut up by Hill or his grantees into lots fronting on the road and one hundred feet in depth, and each of these plaintiffs owns one or more of these lots. The deeds to the plaintiff, Rounds, were prior to 1894, the deeds to the other plaintiffs, subsequent. Back of these lots there still remained in the Donnell tract a strip of land 30.02 feet wide, and this strip was owned by Lillian H. Davis. Since 1894 each plaintiff has bought of Davis land in the rear of his own lot. And in each deed the northwesterly line of the land conveyed, which is the line in dispute, is described as being "seven rods and twenty-two links" northwesterly from the "road" leading across "Long Sands Beach." The disputed line is seven rods and twenty-two links from the "road," as all agree. The problem, then, is to find where the road was, which was referred to in the deeds. As all these Davis deeds were subsequent to 1894, the defendant contends that the reference to the "road" in the deeds must be construed as meaning the road or way as it was limited and bounded by the county commissioners, in 1894. The plaintiffs, on the other hand, contend that the word "road" meant the road as wrought and traveled, and not the road as laid out, either originally or in 1894. They contend that it was the intention of the parties that the deeds should cover the land precisely as far back as the deed from Donnell to Hill went in 1874, that is, seven rods and twenty-two links from the northwesterly side line of the road as used in 1874. That line the plaintiffs claim was about five feet northwesterly from the highway line as determined in 1894. And as the line of the road is the starting point in both deeds, there is the same distance of five feet in the rear, between the lines contended for by the two parties. Between those lines the parcel in dispute.

In the first place, where was the 1874 line? When the line of a road is referred to as a boundary in a deed it is a question of intention whether the reference be to the road as laid out, or to the road as traveled and used, in case the road actually traveled lies in whole or in part outside the limits of the way as laid out. *Tibbetts*

v. *Estes,* 52 Maine, 566. The intention is to be gathered from the language of the deed read in the light of existing conditions. Sometimes other clauses in a deed will aid a doubtful expression, and make the intention clear. Sometimes when the calls in a deed are applied to the face of the earth, a doubt arises as to which of two objects or places is meant. The doubt may be resolved by the aid of parol evidence, throwing light upon intention. It is not a question of law, it is a question of fact. It is not a construction of the terms of a deed, it is the application of those terms to the face of the earth. What the road was, and where the northwesterly line of it, as referred to in the 1874 deed, we must decide as a question of fact. But in doing so, we adopt the reasoning of the court in *Sproul* v. *Foye,* 55 Maine, 162. In that case, the proposition was discussed in these words:—"Did the parties refer to the road as located, or to the road as built? To a mere line of location not wrought, not in use for public travel, or to the road that was wrought and in actual use as a public highway? When a road is referred to in a deed as one of the boundaries of the land conveyed, we should ordinarily suppose that something more than a mere location was meant. A road is a way actually used in passing from one place to another. A mere survey or location of a route for a road is not a road. A mere location for a road falls short of a road as much as a house lot falls short of a house. Can the proposition be maintained that an invisible and unwrought location answers such a call better than a visible wrought road over which the public travel is passing daily? We think not." See *Brooks* v. *Morrill,* 92 Maine, 172. Applying the foregoing reasoning to this case, we have no hesitation in saying that the road referred to in the 1874 deed was not the road as located, but the road as used. The boundaries of the located way, if there had been any location, were "doubtful, uncertain or lost." The boundary of the road as used was visible and certain.

Next, where on the face of the earth was the side line of the road as used in 1874? This is a matter of dispute. But there is evidence tending to show that there existed as long ago as 1880 the remains of a stone wall at several different places along the front side of the Donnell tract, by the road; that although the greater part of the wall had then disappeared, the sections that remained appeared to be substantially in a line following the course of the road, and as if

they had been parts of a continuous wall. There is evidence tending to show the contrary. To analyze it would serve no useful purpose. We think that the weight of the evidence preponderates in favor of the plaintiffs' contention, that there used to be a wall by the road-side, remains of which are even now in existence. There is credible testimony that some cottagers laid the front sills of their cottages on the wall, that carriages pasing along the road within three or four feet of the wall, and within the same distance of these cottages after they were built.

Now if there was in 1874, or had been previously, a wall separating the traveled road from the adjacent land, and public travel passed along by the side of that wall, the inference is a strong one that the wall marked the line of what was supposed to be the road, and that when the line of the road was referred to in a deed, it meant the line as marked by the wall, which was the physical boundary of the road. This inference is strengthened by the consideration that the westerly end of the line described in the 1874 deed was tied to the easterly corner of the Donnell pasture "as now walled in." The wall at the corner fixed the location of the line at that point. And the evidence shows, we think, that some part of the pasture wall still remains, and that it is substantially in the line of the old stone wall to the east, as claimed by the plaintiffs.

We accordingly sustain the contention of the plaintiffs that the deed of Donnell to Hill in 1874, beginning at the line of the old stone wall conveyed to a line seven rods and twenty-two links northwesterly from it.

That being so, the next question is, from what line is the distance northwesterly named in the Davis deeds since 1894 to be measured? Each of these deeds gives the distance as "seven rods and twenty-two links from the road."

In the first place there is no evidence in the record before us that the course of actual travel on the northwesterly side of the road differs from that in 1874. If the road, as used, was not changed prior to the Davis deeds, it follows that the "road" referred to in them is the same road that was referred to in the Donnell deed in 1874. And in that case, the call in these deeds of "seven rods and twenty-two links" would start at the same point as the call for the same distance started in the 1874 deed, namely, at the site of the old stone wall.

Besides this, each of the Davis deeds, after giving a particular description by metes and bounds of the tract conveyed, adds, "said tract being a part of the land conveyed" by Donnell to Hill in 1874. This latter description was doubtless inserted as a recital of the source of title, and not to locate the land. It cannot add to the particular description which precedes it. *Hathorn* v. *Hinds,* 69 Maine, 326; *Jones* v. *Webster Woolen Co.,* 85 Maine, 210; *Peasley* v. *Drisco,* 102 Maine, 17. But the 1874 deed being referred to, and thus being in the minds of the parties to the Davis deeds, it is significant that they used the same expression to indicate the starting point of the call in question as was used in the 1874 deed, namely "from the road," and then made the line run back from the road precisely the same distance as the same line did in the 1874 deed, namely "seven rods and twenty-two links." Under the circumstances, these facts almost compel the inference that the intention was to embrace in the description the land as far back from the road as the 1874 deed did. If not, we shall be driven to the conclusion that Davis, for some inconceivable reason, retained title to a little strip of land not more than five feet wide at the back end of each lot. We are persuaded that she did not intend to do so.

Upon the whole we conclude that the plaintiffs' titles extend back seven rods and twenty-two links from the line of the road as it was used in 1874, and marked then by a wall or the remains of one. This covers all the land claimed by them in these suits. The certificate in each case will be.

Judgment for the plaintiff.

JARVIS C. PERRY et als. *vs.* LUKE A. SPEAR.

Knox. Opinion November 26, 1913.

Allegation. Amendment. Cemetery. Exceptions. Fee. Real Action.

Real action to recover possession of a lot in a cemetery in which plaintiff claims a fee.

Held:

1. In a real action, the demandant must prove that he has such an estate in the premises as he has alleged.

2. If it appears that he has an estate less than alleged, the action cannot be sustained without an amendment.

3. The demandants have only an easement to bury the dead upon said lot in said cemetery so long as the ground continued to be used as a place of sepulture.

On exceptions by the defendant. Exceptions sustained.

This is a real action to recover the possession of lot No. 74 in Sea View Cemetery, which is located in the town of Rockport, in the County of Knox. The case was submitted to the presiding Justice at the April Term of the Supreme Judicial Court for Knox County, 1913, with the right of exceptions. The Justice directed judgment to be entered for the plaintiffs for an easement in said lot for the burial of the dead there, "so long as the cemetery continues to be used as a place of sepulture," and for the possession of said lot. To this finding the defendant excepted.

The case is stated in the opinion.

A. S. Littlefield, for plaintiffs.

R. I. Thompson, for defendant.

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

KING, J. Real action to recover a cemetery lot. The presiding Justice who heard the case, with right of exception, gave judgment for the plaintiffs, and the case comes up on defendant's exceptions.

In a real action the demandant must prove that he has such an estate in the premises as he has alleged. If it appears that he has an estate less than that alleged, the action cannot be sustained without an amendment. *Rawson* v. *Taylor,* 57 Maine, 343; *Hamilton* v. *Wentworth,* 58 Maine, 101, 105-6; *Forsythe* v. *Rowell,* 59 Maine, 131-133.

In their declaration the demandants claim an estate in fee. The presiding Justice, however, found that they did not have "an absolute title in fee, but only an easement to bury the dead upon said lot so long as the ground continued to be used as a place of sepulture." Accordingly, without an amendment, the action was not sustainable upon the Justice's findings as to the character and quality of the demandants' estate in the premises. As no amendment was made, and a judgment was rendered therein only for said easement in the premises, the entry must be.

Exceptions sustained.

G. B. JOHNSON et al.

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD, and Trustee.

Cumberland. December 6, 1913.

Common Carriers. Damages. Delay. Directing Verdict. Exceptions. Negligence. Perishable Goods. Reasonable Diligence. Special Contract.

1. Upon exceptions to an order of nonsuit or of verdict for defendant, the duty of the court is simply to determine whether, upon evidence, under the rules of law, the jury could properly have found for the plaintiff.

2. If there was evidence which the jury were warranted in believing, it is reversible error to take the issue from the jury.
3. It is the duty of the forwarding carrier, and as well, the duty of all connecting carriers, to exercise reasonable care and diligence in transportation, to transport in a reasonable time, without unnecessary delay, to prevent so far as reasonable and practicable any loss or damage which may be occasioned by delay in transit.
4. In the absence of a special contract, or of special circumstances which take the case out of the general rule, the carrier is not bound to use extraordinary means to forward even perishable freight.
5. The carrier is not bound to make up special trains or perform special service.
6. The shipper must be understood to contemplate carriage by the regular trains on the ordinary schedules. If he desires special service, he may contract for it.
7. It is not unlawful for a carrier to give priority in carriage to berries and other perishable goods. Nor is it an unlawful discrimination for a carrier to expedite a switching service for perishable goods, provided the service is extended to all shippers of that class of goods.
8. To "mail" a letter to a person means to deposit it in the mail properly stamped and properly addressed. And that is prima facie evidence of delivery by due course of mail to the addressee.

On exceptions by the plaintiff. Exceptions sustained. Judgment for the plaintiff for $233.17.

This is an action on the case against the defendant company as a common carrier to recover damages occasioned by the alleged negligent delay in transporting a car of strawberries from the defendant's freight yard in South Boston, Massachusetts, to Auburn, Maine. At the conclusion of the evidence, the presiding Justice ordered a verdict for the defendant with an agreement on the part of the defendants that if this order is overruled, the Law Court may enter judgment for the plaintiffs for the sum of $233.17. To this order of verdict for defendants, the plaintiffs excepted. Plea, general issue.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiffs.

Symonds, Snow, Cook & Hutchinson, for defendant.

N. & H. B. Cleaves & S. C. Perry, for trustee.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, PHILBROOK, JJ.

SAVAGE, C. J. Case for damages occasioned by alleged negligent delay in transportation of a car of strawberries from the defendant's

freight yard in South Boston, Massachusetts, to Auburn, Maine. The case comes before us on exceptions to an order of a verdict for the defendant, with a stipulation that if the exceptions are sustained and the order overruled, the Law Court is to enter judgment for the plaintiff.

Upon exceptions to an order of nonsuit or of verdict for the defendant, the duty of the court is simply to determine whether, upon the evidence, under the rules of law, the jury could properly have found for the plaintiff. We are not called upon to express our own judgment of the probative force of the testimony. Whatever our own conclusions might have been, if there was evidence which the jury were warranted in believing, and upon the basis of which honest and fair minded men might reasonably have decided in favor of the plaintiffs, then the exceptions must be sustained. In such a case it is reversible error to take the issue from the jury.

We have carefully examined the evidence in this case. There is not much controversy about the facts. And where there is a dispute, there are no circumstances which take the testimony out of the operation of the general rule that a jury is the proper tribunal to determine the credibility of witnesses.

We think a jury might reasonably find the following facts to be true. In the early morning of June 21, 1909, a car of strawberries from New Jersey or Delaware came over the defendant's road into its yard at South Boston. It was consigned to one Littlefield. Littlefield removed some of the strawberries, and sold the rest of them in the car to the plaintiffs, to be shipped to Auburn. He received a bill of lading, by which the car was routed over the Union Freight railroad and the Boston & Maine railroad. The defendant knew that the car contained strawberries, and of course knew that they were perishable. Notice of the order to ship the car to Auburn was received at the defendant's Agent's Department as early as 6.45 A. M. that day, and was received by the Yard Department at 9 or 9.30 A. M. The car was not moved, however, until 9.15 P. M., when, following the usual route of freight going to the Boston & Maine Railroad, it was taken over various tracks of the defendant, of the Boston Terminal Company, and of the Boston & Albany railroad to Dover Street. There it was taken at 1.10 A. M. June 22, by the Union Freight railroad, having been about eighteen hours

traversing a distance of two miles or less. The Union Freight railroad hauled it a distance of less than two miles and delivered it to the Boston & Maine at 6.20 A. M. It remained with the Boston & Maine in Boston until 1.50 P. M. Then that company hauled it to Portland and delivered it to the Maine Central railroad at 5.20 A. M., June 23. It finally reached Auburn at noon of that day. It had come about one hundred and fifty miles in the fifty-three hours after the order of shipment was given. The strawberries, when received at Auburn, were in a badly damaged condition, due to delay in transit.

The plaintiffs do not count upon any special contract, but upon the general liability of the defendant as a common carrier, and as the initial carrier. They claim that the defendant was itself the chief offender in respect to negligent delay, but that the subsequent carriers were also negligent. They contend however that the defendant as initial carrier is liable for the whole damage under 34 U. S. Statutes (1906), ch. 3591. There was also evidence which a jury would be warranted in believing, that in the ordinary course of carriage, berries ordered shipped as these were should reach Auburn from 4 to 6 o'clock the next morning.

The duty of the defendant, as the forwarding carrier, and as well, the duty of all connecting carriers, was to exercise reasonable care and diligence in transportation, to transport in a reasonable time, without unnecessary delay, to prevent so far as is reasonable and practicable any loss or damage which may be occasioned by delays in transit. *Fisher* v. *Railroad Co.*, 99 Maine, 338. What is reasonable diligence in this class of cases, as in all others where reasonableness is the standard, must depend upon the circumstances of the particular case. It has been held that the carrier may discriminate under some circumstances between different classes of goods when the exigencies require it, as where one class is perishable and the other is not. In such case, if unable to carry both classes at the same time, the carrier may give priority of carriage to the perishable goods. And there are other emergencies which may call for discrimination. *Marshall* v. *New York Central R. R. Co.*, 45 Barb., 502; *Peet* v. *Chicago & N. W. Ry. Co.*, 20 Wis., 594; Wyman, Public Service Corporations, sects. 840, 841.

On the other hand, in the absence of a special contract, or of special circumstances which take the case out of the general rule, the carrier is not bound to use extraordinary means to forward even perishable freight. It is not bound to make up special trains or perform special service. The shipper must be understood to contemplate carriage by the regular trains on the ordinary schedules. If he desires special service he may contract for it.

In this case there was no special contract. But it was the duty of the defendant, we think, to forward such perishable freight as strawberries at least by its earliest scheduled opportunity or by the earliest train it made up in the course of its business; and in any event, at as early an hour as it had given the shipper reason to understand that it would be forwarded.

If there were no other facts than those already stated, we think a jury would be warranted in saying that there was unreasonable delay somewhere in forwarding and transporting this car of strawberries, the time occupied being fifty-three hours instead of twenty-four hours or less, the ordinary time. It is so far sufficient that it puts the onus of explanation on the defendant.

In defense the following additional facts are shown. The car at 6.45 A. M. June 21, was in the defendant's yard. To get it to the Boston & Maine it was necessary to get it over the tracks of the Boston Terminal Company to the Union Freight Company. There is no direct trackage from the defendant's yard to the Union Freight Company. The Boston Terminal tracks, which at the train shed are twenty-eight in number, lie between. Cars are shifted from defendant's yard to the Union Freight Company by being switched back and forth from track to track on the Terminal Company's tracks. Several hundred passenger trains daily enter and leave the Terminal Company's station, known as South Station. During the hours of passenger train service, or between 6 A. M. and midnight, no freight was allowed to be hauled over the Terminal Company's tracks without special permission of the Terminal Company. But it appears that special permission was given from time to time, when the defendant asked for it.

Another reason assigned for restricting the movement of freight to the hours of the night is the fact that the Union Freight Company's tracks lay in Atlantic Avenue and other crowded streets in

the city of Boston, in which there was much traffic and heavy teaming in the day time. But it appears also, that notwithstanding this fact, the Union Freight Company from time to time did haul cars along these streets and to the Boston & Maine in the day time. The inference therefore is that, the parties being willing, it was not impossible, nor impracticable, to move freight cars to the Boston & Maine in the day time.

In the usual course of transportation, three trains only were scheduled to be made up and sent from the defendant's yard to the Boston & Maine. One was due to leave at 9.15 P. M. and the other two at 2 A. M. and 4 A. M. respectively. And the defendant points out that the plaintiff's car left the defendant's yard at 9.15 P. M. on the very first train, according to schedule, which left the yard after the order to forward had been given in the morning. The defendant contends further that the car went by first trains also on each of the connecting roads. This does not appear to be quite true with respect to the Boston & Maine. The car was delivered to that company at 6.20 A. M., June 22. There were two freights leaving for Portland that forenoon, one at 10.18 and one at 11.25. The car was not sent on either of these trains. It did not start until 1.50 P. M. What connection the two earlier trains had in Portland with Maine Central trains does not appear. But if it be true, as the testimony is, that berries purchased in Boston and forwarded by Boston & Maine one day, in the usual course of carriage, arrived in Auburn at 4 or 5 or 6 o'clock the next morning, it seems to be a reasonable inference that the Boston & Maine, which had this car in its possession at 6.20 A. M., June 22, might by the exercise of reasonable diligence have forwarded it on the train that would reach Auburn in the morning, instead of one that did not reach there until six or eight hours later, at noon. It may be that this delay can be explained, but no explanation is offered. And it may be that a jury might reasonably conclude that this shorter delay was unreasonable and damaging to the plaintiffs. But we do not rest our decision wholly on this ground.

The plaintiffs, in reply to the defendant's contention, and conceding that during most of the year freight was moved across the Boston Terminal tracks only in the night time, say that during the "berry season" a different practice prevailed as to berries and like

perishable stuff. The plaintiff's buyer testified in effect that the commission men, the fruit and produce men, of whom he was one, complained to the defendant's superintendent of freight that the refusal to transfer berries and the like in the day time would hurt the business, and that after conference an understanding was reached that such freight would be forwarded in the daytime. That such a practice was in vogue at some time cannot be questioned. The defendant's witness, who was yard-master, admits it. He testifies that it was the custom during the heaviest of the season, when requested by the fruit and produce people for the railroad, without extra charge, to transfer cars of perishable goods in the daytime, if agreed to by the Union Freight Company, and there were three cars or more. But he testified that this arrangement was not in effect June 21, 1909. The plaintiffs introduced evidence tending to show that it was in effect then, that then, by the usual course of business, if a car was ready for shipment before 9 A. M. it would be moved by the defendant and connecting carriers so as to be in Auburn the next morning. And a jury might properly have sustained the plaintiff's claim in this respect.

But the defendant says that if in point of fact the plaintiff's contention is true, yet it is not liable as a matter of law. It appears that the defendant had provided for a special switching service, for which it had established a special tariff, approved by the Interstate Commerce Commission. And it contends that the service for want of which the plaintiffs complain was such a special switching service; that such service might be rendered upon request of shippers or consignees; that for rendering such service it was entitled to receive the special tariff rate of $30; that neither the shipper nor the consignee asked for such service, and the tariff rate was not paid nor tendered. It says further that it could not lawfully engage to render such service to the plaintiffs without exacting the scheduled compensation, because to do so would be a violation of the federal Commerce Act, and that it is not liable in law for the failure to perform an unlawful engagement, even if such an engagement was made.

It is true that a common carrier engaged in interstate commerce has no right to grant special favors to anybody. To agree with a particular shipper to expedite a shipment at regular rates, even

where no rate has been established for special expediting, is a discrimination, and as such a violation of the Elkins Act of February 19, 1903, 32 Stat. 847, chap. 708. It was so held in *Chicago & Alton Ry.* v. *Kirby,* 225 U. S., 155. A carrier cannot legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. *Kansas Southern Ry.* v. *Carl,* 227 U. S., 639. Discrimination is forbidden.

We think, however, that the case at bar does not fall within the rule just stated. The language used in the order providing for special switching service is as follows: "Where Special Switching Service has been arranged by the Operating Department upon request of shippers or consignees the following rates will be charged for such Special Switching Service." As we construe this language, it means a service rendered at the request of individual shippers or consignees, a service rendered under a special contract or engagement, and not a service which it had bound itself to render to all shippers or consignees similarly situated, and which was open to all. As we have already seen, it is not unreasonable nor unlawful for a carrier to give priority in carriage to perishable goods. And it does not seem to us to be an unreasonable and unlawful discrimination for a carrier to expedite a switching service for a class of goods, perishable in their nature, like strawberries, provided the service is extended to all shippers of that class of goods. Such expedition is reasonable, if not absolutely necessary.

And where a carrier has undertaken to perform such a service for all similarly situated, without additional compensation, the undertaking to do so is implied in the general contract for carriage, under its tariff for that class of goods. That is, having undertaken to do this service for all of this class of shippers, the undertaking becomes a part of each contract of carriage, and the carrier is bound to perform this service as a part of the duties created by the contract, for which the rates in its general tariff schedule will be presumed to be sufficient compensation. We think that under such a contract it would be as much the defendant's duty to expedite the transfer in Boston as to haul the car from New York to Boston, had its shipment been made from New York.

But the defendant says that it did not own or control all of the tracks necessary for the transfer, and that its power to transfer

was subject to the will of one or two other independent corporations. We think the course of business at the Boston Terminal, as shown by the case, was such that if a jury should find that consent would have been given for the transfer, if requested, and if the verdict rested upon that issue, we should not feel warranted in disturbing it. In this case, however, there was no request and no refusal. The defendant took no step to expedite. Nor did it give any notice to the plaintiffs of its unwillingness or inability to expedite. If, as we think a jury might properly find, it had held out to the plaintiffs that it would expedite, we think a jury might also properly say that it failed to perform its full duty as carrier, and is liable to the plaintiff for damages caused by unreasonable delay.

At the trial, the defendant claimed that it had not been shown that the plaintiffs had made claim in writing either upon it, or upon the carrier at the point of delivery, the Maine Central, within four months after delivery, as required by the bill of lading. This point is not much pressed in argument, and cannot be sustained. The evidence is that the claim was seasonably "mailed" to the Maine Central. Whatever may have been the rule in the days of primitive mail service, and before prepayment of postage, such is now the regularity and the certainty of the service, and the universality of the prepayment of postage, that, by common acceptation, to "mail" a letter to a person means to deposit it in the mail properly stamped and properly addressed. And that is prima facie evidence of delivery by due course of mail to the addressee. *Chase* v. *Surrey,* 88 Maine, 468.

It follows from what has been said that there was sufficient evidence on the question of the defendant's liability to require the case to be submitted to the jury, and that the order of a verdict for the defendant was error. This being so, in accordance with the stipulation of the parties, the certificate will be,

Exceptions sustained.
Judgment for the plaintiffs for $233.17.

FRANK E. BORDEN *vs.* SANDY RIVER & RANGELEY LAKES RAILROAD.

Franklin. Opoinion December 6, 1913.

Burden of Proof. Corroborative Evidence. Damages. Fraud. Misrepresentations. Release.

1. When only one reasonable conclusion can be reached by careful and discriminating minds, it is the duty of the presiding Justice to direct a verdict accordingly.
2. 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.
3. In the absence of fraud, or unconscionable advantage or mental incapacity, such settlements should stand.
4. Letters written by one party to the other, after an alleged settlement, giving his version of what had been said and done between them, are, when offered in evidence by the writer, merely self serving statements, and are inadmissible.

On exceptions by the plaintiff. Exceptions overruled and in accordance with the stipulation, judgment to be entered for the defendant. So ordered.

This is an action on the case to recover damages for personal injuries received by the plaintiff on account of the alleged negligence of the defendant. The case has been tried once before and the plaintiff recovered a verdict, which was set aside on the ground that the plaintiff, prior to suit, had settled his claim and released in writing the defendant. See *Borden* v. *Sandy River & Rangeley Lakes Railroad,* 110 Maine, 327.

By agreement of parties, the court record of all evidence taken at the first trial in September, 1912, was offered and admitted, and additional documentary evidence and testimony was admitted, subject to exception noted. After the evidence was all in, the presiding Justice order a verdict for the defendant, to which order and ruling the plaintiff excepted. Plea, general issue and brief statement, stating in substance that on the 3d day of November, 1911, the plaintiff, by his certain writing of release by him signed, in con-

sideration of thirty-five dollars to the plaintiff in hand paid by the defendant, the plaintiff did thereby release and forever discharge said defendant for damages to him in person and property for injuries received.

The case is stated in the opinion.

Sumner P. Mills, for plaintiff.

Frank W. Butler, and Elmer E. Richards, for defendant.

SITTING: SAVAGE, C. J., SPEAR, KING, BIRD, PHILBROOK, JJ.

SAVAGE, C. J. Action for personal injuries. This case has been before this court once before, 110 Maine, 327. The plaintiff then had a verdict, which was set aside on the ground that the plaintiff, prior to suit, had settled his claim and released the defendant. That the plaintiff had given the defendant a written release of all claims, signed by himself, was not denied. But the plaintiff claimed that the release had been fraudulently procured, that he did not read it before he signed, that he could not read it, because of weakness of his eyesight, that the defendant's claim agent read it to him, but did not read it truly, and that the release as read was merely the acknowledgement of the receipt of money on account of lost time. Each of these statements was denied by the claim agent, who said that he did not read the release to the plaintiff, but that the plaintiff himself took the release and appeared to read it. This court, after carefully weighing this evidence in connection with a tell-tale letter written by the plaintiff to the defendant's general manager, after the alleged settlement, quotations from which are found in the opinion, concluded that the plaintiff's story of fraud practiced upon him was so improbable and unreasonable that a verdict of the jury based upon that story was so manifestly wrong that it ought not to be permitted to stand.

Upon a second trial, all of the evidence taken out at the first trial was made a part of the record by agreement. The plaintiff was allowed to introduce, against objection, certain letters written by him to the defendant's agents, after the settlement, in which he denied having made a settlement. He also introduced further and corroborative evidence respecting the weakness of his eyesight,—his inability to read writing. Thereupon, the presiding Justice directed

a verdict for the defendant. The plaintiff excepted, and his exceptions were allowed. And it was stipulated that if the order "directing a verdict for the defendant is overruled, the Law Court is to assess damages and render final judgment for the plaintiff; otherwise final judgment for the defendant."

The letters admitted against objection were clearly inadmissible, and must be excluded from consideration. They are merely self serving statements, and the rule of exclusion is elemental. *Handly* v. *Call,* 30 Maine, 9; *Scribner* v. *Adams,* 73 Maine, 541.

And we think the new evidence touching eyesight does not in reality make the case any stronger for the plaintiff. What the plaintiff and the claim agent said and did at the time of the settlement is of course of the utmost importance. If the plaintiff's eyes were in such condition that he could not read, it would strongly tend to corroborate his story that he did not attempt to read the release. And if there were nothing more than the stories of the two witnesses, with this corroborative evidence, doubtless a jury's declaration of the truth should be allowed to stand. In such a situation it would be error to take the case from the jury. But here we have more. The underlying question is, was the plaintiff fraudulently led to believe that he was giving merely a receipt for money for his lost time, and not a release of his claim for damages? This is the decisive question. The inability to read, if it existed, bears only on the probabilities.

That the plaintiff was not deceived, and that he understood he had made a settlement with the defendant, is shown, we think beyond question, by his letter to the defendant's general manager, written about two weeks after the settlement. In this letter he called attention to the fact that his arm was not improving fast, and that it would be several weeks before he could work; thanked the company for what it had done, and asked for a loan "to bridge me over until I can go to work," promising to repay the loan with labor. This is not the language of a man with a claim which had been recognized by a partial payment, and who had been told by the claim agent, as the plaintiff testifies, that if the arm "did not continue to grow better to let Mr. McDonald (the general manager) know and he would look after it." As was said in the former opinion, the tenor of the letter is "utterly inconsistent with the plaintiff's con-

tention at the trial." This letter so far weakens the effect of the plaintiff's testimony, that no real doubt is left.

When such is the case it is not error to direct a verdict. When only one reasonable conclusion can be reached by careful and discriminating minds, it is the duty of the presiding Justice to direct a verdict accordingly.

The exceptions must be overruled, and in accordance with the stipulation, judgment must be entered for the defendant.

So ordered.

CLIFTON E. DOLLIVER

vs.

GRANITE STATE FIRE INSURANCE COMPANY.

Hancock. Opinion December 10, 1913.

Assent in writing. Conditions. Insurance. Policies. Vacancy.

1. Contracts of insurance are contracts of indemnity upon terms and conditions specified in the policy embodying the agreement of the parties and if it appears that the insured has violated or failed to perform any of the conditions of the contract, and such violation or want of performance has not been approved by the insurer, the assured cannot recover.

2. If the plaintiff permitted the insured premises to become vacant by the removal of the occupants and to remain vacant for more than thirty days without the assent of the company in writing, or in print, he violated a condition of the policy and cannot recover.

3. The subsequent reoccupation of the premises by workmen of the assured did not revivify the policy, nor restore the plaintiff to his former rights, as no act of the plaintiff alone could have that legal effect.

On report. Judgment for defendant.

This is an action on two fire insurance policies, both issued by the defendant corporation, one dated December 8, 1909, for the term of three years and to expire December 8, 1912, on a certain one and one-half story frame dwelling house and additions thereto, including foundations, gas and water pipes and stationery heating apparatus therein, situate on the east side of Oak Point Road in Trenton, Maine. The other policy is dated December 13, 1911, and expires December 13, 1914, on a certain frame barn situate on the east side of Goose Cove Road in Trenton, Maine, and a certain frame carriage house belonging thereto. The buildings described in said policies were totally destroyed by fire on the 28th day of July, 1912.

The defendant plead the general issue and filed a brief statement in substance that at the time of the issuance of said policies, the plaintiff was not the sole owner of the described property; that said policies were void, because without the consent of defendant company in writing, or print, the premises became vacant and remained vacant for more than thirty days prior to the time they were destroyed by fire. At the conclusion of the evidence, the cases were reported to the Law Court for their determinatioon, upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

Edward S. Clark, for plaintiff.

John E. Nelson, for defendant.

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

CORNISH, J. Several questions are raised in defense to this action on two fire insurance policies, but it is necessary for this court to consider only one, namely, the legal effect of the breach of contract as to occupancy.

The policies were dated respectively December 8, 1909, and December 13, 1911, were issued for a term of three years, and covered farm buildings in the town of Trenton. When the first policy was issued the plaintiff was living with his family upon the premises and making his home there. In June, 1910, he moved with his family to Bar Harbor and has since resided in that town but he claims to have kept workmen as tenants in the insured premises until

about January 1, 1912, and we think the evidence fairly supports this contention. The buildings therefore were occupied when the policies were issued.

On January 1, 1912, the premises being then unoccupied, the plaintiff secured thirty-day vacancy permits from the defendant's agent, which expired January 31, 1912. But the premises remained unoccupied until June 18, 1912, when other workmen for the plaintiff entered into possession and continued to occupy the buildings until July 28, 1912, when the fire occurred.

The policies were of the Maine Standard form adopted by the Legislature in 1895, and each contained the usual provision: "this policy shall be void . . . if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent," such assent having been previously defined as "in writing or in print of the Company." It being conceded that the written assent to vacancy issued on January 1, 1912, expired on January 31, 1912, and that no other permit was given, it follows that by their own terms the policies were rendered void, because of the subsequent vacancy extending to June 18, 1912, unless as claimed by the learned counsel for the plaintiff, the reoccupation begun on June 18, and continued till the time of the fire, of itself, revivified the contract and restored the plaintiff to his former rights. Did it have that legal effect?

This is a question raised sharply for the first time in this State and because of its consequences is deserving of the most careful consideration. Especially is this true because the decisions in other jurisdictions are not in harmony.

The policy contains eleven distinct conditions, the violation of any one of which, renders it void. One of these, false representation in the application, relates to matters antedating the policy; nine others, viz.: other insurance, removal, increase of risk, sale, vacancy for more than thirty days, manufacturing establishments running later than nine o'clock P. M., or ceasing operations more than thirty days; keeping of gunpowder or other like articles contrary to law; keeping of camphene, benzine, naptha or other chemical oils, all relate to matters while the policy is in force; while the eleventh, fraud, relates to acts either before or after the loss.

An examination of the authorities reveals the fact that in some states the courts have held that the breach of these conditions does not render the policy void but merely suspends its operation, and when the breach ceases, the policy again attaches. They make it a case of suspended animation rather than of death. But it would seem that in order to do this they ignore the plain words of the contract and seek to reach a conclusion which under the circumstances might seem fairer to the assured, working out what they conceive to be "substantial justice."

The reasons given for these decisions do not commend themselves to our judgment. In some cases the later decisions are based upon earlier ones arising under a different form of policy where the temporary suspension was expressly provided for, but the distinction is not noted, or if noted, the earlier is followed, notwithstanding the changed contract.

For instance, three early cases are often cited as authority for the doctrine of revivification, viz.: *Lounsbury* v. *Ins. Co.,* 8 Conn., 458, (1831); *Phoenix Ins. Co.* v. *Lawrence,* 4 Metc. (Ky.) 9, 81 Am. Dec., 521 (1862), and *U. S. F. & M. Ins. Co.* v. *Kimberley,* 34 Md., 224, 6 Am. Rep., 325 (1870) but in each of them the policy provided, not that it should be void in case the property were used contrary to the conditions specified, but that "so long as the same shall be so appropriated applied or used, these presents shall cease and be of no effect." It is obvious that under that plain language the policy was suspended by its own terms, but when that language was abandoned and it was provided that the policy should be "void," it is difficult to see how these early decisions form any precedent in favor of the doctrine of suspension. In fact they are authorities against it. Yet these decisions among others are cited as authorities in *Athens Mutual Ins. Co.* v. *Toney, Ga.,* 57 S. E., 1013, (1907), one of the more recent cases that adopts the theory of suspension and revivification.

Along the same line are the decisions in Illinois. The earliest case on this subject in that state, and the one often cited by that court as the leading case, is *New England F. & M. Ins. Co.* v. *Wetmore,* 32 Ill., 221, (1865).

But the policy in that case provided, as in the other early cases before referred to, that if the premises should be appropriated to any prohibited use then "so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect," and the court say: "The import of this language it seems to us, is most clear, not that this policy should be absolutely void to all intents and purposes, if the premises are misappropriated, but only while they are so improperly used, the insurance shall have no effect." With this construction we can have no quarrel because plain words are given their plain meaning.

But following this the Illinois court has extended the doctrine even to cases where the policy contains the word "void," as in *Germania Fire Ins. Co.* v. *Klewer,* 129 Ill., 599, 22 N. E., 489 (1889), and *Traders Ins. Co.* v. *Catlin,* 163 Ill., 256, 45 N. E., 255, (1896).

In *Germania Fire Ins. Co.* v. *Klewer,* supra, the court went so far as to hold that while the policy provided that it should be void in case of other insurance existing at the time the policy was taken out, the legal effect was, not to avoid the second policy, the one in suit, but to suspend it until the expiration of the prior policy and then it would come into full force.

Our court has squarely rejected such a doctrine in a case arising under the same clause, and presenting the same point; *Bigelow* v. *Ins. Co.,* 94 Maine, 39. The opinion concludes: "By the express terms of the policy in suit, the defendant company is absolved from all liability thereunder." To the same effect are *Jersey City Ins. Co.* v. *Nichol,* 35 N. J. Eq., 291; *Ins. Co.* v. *Rosenfield,* 95 Fed., 358, and *Carleton* v. *Ins. Co.,* 109 Maine, 79.

In *Traders Ins. Co.* v. *Catlin,* supra, the question arose over changes in the property that increased the hazard, and the court held that if the changed conditions had ceased to exist before the fire, leaving the risk no more hazardous than before, the policy again became in force. The court say: "If a loss occurs during the increased hazard, it would defeat a recovery. If a former increase of hazard has ceased to exist; and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage."

This clearly shows the reasoning of the Illinois court. It is based upon increase of risk at the time of the fire and whether or not the

specific conditions have in the meantime been broken they hold to be of no consequence providing the situation has been restored. They applied the same rule by way of dictum in case of vacancy in *Insurance Co.* v. *Garland,* 108 Ill., 220, and it is the rule of the early case of *Ins. Co.* v. *Wetmore,* supra, applied to an entirely different policy.

This same idea of construing the policy, not according to its own plain terms but according to an arbitrary and unauthorized standard of increase of risk at the time of the loss, forms the basis of many of the decisions which hold to the doctrine of intermittent liability.

In *Athens Mutual Ins. Co.* v. *Toney, Ga.,* supra, after citing the early decisions before referred to and others including decisions from Illinois, the court say: "We place our decision squarely on the proposition that the violation of the condition as to vacancy in this case in no wise contributed to the loss. The increased hazard existed while the house was vacant, but when the house was reoccupied the danger from vacancy terminated, and the policy again attached and became of binding effect, and the company was liable for the loss." The same reason is given in *Born* v. *Insurance Co.,* 110 Iowa, 379; 80 Am. St. Rep., 300, (1900), when construing the clause against incumbrance, and in *Ins. Co.* v. *Pitts, Miss.,* 41 So. 5, 7 L. R. A., N. S., 627, (1906), when construing the clause as to vacancy.

Here again our own court has taken the directly opposite view and has rejected the doctrine that the effect of vacancy, under the present form of policy depends upon the increase of risk.

Prior to the enactment of the standard policy in this State in 1895, there was a general statutory provision (passed in 1861) of this tenor: "A change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk." R. S., 1883, ch. 49, sec. 20.

And under this statute it was held that the breach of the condition as to vacancy did not in the absence of fraud, affect the contract of insurance unless the risk was thereby materially increased. *Cannell* v. *Ins. Co.,* 59 Maine, 582; *Thayer* v. *Ins. Co.,* 70 Maine, 531. It is evident that in such cases reoccupancy would keep the policy valid.

But the enactment of the Standard form of policy repealed the general statute of 1861, supra, so that the question of increase of

risk no longer affects the condition as to vacancy, *Knowlton* v. *Ins. Co.*, 100 Maine, 481. The court made use of this emphatic language which is significant in the case at bar:

"In the light of experience it was practicable to specify ten conditions or changes in the situation of the property, each of which would render the policy void without opening to actual inquiry the question of the increase of the risk. The language of the standard policy is not to be construed to mean that an issue of fact is to be raised upon the question of increase of risk under each of the independent clauses in question. It would not be reasonable to suppose that the legislature contemplated a judicial inquiry under the clause relating to the keeping of gun-powder, or naptha, or under the clause respecting other insurance on the property, or the clause in regard to the sale of the property and the assignment of the policy without the assent of the company as there specified. With no greater or better reason can it be claimed that the question of increase of risk is open under the clause rendering the policy void for vacancy or non-occupancy. It is an independent and absolute stipulation that the policy shall be void if the premises become vacant, and remain so for more than thirty days as there specified. It is not qualified by any other clause in the policy."

It is unnecessary to further analyze or comment upon the decisions holding that the violation of the plain terms of the contract as to vacancy creates only a suspension of liability. Such a construction would seem to be a perversion of the clear and explicit terms of the contract, a creation rather than an interpretation.

In our opinion no better statement can be made of their lack of convincing power than that by Ostrander on Insurance, 2nd ed., sec. 145, viz.: "Regarding the purpose of this provision to be the protection of the insurer from such changes in the circumstances of the risk as would increase the hazard of fire, the courts have sometimes held that although the building becomes vacant and unoccupied during the term of the policy, if it was actually occupied when the fire occurred, the insurer would be held. These decisions appear to be based on the principle, which is not exactly cardinal in the law, that 'substantial justice' need be secured at all hazards. It must be admitted that if no harm comes to the risk during the period of its abandonment and if it is in the care of an occupant at the time

of the loss, no important interest of the insurer is prejudiced on account of the temporary vacancy, and in such case there is an apparent hardship to the honest claimant, if the insurer is excused from paying the loss. But may the courts properly interfere to prevent the execution of a contract, which the parties were competent to make and did make in the exercise of their natural and constitutional rights? The policy plainly enough provides that on the happening of a certain event it shall be void. The event occurred and the obligation of the Insurance Co. then terminated. Unless the court has the power to create for the parties a different contract than the one they created for themselves, it can do nothing to relieve the situation; and when the courts undertake to correct mistakes of persons by taking away their right to make contracts, the well meant effort, in the long run is likely to produce more evil than good."

Let us now turn to the line of authorities holding that the contract should be interpreted as meaning what its language clearly expresses, that a violation of its conditions works a forfeiture and not merely a temporary suspension. The Supreme Court of the United States in *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S., 452, had under consideration a clause rendering the policy void if "mechanics are employed in building, altering or repairing the premises," and in an exhaustive opinion held that the violation of this condition relieved the insurer from responsibility although the fire did not occur in consequence of the alterations or repairs. The reasons are stated as follows: "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insurer against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the

assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

In *Mead* v. *Ins. Co.*, 7 N. Y., 530, the same doctrine was held applicable to the prohibited use of camphene, which had ceased before the fire, and upon the point of revival the court say: "The only question in my mind is, whether the use of the prohibited article at one period of the time for which the policy should by its terms continue, will avoid the policy in a case where the loss occurred at a time subsequent to such use. For the purposes of this question, it should be treated the same as if the use of the camphene had been permanently discontinued before the occurrence of the fire which destroyed the property. A warranty in a contract of insurance is in the nature of a condition precedent. It is settled by numerous decisions, that if the warranty is violated, it avoids the policy, and that it is immaterial whether the breach affects the risk or is connected with the loss or not. It would seem, in theory, that it was equally immaterial whether the act or thing to which the warranty related continued up to the time of the loss, or had ceased or been discontinued before. The amount of it is, the defendants undertook to idemnify the plaintiff against damage or loss by fire, etc., upon condition that certain stipulations were observed and kept by and on behalf of the plaintiff and not otherwise. If the plaintiff failed to perform those stipulations, the defendants' liability to indemnify ceased; could the plaintiff revive at pleasure by fulfilling his agreement—in this case by removing the camphene? If he could in one instance he could, for aught I see, in any number of cases. I incline to the opinion that this could not be done in any case without the

consent of the defendants, and that the only safe rule, is to hold the contract of insurance at an end, the moment the warranty is broken, and that it can not be revived again without the consent of both parties, unless the insurer has by some act or line of conduct waived the breach or violation of the warranty."

In *Reynolds* v. *Ins. Co.,* 107 Md., 110, 68 At. 262, (1907) a violation of a provision requiring an inventory to be taken within thirty days rendered the policy void even though one was taken within fourteen days after the expiration of the required time. "It may seem to be a hard rule," say the court, "to declare a policy forfeited for some act of omission or commission which in point of fact was not the cause of the fire, and actually did no injury to the insurer, but when parties enter into contracts which are not prohibited by law, and are declared by the courts to be reasonable regulations, upon what principle can a court revive a policy, which by its terms was null and void, simply because the insurer sustained no injury by reason of the insured's failure to do what is required of him? After this policy became null and void the insured could not by his act alone revive it so as to bind the insurer."

In *Bemis* v. *Ins. Co.,* 200 Pa., 340, 49 At., 769 (1901) a provision avoiding the policy in case of a change of title was held to be violated by giving a warranty deed, although a reconveyance was made prior to the fire.

The earlier decisions in Massachusetts seem to favor the doctrine of suspension and revival on the ground of no increase of risk, but the later decisions have rather repudiated it and have taken the opposite view. In *Hinckley* v. *Ins. Co.,* 140 Mass., 38, the court held that the temporary use of a bowling alley and pool room without a license, did not render the policy void but merely inoperative for the time being.

In *Ring* v. *Assurance Co.,* 145 Mass., 426, the same doctrine was applied to the insurance of chattels, in a house described as "occupied all the year round," when it appeared that for several weeks the house had been unoccupied, but was occupied at the time of the fire. *Hinckley* v. *Ins. Co.,* supra was cited with approval, but it should be noted that the effect of the non-occupancy upon the insurance on the house itself was not involved.

In *Kyte* v. *Ins. Co.,* 149 Mass., 116, the increase of risk clause was under consideration, the insured having used the premises for

the illegal sale of intoxicating liquors during a substantial portion of the term of the policy, but afterwards, and before the fire, having obtained a license therefor. The court below instructed the jury that if the use of the premises which increased the risk, was merely temporary and ceased before the fire, the plaintiff could recover. The Law Court reversed this ruling and held that the policy was not merely suspended but might be treated by the company as wholly void. The court also took occasion to refer to *Hinckley* v. *Ins. Co.*, supra and to say that the court in that case should have rested its decision upon another ground, "leaving it an open question whether a departure from the terms of the provision of a policy, without an increase of risk, may be deemed merely to suspend and not absolutely to avoid the policy." This rule that an increase of risk absolutely avoids the policy, even though it does not continue up to the time of the loss, applies in principle to a vacancy because under our decisions vacancy is presumptive proof of increase of risk, *White* v. *Ins. Co.*, 85 Maine, 97; *Jones* v. *Ins. Co.*, 90 Maine, 44.

Later Massachusetts decisions follow *Kyte* v. *Assurance Co.* rather than *Hinckley* v. *Ins. Co.*

In *Wainer* v. *Ins. Co.*, 153 Mass., 335, the vacancy clause was under discussion, the disputed question being whether the policy took effect on January 23, 1889, or on March 13, 1889, it being admitted that the premises were vacant up to April 1, 1889, and occupied from that time to the date of the fire May 12, 1889. The court unequivocally held that if the policy had been in force from January 23, it was rendered void, notwithstanding reoccupancy, but also held that it took effect from March 13, and therefore the vacancy had not existed for the prohibited and fatal period of thirty days.

Hill v. *Assuance Co.*, 174 Mass., 542, involved the material alteration clause and the fact that the alterations were completed long before the fire was held to have no curative power. "The fact that a breach of condition is past," say the court, "and did not contribute to the loss does not necessarily put an end to the right of the insurer to avoid the policy." This case was cited with approval in *Stuart* v. *Insurance Co.*, 179 Mass., 434, where the temporary alienation of property was held to avoid the policy notwithstanding reconveyance.

It would seem that reoccupancy should have no greater power to rehabilitate the contract than reconveyance. The court in Massachusetts can therefore be considered as against the doctrine of temporary suspension in a case like the one at bar.

Without prolonging the discussion further it is sufficient to add that the following cases, all involving the question of vacancy and reoccupancy, hold that the policy is not revived: *Moore* v. *Ins. Co.*, 62 N. H., 240; *East Texas Ins. Co.* v. *Kempner,* 87 Tex., 229, 27 S. W., 122 (1894); *Hardiman* v. *Fire Assn. Pa.,* 61 At., 990 (1905); *Hoover* v. *Ins. Co.,* 93 Mo. App., 111, 69 S. W., 42 (1902); *German Ins. Co.* v. *Russell,* 65 Kan., 373, 69 Pac., 345 (1902). See also 19 cyc., p. 709.

These authorities, in our opinion rest on the correct principle. It is not a question whether the insurer has been injured by the breach of the contract but whether the contract itself has in fact been broken. It either has or has not been. If not, the rights of the parties remain unchanged. If it has, then by its own terms the contract is rendered "void." And this word "void" being neither ambiguous, nor technical, should be "construed according to the common meaning of the language," R. S., ch. 1, sec. 6, Par. I. It means null, of no effect. The Legislature has seen fit to prescribe this as the form to be used. If a change is desirable or expedient that change should come by way of legislative amendment rather than by judicial wrenching. The insurer has the right to insist that the conditions surrounding and affecting the property shall continue and remain the same as at the date of insurance. If "void" means "temporarily suspended" then under a policy running three years, the premises might become vacant on the next day after its issuance, remain vacant for nearly the entire term, without the assent of the company, but if reoccupied on the day before the fire, the indemnity would again spring into existence. The contract prescribed by the Legislature clearly forbids any such intermittent rights, and liabilities.

We are, of course, not to be understood as holding that the insurer cannot waive this provision of the policy. It is well settled that he can so waive it, but that question needs no discussion here as there are no sufficient facts to warrant it.

The entry must be,

Judgment for defendant.

JOHN J. FRYE

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Cumberland. Opinion December 12, 1913.

Application. Contract. Estoppel. Evidence. Forfeiture. Insurance. Policy. Premiums. Revised Statutes, Chapter 49, Section 104. Waiver.

The plaintiff was insured under a Free Tontine Policy of Life Insurance, calling for payment of annual premiums for twenty years. The written application for the policy was not printed in or attached to the policy.

Held:

1. That this application was admissible as evidence and as forming part of the contract of insurance.
2. The policy provided that if the assured failed to keep up his payment of annual premiums, he was entitled to a paid-up policy, after three years, for a specified amount of the original policy, but also provided that the assured must return the old policy receipted to the society within six months after the date upon which the last premium in default had fallen due; otherwise, the policy should determine and all premiums paid should be forfeited to the society. The plaintiff paid six annual premiums and when the seventh became due, the agent in the society's office in Portland said to him, "this policy is good for as many twentieths as you have paid in; you don't need any other policy."

Held:

3. Under the provisions of Revised Statutes, chaper 49 section 93, this was a waiver of the return of the old policy, which was binding on the society, and that the society is now estopped to deny its liability under the old policy.

On report. Action to stand for trial.

This is an action of assumpsit on a policy of life insurance for twenty-five hundred dollars. The policy issued to plaintiff was called the Free Tontine Policy. Under this policy, the plaintiff was to pay in advance thirty-one dollars and sixty-three cents, and thereafter to pay annually on or before the 29th day of January in each

year, one hundred and nineteen dollars and fifty cents, for twenty years. The policy provided for a paid-up policy after three years, for as many twentieths of the original policy as complete annual premiums have been paid. The plaintiff paid six annual premiums. When the seventh became due, the agent in charge of the society's office in Portland said to the plaintiff, "this policy is good for as many twentieths as you have paid in when it matures. You don't need any other policy."

The written application for the policy was not printed in nor attached to the policy.

Plea, the general issue, with brief statement of the Statute of Limitations. At the conclusion of the evidence, the case was reported to the Law Court, upon so much evidence as is legally admissible; the Law Court to determine whether the action is maintainable. If not maintainable, judgment is to be ordered for the defendant; if maintainable, the action is to stand for trial before the jury.

The case is stated in the opinion.

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

Symonds, Snow, Cook & Hutchinson, for defendant.

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

PHILBROOK, J. This is an action in assumpsit, coming before this court on report. October 29, 1891, the defendant company issued to the plaintiff a so called Free Tontine Policy of life insurance for twenty-five hundred dollars. On this policy the plaintiff was to make an advance payment of thirty-one dollars and sixty-three cents, and was to pay an annual premium of one hundred and nineteen dollars and fifty cents on or before the twenty-ninth day of January in each year following for a period of twenty years, after which no further payments were required. Among the list of privileges contained in the policy is to be found the following: "It provides for a paid-up policy after three years for as many twentieths of the original policy as complete annual premiums have been paid." The plaintiff paid six annual premiums only; and when the seventh annual premium became due, he went to the office of F. H.

Hazelton, who was in charge of the company's office in Portland and acting as its agent, according to the testimony of the plaintiff, "and spoke to him in regard to not continuing the policy." After some conversation Mr. Hazelton expressed a desire to see the policy and the plaintiff went to his office and got it. When the policy had been examined by Mr. Hazelton, he remarked, according to the plaintiff's testimony, "this is a different policy from what I thought it was, this is good for as many twentieths as you have paid in when it matures, you don't need any other policy." The plaintiff further testified that fully relying upon that statement, he did not return the receipted policy which he held, and made no further effort to obtain any other policy. Under the choice of six methods of settlement provided in the policy and available at the completion of the tontine period of twenty years, the plaintiff claimed that he was entitled to six-twentieths of the surrender value of the policy, said surrender value being, as he says, sixteen hundred and seventy-two dollars, together with the surplus then apportioned by the society, which surplus, the plaintiff says, then was, or ought to have been, eight hundred and thirty-six dollars. Upon refusal of the society to pay the claim, this suit was brought, the writ being dated August 7, 1912.

The policy in the case contains the words, "In consideration of the written and printed application for this policy, which is hereby made a part of this contract," and the first controversy is whether the application is to be admitted in evidence and whether certain stipulations contained in the application are to be given any weight or consideration in determining the rights of the parties in this action. The plaintiff cites R. S., ch. 49, sec. 104, "Nor shall any such company, or any agent, sub-agent, broker, or any other person, make any contract of insurance, or agreement as to such contract, other than as plainly expressed in the policy." Since the application was not "plainly expressed in the policy" the plaintiff urges that it cannot be introduced in evidence or be regarded as any part of the contract between the parties. This act was passed by the Legislature of 1891 and was approved April 2, 1891. The policy in question, being dated October 29, 1891, was issued after this act became effective. The sentence above quoted, and relied upon by the plaintiff, is only part of the act. By reference to the original

we observe its title to be, "An act to prohibit discrimination in life or endowment insurance policies." The entire act is as follows:

"Section 1. No life insurance company doing business in this state, shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and expectation of life, in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts which it makes. Nor shall any such company or any agent, sub-agent, broker, or any other person, make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon. Nor shall any such company or agent, sub-agent, broker, or any other person, pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable in the policy; or any special favor or advantage in the dividends or other benefit to accrue thereon; or any valuable consideration or inducement whatever, not specified in the policy contract of insurance.

"Section 2. Any person or corporation violating any provisions of this act shall be fined not more than two hundred dollars; and it is hereby made the duty of the insurance commissioner, on the conviction of any person acting as such agent, sub-agent, or broker, to revoke the certificate of authority issued to him at once, for the term of one year."

Thus it may be properly inferred that rebating and discrimination in the insurance business had reached such conditions and had assumed such proportions as to become an evil worthy to be deemed a statutory misdemeanor, and of such grave import as to not only call for punishment in the way of a fine but also for a suspension of a civil privilege for a year. It was plainly the intent of the Legislature to provide against secret agreements regarding rebates and discrimination that inspired the act of 1891 upon which plaintiff relies, but of which he only quotes a portion. In drafting contracts it is a long established practice, sanctioned by the common law, to refer to some other existing document or writing specifically, and make it, by such reference, a part of the contract thus being drafted. The contention of the plaintiff is that in case of insurance contracts or policies this practice is forbidden with reference to any and all

elements of the contracts between the parties. We cannot adopt the view that the Legislature intended a provision so far reaching as that claimed by the plaintiff, but rather the intention was that no agreement should be made regarding rebates or discriminations in the insurance contract unless the same was "plainly expressed in the policy." This act was construed in *State* v. *Schwarzchild,* 83 Maine, 261, where Mr. Justice Haskell says: "The true construction of the act of 1891, chap. 281, is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in the policies, and to accord to none any other." This construction is in harmony with the view for which we are now contending.

The defendant also argues that the application in this case is for a policy other than the one the plaintiff holds, but the real controversy demands a broad view and we are not disposed to give great weight to this argument, since the case clearly shows that the policy upon which the plaintiff relies was in fact issued as a result of the application in question.

Believing that we have declared the true meaning of the Legislature in the act of 1891, as applied to this case, and that if the law making body had intended such a fundamental charge as that contended for by the plaintiff, or would abrogate an established and convenient method of legal precedent, it would have used language leaving no room for doubt, we admit the application as a part of the contract between the parties in this case.

The list of privileges in the policy already referred to, providing for a paid-up policy, must therefore be examined in connection with the application. In the latter, under the heading "Privileges," we find, "If premiums upon the policy, for not less than three consecutive years of assurance, shall have been duly received by the society, and default shall be made in payment of a subsequent premium, the policy may be surrendered for a non-participating, paid-up policy, for the entire amount which the full reserve on the policy, according to the present legal standard of the State of New York will then purchase as a single premium, calculated by the regular table for single premium policies, now published by the society; providing, that the policy be returned to the society duly receipted within six months after the date upon which the last

premium in default has fallen due; otherwise the policy shall cease and determine and all premiums paid thereon shall forfeit to the society." The receipted policy not having been returned within such six months, and no such paid-up policy having been obtained, the defendant society says that the plaintiff has no cause of action. To this the plaintiff replies by citing *Chase* v. *Phoenix Mutual Life Insurance Co.,* 67 Maine, 85, and by calling attention to the statements of Mr. Hazelton, already quoted herein, and to R. S., chap. 49, sec. 93, by virtue of which he says that agents of an insurance company are to "be regarded as in the place of the company in all respects" and also that "the company is bound by their knowledge of the risk and of all matters connected therewith."

Before we compare the case at bar with *Chase* v. *Insurance Company,* supra, it may be observed that it has been claimed that in the latter case, decided more than thirty-six years ago, our court announced a position which was out of harmony with that taken by nearly all the other state courts in this Union, and out of harmony with that taken by the Supreme Court of the United States. We believe that those who make such a claim did not give the opinion in that case a careful and discriminating examination. As we shall endeavor to show, that case is in harmony with the views of other courts whose opinions are entitled to respect and will sustain our final conclusion upon the points now under discussion. In that case the policy contained the following: "It being understood and agreed that if after the receipt by the company of not less than two or more annual premiums, this policy should cease in consequence of the non-payment of premiums; then upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums." In that case three annual premiums only were paid, the last payment being in December, 1869. Chase died December 28, 1873, not having surrendered his policy within the twelve months from the time when he ceased to pay premiums. The court gave judgment against the company and it has been held by critics of this judgment that our court did not give full force and effect to the twelve month provision for return of the policy as a pre-requisite to maintaining an

action against the company. Those who so criticize seem to have over-looked a second provision in the Chase policy, distinct from the provision just above quoted which was as follows: "If the said premiums shall not be paid at the office of the Company, in the city of Hartford, Conn., or to an agent of the company, on his producing a receipt, signed by the president or secretary on or before the date above mentioned, then, in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments made as above specified, and this policy shall cease and determine." Mr. Justice Barrows, speaking for the court in the Chase case, after referring to the label on the policy as being "non-forfeiting," said: "Stipulations for a forfeiture in a policy thus labeled should be strictly construed. We do not think the second express condition should be so construed as to make the right of the insured to recover such part of the sum as is 'proportionate with the annual payments' which have been made, dependent upon the surrender of the policy within twelve months after the first failure to meet an annual payment and upon the reception of a new policy. If such had been the design of the provisions respecting the issue of new policies, it would have been easy to say so. But there is no such stipulation. The terms upon which the company will issue paid-up policies, (which the insured would doubtless find more convenient and available to be used, as they often are, as security for a loan) are stated by themselves. There is no necessary connection between them and the second express condition, nor any thing to indicate that the limited liability recognized in that condition is to be ignored unless the insured surrenders the old and takes out a new policy. The meaning and effect of that condition seems to be that a failure to pay one of the annual premiums on or before the day specified will put an end to the contract for the whole sum, at the option of the insurers; and thereafterwards they will be liable only for such proportion thereof as the payments previously made bear to the whole amount of the premiums stipulated for." The able jurist further declared that it was upon "such a policy as this" that he based his views, and it is plain to be seen that judgment for the plaintiff in that case was the result of the second condition expressed in the policy and that the provision for a paid-up policy at the end of

twelve months after failure to pay premiums was not over-looked or ignored, but on the other hand its full import was carefully considered. Now turning to the policy and application in the case at bar we find a contract differing from that in the Chase case in several particulars. The policy *and application* in the present case "provides for a paid-up policy after three years for as many twentieths of the original policy as complete annual premiums have been paid," but also provides that if "default shall be made in payment of a subsequent premium, the policy may be surrendered for a non-participating, paid-up policy," and adds "providing, that the policy be returned to the society duly receipted within six months after the date upon which the last premium in default has fallen due; otherwise the policy shall cease and determine and all premiums paid thereon shall forfeit to the society." Neither in this policy or application are to be found the second condition such as appeared in the Chase policy and upon which the court ordered judgment against the insurance company. It would seem that the plain terms of the contract in the case at bar, and the failure of the plaintiff to observe the terms imposed upon him by that contract would be decisive of the rights of the parties in this case unless some other element successfully intervened.

That such an element did intervene, is now claimed by the plaintiff, by virtue of the alleged assurances of Mr. Hazelton and by virtue of the statute, R. S., chap. 49, sec. 93. Of this statute also the plaintiff only quotes a portion, the entire section reading as follows:

"Section 93. All notices and processes which, under any law, by-law or provision of a policy, any person has occasion to give or serve on any such (foreign insurance) company, may be given to or served on its agent, or on the commissioner, as provided in the preceding section, with like effect as if given or served on the principal. Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescription known to the agent shall be regarded as known by the company, and waived by it as if noted in the policy." Under this statute, the plaintiff claims that the statments of Mr. Hazelton,

as agent of the company, are not only admissible in evidence, but that they constitute a waiver on the part of the defendant society to claim a return of the old policy, or act as an estoppel against the society to now deny liability on the ground that plaintiff had not complied with the terms of the contract.

This latter act upon which the plaintiff relies was adopted by the Legislature in 1870. We have examined with some care each case brought before this court, since that time, in which this statute has been examined and construed. In a large majority of those cases the contention has been with reference to the knowledge on the part of agents regarding the risk when the application for insurance was made. One case, however, *Day* v. *Insurance Co.*, 81 Maine, 244, seems to be decisive of the contention now under consideration. In that case, the policy required proof of loss to be submitted within a certain time after the fire, which was not done. In excuse for not doing so the plaintiff introduced a letter from an agent of the company containing these words "Make no move in the Day case until I see you." Defendant took exceptions to the admission of the letter and also to the following instruction given by the presiding Justice at nisi prius: "I say then further, if that letter was written by Mr. Robinson (the agent) for and in behalf of the company, and was by authority of the company, because what I am speaking of now must come from the company itself, and if from the other testimony, you are satisfied that there were negotiations going on between these parties from the time, or very near the time, within thirty days of the time of the loss, continued up to that time, that would be a waiver of notice entirely." The exceptions to the admission of the letter from the agent and to the above instructions were overruled. In that case Mr. Justice Walton, for the court said: "It is claimed that the letter was inadmissible because, by the terms of the policy it was declared that no act of any agent of the company, other than its secretary or president, shall be construed or held to be a waiver of a full and strict compliance with all the provisions of the policy. The policy does contain such a provision. But we have no hesitation in declaring the provision illegal and void. Previous to the enactment of our present insurance law, policies had become so loaded down with provisos, limitations and conditions that in many cases they secured to the insured nothing

better than an unsuccessful law suit in addition to the loss of his property. And one of the purposes of our present statute was to put an end to this evil. The statute declares that the agents of all insurance companies, foreign or domestic, shall be regarded as in the place of the company *in all respects,* regarding any insurance effected by them; and that all provisions contained in any policy in conflict with any of the provisions of said chapter shall be null and void. We think these provisions should not be limited in their application to the agents through whom insurance is effected, or to those whose names are borne upon the policies. We think they were intended to apply to all the agents of insurance companies; to agents appointed to investigate the circumstances attending fires and to adjust losses as well as to those through whom the insurance is effected."

In the case at bar, under the authority of *Day* v. *Insurance Co.,* supra, it must be declared that the provisions of the policy, "No person except one of the executive officers named above is authorized to make, alter or discharge contracts or waive forfeitures" is "illegal and void," and the act of Mr. Hazelton, was not only a waiver of the requirement to return the old policy but that the defendant company is bound by that waiver. In accordance with the stipulation in the report the entry must be,

Action to stand for trial.

ELIJAH T. POND *vs.* MARCELLUS L. HUSSEY et als.

Piscataquis. Opinion December 16, 1913.

Action. Commissioners. Improvements. Partition. Real Action. Revised Statutes, Chapter 106, Section 24.

Petition for partition of real esate. In 1905, the petitioner brought a real action in Supreme Judicial Court for Piscataquis County against these defendants to recover same land. In that action the defendants filed a written claim to compensation for buildings and improvements, on the premises, and a request for an estimation by the jury, and the plaintiff filed a request in writing that the jury would also estimate what would have been the value of the premises at time of trial if no buildings had been erected. By agreement of parties three persons were appointed to ascertain the value of the buildings and improvements on the land, etc.

Held:

1. When the parties agree that the value of the building and improvements on the land shall be ascertained, by persons named on the record for that purpose their estimate is equal in its effect to a verdict.

2. After verdict, the demandant may elect to abandon the premises to the tenant at the value estimated and have judgment against him for the sum estimated and costs.

3. When the demandant does not so elect to abandon the premises, no writ of possession shall issue on the judgment, nor a new action be sustained for the land, unless, within one year from the rendition thereof, he pays into the clerk's office, or to such person as the court appoints, for the use of the tenant, the sum assessed for the buildings and improvements, with interest thereon.

4. The demandant cannot be permitted to dieregard the proceedings had on the real action and bring another action against the same defendants to again try out his claim in that property.

5. These petitions for partition constitute a new action within the meaning of the statute, brought by this petitioner for the same premises involved in the real action.

6. Although this process is designed to establish the petitioner's legal right to possession in severalty to part of the property, all questions concerning the title of the parties and the nature and extent of their interests, are to be determined before the interlocutory judgment for partition can be made.

On exceptions by petitioner. Exceptions overruled.

This is a petition for division of certain land situate in Guilford village, in the town of Guilford, in the County of Piscataquis, and is brought under the provisions of Revised Statutes, chapter 90. In 1905, this petitioner brought a real action in the Supreme Judicial Court, Piscataquis County, against these defendants to recover this same land, which he seeks to have set out to him in severalty in these proceedings. In the real action, the defendants in this filed a written claim to compensation for buildings and improvements on the premises and a request for an estimation of the increased value of the premises by reason thereof, and the demandant in the real action, being the petitioner in this, filed a request in writing that the jury would estimate what would have been the value of the premises at time of trial, if no buildings had been erected, improvements made or waste committed. By agreement of the parties, three persons were named to fix the values as prescribed in chapter 106 of the Revised Statutes. The commissioners made their report at the September Term, 1910, and the report was accepted at same term, and no further proceedings were had, until this petition was filed for partition. The presiding Justice, on motion of defendant, dismissed the petition for partition, and the petitioner excepted.

The case is stated in the opinion.

J. S. Williams, for petitioner.

Hudson & Hudson, for defendants.

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

KING, J. Petition for partition of real estate. The petition was dismissed in the court below and the case comes up on exceptions to that ruling.

In 1905 the petitioner brought a real action in the Supreme Judicial Court, Piscataquis County, Maine, against these defendants to recover the same land which he now asks to have set out to him in severalty in these partition proceedings. In that real action, as provided for in sec. 24, c. 106, R. S., the defendants filed a written claim to compensation for buildings and improvements on the premises and a request for an estimation by the jury of the increased value of the premises by reason thereof; and the plaintiff likewise

filed a request in writing that the jury would also estimate what would have been the value of the premises, at the time of the trial, if no buildings had been erected, improvements made, or waste committed. The parties then agreed, as provided for in sec. 34 of c. 106, R. S., that the value of the buildings and improvements on the land demanded, and the value of the land, should be ascertained by certain persons named on the record for that purpose. Thereupon the case was reported to the Law Court with a stipulation that if the plaintiff was found entitled to recover, the case should be remanded to nisi prius "for assessment, by commissioners already agreed upon by the parties, of defendants' compensation for buildings and improvements under the provisions of R. S., chapter 106, section 24." Thereafter, October 8, 1909, the Law Court certified its opinion that the plaintiff was entitled to judgment for twenty-one fortieths of the premises, and remanded the case to the trial term for the assessment of defendants' compensation for buildings and improvements, in accordance with the stipulation of the report. The commissioners then ascertained and determined the value of the buildings and improvements on the land demanded, and also the value of the land, all as required by their warrant, and made their report thereof to the court, which report was accepted by the court at its September Term 1910. Nothing further was done by the plaintiff respecting that real action, and on September 11, 1911, he began this petition for partition, claiming to be seized in fee simple of said twenty-one fortieths of said land, and to be entitled to have the same set out to him to hold in severalty.

In a real action, when a request therefor is made, the jury shall make and state in their verdict their estimate of the increased value of the premises by reason of buildings and improvements made thereon by the tenant, and also their estimate of what would have been the value of the premises at the time of the trial if no buildings had been erected, improvements made, or waste committed. Sec. 24, c. 106, R. S. When the parties agree that the value of the buildings and improvements on the land demanded, and the value of the land, shall be ascertained by persons named on the record for that purpose, their estimate "is equal in its effect to a verdict." Sec. 34, c. 106, R. S.

After such verdict the demandant may elect (Sec. 26, c. 106, R. S.) to abandon the premises to the tenant at the value estimated by the jury and have judgment against the tenant for the sum so estimated, and costs. But if he does not so elect his rights under the real action, and in the premises, are limited and controlled by the provisions of sec. 31 of said chapter 106, which reads as follows:

"When the demandant does not elect so to abandon the premises, no writ of possession shall issue on his judgment, nor a new action be sustained for the land, unless, within one year from the rendition thereof, he pays into the clerk's office, or to such person as the court appoints, for the use of the tenant, the sum assessed for the buildings and improvements, with interest thereon."

After the persons named on the record in the real action by agreement to ascertain the value of the buildings and improvements on the land demanded, and the value of the land, reported their estimate thereof, and the same was accepted by the court, there was in effect a verdict in the real action, which stated, on the one hand, the increased value of the premises by reason of the tenants' buildings and improvements thereon, and on the other, the value of the land at the time of the trial without the improvements. That verdict qualified and limited the demandant's title in his twenty-one fortieths of the land, by establishing an interest therein in favor of the tenants by virtue of the buildings and improvements made on the land by them or those under whom they claimed. He then had, under the provisions of the statute, the option, either to have judgment against the tenants for the value of the land at the time of the trial, as stated in the verdict, independent of the tenants' improvements, or to have the premises including the improvements, upon paying the sum stated in the verdict as the increased value of the premises by reason of the improvements. That verdict stands unreversed, and it controls the demandant's rights in the premises as between him and the defendants in that action. Obviously he cannot be permitted to disregard that verdict and bring another action against the same defendants to again try out his claims to that property. And, moreover, it is the express prohibition of the statute, that "no writ of possession shall issue on his judgment, *nor a new action be sustained for the land,*" when the demandant does not so abandon the premises, unless he pays the assessed value of

the improvements within the one year specified in the statute. Sec. 31, c. 106, R. S. above quoted.

The partition proceedings constitute a new action, within the meaning of the statute, brought by the petitioner for the same land involved in the real action. Although this process is designed to establish the petitioner's legal right of possession in severalty to a part of the property, nevertheless all questions concerning the title of the parties and the nature and extent of their interests, are to be determined before the interlocutory judgment for partition can be made. *Allen* v. *Hall,* 50 Maine, 253, 263. Those questions have already been adjudicated in the real action, under which the petitioner might have taken judgment for the possession of the twenty-one fortieths of the land by paying the sum therein assessed for the tenants' improvements thereon.

But that he has elected not to do, and to permit him now to recover in a new action for partition the same premises, would not only violate the express prohibition of the statute, but also defeat its manifest intention, which withholds from him the fruits of his judgment in the real action, if he does not, within the year, extinguish the adjudicated interest which the tenants have in the property by reason of their improvements thereon. *Gilman* v. *Stetson,* 18 Maine, 428. See also *Thorndike* v. *Spear,* 31 Maine, 91.

It is therefore the opinion of the court that the petition for partition was rightly dismissed as not being sustainable.

Exceptions overruled.

MARY I. L. ADAMS, in Equity, *vs.* JOHN O. LEGROO et als.

Franklin. Opinion December 16, 1913.

Bequests. Codicil. Construction. Intention. Remaindermen. Renunciation. Sequestration. Waiver. Will.

By the will dated November 23, 1905, the testatrix made several pecuniary bequests aggregating about $1500, including a small bequest to her husband and gave the residue of her estate to her nephews named. May 24, 1910, she made a codicil, in which the testatrix gave in trust to a person named, $2000, to be invested by the trustee, and if her husband survived her, the income thereof and so much of the principal as should be necessary for his comfortable maintenance and support was to be used for that purpose, and at his decease, if any of said fund remains unexpended, she gave to certain persons named. The testatrix died without issue. Her husband waived the provisions for him in the will and codicil, taking one-half of the estate, which was about $4000.

Isabel Pratt, a legatee in the will for $200, died before the death of the testatrix.

Held:

1. In construing the will and codicil in the light of the situation and circumstances of the testatrix, when the codicil was made, it is the opinion of the court that she intended that the pecuniary bequests in her will should be paid and that she regarded these bequests superior to the provisions that any unexpended balance of the trust fund remaining at the death of her husband was to go to the persons therein named.
2. That the intention of the testatrix that the pecuniary bequests in her will should be paid, can and should be carried out by using so much of the trust fund as may be necessary therefor to pay those bequests made in the will.
3. That the interest of the remaindermen in the trust fund takes precedence of the interest of the residuary legatees in the will.
4. If the net estate left after the husband's share is taken out, is in excess of the $2000 trust fund, that excess will be applied to the payment of the pecuniary bequests, and then the trust fund must contribute enough to satisfy the balance of the pecuniary bequests, and what remains of the trust fund will belong to the remaindermen named in the codicil.
5. The bequest to Isabel Pratt lapsed as she died before the death of the testatrix, and was not related to her by blood.

On report. Decree according to the opinion.

This is a bill in equity for the construction of the will and codicil of Relefa Legroo, brought by the executrix thereof. All of the parties defendant filed answers admitting the various allegations in the bill in equity, and replications thereto were filed. At the conclusion of the hearing before the presiding Justice, the case was reported to the Law Court upon the following stipulation: "In this case, the Justice hearing the same being of the opinion that questions of law are involved of sufficient importance and doubt to justify the same, and the parties agreeing thereto, the case is reported to the Law Court for determination."

The case is stated in the opinion.

Joseph C. Holman, for plaintiff.

C. N. Blanchard, Currier C. Holman, and Frank W. Butler, for defendants.

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

KING, J. The questions presented center about the effect to be given to the codicil to the will of Relefa Legroo in view of her husband's waiver of the provisions therein made for him.

By the codicil the testatrix gave in trust to a person therein named the sum of $2000 to be invested by the trustee and, if her husband survived her, the income therefrom, and so much of the principal as should be necessary for his comfortable maintenance and support, was to be used for that purpose, and at his decease, "if any of said fund remains unexpended, then I give, bequeath and devise the balance of the same" to certain persons therein named.

The husband's election to waive the provisions made for him and take his share of the estate under the statute affects materially the other legatees having bequests under the will; in fact his share of the estate is practically all there is of it except the amount required for the trust fund, and if that fund is to be preserved intact for the remaindermen named in the codicil, notwithstanding the husband's waiver, then the other bequests in the will cannot be paid in whole or in part. Is such an effect the necessary result of the waiver?

We think it cannot be held that the husband's waiver abrogated all the provisions of the codicil so that the trust fund therein created

was ipso facto destroyed. There was a gift over of any balance of the trust fund remaining unexpended at the husband's death, and therefore, others had an interest therein, contingent though it was. And it is a well settled principle that a waiver by a husband or wife of a testamentary provision annuls so much thereof only as the person waiving it had a personal interest in, leaving the force and effect of the rest of the provision to be determined with a proper consideration for the interests of the other legatees and devisees under the will in view of the diminished state of the testator's property as a result of the waiver.

Generally the extinction of the first interest carved out of an estate accelerates the right of the second taker, and lets him into the immediate enjoyment of the estate. But it is not an unyielding rule that remaindermen, under a testamentary provision for a husband or wife which has been waived, are entitled to the gift over irrespective of the effect of the waiver upon other bequests and legacies contained in the will. Except as the waiver necessarily modifies it, the will is to be given effect as nearly as possible according to its terms to carry out the intention of the testator. The courts have carefully refrained from permitting such an election to affect the other testamentary dispositions made in the will, except so far as necessarily results from the waiver, holding that the bequests to other legatees are to have full force and effect so far as any estate remains from which they may be paid. *Firth* v. *Denny,* 2 Allen, 468, 470; *Blandenburg* v. *Thorndike,* 139 Mass., 102, 104; *Fox* v. *Rumery,* 68 Maine, 121, 129.

And the doctrine is well recognized, that a renounced testamentary provision for husband or wife may be sequestered for the benefit of legatees or devisees whose portions have been diminished as a result of the renunciation. This doctrine is a qualification of the general rule that a gift over shall take effect upon the termination of the particular estate or interest, however such termination is effected, by holding that the rule must yield to an obvious intention to the contrary deduced from the manifest purpose of the testator in the disposition of his bounty, which it is presumed he desired to have carried out so far as possible. Hence the well

settled principle that equity will interpose, if necessity requires it, to preserve a superior or preferred intent of the testator from destruction.

The principle is thus stated in Pom. Eq. Jur. Vol. 1, sec. 517: "A court of equity will then sequester the benefits intended for the electing beneficiary in order to secure compensation to those persons whom his election disappoints." In Woerner's Law of Administration (119) the author says: "The rejection by the widow of the provisions made for her by will generally results in the diminution or contravention of devises and legacies to other parties. The rule in such case is that the devise or legacy which the widow rejects is to be applied in compensation of those whom her election disappoints." The following are some of the cases in which this doctrine has been considered and applied. *Timberlake* v. *Parish,* 5 Dana, 346; *Sarles* v. *Sarles,* 19 Abb. N. C., 322; Re Lawrence, 37 Misc., 702, 76 N. Y. Supp., 653; Sandoes Appeal, 65 Pa. St., 314; Ferguson's Estate, 138 P. St., 208, 20 Atl., 945; Vance's Estate, 141 Pa. St., 201, 21 Atl., 643; Portuondo's Estate (Pa.) 39 Atl., 1105. *Latta* v. *Brown,* 96 Tenn., 343, 31 L. R. A., 840; *Wakefield* v. *Wakefield,* 256 Ill., 296, 100 N. E., 275; *Jones* v. *Knappen,* (Vt.) 14 L. R. A., 293 and note; *Holdren* v. *Holdren,* 78 Ohio St., 276, reported also in 18 L. R. A. (N. S.), 272 with a case note in which the acceleration of remainders by reason of a widow's waiver of a testamentary provision in her behalf, and the doctrine of the sequestration of such a renounced provision, are considered and the authorities collated. The author of the note says: "It has been almost always held that such a sequestration will take place for the benefit of specific or general legatees or devisees the provision for whom has been affected by the widow's election." The controlling doctrine announced in these authorities, and, as we think, supported by the weight of authority, is that the renounced provision should be used to compensate as far as may be, the devises and legacies diminished by such renunciation, on the principle that equity will depart from the literal provision of a will when necessary in order to carry out a superior intent of the testator, which would otherwise fail.

Applying this doctrine to the case at bar what is the necessary conclusion?

The will and codicil are to be read together as one instrument, and effect is to be given to the intent of the testatrix to be ascertained from the words she used read in the light of the circumstances under which she employed them, provided that in so doing no fixed and unyielding rule of construction is violated.

In her will dated November 23rd, 1905, the testatrix made the following pecuniary bequests to others besides her husband: to the Methodist Episcopal Church of Wilton, $600; to Mary Ellen Pratt, widow of Albert Pratt, $50; to Hattie Littlejohn, the adopted daughter of Albert and Mary L. Pratt, $25; to her brother, Francis C. Pratt, $25; to Isabel Pratt, wife of her brother Francis, $200; to her niece, Etta Pratt, $200; to her step-daughter, Mary I. L. Adams, $100; to two children of her step-daughter, $100 each; to Norris E. Adams, $50.

On May 24, 1910, about six months before her death, she made the codicil. Her estate of about $4000 net consisted of rights and credits. It is to be presumed that when she made the codicil she knew the amount of her estate, and knew that her husband by law would be entitled to one-half of it, she being childless. In that situation and under those circumstances she made the codicil, providing therein the trust fund of $2000 all of which was to be used, if necessary, for her husband's support during his life. Her estate was abundant for that trust fund and for the payment of all the pecuniary bequests contained in her will, leaving a material sum for the residuary legatees. By the codicil she did not revoke or alter any of those pecuniary bequests to others contained in her will, but on the other hand, we think, the language of the codicil, "Prior to any of the gifts and bequests in my said will I hereby make the following," recognizes and retains the gifts and bequests of the will.

Construing the will and codicil in the light of the situation and circumstances of the testatrix when the codicil was made we have no doubt that she intended that the pecuniary bequests in her will should be paid, and that she regarded those bequests as superior to the provision of the codicil that any balance of the trust fund remaining unexpended at the husband's death was to go to the persons therein named.

Her husband's election to take under the statute against the will and codicil withdraws one-half of the estate from the operation of

the provisions of the will, the effect of which necessarily is, unless otherwise controlled, to wholly defeat the pecuniary bequests in the will contrary to the obvious superior intent of the testatrix. Such a result should be prevented if possible, and it may be done, under the equitable doctrine of sequestration herein stated, by using so much of the trust fund as may be necessary to pay the pecuniary bequests. And it is the opinion of the court that so much of the trust fund as may be found necessary is to be used for that purpose.

The fifth clause of the will is as follows: "I give and bequeath to Isabel Pratt, wife of Francis Pratt, the sum of two hundred dollars." This legatee died before the death of the testatrix, and she was not related to her by blood. Accordingly her legacy lapsed. *Kenniston* v. *Adams,* 80 Maine, 290; *Farnsworth* v. *Whiting,* 102 Maine, 296.

We have herein stated that the husband's waiver did not wholly abrogate all the provisions of the codicil. The provisions for the remaindermen therein named, though yielding to what we have found to be the superior intent of the testatrix that the specific pecuniary bequests to other legatees should be paid, is to be given effect so far as practicable. And we are of opinion that the interest of the remaindermen in the trust fund takes precedence of the interest of the residuary legatees in the will. In other words, if the net estate left after the husband's share is taken is in excess of the amount of the $2000 trust fund that excess will be applied to the payment of the pecuniary bequests and then the trust fund must contribute enough to satisfy the balance of the pecuniary bequests, and what then remains of the trust fund will belong to the remaindermen named in the codicil.

And we think the remaindermen are entitled to receive at once the balance of the trust fund under the doctrine of acceleration, for no contrary intention on the part of the testatrix is discoverable, and the persons who are to receive it are all specified and determined by the codicil. The authorities seem unanimous that, in the absence of a controlling equity or an express or implied provision in the will to the contrary, the renunciation by the first taker of his interest that is carved out of an estate, accelerates the interest of the second taker and lets him into the immediate enjoyment of it. *Fox* v. *Rumery,* 68 Maine, 121. See note to *Holdren* v. *Holdren,* 18 L. R. A. (N. S.) 272.

In the foregoing opinion all the questions presented have been answered, and it does not seem necessary to further summarize them. The costs of these proceedings, including a reasonable counsel fee for complainant's attorney, may properly be decreed a charge upon the estate.

Decree according to the opinion.

JOSEPH BRUZAS *vs.* PEERLESS CASUALTY COMPANY.

Cumberland. Opinion December 18, 1913.

Accident. Disability. Exceptions. Indemnity. Insurance. Notices. Policy. Physician. Premium. Waiver.

In an action of assumpsit on a policy of accident and illness indemnity, it appeared that the plaintiff took out his policy on January 5, 1911, covering the period until February 1, 1911, and paid the premium therefor in advance; that subsequent premiums were due and payable monthly in advance on the first day of each month; that the plaintiff continued to make these monthly payments, sometimes in advance, but often when overdue, the premium for June being paid on May 8; for July on July 24; for August on August 5; for September on September 5; for October on October 3; and for November, in advance on October 29.

The plaintiff fell ill and ceased work on June 24. He consulted a physician for the first time on July 5. From that date until October 1, he was necessarily and continuously confined within the house and regularly visited by a legally qualified physician at least every seven days. From October 1, he was convalescent but unable to work.

Held:

1. That for the period between June 24 and July 1, the plaintiff is not entitled to recover because the condition in the policy that the assessed must be "necessarily and continuously confined within the house" was not fully met; and for the further reason that he was not "therein regularly visited by a legally qualified physician," as required by the policy.

2. That for the period from July 1 to July 5 the plaintiff cannot recover because of the same lack of medical attendance.

3. That for the period from July 5 to July 24, the plaintiff can recover full indemnity at the rate of $25 per month, even though the renewal premium, due July 1, was not paid until July 24. The company waived the condition of forfeiture for non-payment of premium in advance by accepting and retaining it when overdue. It could not accept and retain the premium and still be free from liability.

The provision, "nor shall the acceptance of any overdue premium or premiums constitute a waiver of the requirement that all renewal premiums be paid in advance as specified in the contract," refers to a waiver affecting the future and not the past.

4. That for the period from July 24 to October 1, the plaintiff is entitled to full indemnity.

The provision "if the payment of renewal premium shall be made after the expiration of this policy or of the last renewal receipt, neither the assured nor the beneficiary will be entitled to recovery . . . for any illness originating before the expiration of thirty days after the date of such renewal payment," does not apply because the plaintiff's illness did not originate within thirty days after the payment but many days before.

5. That for the period from October 1 to December 1, the plaintiff is entitled to half indemnity, at the rate of twelve dollars and fifty cents per month.

On exceptions by the defendant. Exceptions overruled.

This is an action of assumpsit on a policy of accident and illness indemnity insurance, heard before the Judge of the Superior Court of Cumberland County without a jury on an agreed statement of facts. This policy was issued to the defendant on January 5, 1911, in consideration of one dollar and seventy-five cents, paid by him, insuring him against accident and illness until February 1st following, and for such further period as premiums should be made thereon in accordance with the terms of the policy. Plea, general issue. The Judge, before whom the case was heard, found for the plaintiff in the sum of $71.00, and the defendant excepted.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

Charles G. Keene, for defendant.

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

CORNISH, J. Action of assumpsit on a policy of accident and illness indemnity insurance.

On January 5, 1911, the defendant issued a policy to the plaintiff insuring him, in consideration of a premium of one dollar and seventy-five cents paid, against accident and illness until February 1st, following, and for such further period as premium payments should be made thereon in accordance with the terms of the policy. These premium payments were payable monthly in advance and were due on the first day of each month for the month ensuing.

The plaintiff continued to make the monthly payments, sometimes in advance but often when overdue. The renewal premium due June 1, was paid in advance on May 8; that for July, on July 24; for August on August 5; for September, on September 5; for October on October 3; and for November, in advance, on October 29.

According to the agreed statement of facts, "The plaintiff on the 24th day of June 1912, became ill and ceased work, believing that a rest would restore his strength, not suffering any great amount of pain, but being weak. He rested until the fifth day of July, A. D. 1912, at which time his condition not improving, he consulted a physician. From this date until October first, 1912, he was necessarily and continuously confined within the house and therein regularly visited by a legally qualified physician at least every seven days. From the first day of October, 1912, to the first day of December, 1912, while convalescent, he was unable to work and not continuously confined to the house, entitling him to partial benefits if the referee should find this action can be maintained. The case was diagnosed as walking typhoid fever. The plaintiff gave all proper notices and affirmative proof to the defendant as provided for by the policy, and filed with the defendant at proper times all certificates, notices, reports, etc., required under the terms of the policy. The plaintiff was wholly and continuously disabled, suffering from walking typhoid fever, a disease which requires regular attendance by a physician, from the twenty-fourth (24) day of June, A. D. 1912, to the fifth (5) day of July, A. D. 1912; but the said plaintiff was not attended by any physician from said twenty-fourth (24) day of June, to said (5) day of July, A. D. 1912."

Upon this agreed statement the presiding Judge, who heard the case without the intervention of a jury, rendered judgment in favor of the plaintiff in the sum of seventy-one dollars and the defendant alleged exceptions.

It being uncontroverted that the plaintiff took out his policy on January 5 and made payment thereafter of each renewal premium for a period of ten months, although not always on the prescribed date, in other words paid premiums for insurance from January 5 to December 1, all of which sums the defendant accepted, retained and still retains; it being also admitted that the plaintiff fell sick on June 24th and was "necessarily and continuously confined within the house and therein regularly visited by a legally qualified physician from July 5 until October 1," and was convalescing but unable to work from October 1, to December 1, it would seem as if he should be entitled to some of the benefits for which he was paying, and the inquiry naturally arises, what can be the grounds on which the company resists all liability?

The defendant divides the whole term of the plaintiff's disability, June 24, to December 1, into five component parts, and discusses each separately. We will follow the same order.

1. PERIOD FROM JUNE 24, TO JULY 1.

The renewal premium for the entire month of June having been paid in advance on May 8, the policy was admittedly in force on the day the plaintiff fell sick, June 24. The agreed statement recites that during this period of seven days the plaintiff "was wholly and continuously disabled, suffering from walking typhoid fever," while the condition of the policy, Article 13, is that he must be "necessarily and continuously confined within the house." The condition of the policy is not fully met, and the agreed statement does not rise to the policy requirement, which is a condition precedent to the right of recovery. *Dunning* v. *Mass. Mut. Acc. Assn.*, 99 Maine, 390.

Moreover, the policy further requires, not only necessary and continuous confinement within the house, but also "and therein regularly visited by a legally qualified physician" and regular visitation is defined by another clause in the policy to be "at least once every seven days." It is conceded that a physician was not called until July 5, and therefore this condition precedent was not complied with. For these two reasons, the plaintiff cannot recover for this period, June 24 to July 1.

2. PERIOD FROM JULY 1, TO JULY 5.

No physician was in attendance during this period, and for that reason as already stated the plaintiff is barred from recovery.

3. PERIOD FROM JULY 5, TO JULY 24.

During this time the requirement in regard to attending physician was complied with, but the defendant contends that the insurance was not in force because the renewal premium due and payable July 1, was not paid until July 24, and the policy had thereby been forfeited. This contention cannot be sustained under the facts in this case. The company not only accepted and retained this premium when overdue, but in like manner accepted and retained overdue premiums for the months of August, September and October, and then on October 29, accepted the advance premium for the month of November. This constituted a waiver on the part of the company so that the policy was kept continuously in force. The company having full knowledge of the facts, had the option either to treat the policy as lapsed and decline further premiums or to accept the overdue premium and thereby treat it as subsisting. It could not accept and retain the premium and still be freed from liability. The premiums it retains must be on living not on dead policies. The lapse of a policy for non-payment of premiums is waived by the insurer's acceptance of either the overdue or subsequent premiums paid under the policy. This is settled law. *Lally* v. *Ins. Co.*, 75 N. H., 188; *White* v. *McPeck*, 185 Mass., 451; *McNicholas* v. *Ins. Co.*, 191 Mass., 304; *Williams* v. *Relief Assn.*, 89 Maine, 158.

It is true that the policy contains this provision, "Nor shall the acceptance of any overdue premium or premiums constitute a waiver of the requirement that all renewal premiums be paid in advance as specified in the contract." This in no way conflicts with the rule just stated. The acceptance of overdue premiums does not of itself work a waiver of future prompt payments, but it is a waiver of the condition so far, and so far only, as covered by the overdue payments themselves. It affects and must affect the past, but not necessarily the future. *Crossman* v. *Mass. Benefit Assn.*, 143 Mass., 435. This is the true construction and limitation of this clause in the policy. To permit it to go further would be contrary to public policy in allowing an insurance company to receive the money of its patrons and to give them nothing in return, thus perpetrating a fraud. It follows that this policy was valid from

July 5 to July 24, and the plaintiff is entitled to full indemnity at the rate of twenty-five dollars per month during that time.

4. PERIOD FROM JULY 24 TO OCTOBER 1.

For the reasons just stated, this policy was in force during this entire time, the acceptance of the several premiums having worked a waiver of the forfeiture.

But the defendant now calls attention to another condition, which reads as follows, "The acceptance of any renewal premium shall be optional with the company, and if the payment of renewal premium shall be made after the expiration of this policy or of the last renewal receipt, neither the assured nor the beneficiary will be entitled to recovery . . . for any illness originating before the expiration of thirty days after the date of such renewal payment." The first sentence of this condition is of general application and gives the company the right to terminate the insurance at the expiration of any premium period. That point is not involved here.

Under the remainder of the provision the defendant argues that as the illness from which the plaintiff was suffering not only originated before the expiration of thirty days after the date of the renewal payment, July 24, but actually originated on June 24 which was thirty days before the date of the renewal payment, the plaintiff is precluded from recovering. This contention is in effect that if the illness shall be contracted within thirty days after the delayed renewal premium is paid, or had originated at any time previous to such payment, yet the company is relieved. During all this time the insured may have been making his payments, and have been laboring under the conviction that he was insured, and yet the subsequent acceptance of an overdue premium by the company would, on this theory, nullify it all. This, of course, cannot be.

Nor is this the fair import of the language. It is, "any illness originating before the expiration of thirty days after the date of such renewal payment." That is, within thirty days after such payment. The date of payment is the initial point of reckoning, and the contemplated period is thirty days subsequent thereto. The past is not taken into consideration. This is the construction which would be placed upon this condition giving the words their ordinary signification. If, as the defendant contends, such was not the inten-

tion of the company but it was designed to embrace a period prior to the payment as well as subsequent thereto, the company has failed to make that intention clear. The most that could be claimed is that the language is ambiguous and if so it falls within the familiar rule of construction that it shall be taken most strongly against the insurer, whose language it is. Applying this construction, it will be readily seen that this clause in no way affects the policy. The illness did not originate within thirty days after July 24, the date of the delayed renewal payment but had already originated on June 24, thirty days before. That being so, the liability of the company can not be avoided by the clause in question.

It is to be further observed that when the company accepted the overdue payment on July 24, it must already have been informed of the plaintiff's illness, because he fell ill on June 24, and under another provision of the policy it was his duty to give written notice to the company of such illness, within twenty days from the beginning of the illness. The agreed statement does not show the precise day on which notice was given, but it doubtless was prior to the expiration of that twenty days, otherwise that defence would have been set up in this case. Even the extreme limit of twenty days viz. July 14, was ten days prior to the acceptance by the company of this overdue premium, so that it accepted the premium having full knowledge of his illness. Under these circumstances it might with reason be held that it waived this provision of the policy which it now invokes. The defendant is plainly liable for the full indemnity between July 24 and October 1.

5. Period from October 1, to December 1.

During the period of convalescence, the plaintiff was entitled to half indemnity unless some tenable defence prevents. The only objection made to this is the one already discussed under item 4. The defendant seeks to project the attempted defense to the period of total disability forward into the period of convalescence. Had it been good there, it would have been good here; but having failed there, it also fails here.

Our conclusion, therefore, is that the plaintiff is entitled to recover at the rate of twenty-five dollars per month from July 5 to October 1, the period of total confinement under a physician's care; and at the rate of twelve dollars and fifty cents per month from October 1,

to December 1, the period of convalescence; a total of ninety-seven dollars and fifty cents. The amount found due by the presiding Judge being only seventy-one dollars, the exceptions of the defendant cannot be sustained, as the ruling was not prejudicial.

Exceptions overruled.

CITY OF ROCKLAND *vs.* LUCY C. FARNSWORTH, Ex'x.

Knox. Opinion December 18, 1913.

Administratrix. Assessors. Collectors. Debt. Identity. Jurisdiction. Property. Revised Statutes, Chapter 10, Section 31. Taxes.

In an action of debt to recover the State, county and city taxes of 1907, 1908 and 1909, assessed against the defendant, it is

Held:

1. That, "this not being a case where the defendant's person or property is levied upon by direct warrant from the assessors, but being, instead, an action for the tax, the action will not be defeated by any mere irregularities in the election of assessors or collector, or in the assessment itself, but only by such omissions or defects as go to the jurisdiction of the assessors, or deprive the defendant of some substantial right, or by some omission of an essential prerequisite to the bringing of the action."

2. That, the assessment being against "Lucy C. Farnsworth, Executrix of Estate of James R. Farnsworth" in 1907 and 1909, and against "Lucy C. Farnsworth Ex'x" in 1908, when in fact she was administratrix of the estate with will annexed, was an error made harmless by R. S., chap. 10, sec. 31.

3 That "personal estate $10,000" was a sufficient designation of the property assessed.

4. The interlineation of the tax of 1907, in the assessment record is sufficiently explained. In copying from the inventory to the assessment record this tax was evidently omitted and when the omission was discovered, it was remedied. Such errors are correctible.

5. As the duties and powers of the special administrator appointed on November 28, 1905, ceased upon the appointment of the defendant as administrator with the will annexed on January 22, 1907, the personal property of the estate was, in the eye of the law, in the legal possession of this defendant on April 1, 1907, and taxable to her, whether the special administrator had, in fact, at that time turned over the assets of the estate to her or not.
6. That the notice to taxpayers under R. S., chap. 9, sec. 73, is not a condition precedent to a valid assessment.
7. That the tax collector elected by the city government to fill the vacancies after the resignation of the collectors for 1907 and 1908 was, at least, collector de facto if not de jure, and it would seem that, under the city charter, he was collector de jure. But in this form of proceeding, whether the collector was or not legally elected is entirely immaterial.
8. That the written direction to the city solicitor instead of to the collector, to bring this suit was a compliance with R. S., chap. 10, sec. 65, and combining the taxes of three years in the one notice did not invalidate it.

On report. Judgment for the plaintiff for $655.00 and interest from December 1, 1910.

This is an action of debt brought by the City of Rockland against Lucy C. Farnsworth as executrix of last will and testament of James R. Farnsworth, who resided in said Rockland at the time of his decease, to recover for taxes assessed against her for the years of 1907, 1908 and 1909, amounting to $670.00. 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 may be legally admissible.

The case is stated in the opinion.

E. K. Gould, for plaintiff.

J. H. Montgomery, for defendant.

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

CORNISH, J. Action of debt to recover the State, county and city taxes of 1907, 1908 and 1909, alleged to have been duly assessed against the defendant, as representative of the estate of James R. Farnsworth, deceased.

As was said by this court in the recent case of *Greenville* v. *Blair,* 104 Maine, 444: "This not being a case where the defendant's

person or property is levied upon by direct warrant from the assessors, but being, instead, an action for the tax, the action will not be defeated by any mere irregularities in the election of assessors or collector, or in the assessment itself, but only by such omissions or defects as go to the jurisdiction of the assessors, or deprive the defendant of some substantial right, or by some omission of an essential prerequisite to the bringing of the action." The absence of forfeiture has given rise to this liberal rule, which is adhered to in the collection of taxes by suit.

The defendant urges the following points:

1. WRONG CHARACTERIZATION OF PERSON ASSESSED.

In 1907, the assessment is against "Lucy C. Farnsworth, executrix est. James R. Farnsworth;" in 1908, "Lucy C. Fransworth Executrix," and in 1909, "Lucy C. Farnsworth executrix estate of James R. Farnsworth." In fact she was administratrix of the estate with will annexed. So far as the years 1907 and 1909 are concerned the variance is immaterial. The identity is admitted and the intention of the assessors to assess Lucy C. Farnsworth, as legally representing the estate of James R. Farnsworth, is not controverted. This being so the error in characterization is no defence. *Farnsworth Co.* v. *Rand,* 65 Maine, 19; *Bath* v. *Reed,* 78 Maine, 276. It was an error made harmless by R. S., chap. 10, sec. 31.

The assessment list of 1908 contained simply the designation, "Executrix," without naming the estate. We do not think this is fatal. R. S., chap. 10, sec. 31, above referred to provides: "nor shall any error, mistake or omission by the assessors, collector or treasurer, render it (the assessment) void." This is construed with great liberality, because it is important that all persons and estates liable to taxation should pay their just proportion of the public charges and not escape because of harmless errors and frivolous objections.

The omission here neither goes to the question of jurisdiction nor does it deprive the defendant of any substantial right. Under the statute "the personal property of deceased persons in the hands of their executors or administrators, not distributed, shall be assessed to the executors or administrators." R. S., chap. 9, sec. 13, Par. VIII. This gives the required jurisdiction. The assessors acted within their legal rights and powers in assessing the personal estate of the late James R. Farnsworth to the legal representative.

So far as the defendant's substantial rights are concerned, they were in no wise affected by the omission in the assessment roll, of the name of the estate. The tax was a matter between the city and herself. The city knew of what estate she was executrix. The assessment of 1908 was only a repetition of the assessment of the preceding year in which the estate was named. Moreover, the inventory of the polls and estate for this same year 1908, gave the full designation "Lucy C. Farnsworth executrix estate of James R. Farnsworth." The error crept in when the transcription was made from the inventory to the assessment roll; and the statute before referred to was broad enough to cover errors of omission as well as of commission. *Tyler* v. *Inhabs. of Hardwick,* 6 Met., 470. The defendant could have had no doubt as to the estate for which she was taxed; and had she been in doubt, an examination of the city records would have given her the desired information.

The requirements are that the person shall be liable to taxation. and be in fact the person intended to be taxed under that designation. The defendant was personally liable for the tax. *Fairfield* v. *Woodman,* 76 Maine, 350; *Dresden* v. *Bridge,* 90 Maine, 489-493; and the identity was admitted. The slight omission complained of, was, under the facts of this case, entirely harmless.

2 INSUFFICIENT DESIGNATION OF PROPERTY ASSESSED.

The assessment each year was simply on "personal estate $10,000." But in this method of collection we think that is sufficient. The record shows the amount of personal estate liable to taxation to have been far in excess of the amount stated. Were is otherwise that fact would not be available to the defendant in this form of action. *Bath* v. *Whitmore,* 79 Maine, 182; *Rockland* v. *Rockland Water Co.,* 82 Maine, 188.

Her right of appeal is also gone because she had not handed in the preliminary list of taxable property which is made by law a prerequisite to such appeal. What difference does it make in this suit whether the ten thousand dollars of personal estate consisted of notes, or bonds, or cash, or a certain portion of each. She owes this debt none the less, and the characterization of that property could neither add to nor take from her legal rights; nor increase nor diminish her legal burdens. Moreover she, and not the assessors, knew of what it did consist. It is with ill grace that she complains

of the meagreness of the description when she and not the assessors had it in her power to make it accurate and complete by filing the list required by law.

In the case of assessment of tax upon real estate, neither a description of the property, nor a separate valuation in case of various parcels is necessary under like circumstances. *Tobey* v. *Wareham,* 2 Allen, 594; *Cressey* v. *Parks,* 76 Maine, 534; *Rockland* v. *Ulmer,* 84 Maine, 503; *Foxcroft* v. *Campmeeting Association,* 86 Maine, 78.

For even stronger reasons an assessment of personal property in gross should not be held to invalidate a tax. The assessors might perhaps by searching the Registry of Deeds, obtain a description of real estate, but the description of the classes of personal property owned by a tax payer is almost wholly inaccessible to them and lies in the knowledge of the tax payer. In *Dresden* v. *Bridge,* 90 Maine, 489, the personal estate was assessed and valued in gross in the original assessment and the supplemental assessment was also in gross. The court held that the former covered the latter but raised no objection to the assessment made in gross. The precise question arose in *Noyes* v. *Hale,* 137 Mass., 266, and the assessment was held valid. *Sweetsir* v. *Chandler,* 98 Maine, 145, cited by the defendant, involves a different question. The original assessment in that case specified 92 shares of National bank stock, (return of which had been made to the assessors by the officers of the bank) and "money at interest in excess of debts." A supplemental tax was afterwards laid upon certain specified bonds, stock and scrip, contained in an inventory filed in the Probate Court. The court held that the supplemental assessment for stock and scrip would lie, but not for bonds as they were included in the original assessment under the phrase money at interest. "This record shows," reads the opinion, "that money at interest was assessed and we think such an expression was broad enough to cover all forms of interest-bearing securities, whether represented by notes or bonds or otherwise." This was a partial grouping of items and so far as it goes sustains rather than contravenes our view of the law. Precisely the same language "money at interest in excess of debts" was used in the inventory in the case at bar in each year but was condensed to "personal estate" in the assessment record. The second point cannot be sustained.

3. INTERLINEATION IN THE ASSESSMENT OF 1907.

This was made in the handwriting of one of the assessors who was out of the State at the time of the trial, and therefore did not explain it; but the explanation is obvious. The inventory is in evidence and is in regular form and order. In copying from the inventory to the assessment record it is evident that this tax was omitted, and when the mistake was discovered, the interlineation was made in accordance with the facts. This was all done before the commitment to the collector. Such errors are correctible. *Eliot* v. *Prime,* 98 Maine, 48.

4. NO PERSONAL PROPERTY OF JAMES R. FARNSWORTH SHOWN TO HAVE BEEN IN THE HANDS OF THE DEFENDANT.

It appears that James R. Farnsworth died on May 9, 1905. The defendant was appointed administratrix of his estate June 20, 1905, and gave bond, but filed neither inventory nor account. Litigation arising, and a will apparently having been discovered, Joseph E. Moore was appointed special administrator on November 28, 1905. On November 20, 1906, the special administrator filed an inventory in the Probate Court showing personal property, consisting of stocks and bonds to the amount of about $130,000. This inventory also shows that cash to the amount of over $8000 and notes amounting to over $11,000 beside stock certificates of the value of about $5500 were received by the defendant, while she was acting as administratrix and before the special administrator was appointed. So that far more than $10,000 of personal property actually came into the defendant's hands under her first appointment and there is no evidence that any portion of it was ever distributed.

Moreover, the powers and duties of the special administrator ceased when the defendant was appointed administratrix with the will annexed on January 22, 1907, and gave bond on the same date. R. S., chap. 66, sec. 35. From that time forward, in the eye of the law she had all the goods and estate of the testator in her possession.

Physical possession was not necessary. It is true that the special administrator did not settle his final account until August 20, 1907, but his power over the estate had ceased on January 22, and the defendant had the right to then take it into her own custody. Suppose on April 1, 1907, the city of Rockland had assessed the special administrator for this estate. He could clearly have defended on

the ground that he was out of office. He was no longer the legal owner of the property. The defendant had succeeded him and was the only person legally liable. It often happens that personal property may on April 1, be in the actual possession of a third party, but the party who really owns it and is entitled to it is the party taxable, because it is in his legal possession. The defendant therefore was legally taxable in 1907, and as she has never notified the assessors of any distribution of the estate, that liability continued through 1908 and 1909.

5. INSUFFICIENT NOTICE TO TAXPAYERS.

This notice, required by R. S., chap. 9, sec. 73, is no longer a condition precedent to a valid assessment, and an action against a taxpayer to recover the amount of his tax can be maintained even if this requirement has not been complied with. This was settled in *Boothbay* v. *Race,* 68 Maine, 351, and remains the law in this State.

6. TAX COLLECTOR NOT LEGALLY ELECTED.

The duly elected collector for 1907 died on November 25, 1907, and one Packard was elected in his place on December 2, 1907. Packard resigned on March 16, 1908, and in September, 1908, L. F. Starrett was elected to fill the vacancy. The duly elected collector for 1908 resigned on March 15, 1909, and Mr. Starrett was elected to fill that vacancy. The defendant contends that there is no statutory provision for the resignation of a tax collector, and, therefore the plaintiff cannot recover.

Three effective answers may be made to this proposition as a defense in this case.

First: That under the charter of the city of Rockland, Priv. and Spec. Laws 1885, chap. 482, secs. 11 and 13, the collectors would seem to have a legal right to resign and their resignations having been accepted and the vacancies filled, the new incumbent would seem to be collector de jure.

Second: The new incumbent, Mr. Starrett, was at least collector de facto, and that was sufficient. *Whiting* v. *Ellsworth,* 85 Maine, 301; *Greenville* v. *Blair,* 104 Maine, 444.

Third: In this mode of collecting the tax, the question whether the collector was or not legally elected is entirely immaterial. *Auburn* v.

Union Water Power Co., 90 Maine, 71. If any irregularity had existed in his election it did not affect the validity of the assessment of the tax nor the obligation of the defendant to pay it, and those are the two vital points in this case. His only part in the transaction was to make demand for payment on November 26, 1910, for the taxes of 1907 and 1908, and that affected neither of these points. *Bresnaham* v. *Soap Co.*, 108 Maine, 124-7.

7. INSUFFICIENCY OF DIRECTION TO BRING SUIT.

The written direction to bring this suit in the name of the city was given by the mayor and treasurer to the city solicitor and the defendant urges that it should have been given to the collector under the provisions of R. S., chap. 10, sec. 65, which provides that "in addition to the other provisions for the collection of taxes legally assessed, the mayor and treasurer of any city, . . . may in writing direct an action of debt to be commenced in the name of such city . . . against the party liable." The statute does not prescribe the officer to whom the written direction shall be given. It might, doubtless, be given to the collector, but he, in turn, would need to notify the solicitor, the law officer of the city, and there is no reason why in such a case it cannot be given directly to the solicitor.

The purpose of this provision has been stated by this court as follows: "We think the intent of the Legislature is obvious. It is the duty of tax collectors, to collect, ordinarily at their own expense, the taxes committed to them for the compensation agreed upon. They may proceed by any of the methods provided by statute, and, if they deem it advisable, they may commence actions of debt in their own name. But there may be occasions when for special reasons, such as the denial of liability, a question as to the validity of the assessment and for other reasons, it would be equitable and proper for the city or town to allow a suit to be brought in its name, pay the expenses and be liable for costs in case of defeat. As to the sufficiency of these reasons in any case the selectmen of the town are the sole judges." *Orono* v. *Emery*, 86 Maine, 362.

The defendant further contends that a separate written direction should have been given for each year's tax and not one direction covering the taxes against the defendant for the three years. This

is too technical. It is true that a general written direction to a collector to bring suit against all delinquent tax payers is insufficient as not carrying out the clear intention of the statute, in that it practically transfers to the collector the power to exercise the judgment and discretion in particular cases which the statute has reserved to the superior officers, *Cape Elizabeth* v. *Boyd,* 86 Maine, 317; and the particular parties against whom suit is to be brought should be named, *Orono* v. *Emery,* 86 Maine, 362. In the case at bar the particular party is named and the delinquent taxes of the particular years are specified. They could as well be joined in one notice as the claims thereunder are in one writ.

As none of the objections raised to the maintenance of this action can be sustained, the plaintiff is entitled to judgment for the unpaid tax of each year with interest from the date of demand, December 1, 1910.

Interest should not be allowed from the various dates alleged in the writ as those fixed by the city government for the payment of taxes because the evidence fails to show that those dates were fixed or that they were determined upon when the money was raised. *Rockland* v. *Rockland Water Co.,* 82 Maine, 188; *Rockland* v. *Ulmer,* 87 Maine, 357.

Judgment for plaintiff for $655 and interest from December 1, 1910.

SCOTT WILSON, Attorney General, GEORGE A. WELCH, Relator,

vs.

JOHN LACROIX.

SAME, FORTUNAT BELLEAU, Relator, *vs.* STEPHEN J. KELLEY.

SAME, GEORGE B. O'CONNELL, Relator, *vs.* J. J. PELLETIER.

SAME, AIME ASSELIN, Relator, *vs.* JOHN M. KEARNS.

Androscoggin. Opinion December 18, 1913.

Appeal. Jurisdiction. Petitions. Quo Warranto. Revised Statutes, Chapter 6, Sections 70-74.

Upon petitions for quo warranto brought by the above named petitioners to test the title of the offices of assessor, city solicitor, city physician and city auditor in the city of Lewiston, it appeared that a hearing was had before a single Justice in June 1913, on petitions brought under Revised Statutes, chap. 6, secs. 70-74, by these respondents and other claimants against these petitioners and others then holding the respective offices, and on June 7, 1913, the sitting Justice rendered a decision in favor of all the then petitioners, now respondents. Appeals were taken from that decision by two of the parties, but none by these relators. Those appeals were decided in favor of the two appellants and they were declared entitled to the offices which they respectively claimed.

Thereupon, these four relators brought these proceedings in quo warranto against these respondents who, by the unreversed decision of the single Justice in the former proceeding, had been held entitled to their respective offices.

Held:

1. That prior to 1880, the only legal process in this State by which the right of one unlawfully holding a public office could be inquired into was by quo warranto. If successful this was followed by mandamus. By the former process the usurper was ejected; and by the latter, the legal incumbent was substituted.

2. That by chap. 198 of the Public Laws of 1880, which with its subsequent amendments has become R. S., chap. 6, secs. 70 to 74, the Legislature created an additional remedy not known to the common law and one more effective, not only because of its promptness but because of its scope. This act accomplished by one and the same process the objects contemplated by both quo warranto and mandamus.
3. That these remedies are concurrent, and parties contesting title to the public offices named in the statute can proceed in the one method or the other.
4. That judgment rendered in one form of procedure is conclusive upon all the parties thereto and is a bar to any subsequent proceedings in the other form.
5. That the relators in this proceeding of quo warranto, having been respondents in the former statutory proceedings involving the same questions, are bound by the adverse judgment rendered in that proceeding, no appeal having been taken by them and the judgment still remaining unreversed, because it is a fundamental rule of law that, conceding jurisdiction, regularity in proceedings and the absence of fraud, a judgment between the same parties is a final bar to any other suit for the same cause of action.
6. That a judgment in the absence of fraud cannot be overthrown in a collateral proceeding by parol testimony.

On report. All petitions dismissed without costs.

The relators in the above four cases have each brought quo warranto to test the title to the offices of assessor, city solicitor, city physician and auditor in the city of Lewiston, and were tried together. In June, 1913, these respondents, and other claimants, brought petitions under Revised Statutes, chapter 6, sections 70-74 against these petitioners, and others, then holding the above named offices, and upon a hearing before the sitting Justice, on June 7, 1913, said Justice rendered a decision in favor of the respondents. Appeals from said decision were taken by two of the parties, but none by these relators. Answers and replications were filed in these cases, and at the conclusion of the hearing, the case was reported to the Law Court upon the following stipulation:

"By agreement of the parties, these four cases, which were heard together, are reported to the Law Court for its determination upon the law, the facts agreed upon, and so much of the evidence as is legally admissible. A copy of the findings made upon the original petitions by JUDGE SAVAGE may be referred to as a part of the case, and used in argument by either party, but need not be printed."

The case is stated in the opinion.

Frank A. Morey, for plaintiffs.

W. B. Skelton, for defendants.

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

CORNISH, J. A full statement of the facts leading up to this case may be found in *Tremblay* v. *Murphy,* 111 Maine, 38, but an outline sufficient for our purpose, is as follows:

On the first Monday of March, 1913, a municipal election was held in the city of Lewiston, at which votes were cast for mayor, nine aldermen and twenty-seven councilmen, each of the nine wards electing one alderman and three councilmen. A contest arose over the election in ward two. Certificates of election were issued by the old board of mayor and aldermen, acting as a canvassing board, to Charles G. English as alderman and J. E. Ballard, M. Sullivan and Ferdinand Ebert as councilmen. The opposing candidates, George F. Libby for alderman, and Charles G. Kernan, Henry A. Coombs, and C. F. Maines, for councilmen, claimed to be elected, and proceeded as in equity under R. S., chap. 6, secs. 70 to 74, against the parties holding the certificates, by filing their petition returnable before a single Justice of this court. Due service was made upon the respondents named, and a hearing was had before the single Justice, who rendered judgment in favor of three of the then petitioners, viz.: Messrs. Libby, the alderman, and Kernan and Coombs, the councilmen, and in favor of one of the then respondents, Mr. Ballard, the decision being filed March 14, 1913. An appeal was taken on March 24, 1913, from this decision by the two councilmen unseated, Messrs. Sullivan and Ebert, to the Justices of this court, was argued, and a decision was handed down on May 17, 1913, sustaining the decision below as to Libby, Kernan and Coombs, but declaring that neither Ballard nor his opponent Maines was elected councilman, their vote being a tie. *Libby* v. *English,* 110 Maine, 449.

The City Council organized on March 17, 1913, three days after the hearing before the single Justice and before the appeal was filed.

Sullivan and Ebert, the two councilmen, who at that time held certificates of election, were sworn into office and took their seats in the board, against the protest of Kernan and Coombs who claimed to be entitled to their seats by reason of the decision of the single Justice. On April 4, 1913, a joint convention was held, Sullivan and Ebert taking part and making a total of fifteen members, the other twelve members declining to take part. At that joint convention subordinate city officers were elected, viz.: Welch, the relator, as assessor, one Bernier also an assessor; O'Connell, the relator, city physician; Belleau, relator, city auditor; LeMaire, city clerk; Stetson, city treasurer; Murphy, collector of taxes. The officers thus elected entered upon the discharge of their duties. On May 19, 1913, two days after the decision on appeal declaring Kernan and Coombs entitled to the seats then held by the sitting members, Sullivan and Ebert, another joint convention was held, and sixteen members were present, including Kernan and Coombs. Another set of subordinate officers was then elected, viz.: John Lacroix, one of the respondents in the case at bar, and W. S. Keene, assessors; Pelletier, another respondent, city physician; Kelley, respondent, city solicitor; Kearns, respondent, auditor; and other officers, not involved here. Thereupon, the officers elected this second joint convention proceeded as in equity under chap. 6, sec. 70 of the Revised Statutes and filed petitions, returnable before a single Justice, against the parties elected to the respective offices at the first joint convention, viz.: Pelletier against O'Connell, to obtain title to the office of city physician; Kelley against Belleau for the office of city solicitor; Kearns against Asselin for the office of auditor; Murphy and Lacroix against Bernier and Welch for the office of assessors, and all the other officers for the respective offices claimed by them.

These petitions were duly served upon the various respondents and a hearing was had before a single Justice who rendered his decision on June 7, 1913, sustaining all the petitions and holding that the joint convention of April 4, 1913, was void, that none of the officers then elected had any title to his office, and that the several parties elected at the joint convention of May 17, 1913, were entitled to the offices.

From this decision appeals were entered on the part of Murphy, then holding the office of collector and Bernier then holding the office of assessor, but none was entered by or on behalf of Welch, Belleau, O'Connell, nor Asselin, the petitioners in the pending cause, nor on the part of any of the other defeated parties. The statement in *Tremblay* v. *Murphy,* supra, that Welch appealed and was entitled to his office was inadvertently made. A decision on this appeal was handed down on August 6, 1913, 111 Maine, 88 Atl. 55, holding in effect that although Sullivan and Ebert were not de jure members of the joint convention of April 4, they were members de facto as they held at that time certificates of election from the proper returning board and were, therefore, entitled to act upon all matters regularly presented, including the election of subordinate officers, and their right to so act could not be attacked collaterally in a proceeding to which they were not parties. It was accordingly held that Murphy was entitled to the office of collector, and Bernier to the office of assessor. Coupling Welch with Bernier in the opinion was, as we have stated, an inadvertence.

On August 30, 1913, the relators, being four of the parties declared to be not elected to their respective offices by the decision of the single Justice on June 7, viz.: Welch, Belleau, O'Connell and Asselin to the offices of assessor, solicitor, physician and auditor respectively, brought these petitions in quo warranto against their respective opponents to test the title to these offices, and the question for the court to determine is whether, under the agreed facts and the evidence in the case these petitions can be maintained.

In our opinion they cannot, and for the following reasons which are but a restatement of the familiar legal principles of res judicata.

In the first place prior to 1880 the only legal process by which the right of one unlawfully holding a public office could be inquired into was by quo warranto; if successful this was followed by mandamus. By the former process the usurper was ejected and by the latter the legal incumbent was substituted. By chap. 198 of the Public Laws of 1880, which with its subsequent amendments has become R. S., chap. 6, secs. 70-74, the Legislature created an additional remedy not known to the common law, and one more effective not only because of its promptness but because of its scope. As characterized by the court in *Prince* v. *Skillin,* 71 Maine, 361, "The

act accomplishes by one and the same process the objects contemplated by both these results. It ousts the unlawful incumbent. It gives the rightful claimant the office to which he is entitled. It affords a speedy and effectual remedy instead of the tedious and dilatory proceedings of the common law." In other words this statutory remedy covers the ground contemplated by quo warranto and more. It did not displace the common law remedy. It afforded merely an additional avenue of relief.

It follows, therefore, that since 1880, parties contesting the title to the public offices named in the statute can proceed in the one method or the other. Both are open. They are concurrent. The same parties try the same issue and under the supervision of the same court whichever route is travelled. This being so, it follows that judgment rendered in one form of procedure is conclusive upon all the parties and is a bar to any subsequent proceedings in the other form. The tests are: Did the court have jurisdiction in the first proceeding? Were the parties the same? Was the issue the same? Was final judgment rendered? If all these inquiries can be answered in the affirmative the judgment so rendered stands as a bar to any subsequent litigation along the concurrent line.

In the case under consideration all these tests are satisfied.

Under the statutory proceeding which was instituted by these respondents the court had full and complete jurisdiction, both of the parties and of the subject matter. Service was duly made upon the then respondents, now relators, in accordance with the order of court. They were all present at the hearing and, with one exception, were all represented by counsel. The parties were precisely the same, only reversed in the proceedings, the petitioners then being the respondents now, and the respondents then being the relators now. The issue was the same; viz., the legal title to the respective offices. And the judgment rendered in that hearing before the single Justice was final so far as these relators are concerned because no appeal was taken by them. They are bound by that decision unreversed and unappealed from. The statute terms that decision a "judgment," chap. 6, sec. 68, and like any other judgment unappealed from, it, of course, becomes final. If appealed from then the decision of the appellate court becomes the final judgment. And

after final judgment has been rendered from either source, the party unlawfully holding the office may be ousted and the legal incumbent may be installed, chap. 6, sec. 73. It is clear, therefore, that the title to these offices was finally and conclusively adjudicated in the statutory proceeding.

This being so it follows that the same question cannot be again litigated in these quo warranto proceedings. It is a fundamental rule of law, that conceding jurisdiction, regularity in proceedings and the absence of fraud, a judgment between the same parties is a final bar to any other suit for the same cause of action, and is conclusive not only as to all matters which were tried, but also as to all which might have been tried in the first action. *Davis* v. *Davis,* 61 Maine, 395; *Blodgett* v. *Dow,* 81 Maine, 197; *Corey* v. *Independent Ice Co.,* 106 Maine, 485, and cases cited. On the same principle, decrees of a Probate Court touching matters within its jurisdiction, when not appealed from, are conclusive, upon all persons, being considered in the nature of judgments. *May* v. *Boyd,* 97 Maine, 398; Mudgett's appeal, 103 Maine, 367; *Chadwick* v. *Stilphen,* 105 Maine, 242.

The learned counsel for the petitioners seeks to avoid the effect of res judicata on two grounds: First, that the relators here were the parties respondent in the former proceedings, that they did not elect that tribunal, but were involuntary parties to the proceedings, and therefore should not be bound thereby. This, however, does not prevent the working of the rule. This is not a question of election of remedies but of res judicata. If the former proceeding was legal it was equally binding upon the parties, the then respondent as well as the then petitioner. No judgment can be rendered except in favor of one party and against another and it is as binding upon the involuntary defendant as upon the voluntary plaintiff. Thus it has been held that a party cannot bring a bill in equity to enforce an equitable right, which he might have pleaded in defence to an action at law in which judgment had been rendered against him. The former judgment, in which he was a party defendant, is a bar. *Aetna Life Ins. Co.* v. *Tremblay,* 101 Maine, 585.

In the second place the relators claim that the reason for not taking an appeal was that at the hearing before the single Justice it was

understood that all the cases would be treated alike and one decision would cover all. Technically this has no legal force because, in the absence of fraud, a judgment cannot be overturned in a collateral proceeding by parol testimony. The relators omitted or neglected or at the time concluded not to enter appeals, and it has been held that the court cannot excuse a party from the result of his own mistake or negligence, even though it was due in some measure to the suggestion of the court below. *Risher* v. *Roush,* 2 Mo., 95, 22 Am. Dec., 442.

But the more satisfactory answer to the claim of the relators is that a careful scrutiny of the evidence leads to the conviction that so far as the sitting Justice was concerned, and the parties at the time, the understanding pertained to that hearing alone, and not to any further proceedings in the nature of an appeal. The record shows that the attention of the sitting Justice was called, before the hearing began, to the fact that one of the relators was present without counsel, and the Justice replied "that doesn't make any difference, as one goes, they will all go." When the record in these cases at bar was made up before the same Justice, he stated that, as he recollected it, the expression used was "they will all be treated alike." That evidently meant, that the absence of counsel for one of the parties at that hearing could not affect the result, as counsel for the others were present, the right of all were alike, and the decision of one case would decide all. And that understanding was carried out. They were all treated alike, and the same judgment was rendered by the sitting Justice in all the cases. The matter of appeal was neither discussed nor mentioned, and evidently was not in the contemplation of the parties at that time. Moreover, it appears that several of the parties, whose rights were then litigated, neither appealed nor have they joined in these quo warranto proceedings. On the merits, therefore, there can be no substantial ground for complaint on the part of these relators who failed to preserve their rights in the only way prescribed, by taking an appeal and who are therefore bound by the decision rendered below.

All petitions dismissed without costs.

AGNES BOYD *vs.* BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot. Opinion December 23, 1913.

Collision. Conflicting Testimony. Damages. Miscarriage. Negligence. Personal Injuries.

This is an action on the case to recover damages for personal injuries occasioned by a collision of the defendant's electric cars, due to the negligence of the defendant company.

Held:

1. When the evidence is conflicting and the question of liability and damages is one peculiarly within the province of the jury, and the evidence does not convince the court that the jury were clearly wrong a motion for a new trial will be overruled.
2. From the testimony of all the witnesses having knowledge of the facts, it clearly appears that the plaintiff's suffering was intense at times and for a long period her suffering was severe.
3. The court will not disturb a verdict upon the ground of excessive damages unless it very clearly appears to be excessive upon any view of the facts which the jury are authorized to adopt.
4. The jury saw the parties and could best judge what damages would fit the case, and the court cannot discover that they were actuated by prejudice or other improper motive.

On motion for new trial by defendant. Motion overruled.

This is an action on the case to recover damages for personal injuries sustained by the plaintiff on account of the alleged negligence of the defendant company. On the 22d day of September, 1911, an electric car of the defendant company, in which the plaintiff was a passenger, collided with another car of the defendant company, on Main Street in Bangor. By this collision the plaintiff sustained the injuries complained of. The plea is the general issue. The jury returned a verdict for the plaintiff for $2071.00 and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Bartlett Brooks, for plaintiff.

E. C. Ryder, for defendant.

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

HANSON, J. This is an action on the case to recover damages for personal injuries sustained while a passenger on one of the defendant's cars. The plaintiff obtained a verdict for two thousand and seventy-one dollars, and the defendant has filed a motion for a new trial on the ground that the verdict is against law and the weight of evidence, and because the damages are excessive.

On September 23, 1911, the plaintiff entered the defendant's car at Hampden, and paid her fare to Bangor, her destination. She was riding in the fourth seat from the front end of the car, and her husband and one John Gilpatrick occupied the seat with her. While proceeding along Main Street in Bangor, and near the opera house, the car in which the plaintiff was riding collided with a car in front which had stopped to allow a passenger to alight. The collision was of sufficient force to break the windows of the first car, and destroy the glass in the headlight of the forward car. The plaintiff claims that she was thrown violently forward, striking her right knee and body against the seat in front of her, that her knee was seriously injured, and that she received other injuries resulting in a miscarriage. The extent of the injury claimed was testified to by many expert witnesses on each side, and the jury apparently had the benefit of all the scientific information available. It is conceded that the collision occurred, and that the plaintiff's right knee was injured. The defendant claims, however, that the collision was slight, that the injury was not serious, and "it was impossible for the plaintiff to have been injured as she stated for the reason that she could not have struck her stomach and knee against the seat in front of her at the same time," and insists that the damages are excessive even if the jury found miscarriage was the result of the accident.

The defendant claimed in addition that any damage arising by reason of miscarriage was due to the act of the plaintiff in taking medicines to produce a miscarriage, and called Mrs. Alice L. Trimble, whose testimony covers many pages of the record, in support of this contention. Mrs. Trimble was housekeeper for the plaintiff while the latter was following her occupation as nurse, and at the time of the accident was so employed. She saw the plaintiff

on her return home on Tuesday following the accident, and says "she was walking lame, and I asked her what ailed her, and she told me she got hurt," and told her how she was injured, and that the following Saturday she saw her taking medicine and "asked her what it was for," and she was told in effect that the medicine was intended to produce a miscarriage; that again on the same day she saw her prepare other medicine, which plaintiff admitted she had taken later on the same day for the same purpose. According to the testimony of this witness, plaintiff's "sister was in the house when she took it, and she went out and must have told some of the children of the neighborhood about it. I heard of it and come home and told Mrs. Boyd, and she sent her sister up stairs to get the bag of pennyroyal, and made her throw it in the fire, and threatened to put her in the asylum if she ever told about it. Q. Did you see her burn the pennyroyal? A. I did. Q. Went up stairs and got it? A. Yes, sir."

The testimony of this witness was denied by the plaintiff, who explained in detail conversations with the witness as to the medicines being used for other purpose than that claimed by the witness, and by the plaintiff's sister who denied as completely the statements relating to her presence and acts. The plaintiff also introduced expert medical testimony as to the use and effect of the medicines and preparations claimed to have been used by the plaintiff.

The issues in the case were presented to the jury under proper instructions. The testimony was conflicting. The defendant placed much reliance on the testimony of Mrs. Trimble. She was pitted against the plaintiff upon a vital question in the case. The jury saw and heard them, and judged between them.

After carefully examining and comparing the testimony, we cannot say that the verdict is so manifestly wrong as to be set aside as against the evidence. When the evidence is conflicting and the question of liability and damages is one that is peculiarly within the province of the jury, and the evidence does not convince the court that the jury were clearly wrong, a motion for a new trial will be overruled.

Stone v. *Street Railway,* 99 Maine, 243; *Guptill* v. *Insurance Co.,* 109 Maine, 323; *Hubbard* v. *M. H. & E. Company,* 105 Maine, 384.

A verdict on a properly submitted issue should not be lightly set aside. *Sanford* v. *Kimball,* 106 Maine, 355.

While the burden was on the plaintiff to satisfy the jury of the defendant's liability, yet after verdict for the plaintiff the burden is on the defendant to make it clearly appear that the verdict is wrong. *Coombs* v. *King,* 107 Maine, 376.

The damages are large, but we cannot say that they are so excessive as to require us to disturb the verdict. From the testimony of all the witnesses having knowledge of the facts, including that of Mrs. Trimble, it clearly appears that the plaintiff's suffering was intense at times, and for a long period her suffering was severe. This was an element of damage considered by the jury under proper instruction, and was properly left to the judgment of the jury who saw and heard the witnesses, and they were in better position to determine the facts than the court can be. The court will not disturb a verdict upon the ground of excessive damages unless it very clearly appears to be excessive upon any view of the facts which the jury are authorized to adopt. *Donnelly* v. *Granite Co.,* 90 Maine, 110.

"The court cannot say that the verdict is either against the evidence or too large. The jury saw the parties and could best judge what damages would fit the case, and the court cannot discover that they were actuated by prejudice or other improper motive."

Sanborn v. *Fickett,* 91 Maine, 364; *Guptill* v. *Ins. Co.,* 109 Maine, 323.

The entry will be,

Motion overruled.

WARREN E. COBB *vs.* HOWARD COGSWELL.

Aroostook. Opinion December 23, 1913.

Delivery. Instructions. Motion. Newly Discovered Evidence. Possession. Replevin. Sale. Title. Verdict. Written Contract.

Replevin to recover an automobile. The verdict was for plaintiff. The defendant filed a general motion for a new trial, and also a motion based on newly discovered evidence.

Held:

1. When there is evidence to support a verdict and there is nothing in the case which would justify the substitution of the judgment of the court, who did not see the witnesses, for that of the jury, who did, and the parties have had a fair trial without prejudicial error in law, the verdict will not be disturbed.
2. While the burden was on the plaintiff to satisfy the jury of the defendant's liability, the burden is now on the defendant to make it clearly appear that the verdict is wrong.
3. It is not necessary that newly discovered evidence should be such as to require a different verdict, but there must be a probability that the verdict would be different upon a new trial.
4. A new trial will not be granted on the ground of newly discovered evidence, when the moving party might, by proper diligence, have discovered such evidence in season for the trial.

On motion for a new trial by the defendant. Motion overruled.

This is an action of replevin against the defendant for a Cadillac automobile, 1911 model. The defendant purchased said automobile of John C. Merrill on September 19, 1911. In November, 1911, the defendant traded this car with said Merrill for a 1912 model, and in December, 1912, said Merrill sold this 1911 car to the plaintiff. This automobile remained in possession of defendant from September, 1911, until May 2, 1912, when it was taken from him on the writ in this case. The defendant pleaded the general issue, and for brief statement said that at the time of the alleged taking, the title and right of possession of the property described in the plaintiff's writ were in the defendant and not in the plaintiff. The verdict

was for the plaintiff, and the defendant filed a general motion for a new trial and also a motion for a new trial on the ground of newly discovered evidence.

The case is stated in the opinion.

O. L. Keyes, Hersey & Barnes, and Doherty & Tompkins, for plaintiff.

Powers & Guild, and Nicholas Fessenden, for defendant.

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

HANSON, J. Replevin to recover a Cadillac automobile. The verdict was for the plaintiff. The defendant has filed two motions for a new trial; one on the ground that the verdict was against the evidence, and the other based on newly discovered evidence.

The automobile was sold in 1911 by the Bangor Motor Company to John C. Merrill. September 19, 1911, Merrill sold the automobile to the defendant. In November following the defendant entered into a contract in writing with Merrill which provided, as defendant claims, that he should pay Merrill $200 on the day of the date of the contract and on May 1, 1912, $100 additional, and deliver to said Merrill the automobile in controversy, and receive from Merrill a new automobile. The contract was retained by Merrill, who promised, as defendant claims, to furnish defendant a duplicate, which he did not do.

In December of the same year, Merrill sold the automobile in question to the plaintiff, and a few days later absconded. The automobile remained in defendant's possession until May 2, when suit was brought. It is claimed by the plaintiff that Merrill had the right to sell the automobile to him, that the defendant delivered the same to Merrill when the $200 was paid in November, 1911, and that Merrill exercised acts indicating ownership, as well as claiming to own the automobile when he sold the same to the plaintiff.

The defendant says that the plaintiff has not sustained the burden of proving (1) that the title and right of possession of the automobile were transferred back to Merrill under the terms of the contract entered into by Merrill and the defendant in November, 1911, and (2) that such title and right to possession were, on May 2, 1912,

vested in the plaintiff under the terms of the contract between Merrill and the plaintiff, of December 26, 1912. The defendant in his brief adds, "it is in regard to the first of these propositions, that is, as to what were the terms of the contract entered into by Merrill and the defendant in November, 1911, that there occurs the only conflict in the testimony in the case." Upon this point two witnesses have testified. The plaintiff introduced B. B. Perkins, who was the manager of the Bangor Motor Company, whose testimony as to the terms of the contract is substantially the same as that of the defendant. Mr. Perkins testified that he had seen and read the contract in defendant's house. The defendant denied this, and by leave of court defendant's counsel testified to conversations in his office in which Mr. Perkins had made remarks inconsistent with his testimony at the trial. The issue was properly submitted to the jury under appropriate instructions. The testimony was conflicting. There was evidence to support the verdict. The jury saw and heard the witnesses, aud decided the case. No reason appears to warrant the court in saying that the verdict is manifestly wrong. This first motion cannot be sustained.

A verdict on a properly submitted issue should not be set aside. *Sanford* v. *Kimball,* 106 Maine, 355.

Even when there is strong doubt of the actual occurrence or existence of a fact found by a jury, if the evidence is conflicting, their findings will not be disturbed on that ground. *Lewis* v. *Railroad,* 97 Maine, 340.

A new trial will not be granted unless the verdict is clearly wrong. *Stone* v. *Railway,* 99 Maine, 243; *Caven* v. *Granite Co.,* 99 Maine, 278.

Where there is evidence to support a verdict, and there is nothing in the case which would justify the substitution of the judgment of the court, who did not see the witnesses, for that of the jury who did, and the parties have had a fair trial without prejudicial error in law, the verdict will not be disturbed. *Atkinson* v. *Orneville,* 96 Maine, 311; *Berry* v. *Ross,* 94 Maine, 270.

While the burden was on the plaintiff to satisfy the jury of the defendant's liability, the burden is now on the defendant to make it clearly appear to us that the verdict is wrong. *Coombs* v. *King,* 107 Maine, 376.

The evidence offered by the defendant to sustain his motion for a new trial on the ground of newly discovered evidence is directed to the one object of impeaching the testimony of Mr. Perkins, the plaintiff's witness. The defendant offers,—1. A letter from the Bangor Motor Company to Messrs. Powers & Guild, dated April 24, 1912, which was written in reply to a letter from Messrs. Powers & Guild, dated April 20, 1912, the purpose being to discredit the testimony of Mr. Perkins. Defendant claims that the matter sought to be brought out by the letter will contradict the statement that the witness had seen a contract between the defendant and Mr. Merrill, and read the same in the dining room of defendant's house. Sharp contention was raised by counsel at the trial upon this point, and on the ground of surprise, defendant's counsel was allowed to testify to occurrences in his office which he claimed tended to contradict the witness.

Three letters were written in relation to the case, one of which, the letter from the Bangor Motor Company to the defendant, above mentioned, was introduced as defendant's Exhibit 2, and that letter refers to a letter written by Messrs. Powers & Guild to the Bangor Motor Company, the reply to which is now offered as newly discovered evidence.

The motion recites that the defendant and his counsel were "taken entirely by surprise by the testimony of said Perkins," and . . . that neither the said defendant nor his said attorneys had the said letter in court at the time of said trial, and that the knowledge of the existence of said letter did not come to said defendant, or his said attorneys, until after the trial and the verdict in said action.

Notice to produce the "letters and papers in connection with the transaction" was duly served on defendant's attorneys, and but one letter was produced, and that letter refers in terms to the correspondence of which the letter now offered formed a part, and it is evident that, if reasonable diligence had been used at the time of the notice to produce the letters and papers, the discovery of the latter in question would have been certain.

2. The testimony of defendant's wife. We think the testimony of Mrs. Cogswell fails entirely to discredit the testimony of Mr. Perkins. On the contrary, it tends to corroborate his statement that he had seen and read a contract in her dining room. She says the

defendant and Mr. Perkins came into her house, Mr. Perkins was introduced to her, and immediately went through the house with the defendant to the barn; "they stayed a few minutes and came back again and walked across the kitchen floor; my husband went from the kitchen into the dining room. Mr. Perkins went as far as the dining room door, and there they said something. I don't remember what they said; they had a few words, and they came out and went out." "From where I was standing, near my table, I could see so far as they went into the dining room, so far as my husband went into the dining room." She further states that her husband did not show Mr. Perkins any paper, and that he read no paper in her house that day.

This testimony is open to the same criticism as the first. The witness is defendant's wife. No inquiry was made of this witness previously. The evidence offered is not so material as to induce the belief that the result would thereby be changed, nor is it of such character, weight and value as to make it seem probable that it would have changed the result. Under such circumstances, a new trial should not be granted.

Fitch v. *Sidelinger,* 96 Maine, 70, and cases cited. Idem, 503.

It is not necessary that newly discovered evidence should be such as to *require a different verdict,* but there must be a probability that the verdict would be different upon a new trial. *Drew* v. *Shannon,* 105 Maine, 562; *Fitch* v. *Sidelinger,* 96 Maine, 70; *Parsons* v. *Railway,* 96 Me., 503; *Mitchell* v. *Emmons,* 104 Me., 76.

A new trial will not be granted, on the ground of newly discovered evidence, when the moving party might, by proper diligence, have discovered such evidence in season for the trial. *Hunter* v. *Randall,* 69 Maine, 183; *Berry* v. *Ross,* 94 Maine, 270; *Thompson* v. *Morse,* 94 Maine, 359. Unless it is apparent that an injustice has been done. *Woodis* v. *Jordan,* 62 Maine, 490; *Fitch* v. *Sidelinger,* supra.

The witness located Mr. Perkins in the dining room door, his back towards her and standing between herself and her husband. Their purpose in entering the dining room, unexplained by defendant, does not aid in establishing the probability of the correctness of her statement, but does furnish ample ground for the presumption, that if, as she stated, she does not remember what they said, she did not see all that occurred.

Motions overruled.

EDWARD J. GEYER *vs.* CLARA A. COOK.

Knox. Opinion December 30, 1913.

Complaint. Exceptions. Flowage. Jurisdiction. Revised Statutes, Chapter 94, Section 30. Revised Statutes, Chapter 84, Sections 7-8. Survival of Actions.

Upon the death of a party defendant in a complaint for flowage under Revised Statutes, chapter 94, section 35, the administrator of the deceased party may be cited in, and in such case must answer or be defaulted, and suffer judgment against him.

On exceptions by the defendant. Exceptions overruled.

This is a complaint for flowage under Revised Statutes, chapter 94, section 35. The defendant died, and the death being suggested, the complainant was granted leave to cite in her administrator. Upon summons, the administrator appeared and filed a motion to be discharged from the proceedings. The presiding Justice overruled the motion and the defendant excepted.

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

Rodney I. Thompson, for defendant.

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

SAVAGE, C. J. Complaint for flowage, under Revised Statutes, chapter 94, sec. 35. The death of the defendant being suggested, the complainant had leave to cite in her administrator. Summons to administrator was issued, and the administrator appeared. Later the administrator moved to be discharged from the proceedings, on the ground that he was not a proper party, had never been made and could not without his consent be made a party, and that the court had no jurisdiction over him as such. The motion was overruled and exceptions were taken.

The issue at law between the parties may be stated as follows:— The administrator says that complaints for flowage do not survive under the general provisions of Revised Statutes, chapter 84, secs. 7 and 8. The complainant replies that by virtue of chapter 94, sec. 30,—the flowage statute—"no complaint for so flowing lands or diverting water abates by the death of any party thereto; but it may be prosecuted or defended by the surviving complainants or respondents, or the executors or administrators of the deceased." To this the administrator rejoins that the word "may" in the phrase, "may be prosecuted or defended" is permissive; that it means that an administrator may at his option defend, but that he cannot be compelled to do so.

We are unable to concur in the administrator's view. Under the statute a complaint for flowage survives because the statute says it does not abate. If it survives, it seems clear that the plain intendment of the statute is to provide for the necessary steps by which it may be prosecuted. It cannot be prosecuted without a party complainant and a party defendant. If either party dies, the other party is still in court with a litigant's rights. The administrator of either party may be summoned in by the other. It is true that the administrator of the complainant, after being summoned in may elect to abandon the suit, as all complainants and plaintiffs may do, and be liable to pay such costs as the law awards. Not so, with the administrator of a defendant. He, like all other defendants, must answer, or be defaulted and suffer judgment against him.

Exceptions overruled.

CHARLES W. WATSON *vs.* GEORGE F. CAMERON.

Penobscot. Opinion December 30, 1913.

Acceptance. Assumpsit. Consideration. Delivery. Failure of Consideration. Sale.

1. An action of assumpsit to recover the price of goods sold cannot be maintained without proof of delivery and acceptance of the goods.

2. This case shows no evidence of delivery or receipt, and for that reason this action is not maintainable for the price of goods bargained.

3. The destruction by fire of goods bargained, but not delivered, is a total failure of consideration of a check given in part payment before the fire, but not presented for payment until afterwards.

On report. Judgment for the defendant.

This is an action of assumpsit upon an account for a mow of hay in the barn of the plaintiff. There is also a count upon the check of the defendant claimed to have been given in part payment for the hay, payment of which check had been stopped. The check was given on November 14, and in the night of that day, the hay was consumed by fire, and on the following day, the defendant stopped payment of the check. The defendant pleaded the general issue, and filed a brief statement alleging, among other matters, that there was never any delivery of said hay, nor of any part thereof by plaintiff to the defendant, nor any acceptance of same, or any part thereof by the 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, for final determination; the Law Court to render such judgment as the legal rights of the parties require.

The case is stated in the opinion.

Charles H. Reid, Jr., and Edward P. Murray, for plaintiff.

Matthew Laughlin, for defendant.

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

SAVAGE, C. J. Assumpsit upon an account annexed to recover the price of a mow of 30 tons of hay sold. There is also a count upon the defendant's check, alleged to have been given in part payment for the hay, and upon which payment was stopped; also, the money counts.

The case comes up on report, and we must settle the facts, as well as the law. The parties disagree about some material matters of fact, but the following is a statement of the facts as we find them. On October 2, 1911, the plaintiff offered to sell the hay to the defendant. A price was agreed upon for the hay delivered, and the defendant agreed to take it at the price. The hay was to be pressed in the plaintiff's barn and hauled away by the defendant, at his convenience, the plaintiff agreeing to board the pressers at the defendant's expense. But it was understood that payment for the hay would not be required before the following February. At the same time, but by a separate agreement, the defendant agreed to buy and take the plaintiff's straw at an agreed price. The same arrangement was made for pressing the straw, as for the hay. The defendant had not seen the hay, but he was familiar with the plaintiff's farm, and once or twice before had bought hay from it. On October 15, the defendant called at the plaintiff's house, saw the hay in the barn, and made some talk about having the plaintiff haul it. Subsequently the defendant hired a man to press the hay. The straw was pressed, and the plaintiff was paid for boarding the pressers. On November 14, the plaintiff, desiring some money to use, asked the defendant for some. The defendant gave him his check for $100, and took his receipt for "one hundred dollars advanced on sale of hay and straw to be delivered." Concerning this request for money the defendant testified,—"I confess I was a little surprised, and being a nervous man and a little provoked . . . consequently I let him have money. However, I had no excuse to refuse; this was the first opportunity I had had to secure in a way and make it more emphatic that I had bought the hay, and how I had bought it."

On the very night after the check was given, the hay was consumed by fire, and on the following day, the defendant, hearing of the fire, stopped payment of the check.

It is well settled that an action cannot be maintained for the price of goods sold, without proof of delivery and acceptance. This case, we think, shows no evidence of delivery, or receipt, actual, constructive, or symbolical. The plaintiff did not deliver the hay; the defendant did not receive it. The hay was bargained to the defendant. It was to stay in the plaintiff's barn until pressed and hauled away. But the plaintiff did not deliver and the defendant did not receive. It is true that some days after the trade the defendant saw the hay, and the plaintiff says he placed an estimate upon the quantity, and talked about his plans for pressing. But there was no act of delivery or receipt. Everything rested in words. And since an action for the price cannot be maintained in any event without showing delivery and acceptance, and since there can be no recovery on the check, because of total failure of consideration, the plaintiff cannot maintain this action.

Judgment for the defendant.

LOUISE S. DREW *vs.* WESTERN UNION TELEGRAPH COMPANY.

Androscoggin. Opinion December 30, 1913.

Assumpsit. Breaches. Covenants. Debt. Lease. Sealed Lease.

When one covenants or agrees under seal with another to pay a sum, or to do an act the other cannot maintain assumpsit for a breach of the agreement. The action must be debt, or covenant broken.

On report. Judgment for the defendant, but without prejudice to the right of the plaintiff to bring and maintain an action for covenant broken upon the same instrument.

This is an action of assumpsit to recover damages as alleged in the declaration, for breaches of certain promises, covenants and agreements to do certain acts, contained in a certain lease and indenture under seal. The lease was offered in evidence by the plaintiff, and its admissibility was objected to by the defendant. The question of the admissibility of said lease was reported to the Law Court under the following agreement and stipulation. The declaration, plea joinder and brief statement are to be printed together with lease from plaintiff to the defendant and is the instrument declared on in the writ. It is offered by the plaintiff and its admission objected to by the defendant. If the Law Court shall be of the opinion that this paper is admissible under the pleadings, the case is to be sent back for trial on the merits; otherwise, judgment is to be entered for the defendant.

The case is stated in the opinion.

A. L. Kavanagh, for plaintiff.

Ralph W. Crockett, for defendant.

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

SAVAGE, C. J. This action was brought "in a plea of the case" namely, assumpsit, to recover damages, as set forth in the declara-

tion, for breaches of certain "promises, covenants and agreements" to do certain acts, contained in a certain "lease and indenture." The lease was offered in evidence by the plaintiff. It was under seal. On this ground, its admissibility to support an action on the case was challenged by the defendant. Thereupon, the question of admissibility was reported to this court.

The precise question involved was determined by this court in *Dann* v. *Auburn Electric Motor Company,* 92 Maine, 165, and that case is decisive of this one. It was there held that "when one covenants or agrees under seal with another to pay a sum or to do an act, the other cannot maintain assumpsit upon the agreement. The action must be debt or covenant broken." Therefore the lease under seal was not admissible to support an action in assumpsit.

In accordance with the stipulation, the certificate will be,

Judgment for the defendant, but without prejudice to the right of the plaintiff to bring and maintain an action for covenant broken upon the same instrument.

In Equity.

J. WILDER HAGGETT,
Trustee in Bankruptcy of the Estate of George C. Jones,

vs.

LIZZIE N. JONES.

Cumberland. Opinion December 30, 1913.

Appeal. Consideration. Conveyance. Creditors. Equity. Fraud. Husband and Wife. Inheritance. Trustee in Bankruptcy.

1. The findings of a single Justice, in equity procedure upon questions of fact necessarily involved, are not to be reversed upon appeal, unless clearly wrong, and the burden is on the appellant to satisfy the court that such is the fact; otherwise, the decree appealed from must be affirmed.

2. It is conceded that at the time of the conveyances, the grantor was insolvent, accordingly the kind and amount of the consideration becomes material, even in the absence of an actual intent to defraud.

3. A grantee is not protected in taking a conveyance from an insolvent grantor, when he has not paid an adequate consideration therefor, though he may have acted in good faith.

4. At law, a conveyance is wholly good or wholly bad; there is no middle ground.

5. In equity, when the property is of greater value than the consideration, the conveyance may be impeached to a partial extent as being voluntary, and if not fraudulent in fact, be sustained to the extent of the consideration.

6. The bankruptcy proceedings did not deprive the defendant of her rights by descent under the statute in the property as the bankrupt's wife and that she still has that right in addition to her rights under the conveyance in question.

On appeal by plaintiff from decree of sitting Justice. The appeal is therefore sustained and the case remanded for an accounting as

herein suggested, before a single justice, after which a decree for the sale of the property upon proper terms will be entered in accordance with the opinion. So ordered.

This is a bill in equity by a Trustee in Bankruptcy, to set aside a conveyance of real estate made by George C. Jones to his wife, Lizzie N. Jones, the defendant, on the ground that said conveyance was made in fraud of his, said George C. Jones' creditors, and because said conveyance was not for an adequate and sufficient consideration. The defendant filed an answer to said bill, with a demurrer inserted therein.

The cause was heard by a single Justice, who entered a decree dismissing the bill, with costs. From this decree, the complainant appealed.

The case is stated in the opinion.

Clifford E. McGlauflin, for plaintiff.

Howard E. Hall, Charles L. Macurda, and Weston M. Hilton, for defendant.

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

KING, J. Bill in equity by a Trustee in Bankruptcy to set aside a conveyance of real estate made to the defendant by her husband, the bankrupt, on the ground that it was made in fraud of his creditors. The sitting Justice decreed that the bill be dismissed with costs, and the case is before this court on complainant's appeal from that decree.

The decree appealed from was not accompanied by a finding of facts, but from an examination of the bill and answers it clearly appears that the sitting Justice, in making the decree, must have found either that the husband in making the conveyance had no fraudulent purpose in fact thereby to hinder delay, or defraud his creditors, or, if he had such purpose, that his wife, the defendant, did not participate in it, and did not take the conveyance to further that purpose, and that there was no constructive or legal fraud arising from a want of an adequate and sufficient consideration for the conveyance.

The findings of a single Justice, in equity procedure, upon questions of fact necessarily involved, are not to be reversed upon appeal

unless clearly wrong, and the burden is on the appellant to satisfy the court that such is the fact, otherwise the decree appealed from must be affirmed. *Savings Inst.* v. *Emerson,* 91 Maine, 535, 538.

So far as the decree of the sitting Justice imports that he found that the conveyance was not made with a fraudulent purpose in fact in which the defendant participated, we are not satisfied that it is wrong, and if that were the only question involved in the appeal we should dismiss it.

But upon examination of the record we find certain facts that apparently were not brought to the attention of the sitting Justice, a consideration of which leads us to the conclusion that the appeal must be sustained.

It is conceded that at the time of the conveyance the grantor was insolvent, accordingly the kind and amount of the consideration therefor becomes material even in the absence of an actual intent to defraud. A grantee is not protected in taking a conveyance from an insolvent grantor when he has not paid an adequate consideration therefor, though he may have acted in good faith. *Egery* v. *Johnson,* 70 Maine, 258, 261.

The conveyance recites a consideration of $1610.60, and it was claimed for the defendant that her husband then owed her that sum, to pay which the conveyance was given, and that it was a fair and adequate consideration for the property conveyed. On the other hand, the complainant contended that there was no bona fide indebtedness from the husband to the wife existing at the time of the conveyance, and, further, that the value of the property conveyed was considerably in excess of the amount specified. The evidence as to the value of the property was conflicting, and if it were an established fact that the husband did actually owe his wife the sum named in the deed, and made the conveyance in payment thereof, we should hesitate to disturb it on the ground that the consideration was inadequate, in the absence of any actual intent to defraud.

There was sufficient evidence to justify a conclusion that the husband was indebted to his wife at the time of the conveyance to some extent, and it may be that both he and his wife believed that indebtedness amounted to $1610.60. That, however, was not the fact as we understand the evidence.

The sum of $1610.60 was made up of two items of supposed indebtedness from him to her with interest thereon. One was an item of $500 drawn from the Waltham, Massachusetts Savings Bank, January 9, 1907. This item with interest to the date of the conveyance, as they computed it, amounted to $635. We think the evidence warrants a finding that this $500 was his wife's property which she drew from the bank and loaned to her husband, and that at the time of the conveyance he owed her that sum and the accrued interest thereon.

The other item was supposed to have accrued to the wife from the husband in this way:

About fifteen years before the conveyance, a brother of the husband died in Colorado leaving an estate of about $3000. The husband went to Colorado, was appointed administrator of his brother's estate, paid the debts and expenses, and brought home, as he says, about $2200 net. He then supposed he was entitled to the whole of that estate as the only heir of his brother, but subsequently it was found that there was another heir who would inherit the estate with him. Thereupon he prepared a personal claim against his brother's estate amounting to $4209.17, and a claim in favor of this defendant against the same estate for $514 was also prepared.

These claims were sent to Colorado and allowed by the court there against the estate of the deceased brother.

It was this alleged claim of $514 in the defendant's favor against the estate of the brother-in-law, with interest thereon to the date of the conveyance, that made up the balance of the $1610.60. The defendant claimed that her husband was indebted to her for the amount of that claim because he was the administrator of that estate. We need not here consider the several reasons suggested in behalf of the complainant why it should not be held that the husband was indebted to his wife for this claim at the time of the conveyance. It will be sufficient to point out the fact that the copy of the order of the court of Colorado, put in evidence by the defendant, shows that the husband's claim, allowed for $4144.90, (nearly double the net amount of the estate) was allowed as a claim having precedence of the wife's claim. The language of the order in this respect is as follows:

"It is therefore considered and ordered by the court that the sum of $380.20 be allowed George C. Jones as a claim of the 1st class, and the sum of $77.00 as a claim of the second class, and the sum of $3687.70 as a claim of the 3d class, to be paid from said estate; and that the sum of $514.00 be allowed unto Lizzie N. Jones as a claim of the 4th class, to be paid from said estate."

The conclusion is inevitable, of course, that the husband never was indebted to his wife for anything on account of the allowance of her alleged claim against his brother's estate of which he was the administrator. As allowed her claim was worthless and he was under no obligation to pay it to her. And there is no sufficient evidence from which it could be found that he ever legally obligated himself to pay it to her.

The evidence is plenary, therefore, that of the $1610.60 named in the conveyance as its consideration only $635 was an actual indebtedness from the grantor to the grantee. That sum was undoubtedly not much more than one-third of the value of the property conveyed, and it must be regarded as a palpably inadequate consideration for the conveyance. The transfer included all the real estate the grantor owned, and left him without means to pay his other then existing creditors, and the grantee had knowledge of those facts.

As suggested above, we think the evidence justifies the conclusion that the conveyance from Mr. Jones to his wife was not intentionally fraudulent, but rather entered into in the mistaken belief that he was actually indebted to her to an amount equal to the full value of the property conveyed. The transaction, however, being without an adequate consideration, is fradulent by construction of law.

The question then arises, what disposition should be made in a court of equity of the conveyance? Should it be regarded and treated as absolutely void, or should it be permitted to stand as security for the sum actually paid by the grantee therefor—the bona fide indebtedness then existing from the grantor to the grantee? In *Foster* v. *Foster,* 56 Vt., 540, the court said: "In respect to the consideration of the conveyances, it is to be observed that there is an important difference between law and equity. At law, a conveyance is wholly good or wholly bad; there is no middle ground. But in equity, when the property is of greater value than the consideration,

the conveyance may be impeached to a partial extent as being voluntary, and, if not fraudulent in fact, be sustained to the extent of the consideration. Chancellor Kent says that nothing can be more equitable than this mode of dealing with conveyances of such indecisive and dubious aspect that they cannot be entirely suppressed or entirely supported with satisfaction."

In *Hanson* v. *Gregory*, (Iowa) 73 N. W., 478, where a husband conveyed $5000 worth of property to his wife in consideration of $1430 previously borrowed from her, it was held that the conveyance was voluntary to the extent that the value of the land exceeded the debt, and that the property, after the first lien to the wife, will be subjected to the payment of debts contracted by the husband prior to the conveyance. And in *Cox* v. *Collis* (Iowa), 80 N. W., 343, it was held that where the value of the land conveyed by a husband to his divorced wife in payment of a loan from her to him greatly exceeds the amount of the debt the conveyance was fraudulent as to his creditors to the extent that the consideration was inadequate, although it was accepted by her in good faith.

See Cyc., Vol. 20, pp. 508 and 509, and numerous cases there cited.

In *Smith* v. *O'Brien,* (N. J. Eq.) 41 Atl., 492, it was held that such a conveyance should be decreed to be a mortgage to secure the grantee for the amount actually paid by him. To the same effect was the decision in *Warner* v. *Withrow,* 56 N. J. Eq., 795, 35 Atl., 1057, Pitney V. C. saying: "I think that, when such a case arises, the inclination of a court of equity should be to hold the transaction a mortgage, instead of an absolute sale, as was done in the case of *Damarest* v. *Terhune,* 18 N. J. Eq., 532, I shall therefore advise a decree that the complainant have leave to redeem the property by paying to the defendant Withrow the sum of $2500 with interest, the latter to be charged with the rents and profits of the premises in the meantime and credited with the expenses of repairs and taxes."

We think the case at bar is one where, on the one hand, the conveyance cannot be allowed to stand in full force and effect because fraudulent in law as to the grantor's creditors, and, on the other hand, that is should not be set aside except upon such terms and conditions as will protect the defendant to the extent of her equities in the property. It is therefore the opinion of the court that the conveyance should not be upheld as an absolute sale of the property,

but that it should be regarded as having the effect of a mortgage securing to the defendant the sum of $635, that being the actual sum which the grantor owed her at the time.

In deciding what procedure will best secure to the defendant her rights in the property, and also make the balance of it available for her husband's creditors, it is to be borne in mind that the bankruptcy proceedings did not deprive the defendant of her rights by descent, under the statute, in the property as the bankrupt's wife, and that she still has that right in addition to her rights under the conveyance in question.

On the whole, we are of opinion that it will best subserve the rights and interest of all parties to have the property sold, subject to the defendant's right by descent therein, under a proper decree of the court, and the net proceeds of such sale first used to pay the defendant the amount found to be due her upon an accounting as hereinafter provided for, the balance of such proceeds to be turned over to the complainant for the benefit of the grantor's creditors under the bankruptcy proceedings. In such accounting the defendant is to be credited with the $635 and interest thereon from the date of the conveyance, together with her expenses for taxes and repairs on the property. She is to be charged with the rents and profits of the premises in the meantime, and also with the amount due under a mortgage upon a part of the property given by her to Alzena M. King, December 8, 1911 for $243.74, less, however, the sum of $90 and interest thereon, that part of the mortgage debt having been obtained to defray the expenses of the husband's bankruptcy proceedings.

The appeal is therefore sustained and the case remanded for an accounting as herein suggested before a single Justice, after which a decree for a sale of the property upon proper terms will be entered in accordance with this opinion.

So ordered.

WILLIS E. CROSBY *vs.* FRANK H. PLUMMER et al.

Cumberland. Opinion December 30, 1913.

Breach of Duty Contract. Due Care. Duty. Exceptions. Instructions. Insurance. Negligence. Pleading. Policies. Renewal. Trespass.

An action of trespass on the case for alleged omission to perform or discharge a duty arising from contract.

Held:

1. It is elemenary law that an action on the case may be brought for the recovery of damages for the omission or neglect of a duty or obligation arising from contract as well as of one imposed by statute.
2. The plaintiff must prove negligence, but in all cases when a wrong, a fault or an omission of a duty even is proved, from which damages result, the wrong, fault or omission implies a neglect, in the absence of other evidence, which requires explanation from the apparently guilty party.
3. The contract with its incidents either express or attached by law, becomes the only measure of the duties between the parties.
4. That the defense of the contributory negligence of the plaintiff must be based upon the plaintiff's obligation, or duty, under the contract, or its incidents, and must be shown to be a proximate cause of the breach by the defendant.
5. Failure on the part of the plaintiff, after a breach to use due care to prevent or diminish consequences which are avoidable in whole or in part, is a matter of defense distinct from contributory negligence.
6. The latter goes to the right of recovery, the former affects the amount of damages, and the burden of proof is upon the party alleging it.

On exceptions by the defendant. Exceptions overruled.

This is an action of trespass on the case to recover damages for failure of defendant to perform an alleged undertaking to obtain the renewal of a policy of insurance upon its expiration, which would occur at a future date. Plea, general issue.

At the close of the charge of the presiding Justice, to the jury, the defendant requested the presiding Justice to give to the jury certain instructions, which he refused to do, and the defendant excepted thereto.

The case is stated in the opinion.

Walker & Pike, and Arthur Chapman, for plaintiff.

Frank H. Haskell, for defendants.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, PHILBROOK, JJ.

BIRD, J. This is an action of trespass on the case for alleged omission to perform or discharge a duty arising from contract. The plea was not guilty. There was evidence tending to prove that plaintiff, meeting on or about September 5, 1911, one of the defendants, who were copartners as insurance agents, at a place other than the office of defendants, placed before him three policies of insurance upon property of plaintiff; that one of the policies had already expired and of the others, one expired October 21, 1911, and the other November 26, 1911; that plaintiff requested the defendants to procure new insurance at once in place of the policy already expired and to replace the other two policies when they respectively should expire; and that this was assented to and the policies taken by the member of the firm in question.

On part of defendants it was claimed and there was evidence tending to prove that but two policies, that already expired and that expiring in October, 1911, were delivered by plaintiff.

It is not questioned that defendants caused insurance to be written at once in replacement of the expired policy and, immediately on its expiry, of the policy which terminated October 21, 1911; and that both these renewed policies were seasonably forwarded to plaintiff. But no insurance was effected by defendants upon the policy which expired November 26, 1911, of which fact plaintiff had no actual notice nor knowledge prior to the destruction by fire of the property covered by the policy last named, which occurred on the twelfth day of January, 1912.

The verdict was for plaintiff and the case comes before this court upon the exceptions of defendants to the refusal of requested instructions.

It is elementary law that an action on the case may be brought for the recovery of damages for the omission or neglect of a duty or obligation arising from contract as well as of one imposed by statute. *Milford* v. *B. R. & E. Co.,* 104 Maine, 233, 249-251; *San-*

ford v. *Haskell,* 50 Maine, 86, see also *Hinks* v. *Hinks,* 46 Maine, 423. So declaring, the plaintiff must prove negligence, *Milford* v. *B. R. & E. Co.,* supra; but in all cases where a wrong, a fault or an omission of a duty even is proved from which damages result, the wrong, fault or omission implies a neglect, in the absence of other evidence, which requires explanation from the apparently guilty party. *Guthrie* v. *M. C. R. R. Co.,* 81 Maine, 572, 582-3. In other words, it is often alone in the power of defendant to produce evidence to excuse or explain.

The negligence counted upon must be such as grows out of the contract or its incidents. As has been well stated "the contract with its incidents either express or attached by law, becomes the only measure of the duties between the parties. There might be a choice, therefore, between the forms of pleading, but the plaintiff could not by any device of form get more than was contained in the defendant's obligation under the contract." And we must hold that the defence of the contributory negligence of the plaintiff must be based upon the plaintiff's obligation or duty under the contract or its incidents and must be shown to be a proximate cause of the breach by defendant. It must, therefore, antedate or be concurrent with the latter. Failure on the part of the plaintiff, after a breach, to use due care to prevent or diminish consequences which are avoidable in whole or in part is a matter of defense distinct from contributory negligence. The latter goes to the right of recovery, the former affects the amount of damages and the burden of proof is upon the party alleging it. *Hamilton* v. *McPherson,* 28 N. Y., 72, 77; *Leonard* v. *N. Y. etc. Co.,* 41 N. Y., 544, 565; *Hopkins* v. *Sanford,* 41 Mich., 243; *Murrell* v. *Whiting,* 32 Ala., 54, 67.

The liability of defendant for such breach or omission of duty being shown, the plaintiff is entitled at least to nominal damages. *Merrill* v. *West Un. Tel. Co.,* 78 Maine, 97; *Webb* v. *Gross,* 79 Maine, 224; *Hagan* v. *Riley,* 13 Gray, 515, 516; *Laflin* v. *Willard,* 16 Pick., 64, 67; *Marzetti* v. *Williams,* 1 B. & Ad., 415.

The first requested instruction is as follows: "Under the allegations in the plaintiff's writ before he can recover it is necessary for him to prove affirmatively that no lack of ordinary care on his part contributed to produce his injury." The instruction requested has a double aspect. If it be regarded as a request to instruct that plain-

tiff must be found not guilty of negligence prior to the failure of defendants to renew the policy on the twenty-sixth day of November when the breach occurred and as of which date the liability of defendants, if liable, must be fixed, the defendants were not aggrieved by the refusal, the jury having found delivery of the three policies, as the uncontradicted evidence clearly shows him without fault. If the requested instruction he held to be a request to instruct that the burden of proof was upon plaintiff to show no lack of care on his part to avoid in whole or in part the consequences of defendants' neglect it was rightly refused.

The four following requested instructions, in varying form, are to the effect that plaintiff could not recover unless he proved that he exercised due care, after defendants' breach, to avoid the consequences of the breach, by calling attention of defendants to the fact that the renewal of the policy had not been made. These requested instructions were properly refused since, without such proof on plaintiff's part, he would still be entitled to recover nominal damages and because the burden of showing want of due care on the part of plaintiff to avoid the consequences of their breach falls upon defendants. *York* v. *Athens,* 99 Maine, 88, 99.

The remaining requested instruction is "If the jury find that the plaintiff did give to one of the defendants the policy in controversy, the defendants were under obligation to exercise only reasonable care in regard to said policy, and if you find the defendants did exercise such reasonable care in regard to the same after it came into their hands or the hands of either of them they would not be liable." The defense was a denial of the receipt by defendants of the policy expiring November 26, 1913. The jury found it was delivered. There was no evidence, consequently, of care on the part of defendants regarding this policy or any explanation of their failure to renew it after its receipt. *Guthrie* v. *M. C. R. R. Co.,* ubi supra. The defendants were not aggrieved by the refusal to instruct as requested.

Exceptions overruled.

THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF MAINE, in Equity,

vs.

HAROLD M. EDWARDS AND MAUDE M. EDWARDS.

Androscoggin. Opinion December 31, 1913.

Beneficiary. Benefit Certificate. Change of Beneficiary. Children. Contract. Designation of Beneficiary. Interpleader. Widow.

On December 5, 1901, the Grand Lodge, Ancient Order of United Workmen of Maine, issued to Merton O. Edwards, member of Lewiston Lodge, No. 50, a benefit certificate for $2000, payable at his death to his wife, Clara A. Edwards. She died December 7, 1902, leaving one child, Harold M. Edwards. No change or other legal designation of a beneficiary was thereafter made and named in the certificate. June 8, 1907, Merton O. Edwards married Maude M. Edwards, who survived him as his widow, he having died September 22, 1911.

Held:

1. That the constitution and laws of this fraternal association, in respect to which the beneficiary contract of insurance was entered into, so far as applicable, form a part of the contract itself.
2. Unless a new designation of a beneficiary is made in the manner specified in the laws of the order therefor it is not valid and effectual against one who is entitled to the benefit under the contract and the laws of the order, when no new designation is made.
3. Harold M. Edwards could not take the benefit as heir of his mother, the beneficiary who died, for in this case, under the contract and admitted facts, the benefit must go either to another legally designated beneficiary, or to the surviving widow.
4. A new designation of a beneficiary "must be made in the form prescribed and must be signed by the member," and must be forwarded with the beneficiary certificate to the Grand Recorder.
5. The letter from the insured to his son Harold M. Edwards, and the statements therein contained, do not constitute a designation of the son as the beneficiary of the fund, made in the manner provided therefor in the laws of the Order.

On report. Decree according to the opinion.

This is a bill in equity by the Grand Lodge of the Ancient Order of United Workmen of Maine against Harold M. Edwards and Maude M. Edwards, in which the court is asked to determine to whom belongs the amount due and payable under a beneficiary certificate issued to Merton O. Edwards by the plaintiff corporation on the 5th day of November, 1901, for $2000, payable at his death to his wife, Clara A. Edwards, who died December 7, 1902, leaving one child, Harold M. Edwards. June 8, 1907, the insured married Maude M. Edwards, who survived him, he having died September 22, 1911.

By agreement of the parties, the case was reported to the Law Court on the original petition, answers of Harold M. Edwards and Maude M. Edwards and decree of interpleader, letter of Merton O. Edwards to Harold M. Edwards. The Law Court shall determine, upon all of the foregoing, the ownership of the fund described in the petition.

The case is stated in the opinion.

L. L. Walton, for plaintiff.

McGillicuddy & Morey, for Harold M. Edwards.

W. B. Skelton, for Maude M. Edwards.

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

KING, J. On December 5, 1901, the Grand Lodge, Ancient Order of United Workmen of Maine issued to Merton O. Edwards, member of Lewiston Lodge, No. 50, a benefit certificate for $2000, payable at his death to his wife, Clara A. Edwards. She died December 7, 1902, leaving one child, Harold M. Edwards. No changes or other legal designation of a beneficiary was thereafter made and named in the certificate. June 8, 1907, Merton O. Edwards married Maude M. Edwards, who survived him as his widow, he having died September 22, 1911. All assessements and dues were paid, and at the death of Merton O. Edwards the amount due and payable under said certificate, to whomsoever it belonged, was $1826.96. Harold M. Edwards and Maude M. Edwards each claimed to be entitled to the amount due under said certificate, and

thereupon said Grand Lodge brought its bill in equity asking that they be required to interplead touching their claims to the fund, which was ordered. By agreement the case was then reported to this court for determination upon the bill, answers, decree of interpleader, a letter from Merton O. Edwards to his son Harold M. Edwards written sometime after June 8, 1907, and such portion of the constitution, general laws and by-laws of the plaintiff corporation as are material.

Maude M. Edwards claims the fund as the surviving widow of Merton O. Edwards, and Harold M. Edwards claims it (1) as the only heir of Mary A. Edwards and (2) by virtue of statements made in the letter to him from his father which is by agreement to be considered as a part of his answer.

Section 7 of General Law XVI of the plaintiff corporation, so far as material to the questions here involved, provides: "and if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other legal designation, the benefit shall be paid to his widow, if living at the time of his death; if he leave no widow surviving him, then said benefit shall be paid, share and share alike, to his children," etc.

It is too well settled to admit of doubt that the constitution and laws of this fraternal association, in respect to which the beneficiary contract of insurance was entered into, so far as applicable, form a part of the contract itself. *Grand Lodge, A. O. U. W. v. Connolly*, 58 N. J. Eq., 180, 43 Atl., 286; *Grand Lodge, A. O. U. W.* v. *Gandy*, 63 N. J. Eq., 692, 53 Atl., 142. This contract is to be construed and given force and effect as other contracts upon similar subjects.

Applying this well established principle in the case at bar, we find that the beneficiary contract between the Lodge and the insured member expressly provides that if the beneficiary named in the certificate shall die during the lifetime of the member, and he shall have made no other legal designation of a beneficiary, the benefit shall be paid to his widow, if living at his death. And the admitted facts are, that the sole beneficiary named in the certificate died in the lifetime of the member, and that at his death his second wife, survived him as his widow. It is therefore too clear to admit of controversy that the benefit in question, under the express terms of

the contract, belongs to the surviving widow of the member, Maude M. Edwards, unless he made aonther "legal designation" of a beneficiary of it.

It necessarily follows, therefore, that there can be no merit in the first claim of Harold M. Edwards, that he took the benefit as heir of his mother, the beneficiary who died, for in this case, under the admitted facts, the benefit must go either to another legally designated beneficiary, or to the surviving widow.

This brings us to a consideration of the other claim of Harold M. Edwards, that he was designated by his father as the beneficiary of the fund in question.

In support of this claim he relies upon the statements of his father contained in the letter referred to. That letter was a strong expression of the father's displeasure and grief on account of the son's misconduct, and a most earnest appeal to him to change his course of conduct and try to become more efficient. He tries to assure his son that he still has a full measure of parental solicitude for his welfare, and that he will help him in every way that he can consistent with his means. The following are the strongest expressions contained in the letter touching the point now under discussion. "I may not live a great while. I do not expect to but I will not tell you why for you do not care. My property I shall leave to you and no one else will get much of it. My insurance will go to you. I am not against you as you may know sometime when too late," . . . Again, "No one will get my money but you and I want to save it for you."

It may be conceded that the letter expresses the father's intention and purpose that at his death his son was to have the benefit in question. But is that enough to constitute a "legal designation" of a new beneficiary in the manner provided for in the law of the order?

It is to be borne in mind that notwithstanding the death of the beneficiary named in the certificate during the lifetime of the member, the contract still specified the person or persons to take the benefit, viz.: the widow, if a widow survived the member, and if not then his children, etc. Therefore, in order for the benefit to go to some one other than those included in the contract, the contract

must be changed. And this was expressly provided for in the General Laws of the order. Section 10 of General Law XVI reads:

"A member may, at any time, when in good standing, revoke his directions as to the payment of his Beneficiary Certificate, and a new Beneficiary Certificate shall thereafter be issued, payable to such beneficiary or beneficiaries as such member may direct in accordance with these Laws, upon the payment of a fee of fifty cents. Said revocation and direction must be made in the form prescribed, signed by the member in presence of and attested by the Recorder of his Lodge, and accompanied by the required certificate of the Subordinate Lodge, under its seal, shall be forwarded with the Beneficiary Ceritficate to the Grand Recorder. If it is impracticable to have said revocation and direction signed in the presence of and attested by the Recorder attestations may be made by a notary public or an officer of a court of record, with his official seal attached. When such revocation, direction and certificate, made in accordance with these Laws, shall have been received by the Grand Recorder, any previous direction in regard to the payment of the benefit shall thereby be rendered null and void."

The authorities are almost uniform in holding that he who relies upon a change in the beneficiary contract whereby a new beneficiary is designated to take the benefit in place of those who would otherwise be entitled to it under the unchanged contract, must show that the change has been made in the manner provided for in the laws of the order.

Mr. Bacon in his work on Benefit Societies (Section 308) states the rule to be that the member must revoke his designation of a beneficiary, and appoint a new one, in the way pointed out by the laws of the order. In *American Legion of Honor* v. *Smith,* 45 N. J. Eq., 466, 17 Atl. 770, the court said: "The best considered cases upon this subject are uniform in holding that the by-laws, above recited, constitute an essential part of contracts like the one under consideration, and that no person can successfully assert a right to a fund payable on the death of a member unless he can show that he has been appointed a beneficiary by said member, in the manner required by the contract." This principle is so well settled that it is unnecessary to make extended citations from the vast number of authorities sustaining it. But we do here call attention to the following cases.

In *Grand Lodge, A. O. U. W.* v. *Gandy,* 63 N. J. Eq., 692, the member had designated his wife as his beneficiary. She predeceased him. Some years after her death he attempted to designate a new beneficiary by declaring in a separate signed affidavit that he desired another person to be his beneficiary which he sent pinned to the original certificate to the order, and a new certificate containing the name of the new beneficiary was issued to him and remained in his possession until his death.

It was held in that case, that the attempted designation did not conform to the rules of the order, and was incompetent to take away the benefit from the member's children, who were entitled to it under the laws of the order, there being no surviving widow, unless another direction was effectually made.

The case of *Grand Lodge, A. O. U. W.* v. *Connolly,* 58 N. J. Eq., 180, 43 Atl., 286, is practically on all fours with the case at bar. In that case the member's wife, Emiline Connolly, was named in the certificate. She died before his death leaving four children. Shortly before her death he went to the officers of the subordinate lodge and stated that he wished the policy to be payable to his children and was informed that all that was necessary was to hand the certificate to his children and that upon his death they would receive the beneficial fund. Thereafter he married and that second wife survived him. The children on the one hand, and the surviving widow on the other, claimed the fund. Upon a bill of interpleader the fund was placed in court to be paid to whomsoever it should be decreed to belong. In that case, as in the case at bar, it was provided in the laws of the order that if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other direction in the manner provided therefor, the benefit should be paid to his widow if any. In that case also the provision contained in the laws of the order for changing the beneficiary appears to be the same, or at least substantially the same, as that in the case at bar. The court there held that there was no designation of a new beneficiary in the manner provided by the laws of the order, and that the widow was entitled to the beneficial fund.

In the case at bar, as above noted, the benefit belongs to the surviving widow of the member, under the express terms of the laws

of the order which are a part of the contract, unless the member made another "legal designation" of a beneficiary to take it.

The law of the order quoted above specifies in detail the manner in which a new designation can be made. Among other provisions it is required that the direction therefor "must be made in the form prescribed, signed by the member," and that after it is attested as therein provided for it "shall be forwarded with the Beneficiary Certificate to the Grand Recorder." Obviously those requirements were not complied with in this case. And clearly the letter from the insured member to his son, and the statements therein contained, do not constitute a "legal designation" of the son as the beneficiary of the fund, made in the manner provided therefor in the laws of the order.

It is therefore the opinion of the court that Maude M. Edwards, the surviving widow of Merton O. Edwards, is entitled to payment of the fund.

So ordered.

In Equity.

CORA B. CARLL *vs.* THEODORE KERR.

Cumberland. Opinion January 2, 1914.

Appeal. Conveyance. Equity. Foreclosure. Jurisdiction. Mortgage. Redemption. Tender.

The plaintiff acquired title by administrator's deed to the real estate described in her bill upon which there were two mortgages, given by the intestate to a bank and by said bank assigned to Rena L. Carll, and by Rena L. Carll to the defendant. On the 21st day of October, 1911, the defendant began foreclosure proceedings by publication, the dates of publication being November 3-10-17 1911. The plaintiff claimed to have first learned of the

mortgages on September 20, 1912. She consulted an attorney, who inquired by telephone of the Register of Deeds as to the date of the first publication, and was informed that it was November 17, when, in fact, that was the date of the last publication. Her attorney then wrote defendant for statement of the amount due on the mortgages and the expense of foreclosure. To this request, the defendant made no reply. November 16, 1912, plaintiff called on defendant prepared to pay the amount due on mortgages and expense of foreclosure. The defendant informed her that the year of redemption had expired and refused to accept the money.

Held:

1. That the time in which a mortgage may be redeemed, is clearly fixed by statute and the court cannot enlarge it.
2. That this case does not fall within the rule of mistake or accident which would give the court equity jurisdiction.
3. If the defendant received the request for a statement of the amount due and did not reply thereto it would not be acting so negligently, unequitably and contrary to law as to give the court jurisdiction on the ground of fraud.
4. The decision of a single Justice upon matters of fact in an equity hearing should not be reversed, unless it clearly appears that such decision is erroneous.

On appeal by the defendant. Appeal sustained. Bill dismissed without costs.

This is a bill in equity in which the plaintiff prays that an account may be taken of the sums equitably due the defendant on each of said mortgages; that the plaintiff may be allowed to redeem said mortgaged premises by paying to the defendant such sums as may be due the defendant by said account, and that the defendant may be ordered upon payment of said sum to release all his right and title in said premises to the plaintiff.

In 1897, one Sabra B. Carll was the owner in fee of certain real estate in Saco and described in plaintiff's bill. May 5, 1897, she mortgaged the premises to the Saco Savings Bank for $200, and March 8, 1898, she mortgaged the same premises to said Bank for $100. The Bank assigned the two mortgages to Rena L. Carll and same were assigned by Rena L. Carll to the defendant. Sabra B. Carll died leaving these mortgages unpaid, and the premises thus mortgaged were conveyed to the plaintiff by the administrator of the estate of Sabra B. Carll. On October 21, 1911, the defendant began foreclosure proceedings by publication, the dates of publica-

tion being November 3, 10, 17, 1911. The plaintiff claimed that she first knew of these mortgages September 20, 1912. Her attorney communicated by telephone to the Register of Probate and inquired as to the first date of publication, and was informed that it was November 17th, when, in fact it was November 3d, and thereupon wrote defendant for the amount due on said mortgages but received no reply. On the 16th day of November, 1912, plaintiff saw defendant and tendered to him the amounts due and was told by him that the equity of redemption had expired.

The single Justice who heard the case decreed that there had been accident and mistake as alleged in the bill and that justice and equity required the granting of the several prayers in the bill. The defend ant appealed from said decree to the Law Court.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

Charles G. Keene, and William C. Eaton, for defendant.

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

PHILBROOK, J. Bill in equity, heard before a single Justice, the parties agreeing that such hearing "was to be final save the right of appeal."

In 1897 Sabra B. Carll was the owner in fee simple of certain real estate in Saco. On May 5th of that year she mortgaged the premises to the Saco Savings Bank for two hundred dollars. On March 8th of the following year she mortgaged the same property to the same Bank for one hundred dollars. The Bank assigned the two mortgages, and the notes which the mortgages were given to secure, to Rena L. Carll on September 25th, 1908, and the same were assigned by Rena L. Carll to the defendant, Theodore Kerr, on September 10th, 1910. All the mortgage deeds and assignments were duly recorded. Sabra B. Carll died leaving the mortgage notes unpaid and the premises were conveyed to the plaintiff, Cora B. Carll, by Guy Carll, administrator of the estate of Sabra. The date of the death of Sabra and the date of the conveyance to the plaintiff do not appear in the record. The administrator's deed to the plaintiff contained no reference to the mortgages, and the plaintiff claims that she had no actual knowledge of their existence until September

20th, 1912. Meanwhile, to wit, October 21st, 1911, the defendant began foreclosure proceedings by publication, the date of publications being November 3d, 10th and 17th, 1911. On the 20th of September, 1912, the plaintiff, having that day discovered the existence of the mortgages and the proceedings to foreclose, consulted an attorney at Biddeford, who telephoned to the Register of Deeds at Alfred for information as to the date of the first publication of the foreclosure proceedings. The Register replied that it was November 17th when, as above stated, the first publication was in fact November 3d, 1911. The plaintiff was advised by the attorney that she could pay the amount due on the mortgage any time prior to November 17th, 1912. On the same 20th of September the firm of which the attorney was a member wrote the defendant stating that it was acting in behalf of the plaintiff and requested a statement of the amount due on the mortgages. The envelope was addressed to the defendant at Westbrook, which is the city alleged in the bill to be the residence of the defendant, and bore a return request of the firm. The defendant denied that he ever received the letter but it appears that the same was never returned to the writer. On the 16th of November, 1912, the plaintiff called on the defendant and tendered payment of the mortgages but was informed that the equity of redemption had expired and payment was declined. At the hearing below, the defendant testified that he had never been informed of the fact that the plaintiff desired to redeem the mortgages until the time of the call on November 16th. Albert W. Cole, a witness for the plaintiff, testified that the premises were worth at least twelve hundred dollars, while the defendant estimated that the value of the premises did not exceed nine hundred dollars. The record is silent at to the amount which the defendant paid for the mortgages or as to how much interest had accrued since the assignment of the same to him.

The plaintiff now brings this bill, alleging that through accident and mistake injustice has been done and prays that she may be allowed to redeem the mortgages by the payment of all sums found justly due the defendant, and that defendant be ordered to give her a deed of the premises. The decree of the presiding Justice who heard the case declared that there had been accident and mistake as alleged in the bill and that justice and equity required the granting of the several prayers in the bill.

The decision of a single justice upon matters of fact in an equity hearing should not be reversed unless it clearly appears that such decision is erroneous. The burden of establishing that error is upon the appellant and he must show that the decree appealed from is clearly wrong, otherwise it will be affirmed. *Young* v. *Witham,* 75 Maine, 536; *Paul* v. *Frye,* 80 Maine, 26; *Berry* v. *Berry,* 84 Maine, 541; *Bartley* v. *Richardson,* 91 Maine, 424.

But the respondent, in his appeal, claims that the decree below was error in law, and that on this ground it should be set aside and the bill dismissed.

These mortgages were in the form customarily used in this State and provided that the right of redeeming the mortgaged premises should be forever foreclosed in one year next after the commencement of foreclosure proceedings. One of the methods of foreclosure provided by statute is that of publication and the Legislature has declared that the year of redemption should begin with the date of the first publication which, in this case, was November 3, 1911, and close one year later. Has this court in equity power, under the circumstances in this case, to extend the time thus fixed by statute? We think not. In *McPherson* v. *Hayward et al.,* 81 Maine, 329, which was a bill in equity to redeem a mortgage, our court has said: "The duration of the mortgagor's right to redeem is clearly defined by law, and one the court cannot abridge or enlarge by a single day."

In *Rockland* v. *Water Co.,* 86 Maine, 55, we find the following: "The statute of 1891, chapter 91, specially giving equity jurisdiction over the foreclosure of mortgages, may not mean more than to declare the law and make it plain in such matters. That is, given an equitable remedy where the nature of the case requires special aid from the equity side of the court, to make the remedy complete and save the parties, perhaps from irreparable loss. *Manifestly the statute periods of redemption are not repealed or otherwise modified.*"

Our attention has been called to *Cameron* v. *Adams,* 31 Mich., 426, which seems to be much in point. In that case the complainant, during the year in which the equity of redemption was running, became dangerously ill, was unable to attend to business, and was delirious much of the time. He invoked the aid of the equity court because of this misfortune which, he claimed, prevented him from

redeeming his mortgaged premises. Aid was denied him, and, among other things, the court said: "Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end. But we think there is no such power to relieve against statutory forfeitures. Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. This principle has not been open to controversy, and is familiar and elementary." In the same case it was declared that inadequacy of price alone was not a vitiating factor in the proceedings, and in conclusion the court there said: "The case is one of much hardship, and it is much to be regretted that the complainants have been deprived of their estate by the rigorous effect of provisions which take no account of misfortunes. But courts of equity cannot assume any censorship to condemn parties for doing what the courts cannot prevent. They can only redress wrongs within their jurisdiction."

The plaintiff, in the case at bar, complains that the respondent "negligently and inequitably and contrary to law," refused and refrained from answering the letter of September 20, 1912, asking for information as to the amount due on the mortgages. Upon this contention, we refer to *Sanborn* v. *Dennis,* 9 Gray, 208, where the complainant contended, in a proceeding like the one at bar, that the neglect of the respondent to render an account had unfairly prevented redemption and that the time of redemption should therefore be extended, but the court overruled the contention.

Under the facts in this case, the plaintiff is without equitable remedy, and the mandate should be,

Appeal sustained.
Bill dismissed without costs.

CITY OF BANGOR *vs.* INHABITANTS OF VEAZIE.

Penobscot. Opinion January 5, 1914.

Abandonment. Custody of Children. Divorce. Emancipation. Minor Children. Pauper. Pauper Settlement.

Action for pauper supplies furnished two minor children of Ralph Spencer. Ralph Spencer, the father, whose pauper settlement was in Veazie in October, 1902, when he left his wife and children and went to Washington and has not returned, and has not communicated with his children or made any provision for them. Nellie M. Spencer, the wife of Ralph Spencer and mother of the children, was divorced from Ralph Spencer in January, 1906, and was married in April, 1908. The care and custody of said children were given to her and have remained with her ever since.

Held:

1. That the abandonment of his children by Ralph Spencer effected their emancipation and they took the pauper settlement of the father, then in Veazie, which continued until they gained a new one for themselves, the power to do which is acquired after they are of age.
2. The decree of divorce in and of itself did not effect the settlement, either of the wife or of the children, divorce not being enumerated among the ways and means by which a settlement may be acquired or affected.
3. Nor is a decree of court, awarding the custody of children to one or the other parent, one of the methods provided by statute for the acquirement of settlements.
4. The statute (R. S., c. 27, sec. 3) does not speak until the end of five years and when it does speak, it has no retroactive force to bring a loss of settlement to those who at one time derived their settlement from such party, but do so no longer.

On report on an agreed statement. Judgment for the plaintiff for the sum of $103.07, with interest on the sum of $24.90 from November 16, 1911, and interest on $78.17 from the date of the writ.

This is an action of assumpsit to recover for pauper supplies furnished to Everett W. Spencer and Paris A. Spencer, minor children of Ralph Spencer and his wife Nellie M. Spencer, between September 14, 1910, and March 15, 1912, amounting to $103.07. Ralph Spencer, whose pauper settlement was in Veazie, left his wife and said minors and went to the State of Washington, and has not returned, or communicated with, or provided for them. The wife removed from Veazie in 1902 and has not lived in Veazie since.

That in January, 1906, she was divorced from Spencer and the care and custody of said children was decreed to her, and they have been with her ever since. In April, 1908, Nellie M. Spencer was married to one Maloy.

By agreement of the parties, the case was reported to the Law Court upon an agreed statement of facts for decision; the court to enter such judgment as the rights of the parties require.

The case is stated in the opinion.

B. W. Blanchard, for plaintiff.

George E. Thompson, for defendant.

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

BIRD, J. This is an action for pauper supplies furnished two minor children of Ralph Spencer on and between September 14, 1910 and March 15, 1912. It appears from the agreed statement of facts that Ralph Spencer, having his pauper settlement in Veazie, in the month of October, 1902, left his wife and said minors, went to the State of Washington and has not returned to the State of Maine, except on one occasion when, coming for a business purpose, and neither communicating with his children nor making provision for them, he remained for a few days only.

His wife, Nellie M. Spencer, removed from the town of Veazie either in the year 1902 or 1903 and lived for some time in Milford, in this State. On the eighteenth day of January, 1906, she was decreed a divorce from her husband and the care and custody of the two minors were given the mother, in whose care and control they have since remained. The records of the plaintiff city show that Nellie M. Spencer and one Maloy, each of Bangor, were married in that city on the thirteenth day of April, 1908. It is also agreed that Nellie M. Spencer had neither then nor ever a pauper settlement in Bangor and that Maloy never had a pauper settlement either in Bangor or Veazie; that Nellie M. Spencer neither at the time of her second marriage nor ever had such settlement in Bangor, and that, since her removal in 1902 or 1903, she has never lived in Veazie nor asked nor received pauper supplies for herself from either Veazie or any other city or town. Both the minors were born in Veazie, one in 1898 and other in 1900. To their support or that

of his wife, Ralph Spencer has made no contribution since he left them in 1902.

The plaintiff claims the settlement of the two children to be in Veazie and defendant denies its liability.

It is apparent that at the time the father abandoned his children, his and their pauper settlement was in Veazie. R. S., c. 27, secs. 1, 2. Upon the authority of *Thomaston* v. *Greenbush,* 106 Maine, 242, 244, 245, and cases cited, this abandonment of his children effected their emancipation and they took the pauper settlement of the father, then Veazie, which continues until they gain a new one for themselves, the power to do which is acquired only after they are of age. R. S., c. 27, secs. 1, 6, paragraphs IV, VII and VIII not applying; see *Exeter* v. *Stetson,* 89 Maine, 531, 533.

The decree of divorce in and of itself did not affect the settlement either of the wife or of the children, *Howland* v. *Burlington,* 53 Maine, 54; see *Marlborough* v. *Hebron,* 2 Conn., 22; a divorce not being enumerated among the ways and means by which a settlement may be acquired or affected: *Dalton v. Bernardston,* 9 Mass., 201, 203. See Laws 1821, c. 122, secs. 1, 2. Nor is a decree of court awarding the custody of children to one or the other parent one of the methods provided by statute for the acquirement of settlements. See *Marlborough* v. *Hebron,* supra; *Carthage* v. *Canton,* 97 Maine, 473, 478.

The defendant invokes the aid of R. S., c. 27, sec. 3, which incorporates the amendment of 1893, Pub. Laws, c. 269. This provision has been construed by this court in *Portland* v. *Auburn,* 96 Maine, 501, and *Thomaston* v. *Greenbush,* supra. In the latter case it is said "the statute does not speak until the end of five years and when it does speak it has no retroactive force to bring a loss of settlement to those who at one time derived their settlement from such party but do so no longer." *Thomaston* v. *Greenbush,* 106 Maine, 246-7. In the case at bar the minors upon their abandonment and emancipation by the father in 1902, then took his settlement which was unaffected by his loss of settlement five years later.

Judgment for plaintiff for the sum of $103.07 with interest on the sum of $24.90 from November 16, 1911, and interest on the sum of $78.17 from the date of the writ.

ARAMEDE S. TARBOX *vs.* ALFRED L. TARBOX.

Sagadahoc. Opinion January 7, 1914.

Decree. Demurrer. Due Care. Equity. Exceptions. Income. Injunction. Master. Mutual Mistake. Taxes. Trustee. Will.

Alfred Lemont, late of West Bath, in the County of Sagadahoc, died on the 21st day of August, 1896, leaving no widow, and as his only heir at law and next of kin, the plaintiff, a daughter. By his last will and testament he bequeathed to Harry R. Tarbox, then of said Bath, all of the bank stock of the deceased, and to the defendant all of the bonds of the deceased, the said legatees being his grandsons and sons of the plaintiff, and bequeathed to the plaintiff all the rest, residue and remainder of the estate of said deceased. The plaintiff, being dissatisfied with the provisions of the will, a compromise was effected whereby Harry R. Tarbox agreed to assign to the plaintiff the income of the bank stock and the defendant agreed to assign to the plaintiff the income of the bonds during her natural life. The original assignment had been lost for many years, but was subsequently found in the plaintiff's possession. This assignment, in fact, included the principal, as well as the income. From the time of the compromise until after the filing of the bill, the parties believed that the bonds belonged to the defendant and that the income only had been assigned to the plaintiff.

Held:

1. The phrase "mutual mistake," as used in equity, means a mistake common to all the parties to a written contract, or instrument, and usually relates to a mistake concerning the contents, or the legal effect of the contract or instrument.

2. If parties are ignorant of facts on which their rights depend, or erroneously assume that they know those rights and deal with their property accordingly, not upon the principle of compromising doubts, the court will relieve against such transactions.

3. A mutual mistake which will afford ground for relief from a contract by reforming it means a mistake reciprocal and common to both parties, when each alike labors under the misconception in respect to the terms of the written instrument.

4. Constructive trusts include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner where there is no intention of the parties to create

such relation, and in most cases contrary to the intention of the one holding the legal title and when there is no express or implied, written or verbal declaration of trust.

5. If a person has assumed to act as trustee, and having received money in that character, misapplies it, he is accountable for the proceeds to the cestui que trust and cannot defend himself by showing that in fact he was not legally a trustee, or that when he committed the breach he did not know who his cestui que trust was.

On exceptions by both parties. Bill sustained. Plaintiff's exceptions overruled. Defendant's exceptions overruled. Decree below affirmed with additional costs.

This is a bill in equity praying that the defendant may be declared to be a trustee of all bonds bequeathed to him by the will of Alfred Lemont, and received by him from the executors of said will, and all other bonds or other property into which said original bonds, or the proceeds thereof, have been converted by the defendant; that the defendant be ordered to pay to her the income thereof during her natural life; for an injunction and an accounting. The defendant filed an answer to said bill and the case was sent to a master, who made his report.

A decree was entered sustaining the bill and confirming the master's report in detail. The plaintiff and defendant excepted to certain parts of the master's report.

The case is stated in the opinion.

William T. Hall, and Barrett Potter, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

HANSON, J. This is a bill in equity to enforce an alleged trust, and comes to this court on exceptions by both parties. The original bill was dated October 14, 1909, and related to bonds aggregating in amount $64,500. The plaintiff alleges "that the defendant held the bonds in trust to pay the income thereof to the plaintiff during her lifetime, and that the defendant disregarding his duty had paid only a portion of said income, and neglects and refuses to pay the balance, denies the trust relation, and declares that he will pay no more of said income hereafter."

The prayer of the bill is, "that the bonds and the proceeds thereof may be charged with a trust in favor of the plaintiff for the payment to her of the income thereof during the term of her natural life," for an injunction, an accounting and other relief.

The writ of injunction was thereupon granted and $57,000 of the fund was turned over to the Lincoln National Bank of Bath, as commanded therein, to await the further order of court.

On March 22, 1910, a master was appointed. The record discloses that the parties were thus far acting under, and governed by, the following facts:

Alfred Lemont, of West Bath, a widower, died August 21, 1896. The plaintiff was his only child. The defendant was his grandson, and is the oldest son of the plaintiff. Alfred Lemont left an instrument purporting to be his last will, in which he named the plaintiff and her husband, since deceased, executors, and in which he bequeathed to Harry R. Tarbox, the second son of the plaintiff, all of the testator's bank stock, and to the defendant his entire holdings of bonds. The plaintiff being dissatisfied with the provisions of the will upon presentation of the same for probate, appeared as a contestant. There was a compromise, and the will was admitted to probate in October, 1896. By the compromise, as appears by the pleadings, Harry R. Tarbox agreed to assign to the plaintiff the income of the bank stock mentioned in the will, and the defendant agreed to assign to the plaintiff the income of the bonds bequeathed to him in the will, for and during her natural life. This arrangement was perfected, and from that time until after the filing of the bill, the parties believed that the bonds belonged to the defendant, and that income only had been assigned to the plaintiff.

The original bill proceeded upon that theory, and alleged that the defendant held the bonds in trust to pay the income to the plaintiff during her lifetime.

The answer denied a trust, but admitted the assignment of income, and also admitted that the defendant had refused to pay over a portion of the income for reasons set out in the answer, and offered to make good any shortage.

While the accounting was in progress, the original assignment which had been lost for many years was found in the plaintiff's possession. It was then discovered that the assignment included

principal as well as income, and that the plaintiff had executed an irrevocable will bequeathing the bonds to the defendant at her decease. The bill was then amended, the amendment setting out the discovery of the assignment, and alleging that "as a result of the mutual mistake as to the rights of the parties in the bonds, the defendant took possession of them, and became and remained a trustee of the same, and of their accumulations, and reinvestments, for the benefit of the plaintiff, and became subject in respect thereto, to the usual duties and obligations of a trustee." The amended bill prayed "that these bonds may be declared the absolute property of the plaintiff, subject to the provisions of the will, and that the defendant be held to the standard of due care in the investment of trust funds, and that he be required to make good any losses of principal or income resulting from lack of such care, and that he be required to pay interest on principal and income lost or withheld.

The defendant demurred to the amended bill on the ground that its allegations were not sufficient to establish a trust. The demurrer was sustained, and the plaintiff excepted, and again amended her bill, alleging "that the bonds have never been in the physical possession of the plaintiff, and that she had never seen them, or any of them, prior to the commencement of this suit, and that at the time of the decease of said Alfred Lemont, they were in a safety box in the Lincoln National Bank of said Bath, which had been used by the said Alfred Lemont in his lifetime, and they remained in said box together with certain other bonds some of which belonged to the plaintiff, and others to the defendant, for some time after the decease of the said Alfred Lemont, and until removed by the defendant. From time to time after the decease of said Lemont, the defendant, with the acquiescence of the plaintiff, took possession of the bonds in said list, to hold and manage the same, and reinvest the proceeds thereof, in trust for the plaintiff, finally obtaining possession of all of them, but without any waiver or surrender by the plaintiff of any rights belonging to her under the defendant's said assignment."

"And the plaintiff further avers, not waiving any rights under the general allegations of the preceding sentence, that as the result of a mutual mistake on the part of the plaintiff and defendant, as to their respective rights in said bonds, each supposing that the defend-

ant was the owner of the same, subject to the right of the plaintiff to receive and enjoy the income thereof during her life, the defendant took possession of said bonds, and became, and remained up to the time of the commencement of this suit, a trustee of said bonds and their accumulations and reinvestments, for the benefit of the plaintiff, and became subject in respect to the same to the usual duties and obligations of a trustee."

The amended bill charges conversion by the defendant of part of principal and income, investments in speculative stocks for his own use and benefit, and in particular an attempted investment through J. M. Fisher & Co., through whose failure the sum of $950 was lost by the defendant from the fund in question.

The prayer was amended by adding to paragraph I the words: "and that said bonds, with their accumulations and reinvestments, be declared to have been trust funds in the hands of the defendant, and the defendant to have been a trustee in respect to the same.

The defendant demurred and answered to the bill as thus amended, the demurrer was overruled, and defendant excepted. The answer to the amended bill denies that a trust existed for the reasons alleged in the bill as amended.

Upon request by the plaintiff, the court instructed the master, among other things, "that if he found there was such a mutual mistake as alleged in the third paragraph of the amended bill, and that as a result of that mistake the defendant took possession of and held and controlled the bonds described in the bill, or any of them, or the accumulations and reinvestments thereof, as alleged in said bill, the defendant was a trustee of the same, and said bonds, or the accumulations and reinvestments thereof, were trust funds in his hands." To which instruction the defendant excepted.

The defendant asked for instructions as to the care and judgment to be exercised in making investments, as to the degree of care, and for what negligence he would be liable, the extent of his liability thereunder, when interest was to be computed, the rate of interest, and especially that compound interest shall not be paid on any sum for losses or shortages or for any purpose. Such instructions were given to the master, and the plaintiff excepted. The master found as follows:

"Under this ruling, and after consideration of the evidence and testimony presented at the several hearings, the master finds that

the defendant was a trustee, and the bonds described in the bill, and the accumulations and reinvestments thereof, were trust funds in his hands."

The master also found that all reinvestments were made in the individual name of the defendant, including an attempted investment of $950, in stock of the United Fruit Company, which sum was a total loss to the trust fund by reason of the failure of his Boston agents, who conducted a bucket shop, but defendant does not appear to have known that they were not conducting a legitimate business; and also an investment of $3565 in the stock of the Amalgamated Copper Company; and that these investments were not authorized or ratified by the plaintiff.

The master also found that, as a result of the mutual mistake alleged in the amended bill as to the ownership of the bonds, the defendant paid taxes on the trust fund to and including 1909, which, with interest added to December 1, 1912, amounted to $3634.44. And the court ruled pro forma, upon motion of defendant's counsel, that the defendant was entitled to a commission of one and one-half per centum on income coming into his hands, which, if he was finally found to be a trustee, would amount to $553.53.

Decree was entered sustaining the bill, and confirming the master's report in detail.

The exceptions taken before the master are again presented to certain findings of the final decree. The defendant excepts to so much of the final decree as finds that he was a trustee, and in respect to investments, and the plaintiff excepts to the allowance of commission, and as to certain taxes charged to her as paid by the defendant.

The issues thus raised between the parties may be considered in the order stated.

The pleadings disclose a mutual mistake as alleged in the amended bill, but the defendant's counsel urges (1) that the defendant cannot be a trustee under such a mutual mistake as described in the pleadings and found by the master and the court, and (2) that as the law stands at present, such a mistake is not sufficient to create a trust of the character and liability set out in the bill, and (3) the most that can be claimed in the case is that the defendant was a mere custodian of the plaintiff's property, and being a mere custodian, he is not liable to the full extent to which a trustee is held.

In support of his position, counsel for defendant cites *Savings Bank* v. *Merriam,* 88 Maine, 146,—"to create a trust the acts or words relied upon must be unequivocal, implying that the person creating the trust holds the property as trustee for another;" and says that comparing the master's finding under the rule given him with that rule, "it is at once clear that no trust existed in the present case."

And the plaintiff's counsel as earnestly contends that a constructive trust may be based on the mutual mistake of fact appearing in this case.

Defendant's counsel in an elaborate and helpful brief contests the claims of plaintiff's counsel in a brief of equal merit, as to the law upon this branch of the case, and insists that "while it may be admitted that equity has jurisdiction to relieve from the consequences of a mistake, it is not admitted that under such a finding as that made by the master in the present case a trust was created."

Was a trust created in this case? The phrase "mutual mistake," as used in equity, means a mistake common to all parties to a written contract or instrument, and it usually relates to a mistake concerning the contents, or the legal effect of the contract or instrument.

Eaton on Equity, sec. 307; *Page* v. *Higgins,* 150 Mass., 27; 5 L. R. A., 152, and cases cited.

This court in considering the subject of mistake in a bill to compel reconveyance of real estate conveyed under mistake as to complainant's rights, and the application of a rule to determine the question, held, that "if the defendant was as ignorant as the plaintiffs, the mistake was mutual. If he was not ignorant, then he knowingly took advantage of their ignorance, and obtained the deeds fraudulently." *Freeman* v. *Curtis,* 51 Maine, 140.

So if parties are ignorant of facts on which their rights depend, or erroneously assume that they know those rights, and deal with their property accordingly, not upon the principle of compromising doubts, the court will relieve against such transactions. *Blakeman* v. *Blakeman,* 39 Conn., 320, 2 Pom. Eq. Jur., 315.

A mutual mistake which will afford ground for relief from a contract by reforming it, means a mistake reciprocal and common

to both parties, where each alike labors under the misconception in respect to the terms of the written instrument. Note to *Page* v. *Higgins,* supra, 5 L. R. A., 157.

A constructive trust is raised by a court of equity whenever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee. Lewin on Trusts, Vol. 1, page 246.

Constructive trusts include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner, when there is *no* intention of the parties to create such relation, and in most cases contrary to the intention of the one holding the legal title, and when there is not express, or implied, written or verbal declaration of trust. 2 Pom. Eq. Jur. sec. 1044, and cases cited; Perry on Trusts, sec. 166; *Griffith* v. *Godey,* 113 U. S., 89.

The principle upon which a court of equity elicits constructive trusts might be pursued into numerous other instances, as if a factor, agent, partner, inspector under creditors deed, *or other confidential person,* acquire any pecuniary advantage to himself through the medium of his fiduciary character, he is accountable as a constructive trustee for those profits to his employer or other person whose interest he was bound to advance. Lewin on Trusts, vol. 1, page 187, and cases cited.

The same authority, vol. 1, 8th edition, page 208, after treating fully the subject of acceptance of the trust, says: "We may add in conclusion, that if a person by mistake or otherwise assumes the character of trustee, when it really does not belong to him, and so becomes a trustee de son tort, he may be called to account by the cestui que trust for the monies he received under color of the trust."

In this State, jurisdiction in equity in cases of "mistake" is expressly conferred by statute. Nor is it in terms limited to mistakes of fact. The Legislature may be presumed to have used the word as generally understood in equity proceedings. *Jordan* v. *Stevens,* 51 Maine, 78.

It is firmly settled that if a person has assumed to act as trustee, and having received money in that character, misapplies it, he is accountable for the proceeds to the cestui que trust, and cannot defend himself by showing that in fact he was not legally a trustee,

or that when he committed the breach he did not know who his cestui que trust was. Lewin on Trusts, vol. 1, page 905, and cases cited.

Equity will afford relief when the mistake is that of both parties, and the mistake is properly established by the evidence. *Young* v. *McGown,* 62 Maine, 56; *Andrews* v. *Andrews,* 81 Maine, 337; Whitehouse Equity, 97; *Brunswick and Topsham Water District* v. *Topsham,* 109 Maine, 334.

From a careful examination of all the evidence, we are of opinion that the exception to the finding that the defendant was a trustee is not well taken, and that the exception as to the investments must also be overruled. It is well established that in the investment of trust funds, trustees are to conduct themselves faithfully and exercise sound discretion, not with a view to speculation, but to make a disposition of the trust fund considering the probable income, as well as the probable safety of the capital to be invested. The defendant does not show that he did either in respect to the attempted investment in the stock of the United Fruit Company, and he does not claim that the investment in Amalgamated Copper stock was such an investment in view of our conclusion, nor is his claim that he was a mere custodian supported by law or fact. The term "custody of property" as contra distinguished from legal possession, means the charge to care and keep for the owner, subject to his order and direction, without any interest or right therein adverse to him which every servant possesses with regard to the goods of his master confided to his mere care, which custody may be terminated and prolonged according to the will and pleasure of the master. *People* v. *Burr,* 41 How. Pract., 283-296; Words and Phrases, 1800.

The master's report and final decree are sufficiently supported by the evidence, and no error appears to warrant a reversal of the findings. *Railroad Company* v. *Dubay,* 109 Maine, 29; *Cary* v. *Herrin,* 62 Maine, 16.

The plaintiff excepts as to taxes, and commission allowed the defendant, and says that allowance for taxes can be made only on the theory that the defendant had paid taxes on the bonds, and quotes from the answer the allegation that "as the reputed owner of the bonds, and as it now appears for the benefit of the plaintiff, he paid taxes on said bonds from 1899 to the present for

which payment he claims to be reimbursed by the plaintiff." And plaintiff makes the point that the allegation must be supported by the evidence, or no allowance can be made for taxes, and for two reasons: (1) because that is the formal ground for allowance set up in the answer, and (2) because on no other ground could a trustee be allowed for taxes."

Whether payment of such tax was made by the defendant was a subject of sharp contention before the master, and objections were made against the testimony of defendant in respect to the circumstances attending the assessment and payment, but the objections were nullified by the plaintiff later calling out in cross-examination the details of the matter to which he had objected. The subject was heard fully by the master, and it appears that every opportunity was afforded both sides to present all the facts under full instruction from the court; and in the absence of error, his report having been confirmed, may not be disturbed.

The plaintiff claims that a mutual mistake as to the ownership of the bonds resulted in her injury, and gives her the right to ask the court in equity to grant relief. Her counsel relies upon the equities arising out of a mutual mistake, and it is upon that ground alone that the bill can be sustained. And so appearing, and thus supported, the plaintiff's right to relief appeals to the conscience of the court, and just as imperatively, the mistake being mutual, the rights of the defendant call for the consideration and protection of the court.

Payments made by defendant for taxes on the bonds should be allowed him, as it does not appear that the plaintiff was entitled to the gross income from the fund.

The exception as to the commission cannot be sustained. The relationship does not change the rights involved. The mistake was discovered after the case was entered, and all that happened thereafter was referable to the mistake, and the remedy upon equitable principles must be applied so that the parties may enjoy the rights belonging to them before the mistake occurred. Commission was not waived, and services were rendered, which under the statute justified the allowance made in this case. R. S., chap. 65, section 37.

As a general rule, he who seeks to be relieved from the consequences of a mistake must see that the party against whom relief is sought is remitted to the position he occupied before the transac-

tion in which the mistake occurred. This rule is of general application in all cases where relief is sought against accident, mistake or fraud, and is based upon the equitable maxim that he who seeks equity must do equity. Eaton on Equity, Sec. 118.

It is the opinion of the court that the decree below should stand unreversed and unmodified. The entry will be,

Bill sustained.
Plaintiff's exceptions overruled.
Defendant's exceptions overruled.
Decree below affirmed with additional costs.

WARREN N. WITHINGTON, Petitioner *vs.* WILLIAM M. BRADLEY.

Cumberland. Opinion January 12, 1914.

Copy of List of Stockholders. Corporations. Inspection of Corporate Records. Interest of Stockholders. Mandamus. Peremptory Writ. Revised Statutes, Chapter 47, Section 20. Stockholder.

In a petition for mandamus by stockholder of corporation to compel Clerk of Corporation to allow petitioner to inspect the corporate records and stock book and to take copies and minutes of such parts as concern his interests.

Held:

1. At common law stockholders are given the right to examine the books, records and papers of the corporation, when the inspection is sought at proper times and for proper purposes, and those purposes are generally held to be proper which relate to the interest of the stockholder as such.
2. These rights have been extended in this State by Revised Statutes, chapter 47, section 20.
3. Under this Statute, a stockholder has an absolute and unlimited right to inspect the corporate records and the list of stockholders, whatever may be his motive or purpose in seeking to exercise it.

4. While the right of stockholders to inspect the records of the corporation and the list of stockholders is unlimited, the right to take copies and minutes therefrom is limited to such parts as concern their interests.
5. A stockholder is one of many engaged in a joint enterprise and the opportunity to communicate with his associates may be of prime importance, and ownership of stock per se renders information as to who are the co-owners of vital interest.
6. The conduct of the corporation, its policies, plans and methods concern all stockholders, and unless they can reach one another so as to obtain concert of action, they may be powerless to prevent injury or disaster.

On exceptions by the respondent. Exceptions overruled.

This is a petition for writ of mandamus, brought by Warren N. Withington against William M. Bradley as clerk of the Commonwealth Power Railway and Light Company, wherein the petitioner prays that a writ of mandamus may be issued against said Bradley commanding him to allow said petitioner, his agents and attorneys to inspect the records and stock book of the Commonwealth Power Railway and Light Company and to take copies and minutes therefrom of such parts as concern his interests as a stockholder in said corporation. A hearing was had before a single Justice and an alternative writ of mandamus was ordered to issue on the 7th day of November, 1913, directing the respondent to allow the petitioner, his agents and attorneys to inspect the records and stock books of said corporation and to take copies and minutes therefrom of such parts as concern his interests. On said 7th day of November, respondent filed a motion to quash the alternative writ, on the ground that said writ recited that the demand made upon Bradley to inspect the records was made on the 4th day of November, 1913, and that the petition set forth that the demand was made on the 5th day of November, 1913. The presiding Justice denied said motion, and upon motion of petitioner allowed said writ to be amended by striking out the word "fourth" and inserting the word "fifth" to which rulings respondent excepted. The respondent filed his return on the alternative writ. The presiding Justice ruled that the restraint upon the taking of copies is upon the parts to be taken, but not of the use which may be made of them. To all of which rulings and refusals to rule, the respondent excepted. The foregoing exceptions were certified for decision to the Chief Justice.

The case is stated in the opinion.
Charles E. Gurney, for petitioner.
Bradley & Linnell, for respondent.

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

CORNISH, J. This is a petition for mandamus brought by a stockholder of the Commonwealth Power Railway and Light Company to compel the defendant, as clerk of the corporation, to allow the petitioner to inspect the corporate records and stock book and to take copies and minutes therefrom of such parts as concern his interests.

After hearing before a single Justice the peremptory writ was ordered to issue and the case is before the Law Court on respondent's exceptions to this ruling. The respondent concedes the right of the petitioner to inspect the records and stock book but denies his right to make and carry away with him a list of the stockholders. and his right to do this is the precise issue in this case.

At common law stockholders are given the right to examine the books, records and papers of the corporation when the inspection is sought at proper times and for proper purposes, and those purposes are generally held to be proper which relate to the interest of the stockholder as such. In re Steinway, 159 N. Y., 250; *Varney* v. *Baker,* 194 Mass., 239; *Stone* v. *Kellogg,* 165 Ill., 192; *Venner* v. *Chicago City Railway Co.,* 246 Ill., 170.

These rights have been extended in this State by statute. R. S., chap. 47, sec. 20, provides as follows:

"All corporations, existing by virtue of the laws of this state, shall have a clerk who is a resident of this state, and shall keep, at some fixed place within the state, a clerk's office where shall be kept their records and a book showing a true and complete list of all stockholders, their residences and the amount of stock held by each; and such book, or a duly proved copy thereof, shall be competent evidence in any court of this state to prove who are stockholders in such corporation and the amount of stock held by each stockholder. Such records and stock book shall be open at all

reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests."

The rights of a stockholder under this statute have been clearly defined in the very recent case of *White* v. *Manter,* 109 Maine, 408, where it was held that this statute, so far as the right of inspection is concerned, adds to the common law rights and removes some of the common law limitations and that it gives the stockholder an absolute and unlimited right to inspect the corporate records and the list of stockholders, whatever may be his motive or purpose in seeking to exercise it. "The Statute," say the court, "does not make the purpose material and we cannot." But the court are careful to add that in using this language they are speaking "of the statutory right and not of any particular remedy."

While, however, the statute adds to the common law rights so far as relates to the privilege of inspection, it restricts those rights so far as relates to the taking of copies.

At common law it was frequently held that the right to make copies and minutes was necessarily incidental to the right to inspect, *White* v. *Manter,* supra, but the distinction between the unqualified rights of inspection, and the qualified right of making copies, as given by the statute, is expressed in *White* v. *Manter* as follows:

"But to avoid any misconstruction, it should be observed that while the right of stockholders to inspect the records of the corporation and the list of stockholders is unlimited, the right 'to take copies and minutes therefrom' is limited to such parts 'as concern their interests.' It has been frequently held that the right to make copies and minutes is at common law necessarily incidental to the right to inspect. However this may be, the statute in this state is restrictive. The stockholder has no statutory right to make copies or minutes of more than concerns his interests."

Two questions, therefore, arise in this case:

First, Whether a list of stockholders concerns a stockholder's interests.

Second, If so, whether under the statute he has the right to take a copy of the list irrespective of his motive or purpose.

Both questions must be answered in the affirmative.

As to the first, it is apparent that ownership of stock, per se, renders information as to who are the co-owners a matter of vital interest. A stockholder is one of many engaged in a joint enterprise and the opportunity to communicate with his associates, may be of prime necessity. The conduct of the corporation, its policies, plans and methods concern all stockholders, and, unless they can reach one another so as to obtain concert of action, they may be powerless to prevent injury or disaster. If those in control can prevent the stockholder from obtaining such a list they may thereby perpetuate themselves in power and continue disastrous policies. Why should this information be confined to the officers who are but agents of the stockholders and withheld from the stock-holders themselves, who are the principals? To say that a stockholder may inspect the list but shall not make copies is to effectually checkmate his right because in the ordinary corporation, with stockholders numerous and widely scattered, inspection alone would serve no practical purpose. If he could memorize the list he might secure his rights but that, except in the case of a corporation with a trifling number of stockholders, would be impossible.

What we have said is not intended to reflect in any way upon the officers or the management in the case at bar because the record is barren of any facts that would warrant such assertion or even suspicion. It is simply a general statement as to some of the reasons why any stockholder has an interest in knowing who his associates are.

The interest being granted, has the stockholder the statutory right to take such copy irrespective of his motive or purpose? Here again we must say, following the analogy of *White* v. *Manter,* "the statute does not make the purpose material and we cannot." In that case it was held that, under the statute, access to the records and stock book was conditional only upon being a party interested, that a stockholder was such an interested party and, therefore, had the absolute right to such inspection without regard to his motive or purpose. In the case at bar, where the taking of copies is requested, the statute imposes two conditions, first that the applicant shall be a party interested and second, that he shall take copies of such parts only as concern his interests. The petitioner fulfils

both conditions. He is a stockholder and the taking of a list of stockholders does concern his interest. It therefore follows that, in this case as in the other, the motive or purpose of the petitioner does not affect his statutory right. The restraint imposed by statute is, as the single Justice aptly stated in his decree, a restraint "upon the parts to be taken and not upon the use that may be made of them." If the door is thereby opened too wide, additional restraint upon the statutory right should be made by the Legislature and not by the court.

It should be added, however, that we do not wish to be understood as holding that it is compulsory upon the court in all cases to enforce the stockholder's right by granting the writ of mandamus, *White* v. *Manter,* supra. From its inception mandamus has been a discretionary writ, not a writ of right, and the remedy, extraordinary in its nature, has been somewhat sparingly employed. The character of this writ and the discretion to be exercised by the court in issuing it seem not to have been taken away nor abridged by the statute under consideration. A state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper or unlawful, that the court might feel compelled to exercise its discretion in the interests of law and justice and decline to issue the writ. In the case at bar, however, the evidence fails to disclose such a purpose and the power of the court was properly exercised. *State ex rel.* v. *Middlesex Banking Co.,* —— Conn., ——, 88 Atl., 861. (Nov. 1913).

Exceptions overruled.

JOSEPH P. BASS, Appellant, *vs.* CITY OF BANGOR.

Penobscot. Opinion January 14, 1914.

Appeal. Assessment. Benefit. Betterments. Description. Land. Proceedings. Streets. Tax. Title. Widening.

1. General acts are held not to repeal the provisions of charters granted to municipal corporations, though conflicting with the general provisions, unless the words of the general statute are so strong and imperative as to render it manifest that the intention of the Legislature cannot be otherwise satisfied.
2. It must be presumed, in the absence of clear expression to the contrary, that the Legislature passed the general law with reference only to those to whom the general tax law before then was applicable, and not for the purpose of affecting corporations that had in their charters a specific provision for taxation.
3. A general statute repealing all acts, or parts of acts contrary to its provisions, will not be held to repeal a clause in any municipal corporation upon the same subject matter.
4. The general law on a subject matter, which has been provided for in certain localities by special laws, will not, although it contains a general repealer of acts inconsistent with it, annul or alter the special provisions in those localities.
5. 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.
6. These proceedings to assess the benefits to the appellant, by reason of the widening of Central Street, were under the charter of the city of Bangor, and section 34 of chapter 23 of the Revised Statutes does not apply.

On report. Case to stand for trial.

This is an appeal by the plaintiff from an assessment by the city council of the city of Bangor, of benefits upon land owned by plaintiff and situate at the corner of Hammond and Central Streets in the city of Bangor. The city council of Bangor, in accordance with the city charter, in the summer of 1911 widened Central Street and assessed said plaintiff in the sum of $4032.93 for benefits.

From which assessment the plaintiff appealed to the Supreme Judicial Court, then next to be holden at Bangor, in and for the County of Penobscot, on the first Tuesday of January, A. D. 1912, and filed therewith his reasons of appeal.

At the close of the hearing below, by agreement of the parties, the case was reported to the Law Court upon so much of the evidence as is legally admissible under these proceedings; in the event the proceedings of the Bangor city council relative hereto are sustained, the case to be sent back for further proceedings according to law.

The case is stated in the opinion.

P. H. Gillin, and E. M. Simpson, for appellant.

Hugo Clark, J. F. Gould, and B. W. Blanchard, for City of Bangor.

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

HALEY, J. The city of Bangor, acting in accordance with the city charter, on the 26th day of July, 1911, widened Central Street from the westerly line of Harlow Street to a point about one hundred feet northerly of Hammond Street, and awarded damages to the several persons mentioned in said proceedings in the sum of $41,000.

September 18, 1911, the city council, in accordance with the provisions of section 14 of the charter, apportioned a part of the damages allowed for the widening of said street upon certain lots or parcels of land adjacent to and bounded on said Central Street, which in the judgment of the city council were benefited by said widening, in the aggregate sum of $21,504.98, the city council being authorized by the charter to assess benefits to an amount not exceeding three-fourths of the damages allowed for such widening.

The appellant is the owner of land at the corner of Hammond and Central Streets, measuring on Central Street one hundred and twenty-one feet, and was assessed for the benefits received by said land the sum of $4032.93. Appellant seasonably appealed to the Supreme Judicial Court from the assessment of benefits, under the

provisions of section 16 of said charter, and set forth in his appeal ten specific reasons for the appeal. The appeal was duly entered, and at the October term, 1912, of the Supreme Judicial Court, the evidence was taken out, and the case reported to the Law Court with the following stipulation; "upon so much of the evidence as is legally admissible under these proceedings, in the event of the proceedings of the Bangor city council relative hereto are sustained, the case to be sent back for further proceedings according to law."

The appellant claims that sections 33 to 37, inclusive, of chapter 23, R. S., authorizing cities to assess land benefited by the widening of streets repealed so much of the charter of the city of Bangor as related to that subject, and that, as the proceedings taken by the city were not according to sections 33 to 37, inclusive, of chapter 23, but according to the city charter of the city of Bangor, the charter and the statute prescribing different methods of assessing the benefits, the proceedings are void.

If the provisions of the charter were repealed by sections 33 to 37, inclusive, of chapter 23, R. S., the city council had no right to levy the assessment in question, as notice was given to the land owners whose land was adjacent and benefited by the widening of the street, according to the provisions of the city charter, and not as required by the statute, and an assessment upon land for benefits received by the widening of a street cannot be levied unless the notice prescribed by law is given, and the important question in this case is, were the provisions of the charter of the city of Bangor relative to assessments for benefits received by the widening of streets, repealed by the enactment of sections 33, 34, 35, 36 and 37 of chapter 23, R. S.?

The provisions of chapter 23, giving cities the right to levy assessments upon lands benefited by the widening of streets, which the appellant claims repealed the provisions of the charter of the city of Bangor upon the same subject, were enacted by the Legislature of 1872, chapter 26, at which time the charter of the city of Bangor upon that subject was the same as now, the charter having been granted by the Legislature of 1834. It was said in *State* v. *Donovan,* 89 Maine, 448, that "general acts are held not to repeal the provisions of charters granted to municipal corporations though

conflicting with the general provisions, unless the words of the general statute are so strong and imperative as to render it manifest that the intention of the Legislature cannot be otherwise satisfied."

The rule as stated is sustained, not only by the authorities cited in the opinion, but by many others.

In *Sheridan* v. *Stevenson,* N. J. L., 371, which was a petition for mandamus against the tax collector to compel him to pay over taxes collected by him which he claimed by the general law he was not obliged to pay over until December, while the special law that applied to the city of which he was collector stated October, the court says:

"The well settled law in this state is, that the provision of a special charter shall not be altered or repealed except by express words. . . .

"It must be presumed, in the absence of clear expression to the contrary, that the Legislature passed the general law with reference only to those to whom the general tax law before then was applicable, and not for the purpose of affecting corporations that had in their charter a specific provision for taxation. *Railroad Co.* v. *Commissioners of Taxation,* 38 N. J. L., 422.

"A general statute repealing all acts or parts of acts contrary to its provisions, will not be held to repeal a clause in any municipal corporation upon the same subject matter. This has been the language of our court since *State* v. *Brannen,* 3 Zab., 484. The repealing clause must be so expressed as to manifest the legislative intention to include all acts, whether special or local or otherwise, inconsistent with the provision of the act. *Bank* v. *Bridges,* 1 Vroom, 112. . . . The change of a city charter must be made by express words or by necessary implication. *State Gorum* v. *Mills,* 5 Vroom, 177."

"It has been well settled in this state that a general law on a subject matter, which has been provided for in certain localities by special laws, will not, although it contains a general repealer of acts inconsistent with it, annul or alter the special provisions in those localities. *State* v. *Brannen,* 3 Zab., 484; *State* v. *Clark,* 1 Dutcher, 54; *Mayor* v. *Freeholders,* 11 Vroom, 595; *Brown* v. *Mullica Township,* 48 N. J. L., 477."

In *Roosevelt* v. *Supervisor,* 40 Hun., 353, the Legislature authorized "every town" in the state by vote, to raise an additional amount of $750 for the improvement of roads and bridges beyond the $500 allowed to be raised for that purpose by the general law, and the court *held,* that act did not repeal the special law conferring upon Pelham unlimited power to vote money for that purpose saying, "the words 'every town' can operate on every town where there is no local law. . . . the two acts can be operated harmoniously at the same time—the local one in its locality and the general one elsewhere."

In *Higgins* v. *Bell,* 53 Hun., 632, 6 N. Y. Suppl., 105, the court say: "The act of 1873 was a special local act, forming a system of government for Brooklyn. By well settled principles the general act of 1874 would not effect a repeal of the special act."

People v. *Munroe County Co.,* 93 N. Y. Suppl., 452, lays down the same doctrine and quotes from *People* v. *Keller,* 157 N. Y., 97: "Being a special and local law, how could the charter of the city of New York be repealed, or altered, by a subsequent general statute, unless such an intent to repeal, or alter was manifest? When a local and special statute covers the entire ground and constitutes a completed system of provisions and regulations, which the general statute, if allowed to operate, would alter, the settled rule is that it is not to be deemed repealed, except the intent to repeal is clearly manifested.

"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?" *Starbird* v. *Brown,* 84 Maine, 238; *Jumper* v. *Moore,* 110 Maine, 159; *State* v. *Cleland,* 68 Maine, 258.

It must be regarded as settled law, that charters or parts of charters of cities are not repealed by a general law if the two can consistently stand together, unless the intention of the Legislature to repeal the charter or parts of charter is clear and plain. In this case there is nothing inconsistent in holding the provisions of the charter of the city of Bangor, relating to assessments for benefits to the land benefited by the widening of a street, not inconsistent with the general law passed upon that subject in 1872, and there-

fore the city government of the city of Bangor was authorized by the terms of the charter to make assessments in proper cases as specified in the charter.

It is admitted that the proceedings by the city of Bangor were according to the provisions of its charter; but ten reasons are urged why the proceedings are void, that is, the petitioner has appealed from the assessment of benefits claimed to have been received by lots or parcels of land owned by him in the city of Bangor, and urges ten reasons why the court should not take cognizance of the case. Section 16 of the charter of the city of Bangor provides: "the said party appealing shall enter his said appeal in said court, and produce certified copies of the proceedings of said city council, which copies said city clerk shall furnish upon demand, within a reasonable time, upon being paid, or having tendered to him a reasonable compensation for making and certifying the same. And the said court shall take cognizance of such case, and if, upon examination of said copies, it shall appear that the proceedings of said city council have been regular and according to the provisions of this act, then said court shall proceed to try and determine, by jury, or otherwise if the parties agree to any other mode, the question whether the said appellant, or his said lot or parcel, ought in justice to be assessed, pursuant to this act and the spirit and intent thereof, and, if so, in what sum."

The first reason urged is, "Because the land assessed is not sufficiently described to enable the boundaries to be determined with proper certainty, or to inform the appellant how many parcels of land are included in said assessment."

From an inspection of the copies, the description of the land assessed is sufficiently accurate to pass the title to the same if used in a deed, and there is nothing in the copies in regard to how many parcels of land are included in the assessment. From an inspection there is but one parcel, even if it was necessary that different parcels, if they were different parcels, should be specified in the assessment. The court in deciding whether to take and retain cognizance of and try the appeal can only look to the copies, and there is nothing in the copies to sustain the first contention.

The second reason is, because the assessment was in a lump sum on a single lot or parcel of land, and the appellant claims that it

consisted of three or more separate and distinct parcels, held by him under distinct titles, as appears by the deeds duly recorded in the Registry of Deeds, and that the different lots, if they were benefited by the assessment, were benefited in different degrees by the widening of the street.

The facts alleged in the second reason do not appear in the copies, therefore the second reason urged is invalid.

The third reason urged is, in substance, that there is included in the assessment of one single lot, or parcel a distinct parcel owned by Ara Warren, of Bangor, and that said Warren was in possession of said parcel.

If it be a fact the court cannot tell it from an inspection of the copies, therefore the reason alleged is invalid.

The fourth reason alleged is, because no notice of said assessment was given to said Ara Warren, as required by law.

Again, it is sufficient to say that if notice was required the record is silent upon the ownership of Ara Warren, and an inspection of the copies does not disclose any reason why notice should have been given to him, therefore the fourth reason alleged is invalid.

The fifth reason urged is, because notice of the assessment was not given to the appellant, as required by the Revised Statutes, chapter 23, section 34.

As the proceedings to assess the benefits were under the charter of the city, and as section 34 of chapter 23, R. S., does not apply to the case as we have above held, the fifth reason alleged is invalid.

The sixth reason urged is, because said street was not widened in front of the premises assessed to the appellant for a distance of one hundred feet, whereby said premises instead of being benefited were damaged.

This only goes to the amount of benefits received by the land, and the appeal was taken to try that question, and it would be a curious rule of law that would allow a party appealing from the assessment of damages for the laying out of a highway, or assessment for benefits received by land by reason of the laying out or changing of a highway, to claim that he had been assessed in a larger sum than he ought to have been, and urge that as a reason why the original proceedings should be dismissed. The appeal is for the purpose of trying that question, therefore the sixth reason alleged is invalid.

The seventh reason urged is, because said assessment is excessive and greater than the benefits accrued to the land, or parcels of land, so assessed to the appellant, and the eighth reason urged is, because no benefit whatever has accrued from and by the widening of said street to the premises assessed to the appellant.

Both of these reasons set forth the claims that the appellant may urge to the jury upon the trial of his appeal, that being the purpose of the appeal, and do not appear upon an inspection of the copies, therefore the seventh and eighth reasons as alleged are invalid.

The ninth reason urged is, that no assessment was made on the westerly side of Central Street, that the sum allowed the Stetson and Strickland heirs were not damages but the purchase price, and that no assessment was made against the property covered by brick stores on the westerly side of Central Street owned by said Stetson and Strickland heirs.

Section 14 of the city charter provides: "It shall be lawful for the said city council to apportion the damages so estimated and allowed, or such parts thereof as to them seems just, upon the lots or parcels of land adjacent to and bounded upon such street or way, and not those lands for which damages are assessed." Damages were allowed to the Stetson and Strickland heirs in the sum of $27,000, and therefore no benefit should have been assessed upon their land. and it does not appear from an inspection of the record that the $27,000 was the purchase price of the land and not for actual damages. Therefore the ninth reason is invalid.

The tenth reason urged is, because no deduction or set-off for benefits caused the lots or parcels of land on the side of said street that was widened was made in assessing damages caused by the taking therefrom of land necessary to said widening, whereby the whole cost of the widening of said street has been assessed upon the land on the opposite or westerly side of said street, and the land of the appellant has thereby been assessed for more than its proportional share of the three-quarters part of said costs allowed by section 14 of the city charter.

None of the matters set forth in the tenth reason appear from an inspection of the copies, and they are proper matters to be urged to a jury who may try the appeal and assess the benefits to the appellant's land, if any.

An examination of the copies of the proceedings of the city council shows the proceedings to have been regular and according to the provisions of the charter, and the appellant having appealed from the assessment of benefits, as authorized by the charter, the court should proceed to try and determine, "whether the said appellant or his said lot or parcel ought in justice to be assessed pursuant to the act and the spirit and intent of the city charter, and if so, in what sum?" The assessment of the tax in this case was the same as any other assessment of taxes, by authority of the Legislature the sovereign power, performed by the city government as agent of the state, and no appeal lies from the assessment, except as given by statute. An appeal from the assessment of taxes is a privilege granted by the power that has the authority to assess the tax, and that power may limit the right of appeal as it sees fit, except as restrained by the constitution. The right being purely statutory, can extend no further than the statute provides. *Hayford* v. *Bangor,* 103 Maine, 434.

In this case, it has seen fit to limit the appeal to the question of whether said appellant or his said lots or parcels ought in justice to be assessed pursuant to the act authorizing the assessment and the spirit and intent thereof, and if so, in what sums? Undoubtedly the court, if the appellant desires, will frame the issues so that if the appellant's land claimed to have been benefited by the widening of the street, consists of more than one parcel or lot, that benefits received by each lot, if any, may be separately assessed according to the benefits received by each lot or parcel; but the validity of the proceedings in making the assessment appearing regular from an inspection of the copies, the court should take cognizance of the appeal and proceed to trial of the issues open upon appeal, as provided by section 16 of the charter of the city of Bangor.

Case to stand for trial.

LEWIS D. CLARK, Appellants from decrees of Judge of Probate.

Washington. Opinion January 16, 1914.

Amendment. Appeal. Discretion. Exceptions. Probate Court. Reasons of Appeal. Undue Influence. Will.

1. The allowance of amendments by a trial court, when legally allowable, is a matter of discretion, and exceptions do not lie to the exercise of the discretion.
2. If an amendment is allowed or disallowed as a matter of law, exceptions lie.
3. Unless the bill of exceptions shows that the amendment was allowed or disallowed as a matter of law, it is to be presumed that the ruling was made as a matter of discretion, and the exceptions do not lie.

On exceptions by the plaintiffs. Exceptions dismissed.

This is an appeal by the plaintiffs from a decree of the Judge of Probate for the County of Washington, June 10, 1913, admitting to probate the last will and testament of Lewis D. Clark, late of Eastport, in said county, deceased. Said appeal was entered in the Supreme Judicial Court, being the Supreme Court of Probate, at the October term, 1913, when the appellants moved to amend their reasons of appeal by striking out reason numbered 7 and substituting therefor another reason. The presiding Justice refused to allow the amendment. To which refusal by said Justice, the plaintiffs excepted.

The case is stated in the opinion.

John F. Lynch, and H. H. Gray, for plaintiffs.

W. R. Pattangall, and A. D. McFaul, for defendants.

SITTING: SAVAGE, C. J., SPEAR, HANSON, PHILBROOK, JJ.

SAVAGE, C. J. This case is an appeal from the allowance by the Judge of Probate of a certain instrument as the last will and testament as the last will and testament of Lewis D. Clark. In the Supreme Court of Probate, the appellant moved for leave to amend

his reasons of appeal by striking out the seventh reason, namely, "That on December 1, 1908, the said Lewis D. Clark by reason of the undue influence of said Andrew Clark signed conveyances to said Andrew Clark of all his property both real and personal whereby and by reason whereof said written instrument was annulled and revoked," and by substituting in lieu thereof the following, as a reason of appeal:—"That on December 1, 1908, the said Lewis D. Clark signed certain written instruments purporting to convey to the said Andrew Clark all of his property both real and personal by reason of which act the written instrument purporting to be the last will and testament of said Lewis D. Clark was thereby revoked." The changes sought by the amendment are an omission of the element of undue influence, and the change of the term "conveyances" to "instruments purporting to convey." The effect of the instruments is more cautiously expressed in the amendment than in the original. The presiding Justice declined to allow the amendment, and to that ruling, exceptions were taken.

Whether amendments, in substance, of reasons of probate appeals are allowable has been mooted in argument in several cases in this State, but never decided. See Thompson Applt., 92 Maine, 563; *Smith* v. *Chaney,* 93 Maine, 214; Abbott, Applt., 97 Maine, 280. Nor do we need to decide it now. It has many times been held that the allowance of amendments by the trial court, when legally allowable, is a matter of discretion, and that exceptions do not lie to the exercise of the discretion. *Clapp* v. *Balch,* 3 Maine, 216; *Wyman* v. *Dorr,* 3 Maine, 187; *Foster* v. *Haines,* 13 Maine, 307; *Carter* v. *Thompson,* 15 Maine, 464; *Cummings* v. *Buckfield Branch R. R.,* 35 Maine, 478. On the other hand, if an amendment not legally allowable is allowed, a question of law is presented, and exceptions lie. *Newall* v. *Hussey,* 18 Maine, 249; *Ayer* v. *Gleason,* 60 Maine, 207; *Brown* v. *Starbird,* 98 Maine, 292. So if an amendment is allowed or disallowed as a matter of law, exceptions lie. But, exceptions do not lie to the refusal of a judge to allow an amendment, unless the bill of exceptions shows that he ruled, as a matter of law, that the proposed amendment was one which could not be allowed. When the bill of exceptions is silent on this point "it is to be presumed that he ruled, as a matter of discretion, not to

allow the amendment, because under the circumstances justice would not in his opinion be thereby promoted." *Gilman* v. *Emery*, 66 Maine, 460.

The bill of exceptions in this case does not show that the ruling complained of was made as a matter of law. Therefore the exceptions were not allowable, and must be dismissed.

Exceptions dismissed.

GEORGE KALIAMOTES *vs.* S. P. WARDWELL.

Androscoggin. Opinion January 19, 1914.

Attachment. Conversion. Declaration of Third Party. Evidence. Title. Trover.

1. If the bill of parcels be considered a declaration of a third party against interest, as it would undoubtedly have been if receipted, it was not admissible, as it was not shown that the declarant was dead.
2. It is not competent to prove the declaration of a person not a party to the suit as to his motive or intent concerning an act of his own, unless the declaration be a part of the act and explanatory of it.
3. When the title to personal property is in question between third parties, mere declarations of the alleged vender unaccompanied by any acts, are not admissible in evidence.

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

This is an action of trover against the defendant, a deputy sheriff, to recover damages for the conversion of four hundred and eighty-five bunches of bananas of the value of $251.40, which were attached by him September 2, 1912, on a writ in favor of G. B. Johnson & Company and against one Arthur Babalais. The defendant pleaded the general issue and "by way of a brief statement" stated that he took into his possession only 260 bunches of bananas,

the title and possession of which were at the time of the alleged conversion, in one Arthur Babalais, and not in the plaintiff. At the trial in January, 1913, to prove title in himself, the plaintiff offered in evidence a bill of parcels of bananas, substantially like the bill in the writ. This bill was made out against the plaintiff and purported to be by the "Boston Fruit Supply Co.," and bore date August 29, 1912. The presiding Justice admitted this bill in evidence, to which the defendant excepted. The jury returned a verdict for the plaintiff for $255.03, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Tileston E. Woodside, for defendant.

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

BIRD, J. The plaintiff seeks in this action of trover to recover damages for the alleged conversion of a quantity of bananas. In defense the defendant claimed that the title to the bananas was, on the day of the alleged conversion, not in plaintiff but in one Babalais and that upon a writ against the latter he, as deputy sheriff, attached them while in the basement of the store of Babalais. At the trial in January, 1913, for the purpose of proving title to himself, the plaintiff testified that he ordered the goods by a letter, not produced, some days before their alleged receipt by him, of the Boston Fruit Supply Co., and, in corroboration, offered in evidence a bill of parcels of bananas, the description and quantity of which were substantially as in his writ. This bill was made out against the plaintiff upon a bill head purporting to be that of the "Boston Fruit Supply Co., Boston, Mass.," and bore date August twenty-ninth, 1912. It was identified by plaintiff alone as the bill of parcels of the goods in dispute. An envelope postmarked "Boston, Mass., Aug. 31, 1912, 4 P. M.," in which it was claimed that the bill was mailed to plaintiff, was introduced. The plaintiff further testified that at or about the time the attachment was made he exhibited both bill and envelope to the defendant and that they were the subject of conversation between them. To the introduction of the bill in evidence, defendant objected and, upon its admission, had exceptions.

If the bill of parcels be considered a declaration of a third party against interest, as it would undoubtedly have been if receipted, it was not admissible as it is not shown that declarant was dead. It is the declaration of one who is neither party nor witness—res inter alios acta. *Rice* v. *Perry,* 61 Maine, 145, 152; see *Silverstein* v. *O'Brien,* 165 Mass., 512, 513. Clearly, however, the statement of account was not a declaration against interest but the contrary rather.

If it may be considered as a declaration accompanying the transaction under consideration by the court, the alleged sale by the dealer in Boston to plaintiff, and upon this ground we understand its admision to have been based, there is no evidence in the case showing that the preparation and mailing of the bill of parcels accompanied any act on the part of the alleged vendor. Plaintiff testifies that the alleged vender shipped to him the goods enumerated in the bill of parcels but the date of either shipment or receipt is lacking. The attachment appears to have been made on Monday, September 2, 1912; the bill of parcels was mailed on Saturday, August 31, 1912, at 4.30 in the afternoon, and is dated August 29, 1912, (Thursday). Plaintiff testifies that he placed the goods in the basement where they were attached on Wednesday. Assuming, as most favorable to plaintiff, that the Wednesday indicated was that next preceding—August 28th—the goods could not have been shipped from Boston later than Tuesday, August 27, 1912, and might have been forwarded at a still earlier date. The act of setting apart and shipping the goods therefor preceded the making of the bill of parcels, assuming it correctly dated, by at least two days and its mailing by four days.

It is not competent to prove the declaration of a person not a party to the suit as to his motive or intent concerning an act of his own, unless the declaration be a part of the act and explanatory of it: *Cushing* v. *Friendship,* 89 Maine, 525, 530; see also *State* v. *Maddox,* 92 Maine, 348, 352; *Atkinson* v. *Orneville,* 96 Maine, 311, 313-314; *Barnes* v. *Rumford,* 96 Maine, 315, 323; *Hudson* v. *Charleston,* 97 Maine, 17, 19-20; *Knox* v. *Montville,* 98 Maine, 493, 494. The cases cited indicate the strictness with which the contemporaneousness of the declaration with the act is insisted upon.

In *Greene* v. *Harriman,* 14 Maine, 32, it is held that where the title to personal property is in question between third parties, mere declarations of the alleged vendor unaccompanied by any acts, are not admissible in evidence.

We are unable to say that the admission of the evidence, to which objection was made, did not affect the verdict of the jury. The reasonable inference is otherwise. As the exceptions must be sustained, the motion for new trial is not considered.

Exceptions sustained.

JAMES W. G. WALKER *vs.* NINA CHINN WALKER.

Oxford. Opinion January 24, 1914.

Demurrer. Desertion. Divorce. Jurisdiction. Motion. Residence.

Libel for divorce. Neither party resided in Maine when the alleged causes of divorce occurred.

Held:

1. The provisions of Revised Statutes, chapter 62, section 2 are to be construed as plainly giving jurisdiction to our courts in divorce proceedings, when the libellant had resided here in good faith for one year prior to the commencement of proceedings.
2. It matters not whether the guilty party transgressed within or without the limits of the State, as the statute makes no exception or restriction.
3. The libellant alleges in his libel that he had resided in the town of Brownfield, in the County of Oxford, in good faith for more than one year prior to the commencement of these proceedings.

On report. Motion to dismiss overruled. Demurrer overruled. Libellee to plead over.

This is a libel for divorce. The libellant alleges that he was married to the libellee at Washington, in the District of Columbia, on the 24th day of February, 1897, and that thereafter they lived

and cohabited as husband and wife in various states of the Union, and also at Kittery, in the county of York, in the State of Maine, until the 19th day of October, 1909, when his wife utterly deserted him and had continued such desertion to the filing of the libel, being January 27, 1913, and that she had also been guilty of cruel and abusive treatment of libellant. The libellant alleged that he has resided in Brownfield in the county of Oxford, Maine, in good faith for more than one year prior to the commencement of these proceedings. At the March term of Supreme Judicial Court for Oxford County, 1913, the libellee filed a motion to dismiss said libel for want of jurisdiction in the court, and said libelee also filed a demurrer to said libel. At the hearing in the above case, upon the motion to dismiss, by agreement of the parties, the case was reported to the Law Court next to be holden at Portland, upon the following stipulation; that if the motion to dismiss is not granted, it may be considered that the demurrer has been filed as of the first term and that if the demurrer is overruled, the libellee to have the right to plead over. The libel, motion to dismiss, demurrer with this order of court to make the report of this case.

The case is stated in the opinion.

Symonds, Snow, Cook & Hutchinson, for libellant.

Payson & Virgin, and Eben Winthrop Freeman, for libellee.

SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HALEY, PHILBROOK, JJ.

PHILBROOK, J. This is a libel for divorce based on alleged desertion for more than three consecutive years next prior to the filing of the libel, and for alleged cruel and abusive treatment. The libel is in the usual form and alleges, among other things, that the parties were married at Washington in the District of Columbia, that after their marriage they cohabited as husband and wife in various states of the Union, and that they so cohabited at Kittery in our county of York; also that the libellant, at the time of bringing the libel was a resident of Brownfield in our county of Oxford, and that he had resided in said Brownfield, in good faith, for more than one year prior to the commencement of these proceedings.

The libellee appeared specially and filed a motion to dismiss on the ground of want of jurisdiction. A demurrer was also filed, and by suggestion of the presiding Justice the parties agreed that the Law Court might pass upon the demurrer if the motion to dismiss is not granted, it being understood that the libellee does not appear generally unless the motion to dismiss is overruled, and that if the demurrer should be overruled then the libellee is to have the right tc plead over. The case is before us on report, which report consists only of the libel, the motion to dismiss, the demurrer and the order of court authorizing the report. No testimony is presented.

The libellee sets forth five claims in support of her motion to dismiss, but in the argument of her counsel those claims are more succinctly contained in three statements viz.: 1. That unless the causes of divorce occurred while the marital domicil was in Maine, this court has no jurisdiction; 2. That if it does not appear that either of the parties resided in Maine when the causes occurred, this court has no jurisdiction; 3. That statutes relating to divorce should be so interpreted that the courts will recognize only those who resided here when the cause occurred, and thus enable the courts of other states to give to our decrees the full faith and credit which our courts give to others.

Our statute enumerates the causes for which a divorce may be decreed, among them being utter desertion continued for three consecutive years next prior to the filing of the libel, and cruel and abusive treatment, these causes being the ones upon which the libellant depends. But the same statute, R. S., chapter 62, section 2, contains the limiting proviso, "that if the parties were married in this state or cohabited here after marriage, or if the libelant resided here when the cause of divorce accrued, or had resided here in good faith for one year prior to the commencement of proceedings, or if the libellee is a resident of this state." Although cohabitation in this State after marriage would seem to satisfy the proviso of our statute, if the parties were actually dwelling together in some place in this State, and not temporary visitors only, (*Calef* v. *Calef,* 54 Maine, 365) we are not called upon to discuss that question at this time because counsel for the libellant distinctly states in his argument that his client comes under the provision, "or had resided here in good faith for one year prior to the commencement of the proceedings."

It is an elementary proposition that our courts derive their powers, authority and jurisdiction largely from the solemn enactments of the Legislature. It has been well said that: "The constitution does not define the extent, or prescribe the limits of the judicial power. The Supreme Court cannot exercise its judicial power by virtue of the constitution alone, but must ascertain the extent of its powers and duties from the enactments of the Legislature. The judicial power is therefore, in our constitution, whatever the laws of the state, from time to time enacted, declare it to be." Opinion of the Justices, 16 Maine, at page 483. From page 485 of the opinion just cited we also borrow the following: "Under written constitutions and laws, defining the powers and duties of the different departments of government, the justness of the old maxim, that a good judge acts well his part by enlarging his jurisdiction, is not perceived. The better rule would seem to be for all to exercise the powers granted, without any attempt to enlarge or restrict them by a strained construction."

Since our Legislature has not only prescribed the causes on account of which injured parties may lawfully ask from this court a dissolution of the marriage contract, but has also by some provisions marked out the boundaries of our jurisdiction to a certain extent, it may be well anticipated that under such circumstances we shall respect the mandates of the law-making body of this State. It follows therefore that decisions from courts of last resort in states whose statutes are different from those of our own, and ethical or philosophical discussions upon the subject will not easily tempt us to wander into the paths of enlargement or restriction "by a strained construction."

As to the question of jurisdiction in the cause at bar, the statutes of this State seem particularly plain and explicit. If the libellant resides here when the cause of divorce accrues, our court has immediate jurisdiction. Can anything be stated more clearly? It matters not whether the guilty transgressed within or without the limits of the State. The statute makes no exception or restriction. On the other hand, in equally clear language, the statute declares that this court has jurisdiction if the libellant had resided here in good faith for one year prior to the commencement of proceedings, regardless of when or where the cause of divorce occurred. If the

Legislature had intended, as claimed by the libellee, that our court should have jurisdiction only when the marital domicil was in Maine at the time the causes of divorce accrued, or that one of the parties must have resided here when the causes accrued, why did it not say so instead of using the simple straightforward language found in our statute. Such language neither needs nor admits of construction. "It is only when the words of a statute are obscure, or doubtful, that we have any discretionary power in giving them a construction." *Coffin* v. *Rich,* 45 Maine, 507.

Upon this question of jurisdiction the court of Massachusetts, in *Franklin* v. *Franklin,* 190 Mass., 349, has said: "Jurisdiction depends upon the situs of the libellant, and not upon the place of the marriage, or of the commission of the offence against the marital relation." This same principle is confirmed and elaborated in *Clark* v. *Clark,* 191 Mass., 128. The statutes of Massachusetts relating to divorce are such as to make the cases just cited particularly applicable to the case at bar.

It becomes unnecessary to discuss the demurrer as no points are raised therein which have not been disposed of by what we have said regarding the motion to dismiss.

Motion overruled.
Demurrer overruled.
Libellee to plead over.

JOHN PATTEN *vs.* FRED BARTLETT.

Aroostook. Opinion January 31, 1914.

Contributory Negligence. Damages. Due Care. Injury. Negligence. Tenant. Unguarded Excavation.

Action for damages for the loss of a horse which was killed by falling into an excavation made by defendant for a cesspool on property owned by the defendant but occupied by a tenant. At the time of the accident, the plaintiff went upon the premises for the purpose of delivering a load of wood to the tenant.

Held:

1. That a licensee is a person who is neither a passenger, servant nor trespasser, and not standing in any contractural relation with the owner of the premises, and is permitted to go upon the premises for his own interests, convenience or gratification.
2. It is well settled that to come under an implied invitation as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the owner or occupant is engaged, or which he permits to be carried on there.
3. The owner or occupant of land, who by invitation expressed or implied induces or leads another to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them and was negligently suffered to exist without timely notice to the public, or to those who were likely to act upon such invitation.
4. If when let, the premises are in a condition which is dangerous to the public, or with a nuisance upon them, the landlord may be liable to strangers for injuries resulting therefrom.
5. By letting the premises in such condition and receiving rent therefor, he is considered as authorizing the continuance of the nuisance.
6. Whenever an owner is bound to repair his building, and has control of it sufficient for that purpose, he, and not the tenants, is liable to third persons for damages arising from a neglect to repair.
7. It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any.

On report. Judgment for the plaintiff. Damages assessed at $150.

This is an action on the case to recover damages of the defendant as owner of a house lot situate in Littleton, in said County of Aroostook, for the loss of a horse, owned by the plaintiff, in the evening of December 29, 1911. The plaintiff, a truckman, on said day was delivering a load of wood to a tenant of the plaintiff in said premises, when said horse fell into an excavation made by the defendant for a cesspool, and was killed. Plea, general issue.

At the conclusion of the evidence for the plaintiff, by agreement of the parties, this case was withdrawn from the jury and 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. And it is further agreed that if the Law Court decides from the evidence that the defendant is liable, damages shall be assessed for the plaintiff in the sum of one hundred and fifty dollars and interest from the date of the writ.

The case is stated in the opinion.

Powers & Archibald, for plaintiff.

Hersey & Barnes, for defendant.

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

PHILBROOK, J. The plaintiff is a general truckman, residing and doing business at Houlton. The defendant owns a house and lot in the same town, occupied by J. Aubrey Henderson, a tenant at will. Before the occupancy of the premises by Henderson the defendant had moved the barn from its former location on the lot to a position in line with the house and ell, so that the entire line of buildings extended easterly from the street and the back end of the barn was nearly contiguous to the easterly line of the lot. Southerly from the barn, in its new location, and very near the easterly line of the lot, before the occupancy of the premises by Henderson, the defendant had made an excavation in the ground for a cesspool and had provided no covering for it, nor had any fence been erected around it, nor other barrier provided to warn any person of its location and to prevent accident by reason of its existence. According to one witness, who claimed to have made some measurements, the cesspool, or excavation, ran two feet back of the outer edge of the slip

or bridge which afforded entrance to the barn, and extended six feet out into the driveway. He also testified that the distance from the edge of the slip to the edge of the cesspool was about a foot. This excavation became filled with water, the water became frozen, and upon this frozen water and upon the adjacent soil snow had fallen to the depth of about five inches, according to the testimony of the plaintiff, thus concealing the existence of the excavation.

About six o'clock in the afternoon of December 29th, 1911, while the premises were thus occupied by Henderson, the plaintiff went there with his truck team for the purpose of delivering a load of wood to Henderson. He drove into the door yard, stopped his team, and began to unload the wood but, on being told by the wife of the tenant that she wanted the wood unloaded nearer the barn, he led his horse toward the easterly line of the lot, whereupon he and his horse fell into the cesspool from which he escaped but the horse was killed.

This action was brought to recover the damages sustained by the loss of the horse. The defendant introduced no testimony, but at the conclusion of the evidence offered by the plaintiff the case was withdrawn from the jury, by agreement, and reported to this court, with a stipulation that if the defendant were liable damages should be assessed for the plaintiff in the sum of one hundred and fifty dollars and interest from the date of the writ.

The defendant urges that the plaintiff has not only failed to prove due care affirmatively but that the evidence conclusively establishes his contributory negligence. This is a question of fact to be determined from all the evidence in the case. The plaintiff had been upon the premises before the barn had been moved or the cesspool dug. He was somewhat familiar with conditions existing there before either of these things had been done. Would it be claimed that on the 29th of December he should expect to find a dangerous and unguarded excavation like that which was there? "It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any." *Engell* v. *Smith,* 82 Mich., 1; 21 Am. St. Rep., 549; Beach on Negligence, 41; *Christopher* v. *Russel,* 58 So. Rep., 45. The plaintiff went upon the premises at the close of a winter day when early darkness had rendered objects somewhat obscure but when there

was sufficient light to enable out door work like that he was doing to be easily performed without a lantern. He did not call for a lantern. None was necessary if the premises contained no hidden pitfall. It is true that the wife of the tenant spoke to him saying "when you go near the corner of the platform be sure and turn out in the field," but her directions did not arouse any reason in his mind to apprehend or look for the danger which was in his path, and she testifies that "the cesspool didn't come into my mind at the time," meaning the time when the plaintiff came to deliver the wood. Obviously there was nothing in this incident which would cause the plaintiff to be charged with lack of due care or contributory negligence. We have examined all the evidence carefully, and while it is always easy to say what should have been done after knowledge has been gained by painful experience, we are inclined to the belief that this plaintiff, on that late December afternoon, did what any ordinarily prudent man would have done under similar circumstances and while engaged in such an enterprise.

Was the plaintiff on the premises as a tresspasser, or as a mere licensee, or was he there by invitation, express or implied? The correct answer to this inquiry will assist in determining the question of liability for the damages which he sustained. Plainly he was not there as a trespasser. "A licensee is a person who is neither a passenger, servant, nor trespasser, and not standing in any contractual relation with the owner of the premises, and is permitted to come upon the premises for his own interest, convenience, or gratification." 29 Cyc., 451 and cases there cited. "It is well settled, that to come under an implied invitation, as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the owner or occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates." *Plummer* v. *Dill,* 156 Mass., 426. In *Dixon* v. *Swift,* 98 Maine, 207, our court declared that if the plaintiff had been on the premises upon business of the defendant he would have been there by implied invitation. In the case at bar the premises were occupied as a tenement. The tenant must have fuel. He had purchased fuel, which was being delivered to him on the

premises by the plaintiff. These circumstances warrant us in saying that the plaintiff was on the premises by implied invitation.

Being so there what rules of law may he invoke for his protection. The defendant says that there was no passage way, or way of any description, across, over or near the lot which would invite this plaintiff to be in the position in which he suffered the damage. He says that any one lawfully on the premises, passing to the house door, or to any doors of other buildings, would not pass any where near the excavation. He says that men going into the barn would travel the entire length of the whole line of buildings and come to a platform leading into the barn, and that beyond the platform was the cesspool. He argues that under these circumstances the owner or occupant was under no duty to the plaintiff in the matter of protection from injury except to avoid wanton injury or the setting of a trap. But the evidence is uncontradicted that the plaintiff entered these premises lawfully, in the discharge of business which had "mutuality of interest" between himself and the occupant, and while pursuing the ordinary, customary and natural route which would be pursued by one so coming on the premises, and which must be necessarily pursued if the wood were to be delivered near the barn door where the tenant wanted it, he inevitably came to the position on the premises made dangerous by this unguarded cesspool, and without fault on his part, as we have seen, suffered the accident for which he now asks payment in damages. Under such circumstances this rule of liability is well settled: "The owner or occupant of land, who by invitation express or implied induces or leads another to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public or to those who were likely to act upon such invitation." *Moore* v. *Stetson,* 96 Maine, 197; *Barrett* v. *Black,* 56 Maine, 498. The case at bar has every element necessary to bring it within the rule of law just stated.

That the plaintiff sustained an injury no one denies. That he was not guilty of contributory negligence we are well satisfied. Was the defendant, who constructed the cesspool, left it in a dan-

gerous condition, suffered it to so exist, promised to repair it before the tenant began his occupancy, repeatedly promised to repair it after the tenant began his occupancy, and did as a matter of fact repair it after the accident, was he guilty of negligence and shall he be required to pay the damages, or shall we declare the fault to rest upon the shoulders of the tenant who did not create the defect, and who relied upon the landlord to keep good his promise to repair.

The defendant urges several reasons why he is not answerable in damages to the plaintiff and among them he invokes the rule that one who visits a dwelling house on the express or implied invitation of the tenant at will cannot be deemed as present therein on the implied invitation of the landlord, and if he suffer damages there by some defect in the premises he must seek his remedy against the person on whose implied invitation he came upon the premises. In support of the rule he cites *McKenzie* v. *Cheetham,* 83 Maine, 543. Under the circumstances of that case this rule is true, but it is not without its exceptions, and the McKenzie case distinctly recognizes an exception when the court says on page 550 of the reported case, "If when let, the premises are in a condition which is dangerous to the public, or with a nuisance upon them, the landlord may be liable to strangers for injuries resulting therefrom; for by the letting of them in that condition and receiving rent therefor he is considered as authorizing the continuance of the nuisance." In a very recent case decided by the Massachusetts court, *Cerchione* v. *Hunnewell et al,* 102 N. E. Rep., 908, the court says, "when there is a lease of premises on which a nuisance exists *or such condition as plainly will lead to the creation of a nuisance,* and a surrender of control is made to the tenant *without* any express agreement touching the nuisance, then the landlord may be found to have contemplated the continuance of the illegal or dangerous condition by the tenant and may be held responsible for damages resulting therefrom." The liability of the landlord in that case even *without* promise to repair is to be noted. In the case at bar the promise to repair exists. Our own court has said in *Smith* v. *Preston,* 104 Maine, 156, "whenever an owner is bound to repair his building, and has control of it sufficient for that purpose, he, and not the tenants, is liable to a third person for damages arising

from a neglect to repair. Such liability rests upon the elementary principle that the party whose neglect of duty causes the damages is responsible therefor." In the case from which we just quote the fact was established that the defect which caused the injury was under the general care of the defendant, and that he had such control of the premises as was necessary to keep them in proper and safe condition. In the case at bar we regard the fact as established that this defendant assumed and retained the care of the premises to the extent of completing necessary work on this cesspool, as shown by his promises to repair made before and during the occupancy by the tenant, and by the further fact that he came upon the premises after the accident and made repairs. It should be noticed that in *McKenzie* v. *Cheetham,* supra, the landlord made no such promise to repair, and retained no control over the leased premises for that or any other reason.

The cesspool existed upon the premises when let. There were such conditions as would plainly "lead to the creation of a nuisance," *Cerchione* v. *Hunnewell,* supra, and for those reasons, and for other reasons already stated, we determine that the defendant is liable, and accordingly assess damages for the plaintiff in the sum of one hundred fifty dollars and interest from the date of the writ.

So ordered.

LEWIS D. CLARK, et als *vs.* ANDREW CLARK.

Washington. Opinion February 5, 1914.

Arbitrators. Discretion. Exceptions. Motion to Strike off Reference. Real Action. Referees. Rule of Court. Will.

Real action entered at the January term, 1912 and referred under rule of court to three arbitrators, together with an equity suit. The report of referees so far as it related to the equity suit was filed January 9, 1913, and with the report a memorandum by referees in which they declared that they deemed it inexpedient to decide the real action until the probate of the last will and testament of Lewis D. Clark. At the October term, 1913, the rule was recalled and the reference stricken off. To which the plaintiff excepted.

Held:

1. That before an award is made, any submission to referees, not by rule of court, may be revoked by any party to the submission, but it is otherwise if the submission is by rule of court.
2. The submission of a cause by rule of court necessarily means that the cause is entered upon the docket of that court, is within the jurisdiction of that court, and under the control and direction of that court so far, at least, as procedure is concerned.
3. The right of the court acting in the exercise of proper discretion, and within the bounds of justice, would seem to fully warrant the recall of the rule of reference, under circumstances like the case at bar.
4. Courts will, upon motion of either party, upon a hearing and for good cause, rescind the rule and dispose of the cause in some other way.
5. The court may also, if the parties or the referees should delay proceedings unreasonably, rescind the rule and order the cause tried by jury.

On exceptions by plaintiff. Exceptions overruled.

This is a real action entered in court at the January term, 1912, of the Supreme Judicial Court, at Machias, in the County of Washington. At the return term, by rule of court, this case and an equity case involving matters in which both parties were interested were referred to three arbitrators. The referees filed their report and award so far as it related to the equity case January 9, 1913, and with the report a memorandum stating that they deemed it inex-

pedient to decide the real action until the probate of an instrument purporting to be the last will and testament of Lewis D. Clark had been determined. At the October term of said court, on motion of defendant, the rule of reference was recalled and the reference stricken off. To this action of the presiding Justice, the plaintiff excepted and his exceptions allowed.

The case is stated in the opinion.

J. F. Lynch, and H. H. Gray, for plaintiff.

W. R. Pattangall, and A. D. McFaul, for defendant.

SITTING: SAVAGE, C. J., SPEAR, PHILBROOK, JJ.

PHILBROOK, J. This is a real action, entered at the January term, 1912, of the Supreme Judicial Court sitting at Machias, and at the return term, under rule of court, referred to three arbitrators. With it was referred to the same arbitrators, an equity suit involving matters of interest to the same parties. The docket entries made at the October term, 1912, of said court provided that the report of the referees was to be filed in vacation as of that term. According to the statement of the case made in the bill of exceptions the report, so far as it related to the equity suit, was filed January 9, 1913, and with that report the referees filed a memorandum in which they declared that they deemed it inexpedient to decide the questions presented in this real action until the probate of a certain instrument, purporting to be the last will and testament of Lewis D. Clark, had been determined.

At the term of court held in October, 1913, on motion of defendant, the rule of reference was re-called and the order of reference stricken off. To this action of the presiding Justice the plaintiff excepted and his exceptions were duly allowed and certified. The issue before this court, raised by the bill of exceptions, is one of practice and procedure.

The plaintiff presents no authorities in support of his contention that the presiding Justice erred in the court below, nor has our attention been called to any instance where this court has been called upon to decide the precise issue now presented. It is universally held that, before an award is made, any submission to referees, not by rule of court, may be revoked by any party to the submission,

but otherwise if the submission is by rule of court. *Gregory* v. *Pike,* 94 Maine, 27. Such has been the rule in this State since the very beginning of our judicial system. *Cumberland* v. *North Yarmouth,* 4 Maine, 459. The submission of a cause by rule of court necessarily means that the cause is entered upon the docket of that court, is within the jurisdiction of that court, and under the control and direction of that court so far, at least, as procedure is concerned. The right of the court, therefore, acting in the exercise of proper discretion, and within the bounds of justice, would seem to fully warrant the recall of the rule of reference under circumstances like the case at bar.

"Courts will, upon the motion of either party, upon a hearing and for good cause, rescind the rule, and dispose of the cause in some other way. The court may also, if the parties or the referees should delay proceedings unreasonably, rescind the rule and order the cause tried by jury." *Dexter* v. *Young,* 40 N. H., 130. The Supreme Court of Michigan, in *Taylor* v. *Judge of Osceola Circuit,* 30 Mich., 99, has held that the setting aside of a reference upon cause shown is such interlocutory action as is within the legitimate discretion of the circuit Judge. The Supreme Court of Indiana, in *Heritage* v. *State,* 88 N. E., 114, has held that when there has been a submission to referees under rule of court, its revocation "is not dependable upon the caprice or desire of either or both of the parties, but rests within the sound discretion of the court; and whether a revocation or a setting aside of the submission is to be had is controlled and determined by the court."

Under these rules of law and the circumstances of this case, we are of the opinion that there was no error in the ruling and order of the court below, and that the entry should be,

Exceptions overruled.

GEORGE M. GRAY, by Guardian, *vs.* ANGIER M. GRAY.

Somerset. Opinion February 26, 1914.

Breach of Condition of Mortgage. Conditions. Forfeiture of Right to Specified Support. Maintenance During Life. Mortgage. Mental Responsibility. Vicious Acts Towards Defendant.

Real action of mortgagee for breach of condition. May 11, 1893, defendant gave mortgage to his mother and to plaintiff, his brother, conditioned to suitably support and maintain them during their lives in his house, or in such suitable house as he might provide, defendant to have benefit of plaintiff's wages. Defendant properly supported his mother until her death in 1900, and furnished a suitable home for plaintiff and treated him kindly, until 1911, when following an outburst of passion and vicious conduct towards defendant, he left the defendant's house, since which time he has refused to have him at his home.

Held:

1. That if the plaintiff understood what he was doing and was at the time mentally responsible, so that he appreciated what the effect and nature of the acts he had performed were, then he would forfeit all right to the support specified in the bond.
2. The real issue involved in the case is whether the plaintiff possessed sufficient intelligence and mental capacity to appreciate the nature and effect of his improper and vicious acts towards the defendant and to conduct himself in a reasonably proper manner.

On motion by plaintiff for a new trial. Motion overruled.

This is a real action by a mortgagee to recover possession of the land described in said mortgage for a breach of the condition of said mortgage. May 11, 1893, the defendant gave said mortgage to his mother and the plaintiff, who is his brother, to secure the conditions in his bond that he would suitably support and maintain them during their lives and provide them with clothes, food, drink, medicine and nursing and all other things necessary, in his house, or in such suitable house as he might provide; he to have the benefit of plaintiff's wages. The mother lived with and was properly supported by defendant until her death in 1900. The plaintiff lived with and was properly supported for eighteen years to 1911. Some-

time in 1911, the plaintiff left the defendant's house, since which time he has not had a home there and the defendant has refused to have him there, because of his unruly and dangerous conduct towards the defendant.

Plea, the general issue with brief statement of special matter of defense, in which it is alleged, in substance, that the title under which plaintiff claims the real estate is a mortgage deed conditioned that defendant should well and truly support Rachel Gray and George M. Gray during their natural lives. That said defendant on his part has fully carried out, fulfilled, done and performed all of the conditions mentioned in said bond. That the defendant has not had the benefit of said plaintiff's wages as set out and agreed in said obligation.

The jury returned a verdict for the defendant and the plaintiff filed a general motion for a new trial.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

Walton & Walton, for defendant.

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

KING, J. Real action by a mortgagee counting on a breach of the condition of the mortgage.

May 11, 1893, the defendant gave the mortgage in question to his mother and the plaintiff (who is his brother) to secure the conditions of his bond that he would suitably support and maintain them during their lives and provide them with clothes, food, drink, medicine and nursing and all other things necessary, in his house or in such suitable house as he might provide, he to have the benefit of the plaintiff's wages. The plaintiff is the surviving obligee and mortgagee. The mother lived with and was properly supported by the defendant until her death in 1900. And it is undisputed that for a period of about eighteen years, down to 1911, the defendant performed the conditions of his bond respecting the plaintiff's support and maintenance, furnishing him at all times a suitable home at his house and treating him with kindness and consideration.

It appears, however, that about 1911 the plaintiff left the defendant's house, following an outburst of passion and vicious conduct on his part towards the defendant, since which time he has not had a home there and the defendant has refused to have him there because of his unruly and dangerous conduct. And concerning that conduct the learned counsel for the plaintiff in his brief says: "If the plaintiff understood what he was doing and is and was mentally responsible, so that he appreciated what the effect and nature of the acts he has performed were, then no doubt he would forfeit all right to the support specified in the bond until he mended his ways."

Therein is involved the real issue in the case, whether the plaintiff possessed sufficient intelligence and mental capacity to appreciate the nature and effect of his improper and vicious acts towards the defendant, and to conduct himself in a reasonably proper manner.

No suggestion is made that that question was not clearly presented to the jury, and it was one they were competent to understand and decide. They returned a verdict for the defendant, showing thereby that they found from the evidence that the plaintiff was possessed of sufficient intelligence to know that his conduct towards the defendant was wrong, and that he should be held responsible for it. Does the evidence justify that finding?

The plaintiff was 51 years old at the time of the trial. After he left the defendant's home another brother was appointed his guardian and brings this action in the plaintiff's behalf. It clearly appears that the plaintiff is considerably below the normal person in mental capacity, and that his intelligence is much limited. But he knew how to perform common labor, to contract for and collect his wages, to make purchases for his needs and comfort, to obtain credit and extensions of credit, to discharge his obligations when due, and to leave his surplus earnings with his favorite sister for safe keeping. He testified at the trial in his own behalf, and certainly the record of his testimony does not indicate that he was so deficient in mental capacity and intelligence that he could not understand the nature and effect of vicious an dthreatening conduct towards his brother, and appreciate that he ought not so to conduct himself. It is true that the printed words of testimony sometimes produce a better impression on the reader's mind of the witness'

intelligence and mental capacity than would have been produced if the reader had observed the witness when the testimony was given. But in this case the jury had the opportunity of observing the plaintiff as he testified. They had not only his testimony, but his looks, his appearance and his conduct while testifying to aid them in judging of his capacity and intelligence.

After an examination and consideration of all the evidence the court is not of the opinion that the decision of the jury in this case is unmistakably against the weight of the evidence and accordingly the entry will be,

Motion overruled.

LYDIA CARLE *vs.* HARRIETT O. LADD and Trustees.

ASA CARLE *vs.* HARRIETT O. LADD.

Piscataquis. Opinion February 26, 1914.

Account. Agent. Agreement for Sale. Contract. Copartnership. Husband and Wife. Lumbering Operations. Mortgage.

In the fall of 1911, Mark P. Ladd, husband of the defendant, his son Fred, and Asa Carle entered into a partnership agreement to carry on a lumbering operation. Mr. Ladd negotiated with the owner of a lot near his home for the soft wood lumber standing thereon, and procured a conveyance of it to his wife, the defendant, she giving back to the owner a mortgage for $700, the full purchase price. A contract in writing was made with two men by the name of Bennett, for the purchase by them of said lumber. The defendant, and also Mr. Ladd, his son Fred, and Mr. Carle signed said contract. In the contract, it was stipulated that the Bennetts should retain in their hands, for the grantees in said mortgage, $1.00 per cord on all lath stock and $3.50 per thousand feet on all logs until the sum of $700, the amount of the mortgage given by the defendant, was thus accumulated.

Held:

1. Mrs. Ladd could not be held liable in these actions on the ground that she was a partner in the lumbering operation with her husband, son, and Carle, and thereby became liable for these debts contracted by the partnership. And that is not really claimed.
2. The only ground on which the defendant's liability in these actions is predicated is the theory that Mrs. Ladd was carrying on the lumbering operation as her business and that her husband was her agent in dealing with the Carles, and bound her by his agreement with Mr. Carle to pay these claims in suit. But the court is constrained to the opinion from a careful consideration and examination of all the evidence that it is clearly insufficient to justify the jury in so finding.

On motion by defendant for new trial. Motion in each case sustained.

These two actions, tried together, are assumpsit on account annexed to the writ. In the case of *Lydia Carle* v. *Harriett O. Ladd*, plaintiff sued for board of laborers and in the case of *Asa Carle* v. *Harriett O. Ladd*, the plaintiff sued for labor and money paid to laborers. In the fall of 1911, Mark P. Ladd, husband of the defendant, Fred Ladd, his son, and Asa Carle entered into a partnership agreement for the purpose of conducting a lumbering operation. The defendant purchased of W. D. Hutchins Company, a corporation, the soft wood lumber on a certain farm in Sangerville, and gave back a mortgage to W. D. Hutchins Company for $700, being the entire purchase price. The defendant with her husband and son and Mr. Carle entered into a contract with Freeman H. Bennett and Galen H. Bennett, owners of a mill in the vicinity, for the sale of the lumber aforesaid. In said contract, it was provided that the said Bennetts were to hold in their hands for W. D. Hutchins Company, grantees in said mortgage, one dollar per cord on all lath stock and $3.50 per thousand on all logs, until they had the sum of $700, the amount of the mortgage secured upon said timber. In accordance with the partnership agreement, Asa Carle, plaintiff in one of said actions, took charge of the lumbering operations, devoted his time and labor to it until about the middle of January, 1912, when a disagreement arose and he, the said Carle, took no further active part in the operation.

The plaintiffs in said actions seek to hold the defendant liable on the ground that she was carrying on the lumbering operation, as

her business and that her husband, Mark P. Ladd, was her agent in dealing with the Carles.

The plea in each case was the general issue. The jury returned a verdict in the case of *Lydia Carle* v. *Harriett O. Ladd,* for the plaintiff for $73.06; and in the case of *Asa Carle* v. *Harriett O. Ladd,* for the plaintiff for $137.82. The defendant filed a general motion in each case for a new trial.

The case is stated in the opinion.

Hudson & Hudson, for plaintiffs.

L. B. Waldron, and P. A. Hasty, for defendants.

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

KING, J. In these cases the respective plaintiffs are husband and wife, and the defendant is the wife of Mark P. Ladd. The action by Mrs. Carle is to recover for boarding certain laborers who worked in a lumbering operation, and that by Mr. Carle is to recover for his own labor and money paid to laborers in the same operation. In each case the verdict was for the plaintiff which the defendant moves this court to set aside as being against the evidence. No question was raised as to the items sued for in either action, and the real issue was the defendant's liability therefor.

It appears that Mr. Ladd, contemplating a lumbering operation on a lot of land near his home, negotiated with the owner of the lot for the soft wood lumber standing thereon and procured a conveyance of it to Mrs. Ladd, she giving back to the owner a mortgage for $700, the full price for the growth. Mr. Ladd and Mr. Carle entered into an arrangement whereby the lumbering operation was to be carried on by a partnership in which Mr. Carle was to share one-half of the profits and losses and Mr. Ladd and his son the other half. Mr. Carle knew of the contemplated purchase of the growth on the lot, examined and estimated it with Mr. Ladd, and considered and discussed the partnership, previous to the purchase of the growth, and indeed the evidence seems to leave little doubt that he actually made the partnership arrangement before the conveyance of the growth to Mrs. Ladd, for that was dated October 25, 1911, and he says that he actually began work in the woods on that day.

Mrs. Ladd knew that the partnership was made between her husband and son on the one side, and Mr. Carle on the other, for operating on the lot. A contract for the sale of the logs and other lumber to be cut on the lot was made with the Bennetts, owners of a mill nearby. That contract was in writing and nominally between Mrs. Ladd of the first part and the Bennetts of the second part. It stipulated, in addition to the terms of the sale and delivery of the lumber, that the Bennetts should hold back in their hands $1.00 per cord on all lath stock and $3.50 per thousand feet on all logs until the sum of $700, the amount of the mortgage given by Mrs. Ladd for the growth, was thus accumulated. It also stipulated that at least 200,000 feet of logs and 50 cords of lath stock should be delivered in the winter of 1911-12. This written contract was also signed by Mr. Ladd, his son and Mr. Carle, and contained the following paragraph: "M. P. Ladd and F. E. Ladd and Asa Carle, by their signature hereto, acknowledge that they are parties to this contract for the cutting and hauling of said logs and lath stock and hereby waive any and all labor liens which might otherwise arise."

Pursuant to the partnership agreement Mr. Carle took charge of the operation devoting his personal labor to it until about the middle of January, 1912. Mrs. Carle boarded some of the laborers. Mr. Ladd purchased supplies in his own name, and Mr. Carle took some of them home to be accounted for in final settlement.

On January 16, 1912, Carle and Ladd, disagreeing about some details of the work, had a conversation as the result of which Carle took no further active part in the operation. He thus stated his version of the important part of that conversation: "and finally I told him he might pay me up what I had in it and he might run it as he had a mind to; and he said, 'All right, how much do you want?' I said, 'Pay me what you pay the other men.' He said, 'All right, just as soon as I can draw some money from the company I will pay you.' I told him my wife would want the pay for the men boarded; and he said 'All right;' and he would come out to see her; and I sold out to him. He said the first money he could draw he would pay me a part of it."

Mr. Ladd's version of the arrangement is different. He stated, in substance, that he told Carle that if he dropped out he would not be entitled to anything, but, nevertheless, he would go on with the

work and if there was anything coming after the other bills were paid he would divide with him until he got what he had put in. But in considering these motions to set aside the verdicts the court will assume that the jury were justified in accepting Mr. Carle's statement that Mr. Ladd agreed to pay him for his labor and what he had otherwise put in, and also to pay Mrs. Carle for boarding the men.

It is not contended, as we understand, and there would be no merit in such contention, that Mrs. Ladd is liable in these actions on the ground that she was a partner in the lumbering operation with her husband, son, and Carle, and thereby became liable for these debts contracted by the partnership. *Haggett* v. *Hurley,* 91 Maine, 542.

The only ground on which the defendant's liability in these actions is predicated is the theory that Mrs. Ladd was carrying on the lumbering operation as her business, and that her husband was her agent in dealing with the Carles, and bound her by his agreement with Mr. Carle to pay these claims in suit. We think there was no sufficient evidence to sustain that theory.

The jury failed apparently to appreciate, or to be governed by, the true relation of Mrs. Ladd to this lumbering operation. She had no active part in it from the beginning. It was proposed, planned, and carried on by her husband in company with Mr. Carle as their business, not hers. The title to the growth was taken in her name, and she became responsible for its purchase price, to assist her husband. She signed the agreement for the sale of the lumber to the Bennetts, "Because my husband wanted me to sign it." Holding the legal title to the growth she permitted her husband and Carle to remove it and sell it, stipulating only that the $700 for which she was liable should be left with their vendees. Her real relation to this lumbering operation was much like that of an ordinary permitter of growth in lumbering operations. She was interested for herself only to the extent that the $700 for which she was liable should be secured from the sale of the lumber.

It was not claimed that Mrs. Ladd had ever said to either of the plaintiffs that her husband was her agent in carrying on the lumbering operation, or that it was her business. There was no conversation touching the subject between her and Mrs. Carle at any time,

and all that Mr. Carle recalled that the defendant ever said to him or in his presence was that when he was at Mr. Ladd's house for supplies she would ask how they were getting on with the work.

It is urged that when Mrs. Ladd was asked if she ever authorized her husband to act as her agent she answered "Yes," and being asked, when and how, she said, "When they began on this lumbering operation. . . . I simply asked him to see about it; go ahead and see that the work was carried on." But we do not think that statement justified the jury in finding that her husband was her agent in carrying on that lumbering operation. She had legally assumed some obligations by signing the agreement with the Bennetts, and she was responsible for the $700, and being thus interested it was both natural and proper that she should ask her husband to see that the work was carried on. She stated that she had nothing to do with the operation, was never consulted about it, and knew nothing about the details of it, and Mr. Ladd also testified that he was not acting as agent for his wife in these transactions.

Finally, Mr. Carle's own statement of the conversation with Mr. Ladd by which, as he now claims, Mrs. Ladd was made liable for these bills sued, shows quite conclusively, we think, that he was then contracting with Mr. Ladd personally, and not with Mrs. Ladd through Mr. Ladd as her agent. His then understanding of the arrangement and the party with whom it was made was clearly and concisely expressed by him at the trial in these words: "and I sold out to him." Mrs. Ladd was not referred to in the conversation by either party, and it is an admitted fact, of no little significance in this connection, that Mr. Carle never saw Mrs. Ladd after he quit the work, or had any communication with her touching this matter.

It is the opinion of the court that the verdicts in these cases are unmistakably erroneous, and that they should be set aside. Accordingly the entry in each case will be,

Motion sustained.

LEWIS W. MOULTON, Relator, *vs.* EVERETT G. SCULLY.

Cumberland. Opinion February 26, 1914.

Address. Adoption. Article IX, Section 5, of the Constitution. Causes. Constitution. Information. Initiative and Referendum. Jurisdiction. Quo Warranto. Records. Removal. Resolution. Section 69 of Chapter 29 of Revised Statutes.

1. Jurisdiction is conferred upon the Legislature in address proceedings by Article IX, section 5 of the Constitution of Maine.
2. Under this provision of the Constitution in address proceedings by the Legislature, three things are required to be done: (1) state the causes of removal and enter them upon the journal; (2) serve notice on the person in office, and (3) admit him to a hearing.
3. In address proceedings to remove any officer from office under Article IX, section 5 of the Constitution, it is a constitutional trial by a coördinate department of the government, the Legislature acting as a constitutional tribunal and limited in authority only by the language of Article IX, section 5.
4. The causes stated must be legal causes and such as specially relate to and affect the administration of the office and must be restricted to something of a substantial nature directly affecting the rights and interests of the public.
5. They must be causes attaching to the qualification of the officer, or his performance of his duties, showing that he is not a fit or proper person to hold the office.
6. Non-feasance specially relates to and affects the administration of the office of sheriff and is of a substantial nature affecting the rights and interests of the public, and manifestly constitutes a charge of unfitness to hold office.
7. The Legislature, under the Constitution, in address proceedings, after it has acquired jurisdiction, is acting in the exercise of sovereign power, and is accountable only to the people for the manner in which it performs its functions.
8. While it is essential that all the facts constituting an offense must be so stated as to bring the defendant precisely within the law, it is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute.

9. When the offense is prohibited in general terms in one section of the statute, and a penalty prescribed, and in another section entirely distinct, there is a particular description of the elements which shall constitute the offense, there is no reason, upon principle or authority, why the indictment should contain anything more than the general description.
10. Whenever a crime consists of a series of acts, they need not be specially described, for it is not each or all the acts of themselves, but the practice or habit which produces evil and constitutes the crime.
11. The central idea of the change of section 1 of part third of Article IV of the Constitution, which provides for the initiative and referendum was to confer the law making power in the last analysis upon the people themselves and applies only to legislation, to the making of laws, whether it be a public act, a private act, or a resolve having the force of law.
12. That the power of the Legislature to recommend the removal of a public officer by address still abides unshorn, as it has existed since the adoption of our Constitution, that this important safeguard of public welfare was neither repealed nor abridged by the adoption of the initiative and referendum and that the resolve in the case at bar became effective upon its adoption.

On report. Information dismissed with costs.

This is an action of quo warranto, brought at the relation of Lewis W. Moulton, who claims to be sheriff of Cumberland County against Everett G. Scully, appointed to the office of sheriff of Cumberland County by Hon. William T. Haines, Governor of Maine, upon the adoption of an address to him by both branches of the Seventy-sixth Maine Legislature, calling for the removal of said Lewis W. Moulton from said office; entered at the April Term, 1913, of the Supreme Judicial Court for Cumberland County.

The address to the Governor by the Legislature, requesting the removal from office of Lewis W. Moulton, sheriff of Cumberland County, alleged the following causes: "Because the said Lewis W. Moulton, who is now holding the office of sheriff for the County of Cumberland, and who has held said office continuously since the first day of January, A. D. 1913, wilfully or corruptly refuses, or neglects, to perform the duties required of him as such sheriff, by section 69 of chapter 29 of the Revised Statutes of Maine, as amended by chapter 41 of the Public Laws of 1905, and particularly his duties as said sheriff in enforcement of the laws against the illegal sale of intoxicating liquors and the keeping of drinking houses and tippling shops." This address was adopted by both

branches of the Legislature, and on the 24th day of April, 1913, the members constituting the Governor's Council voted to advise the Governor and to consent to the removal of the relator, Lewis W. oulton, from the office of sheriff of Cumberland County. On the 28th day of April, 1913, the Governor removed said Lewis W. Moulton from said office to take effect May 8, 1913, and appointed Everett G. Scully of Portland, to succeed said Moulton in said office, to take effect upon the date above named, and authorized and empowered him to fulfill the duties of that office according to law, and to have and to hold the same, together with all the powers, privileges and emoluments thereto of right appertaining unto him, the said Everett G. Scully, until the first day of January, 1915, or until another shall be chosen in his place, if he shall so long behave himself well in said office, unless sooner removed by the Governor and Council for the time being, and before the commencement of this action was duly qualified as such. The respondent, Everett G. Scully, made answer to the writ of information in the nature of quo warranto, and the relator, Lewis W. Moulton, filed a replication. At the conclusion of hearing in above case, the same was reported to the Law Court to be determined by said court upon the pleadings and agreements of the parties. The information, answer, replication and agreements of counsel, and all papers, documents and records are made a part of the case.

The case is stated in the opinion.

William R. Pattangall, Irving E. Vernon, William H. Gulliver, for relator.

Scott Wilson, and Eben Winthrop Freeman, for respondent.

SITTING: SAVAGE, C. J., SPEAR, CORNISH, KING, HANSON, PHILBROOK, JJ. BIRD AND HALEY, dissenting.

SPEAR J,. While the report of the proceedings in this case is quite long and many questions of law and fact are raised by the relator, yet only three pertinent inquiries are involved.

The relator was elected and qualified as sheriff of Cumberland County for the term of office beginning January 1, 1913. On the second day of April following, the Senate and House of Representatives passed in concurrence the following resolve:

"STATE OF MAINE.

"Resolve in favor of the adoption of an address to the Governor for the removal of Lewis W. Moulton, Sheriff for the County of Cumberland.

"Resolved, That both branches of the Legislature, after due notice given, according to the Constitution, will proceed to consider the adoption of an address to the Governor for the removal of Lewis W. Moulton, sheriff for the County of Cumberland, for the causes as following:

"First, because the said Lewis W. Moulton, who is now holding office of sheriff for the County of Cumberland, and who has held said office continuously since the first day of January, A. D. 1913, wilfully or corruptly refuses or neglects to perform the duties required of him as such sheriff by section sixty-nine of chapter twenty-nine of the Revised Statutes of this state as amended by chapter forty-one of the Public Laws of nineteen hundred and five, and particularly his duties as said sheriff in enforcement of the law against the illegal sale of intoxicating liquors and the keeping of drinking houses and tippling shops.

"Resolved, the House of Representatives concurring, that these resolutions and statements of causes of removal be entered on the journal of the Senate and a copy of the same be signed by the President of the Senate and served on said Lewis W. Moulton by such person as the president of the senate shall appoint for that purpose, who shall make return of such service upon his personal affidavit without delay, and that the first day of April, at eleven o'clock in the forenoon, be assigned as the time when the said Lewis W. Moulton may be admitted to a hearing in his defense."

This resolve, with the evidence of its service upon the relator, became the foundation of the hearing and subsequent request of removal, by address. Although the governor acted affirmatively, the attack here made is upon the regularity of the legislative, not the executive, action. The address reads:

"The Senate and House of Representatives in Legislature assembled present this address to the Governor and request the removal from office of Lewis W. Moulton, Sheriff of Cumberland County, for the causes following: Because the said Lewis W. Moulton,

who is now holding the office of sheriff for the County of Cumberland and who has held said office continuously since the first day of January, A. D. 1913, wilfully or corruptly refuses or neglects to perform the duties required of him as such sheriff by section sixty-nine of chapter twenty-nine of the Revised Statutes of this state, as amended by chapter forty-one of the Public Laws of 1905, and particularly his duties as said sheriff in enforcement of the laws against the illegal sale of intoxicating liquors and the keeping of drinking houses and tippling shops."

To the action of the Legislature, in moving and adopting the address, and of the governor in removing Sheriff Moulton, he has filed objections and assigned twenty-two causes of error in the proceedings.

But in view of the constitutional jurisdiction of the tribunal that initiated and concluded the proceedings, we are of the opinion that but three of the objections raised authorize or permit of consideration by the court.

If we now proceed to discover the jurisdiction assumed by the Legislature in this case, we find it conferred by Article IX, section 5 of the Constitution, and reads as follows: "Every person holding any civil office under this state, may be removed by impeachment, for misdemeanor in office; and every person holding any office may be removed by the Governor, with the advice of the council, on the address of both branches of the legislature. But before such address shall pass either house, the causes of removal shall be stated and entered on the journal of the House in which it originated, and a copy thereof served on the person in office, that may be admitted to a hearing in his defense."

By this provision it will be observed that the Legislature in address proceedings, is required to do three things: (1) state the causes of removal and enter them upon the journal; (2) serve notice on the person in office; and (3) admit him to a hearing. Otherwise than this there is no limitation upon the power of the Legislature in the conduct and determination of these proceedings. Whether address or impeachment should have been invoked is a question of interpretation and will be noted later.

It is not in controversy that the Legislature did the three things required. But the objection is that it did not do them right, and

consequently had no jurisdiction. It is the opinion of the court that the objection is not well taken. The address proceedings originated and proceeded under section 5, Article IX of the Constitution. It was a constitutional trial by a coördinate department of the government, the Legislature acting as a constitutional tribunal and limited in authority only by the language of Article IX, section 5. This limitation requires the assignment of causes, notice and hearing, in case of address, as jurisdictional facts. Accordingly the causes stated must be legal causes. The causes contemplated by the constitution can be neither trivial nor capricious. They must be such as specially relate to and affect the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. They must be causes attaching to the qualifications of the officer, or his performance of his duties, showing that he is not a fit or proper person to hold the office. See "Cause," Words and Phrases, Vol. 2, 1009. It must also appear that the notice required is reasonable, and an opportunity afforded for a hearing.

Under this definition it would seem a sound conclusion that the causes stated in the resolution of address constituted a statement of legal causes within the contemplation of the constitutional requirement. To make the statement clear, it is necessary to repeat the causes stated, in connection with the statute cited, in order that the precise import of the causes may be fully understood. The resolution contains the following allegations: "First, because the said Lewis W. Moulton, who is now holding office of sheriff for the County of Cumberland, and who has held said office continuously since the first day of January, A. D. 1913, wilfully or corruptly refuses or neglects to perform the duties required of him as such sheriff by section sixty-nine of chapter twenty-nine of the Revised Statutes of this State, as amended by chapter forty-one of the Public Laws of nineteen hundred and five, and particularly his duties as said sheriff in enforcement of the law against the illegal sale of intoxicating liquors and the keeping of drinking houses and tippling shops."

The statute referred to, as amended, reads as follows: "Sheriffs and their deputies and county attorneys shall diligently and faithfully inquire into all violations of law, within their respective counties, and institute proceedings in case of violations or supposed

violations of law, and particularly the law against illegal sale of intoxicating liquors, and the keeping of drinking houses and tippling shops, gambling houses or places, and houses of ill fame, either by promptly entering a complaint before a magistrate and executing the warrants issued thereon, or by furnishing the county attorney promptly and without delay, with the names of alleged offenders, and of the witnesses. Any sheriff, deputy sheriff or county attorney, who shall wilfully or corruptly refuse or neglect to perform any of the duties required by this section, shall be punished by fine not exceeding one thousand dollars or by imprisonment not exceeding one year." The causes here assigned clearly and fully state a case of non-feasance, which is defined as "an omission to perform a required duty at all, or a total neglect of a duty; the omission of an act which a person ought to do." See "Non-feasance," Words and Phrases, Vol. 5, Page 4821. In fact the title of chapter 41, Public Laws, 1905, is "An Act providing penalties for non-feasance of duty by sheriffs," etc. Under the statute cited, there can be no question that non-feasance specially relates to and affects the administration of the office of sheriff, and is of a substantial nature directly affecting the rights and interests of the public; and, as such non-feasance is punishable by fine or imprisonment, it manifestly constitutes a charge of unfitness to hold office.

As the relator appeared with counsel and was fully heard in an exhaustive trial that lasted several days, no question can be raised as to notice or hearing. We can assume that these jurisdictional requirements are established, and hereafter in referring to jurisdiction it will be upon the assumption that these two requirements are settled.

But it is urged that the causes stated were not sufficiently specific to give jurisdiction. This is not a valid objection, for two reasons. (1) Because when legal causes are stated and entered upon the journal, there the constitutional limitation ends, and the legislative prerogative begins, so far as a statement of causes is concerned; and having acquired jurisdiction the Legislature may file further specifications or not as it may see fit. (2) Because the causes stated are in the language of the statute, as specific as the nature of the case will admit, and, we think, would sustain an indictment.

Under the first reason, as a matter of constitutional interpretation, it may be said, after the Legislature has properly observed the jurisdictional facts and thereby acquired jurisdiction of the case, that, beyond this, all matters of procedure, specification and detail, are left necessarily to the discretion of the Legislature, as acts of sovereign power, as no other way has been prescribed by the Constitution. It could not originate in the courts, nor are the courts given either original or appellate jurisdiction. It must be initiated by the Legislature; be tried by the Legislature; and determined by the Legislature.

This view, we think, is also substantiated by authority so far as the courts have had occasion to pass upon the issue. Necessarily this precise question has become a matter of judicial review but infrequently. In Massachusetts judicial officers may be removed by address, but neither charges, notice or hearing are required by the terms of the Constitution. In *Commonwealth* v. *Harriman,* 134 Mass., 314, it was held that the power of removal was absolute and could be exercised by the Legislature without limitation or restriction. It is there said: (1) "In confiding to the two coördinate branches of the government this important and exceptional power of removing the judiciary, the people found a sufficient protection to the substantial independence of the judicial department in the constitutional guaranties thrown around it, in the fact that the removal can only be made by the concurrent action of both houses of the legislature and of the governor and council, all of whom are directly answerable to the people at frequently recurring periods, and in the trust and confidence they may rightfully repose in their servants and agents that in the exercise of any power committed to them they will act in obedience to their oaths of office and in the spirit of the fundamental principles of the Constitution." (2) "When we consider the origin and history of the provisions, the obvious and natural meaning of its language, and the uniform practical construction which has been given to it, we are forced to the conclusion that the intention of the people was to entrust the power or removal of a judicial officer to the two coördinate branches of government without limitation or restriction. . . . The constitution authorizes the removal without any reason being assigned for it; and therefore it is wholly immaterial what evidence or causes

induced the legislature to vote the address." By a parity of reasoning, our Legislature, when it has once acquired jurisdiction, is supreme.

In New York is found a case which becomes a strong precedent for the interpretation herein presented. The case is In re Guden, Sheriff, N. Y. Appeals, 64 N. E., 451. This case was decided in 1902 under a provision of the New York Constitution, expressed in this language: "The governor may remove any officer in this section mentioned (sheriffs, clerks of counties, district attorneys, and registers in counties having registers,) within the terms to which he shall have been elected; giving to such officer a copy of the charges against him and an opportunity of being heard in his defense." With the exception that our constitution requires notice, as well as causes and opportunity to be heard, the phraseology of the New York constitution is in effect the same as ours; and, so far as the interpretation of the New York constitution bears upon the power of the governor to remove an officer, the two instruments may be regarded as identical, since the chief executive of a state, and the Legislature of a state, are each an equally independent department of the government and equally sovereign in the exercise of their respective powers. The language of the New York constitution is thus construed: "It does not require argument to persuade the mind that the power thus conferred is executive, not judicial; and that it was intended to be vested exclusively in the governor."

The New York case also becomes of peculiar strength upon this issue, since the question was raised by one of the Justices, who concurred in the result but dissented from the reasoning of the opinion, that the proceeding should be regarded as judicial and not as executive. But notwithstanding this contention, the court concluded as follows, C. J. Parker speaking for the court: "Therefore we do not examine into the merits, for they do not concern this court, as both the power to decide whether Guden should be removed from the office of sheriff and the responsibility for a right decision rest solely upon the governor of the state." This decision sustains the interpretation placed upon Article IX, section 5 as to the power thereby vested in the Legislature.

We have failed to find any other pertinent authorities. But, both upon reason and the authorities found, we are unable to avoid the conclusion that the Legislature, under the Constitution, in address proceedings, after it has acquired jurisdiction, is acting in the exercise of sovereign power, and is accountable only to the people for the manner in which it performs its functions.

But the relator contends that this proceeding should be regarded as judicial and governed by the established rules of law touching legal proceedings of a similar nature, and cites with confidence *Andrews* v. *King,* 77 Maine, 224. But the fallacy of this contention is its failure to differentiate between a sovereign tribunal like the Legislature, the executive or the judiciary, and a subordinate tribunal like a board of aldermen or other inferior body. So far as we have been able to note the authorities, this distinction is universally observed. *People ex rel* v. *Krulish & Fornes, et al.,* (N. Y. App.) 67 N. E., 210; *Meacham* v. *Common Council,* 62 N. J. Law, 302. See also *Sawyer* v. *Gilmore,* 109 Maine; *Tremblay et als.* v. *Murphy et als,* Maine, not yet reported. Nor do we find any text writer who disagrees with these conclusions. If, then, the Legislature has done the three jurisdictional things required by the Constitution, it is apparent that all the other objections become immaterial and require no further consideration.

The many other objections interposed by the relator are matters for the attention of the people and not for the action of the court.

Under the second reason we come to the sufficiency of the causes. While it is obiter dicta, it may yet throw some light upon this question, to review the causes in the light of criminal pleading. It will be observed that the causes for adopting the address are expressed in the language of the statute, with a further reference to, and therefore incorporation of, the whole statute under which they were made.

The way of stating the causes in the resolve is analogous, at least, to the rule of pleading which permits certain statute offenses to be set out, in an indictment or complaint, in the language of the statute. The causes specifically state that the relator "who has held office continuously since the first day of January, 1913, wilfully or corruptly refuses or neglects to perform the duties required of him as such sheriff by section 69 of chapter 29 of the Revised Statutes,

as amended by chapter forty-one of the Public Laws of nineteen hundred and five, and particularly his duties as said sheriff in enforcement of the law against the illegal sale of intoxicating liquors and the keeping of drinking houses and tippling shops. It will be observed that this statute, in the language of which, these charges were made is comprehensive, applying to a failure to enforce all statutes against the sale of intoxication liquors, and imposes a penalty upon any sheriff "who shall wilfully or corruptly refuse or neglect to perform any of the duties required by this section." The causes say that the relator did wilfully or corruptly refuse or neglect to perform the duties of his office in these regards. The sheriff is presumed to know the statute relating to the illegal sale of intoxication liquors and his duties touching its enforcement. *Commonwealth* v. *Ashley,* 2 Allen, 356; *Commonwealth* v. *Raymond,* 97 Mass., 567. In the latter case, it is said: "Under this clause, as under the laws against the sale of intoxication liquor or adulterated milk, and many other police, health and revenue regulations, the defendant is bound to know the facts and obey the law, at his peril. Such is the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed. 3 Greenl. Ev., Sec. 21. *Commonwealth* v. *Boynton,* 2 Allen, 160; *Commonwealth* v. *Farren,* 9 Allen, 489; *Commonwealth* v. *Waite,* 11 Allen, 264."

No requirements of the statute could be better known to a sheriff than those which prescibe and define the different forms of offenses arising from violations of the prohibitory law. These various offenses have been upon the statute books for half a century and the particular injunction upon sheriffs to enforce the statutes under which the present charges were made, has been the law of this State for at least thirty years. And the plain object of the amendment of 1905 adding a penalty for non-feasance, was to prevent neglect or refusal by officers to enforce the law.

If, then, the sheriff was "bound to know the facts and obey the law," and he was, *Commonwealth* v. *Raymond,* supra, how could he be better or more fully informed of the offense with which he was charged?

It is the general rule that statutory offenses may be set out in general terms in the language of the statute or its equivalent. *State* v. *Robbins et al.,* 66 Maine, 324. In Ency. of P. & P. Vol. 10, Page 483, we find the following: "Language of Statute. (1) General Rules. While it is essential that all the facts constituting an offense must be so stated as to bring the defendant precisely within the law, it is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute." Under Note 2 it is said: "This rule is so well known and universally accepted as hardly to require citation of authorities to support it." And a long list of cases from all the leading states of the Union is referred to in support of this doctrine. But the cases from Maine and Massachusetts seem to cover all the ground involved in this particular issue.

State v. *Casey,* 45 Maine, 435, is a case in which the indictment was for keeping a drinking house or tippling shop and was set out in the language of the statute of 1856, which read, "no person shall keep a drinking house or tippling shop within the state." The court say: "The only charge in the indictment is, that the defendant did, at the time and place named therein, 'keep a drinking house and tippling shop, contrary to the form of the statute.'" There is another section of the same statute, defining the offense, and providing that it shall consist of certain specified acts; and it is contended that this description should have been set out in the indictment. This is precisely what is claimed by the relator. After giving the general rule of criminal pleading, the court then states the rule in statute offenses: "But where the offense is prohibited in general terms in one section of the statute, and a penalty prescribed, and in another section, entirely distinct, there is a particular description of the elements which shall constitute the offense, we perceive no reason, upon principle or authority, why the indictment should contain anything more than the general description. That gives the defendant sufficient notice of the charge he is to meet, as effectually as if the whole description should be incorporated into the indictment." It will be observed that the statutory offence considered in the opinion and the statutory offence before us, in legal contemplation, are practically identical. Under the

latter statute "the offense is prohibited in general terms in one section of the statute and a penalty prescribed, and in other sections of the chapter, entirely distinct, there is a particular description of the different requirements of the statute, a refusal or neglect to enforce which, constitutes the offense."

State v. *Collins,* 48 Maine, 217, is another case in which the indictment charged that T. C. at a time and place named, "did keep a drinking house and tippling shop contrary to the form of the statute." Upon a motion in arrest of judgment the full opinion of the court reads: "In this case the indictment is sufficient. It is true that the prohibition, and the definition of the offense, by the statute of 1858, section 10, are in the same section. But the provisions are in distinct and separate clauses, as much as in the statute of 1858. In the case of *State* v. *Casey,* 45 Maine, 435, the word 'section' was used inadvertently in the opinion of the court, owing, probably, to the fact that, in the statute then under consideration, the provisions were in distinct sections. But whether in distinct sections, or clauses, can make no difference. The offense, like that of being a common seller of intoxicating liquors, is made sufficiently certain by the terms used in the enacting prohibitory clause." It should here be noted that the offense and the definition are in the same section. Yet the definition was not necessary.

Commonwealth v. *Ashley,* 2 Gray, 356, was an indictment in the language of the statute for keeping a house of ill-fame. The court say: "And we are of the opinion that this is a case in which the indictment so framed, is sufficient; because no allegation of anything more than these words, ex vi terminorum, import is necessary in order to show that the defendant has committed the statutory offense." We think the causes stated in the case before us come clearly within the reason here stated. The statute says: "Any sheriff . . . who shall wilfully or corruptly refuse or neglect to perform any of the duties required by this section shall be punished," etc., and the causes say that the relator did wilfully or corruptly refuse or neglect to perform these duties; no allegation of anything more than these words, ex vi terminorum, is necessary to show that the relator in the case before us has committed the statutory offense. Then the court states the rule: "According to the rule of pleading, laid down in 2 Hawk., c. 25, sec. 111, it is

sufficient, in an indictment, to pursue the very words of a statute, if by so doing the act, in the doing of which the offense consists, is fully, directly and expressly alleged, without any uncertainty or ambiguity. That is done in the present indictment."

In *Commonwealth* v. *Maloy,* 119 Mass., 347, the court states the rule in this way: "Where a statute embraces all the ingredients of the offense intended to be punished, and the language used described such offense with legal certainty, an indictment or complaint may well charge the offense in the words of the statute." In *Commonwealth* v. *Dyer,* 128 Mass., 70, the rule is stated in this language: "When an offense is created by statute, which sets forth with precision and certainty all the elements of the offense, an indictment or complaint is sufficient which charges the offense in the words of the statute." The statute in the language of which the present charge was made sets forth with precision and certainty all the elements of the offense with which the relator is charged, as the reading of the statute will clearly show, and the charges would seem to be sufficiently specific to sustain an indictment.

All these citations, it should be observed, relate to indictments or complaints for statute offenses, involving definite acts of misfeasance, where particular acts might well have been stated. Yet the general rule would seem to be well established that these offenses can be set in the language of the statute or its equivalent. But there is an exception to the rule, which we find clearly stated in *Commonwealth* v. *Barrett,* 108 Mass., 302. The rule and exception are stated as follows: "It is a general rule that, where an offense is created by statute, an indictment or complaint is sufficient which charges the offense in the words of the statute. *Commonwealth* v. *Raymond,* 97 Mass., 567. There is an exception to the rule, where the words of a statute may, by their generality, embrace cases falling within its literal terms, which are not within its meaning or spirit. In such cases, the offense intended to be made penal is ascertained by reference to the context, and to other statutes in pari materia, and the indictment or complaint must allege all facts necessary to bring the case within the meaning and intent of the legislature."

It will be observed that the words of the statute which we are considering are not general, but specific, alleging one specific offense

and no more. No other case could fall within its literal terms. No other charge could be brought under it. The only offense specified in this statute is a failure to act as the section commands; is a single, continuing, habitual offense; purely statutory; malum prohibitum; unknown to the common law; embraces a single charge,—non-feasance; and neither concerns nor is concerned with any other provision of the statute. It cannot be construed in pari materia nor with reference to the context. The meaning and intent of the Legislature is clear. It does not, therefore, come within the scope of the exception. But it is said the causes should have specified particular cases of refusal or neglect on the part of the relator; that, under the causes assigned, he was unable to know from what place in the county he would be called upon to confront the witnesses against him. But this claim, under the offense charged in this case, is specious rather than true. It should be here noted that the sheriff and his deputies are one in the enforcement of the laws and protection of the people against infraction of the laws. R. S., chap. 82, sec. 8, authorizes the sheriff to appoint deputies, "for whose official conduct and neglect he is answerable." The causes charge that he wilfully or corruptly refused or neglected to perform his duties as sheriff in enforcing the prohibitory law in the County of Cumberland over which his jurisdiction extended. Did he not know what he, himself, had done to enforce the prohibitory law? Enforcement is a specific, active performance of which the sheriff must have not only absolute knowledge but in most cases, record evidence. All it was necessary for him to do, when charged with non-feasance, covering a definite space of time, as in this case, was to bring forth his records of enforcement, from every part of the county covering the period, with all other evidence showing just what he had done, and his defense was all in. Because every search and seizure where a warrant is issued is of record; every nuisance case is of record; every drinking house and tippling shop prosecution is of record; every single sale procedure is of record; every charge for illegal deposit or keeping is of record. Every one of these various forms of prosecution, if instituted, was particularly within the knowledge of the sheriff, and not in the knowledge of the Legislature. Accordingly, the general charge of non-feasance covers every one of these offenses, and the answer to every charge

was absolutely within the knowledge, and easy procurement of the relator. The charge did not say, nor was it intended to say, that the relator had not enforced the law in particular towns or cities. nor could it be the whole truth. Within the intention of the causes required by the Constitution, it intended to say just what it did say, that the relator had not enforced the law in any particular town or city, nor anywhere else in the county; and this was the charge which he was required to meet, and which, as above seen, he had every facility, which the truth could afford, for refuting. There could be no surprise. His defense was simply to show what he had done. The causes assigned gave him notice to do this and nothing more. His field of defense was wide open. There was no restraint, technically or otherwise, upon it. It was open to him to show every search and seizure and every prosecution, advised or instituted by him or his deputies, under his orders, or without his orders, under the several forms of prosecution of the prohibitory law, which he is charged with refusing or neglecting to enforce. We are unable to discover how he could have been more fairly or more fully informed of the offense with which he was charged, than in the causes stated, or how he could have ever been better prepared to defend, than against this charge, where all the evidence, if any existed, had been the product of his own action and absolutely within his grasp.

We now call attention to the consideration that the offense of non-feasance, described in section 69, as amended, falls within a special line of decisions which are peculiarly adapted to this class of cases, touching the manner of pleading the charge. It will be readily seen that there is a marked difference between describing misfeasance and non-feasance; one a definite act which the law forbids; the other a failure to act, where the law commands an act. The former consists in doing something; the latter consists in doing nothing; in the former there is some act to specify; in the latter no act to specify. There is no act of any kind. There is habitual and continued omission to act; a course of conduct; a habit of wilful or corrupt refusal to perform the duties required by the statute. It is readily apparent that it is impossible to particularize a continual course of non-action. What a person does not do, can be described only in general terms, in a negative way.

Pertinent to this condition of things is *Commonwealth* v. *Pray,* 13 Pick, 359, in which the caurt say: "Wherever a crime consists of a series of acts, they need not be specially described, for it is not each or all the acts of themselves, but the practice or habit which produces the principal evil and constitutes the crime." Then follows several cases as illustrations of this rule, one of which seems to be peculiarly pertinent, for it involves neglect. It is said: "It is made the duty of towns to keep in repair highways within their limits; and for a neglect of this duty they are liable, not only to indictment, but if any individual injury occurs by reason of it, to a civil action. In indictments and declarations of this statute, which are of almost daily occurrence, the practice has never been to set forth minutely the defects of the highway. But a general allegation, that a certain highway is out of repair, ruinous and unsafe, has always been deemed sufficient." The same rule is found in *Stratton* v. *Commonwealth,* 10 Metcalf, 217, the court saying: "We have no doubt, in looking at the present case, that from the very nature of the offense here charged, it being not a particular act, but a continual series of acts or habit of life, that constitutes the offense of being a common railer and brawler, it is properly set forth by the same general description of the crime charged, that would be good in case of the common barrator or common scold."

We have thus far considered the specification in the light of the charges necessary to be set out in an indictment or complaint. But it was not incumbent on the Legislature, under Article IX, section 5, to observe the same particularity required in an indictment. In re Guden, supra. Throop Pub. Off., section 389; *Burt et al.* v. *Iron County,* 108 Mich., 523; Cyc., 29, 1409 d. note 26; *Andrews* v. *King,* 77 Maine, 224.

We now come to another objection to the action of the Legislature, namely: "That the removal of officers by address under section 5 of Article IX of the Constitution did not contemplate the removal of the officer for official misconduct." If this contention could be established, the action of the Legislature in the case before us would, of course, be void. It would be without jurisdiction under the Constitution. But the contention is untenable. Where this question has been passed upon by the courts, it has been held

by all the authorities, so far as we have been able to discover, that the removal of officers by impeachment for misconduct in office was not an exclusive method, but concurrent with other methods of removal which might be provided for the same cause. Throop on Public Officers, section 400. In *Commonwealth* v. *Harriman*, already cited, this issue was sharply raised and exhaustively considered by the court. Not only is the provision of the Constitution, authorizing impeachment and address, carefully considered, but the history of the events both in England and Massachusetts, which led up to the adoption of the provision, is reviewed. The opinion states the contention of the defendant as follows: "The principle ground upon which he founds his claim is that the charges upon which he was removed were charges of misconduct and mal administration in office, for which he was liable to impeachment, and that the constitutional power of removal by address does not include the power to remove for offenses which are impeachable. This question is an important one." But this contention was overruled as follows: "The language is broad and general, in its terms it includes a removal for any cause which is deemed by the Legislature and executive departments sufficient. If it had been intended to exclude from this provision the power to remove for misconduct in office, leaving that to be dealt with by impeachment exclusively, it would have been so stated. Neither this article nor the article on impeachment contains any indication that the power of impeachment was to exclude the power of removal by address. We must give to the proviso the broad meaning which its language imports." The language in our Constitution is equally broad and general, as a comparison will show.

It hardly seems possible that the framers of the fundamental law upon this subject could have used language so loosely as the construction of the relator would seek to imply. On the other hand, it rather seems to us that the language is so plain that it is difficult to see how any rules of construction can apply other than the fundamental rule "that words and phrases should be construed according to the common meaning of the language."

A single point remains to be considered, a point raised neither by the pleadings nor in argument. It nevertheless should be examined.

It is contended that, as the constitutional amendment, commonly known as the initiative and referendum, adopted by the people under chapter 121 of the Resolves of 1907 provided in section 16 that "no act or joint resolution of the legislature, except such orders and resolutions as pertain solely to facilitating the performance of the business of the Legislature, etc., shall take effect until ninety days after the recess of the legislature passing it unless in case of emergency," etc., and as the address proceedings in the case originated in a joint resolution of the Legislature, it follows that this resolution could not take effect until the expiration of ninety days from adjournment. This would permit the securing of a written petition containing at least ten thousand names, addressed to the Governor, requesting that the resolve be referred to a popular vote and would thereby suspend the effect of the resolution until ninety days after the Governor shall have announced by public proclamation that the resolution has been ratified by a majority of the electors voting thereon at a general or special election. Section 17.

In other words, it is claimed that address proceedings for the removal of a public officer are, under the constitutional amendment providing for a referendum, held up at the very inception because the resolution on which they are based cannot in any event take effect until ninety days after adjournment.

Can this be so? In our opinion such a contention is without foundation.

It seems to proceed upon the theory that merely because the word "resolution" or "resolve" is used in the constitutional amendment, and a resolution was adopted by the legislature as the basis of these proceedings, the court has no power to construe these terms, cannot distinguish between them but must blindly accept the word resolution in both cases as having the same meaning.

It is, however, a fundamental duty of the court and within its exclusive province to construe both statutes and the Constitution and to ascertain not only from the words themselves but from the context, from the purpose to be sought, and in some cases from the result attending upon one construction or the other, what the real intention of the law making power was and how the expressed intention should be interpreted. This principle is too familiar to require the citation of authority.

The precise question for the court to determine on this branch of the case, therefore, is whether the joint resolve which was the first step in these address proceedings was such a resolve as is within the scope or contemplation of the referendum. This question must be answered in the negative.

The fallacy of the claim lies in the failure to distinguish between the Legislature as a law making body and the Legislature as an impeaching or addressing body. In the former capacity it is performing the usual function of any legislative assembly, in the latter it is exercising the unusual powers expressly conferred upon it by the Constitution, powers somewhat akin to those of a judicial tribunal. The two are absolutely distinct and the referendum applies to the one but not to the other.

This legislative power is specified and defined in Article IV of the Constitution, which, in part first, treats of the House of Representatives as one branch of the Legislature, in part second, of the Senate as the other, and in part third, of the Legislature as a whole, composed of both branches.

It is this Article IV which in express terms is amended by the resolve creating the initiative and referendum, Resolves, 1907, chap. 121, and it is the only article in the Constitution that is thereby amended.

Section 1 of part first of Art. IV is amended by striking out the words "the style of their laws and acts shall be 'Be it enacted by the Senate and House of Representative in Legislature assembled' " and inserting in place thereof "but the people reserve to themselves power to propose laws and to enact or reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act, bill, resolve or resolution by the joint action of both branches of the legislature, and the style of their laws and acts shall be 'Be it enacted by the people of the state of Maine.' "

Then follows the amendment to section 1 of part third of Article IV so as to read "The legislature shall convene on the first Wednesday of January, biennially, and, with the exception hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution nor to that of the United States."

And finally come the various sections, numbers 16 to 22, which provide for the initiative and referendum and which are made additional to part third of Article IV, that part, before amendment, consisting of fifteen sections only.

The purpose and scope of these amendments are obvious. The design was to have the legislative power not final but subject to the will of the people, a will to be called into exercise by the somewhat complicated machinery of the referendum. Before amendment "their laws and acts" bore the title of "Be it Enacted by the Senate and House of Representatives in Legislature assembled." Since amendment the title has been "Be it enacted by the People of the State of Maine," the people and not the Legislature being the real arbiters of the laws to be finally accepted. That is, the central idea of the change was to confer the law making power in the last analysis upon the people themselves, a step from representative toward a democratic form of government. This, too, marks the limitation of the amendment. It applies only to legislation, to the making of laws, whether it be a public act, a private act or a resolve having the force of law.

This is shown clearly and conclusively by the language of sec. 2 of part third of Article IV, under the general head of "legislative power." "Every bill or resolution *having the force of law* to which the concurrence of both houses may be necessary . . . which shall have passed both houses, shall be presented to the Governor, and if he approve, he shall sign it," etc. The referendum applies and was intended to apply only to acts or resolves of this class, to *"every bill or resolution having the force of law,"* that is, to what is commonly known as legislative acts and resolves, which are passed by both branches, are usually signed by the governor and are embodied in the Legislative Acts and Resolves, as printed and published. And the words "No act or joint resolution of the Legislature," etc., before quoted, in the referendum amendment must be construed in the light of the context, considering all the sections and parts and articles together, as meaning "no act or joint resolution of the legislature having the force of law." This is the simple and plain interpretation of simple and plain language.

So much for the Legislature as a law-making body and for the class of acts and resolves covered by the referendum.

Now let us turn to another and distinct power lodged with the Legislature by the Constitution, that of preparing an address to the Governor for the removal of a public officer. This power is conferred not under Article IV, before considered, the article which was amended by the referendum, but under a distinct provision, viz.: Section 5 of Article IX, the article being entitled "General Provisions," and covering a wide variety of subjects. Section 5 reads: "Every person holding any civil office under this State, may be removed by impeachment for misdemeanor in office; and every person holding any office may be removed by the Governor, with the advice of the Council on the address of both branches of the Legislature." This section remains unrepealed and unamended. The referendum amendment did not refer to it and did not affect it. Under this section and within this distinct category falls the resolution in the case at bar. It was passed by the Legislature in no sense as a legislative act, as a law nor as a proposed law, but was rather in the nature of a complaint in a criminal proceeding. It was the first step in setting in motion the machinery of removal, and in the exercise of an extraordinary power conferred upon one of the three great departments of government, but entirely apart from the ordinary powers of legislation as such. It was a resolution, or vote or expressed determination to proceed to the trial of a public officer. It preceded the trial itself, was preliminary to it, and the logical conclusion of the theory of the contention is that as this resolution could not become effective until at least the expiration of ninety days from the adjournment of the Legislature, the subsequent trial whether held or not, and its outcome whether favorable or not to the accused, would be wholly immaterial since the people have the right to determine whether the resolution should be effective and any trial at all held. This, of necessity, would work a repeal of so much of section 5 of Article IX as relates to address proceedings and would effectually deprive the Legislature of the power thereby expressly conferred, because if no resolve of this nature can take effect until the expiration of at least ninety days after adjournment, and perhaps not even then, the Legislature, the constitutional tribunal, would then have ceased to be in session and no trial could be had at all. In effect this would be an attempted

transfer of the proceedings for removal of a public officer from the Legislature to the people at large and would effect an impracticable and quite impossible species of recall.

It is almost inconceivable that such a revolutionary result could have been within the contemplation of the Legislature that in the first instance submitted to the people the referendum amendment, or within the contemplation of the people who adopted it. If such was the purpose, section 5 of Article IX would itself have been amended, and by no reasonable stretch of judicial power can the express amendment of Article IV, the legislative power, be construed to work an implied amendment and practical repeal of section 5 of Article IX, the address power.

It is impossible for a majority of the court to accede to the doctrine of the relator's contention on this point. On the contrary, we hold that the power of the Legislature to recommend the removal of a public officer by address still abides unshorn, as it has existed since the adoption of our constitution in 1820, that this important safe-guard of public welfare was neither repealed nor abridged by the adoption of the initiative and referendum, and therefore that the resolve in the case at bar became effective upon its adoption.

From a parliamentary point of view, it seems clear that the address resolve did not come within the referendum amendment. Article IX, section 5 confers upon the Legislature a special jurisdiction. It will be conceded that each equal and coördinate department of government is sovereign within its sphere of action and may determine its own rules of procedure. Jefferson's Manual holds that each branch of Congress was authorized "to determine the rule of its own proceeding." This rule has been adopted by all legislative bodies so far as we are aware and is in force today. Parliamentary rules of order everywhere make use of the word "resolve" as the most apt in serving the legislative purpose, whether national or state. When the Legislature commands, it is by an order; but when it gives expression to a fact, a principle, its own opinions and purposes, it is expressed in the form of a resolution which, through parliamentary usage, has become conventional. But there is a clear distinction between such resolves and those having the force of law. The present resolve was "in favor of the adoption of an address to the governor" as provided in Article IX,

Section 5, the performance of a special duty, in a certain special manner. In other words, the resolve raised the question whether the Legislature should, in that instance, vote to take action on a case within its special jurisdiction. It was the only practical way to get an expression of opinion of the legislative body, to ascertain the legislative will, and its determination to do or not to do the thing proposed. Every move related to instituting the proceeding under its special jurisdiction; and the resolve, which was the conventional way, or some other form of expression, was a necessary step in the premises required by Article IX, and had no greater significance than, "shall the main question be now put," or a "demand for the previous question" or "that the bill providing for removal by address be made a special order for a day certain." Inasmuch as Article IX, section 5 was not amended in terms and provides for the removal of officers by address, it seems conclusive that the resolve was but the parliamental instrumentality by which the Legislature set in motion the wheels of its special power.

Again, if the referendum applies to Article IX, section 5, so does the initiative with equal force and we find ourselves confronted with the astounding situation never before suspected, either by the Legislature which passed the referendum amendment, the governor who signed it, or the people who voted for it, namely, a recall of every officer named in Article IX, section 5 by a popular petition to the Legislature of not less than twelve thousand electors.

It might with propriety be added, that up to the present time this has been the universally accepted view. It is a matter of public knowledge that the Legislature of 1911 adopted similar proceedings in addressing the governor on the removal of a public official and the official was removed. Neither the members of that Legislature, nor the eminent counsel employed nor the public generally even conceived of the idea that the removal was void because the preliminary resolve was within the referendum amendment and therefore had never taken effect.

In the case at bar the eminent and learned counsel for the relator assigned in their information no less than twenty-two distinct causes of error and in their able and comprehensive brief set forth seven grounds for holding the removal illegal, but that of the referendum is not found among them.

While the absence of such a claim on the part of those charged with the management of so important a cause as this is, of course, not conclusive as to its lack of merit, yet its omission, to say the least, must be regarded as significant.

Upon full consideration of the whole case, it is the opinion of a majority of the court, that the relator was lawfully removed from the office as sheriff of Cumberland County, and the entry must, therefore, be,

Information dismissed with costs.

HALEY, J. Dissenting. Lewis W. Moulton, the relator, at the election of September, 1911, was elected sheriff of the County of Cumberland, duly qualified as required by law, and entered upon the discharge of the duties of his office at the expiration of his former term. He thereby became the de jure sheriff of said county for the term beginning January 1, 1913, and ending December 31, 1915, and performed the duties of that office until May 8, 1913, on which day the respondent assumed the office, and continued to perform the duties of sheriff of said county until the filing of the petition in this case.

The respondent claims the office as sheriff by virtue of the following action of the Legislature and the Governor and Council: On the second day of April, 1913, this Resolve passed both branches of the Legislature, but not by a vote of two-thirds of all members elected to each house.

"STATE OF MAINE.

"Resolved in favor of the adoption of an address to the Governor for the Removal of Lewis W. Moulton, Sheriff for the County of Cumberland.

"Resolved, That both branches of the legislature, after due notice given, according to the Constitution, will proceed to consider the adoption of an address to the Governor for the removal of Lewis W. Moulton, sheriff for the County of Cumberland, for the causes following:

"First, because the said Lewis W. Moulton, who is now holding the office of sheriff for the County of Cumberland, and who has

held said office continuously since the first day of January, A. D 1913, wilfully or corruptly refuses or neglects to perform the duties required of him as such sheriff by section sixty-nine of chapter twenty-nine of the Revised Statutes of this State as amended by chapter forty-one of the Public Laws of nineteen hundred and five, and particularly his duties as said sheriff in enforcement of the law against the illegal sale of intoxicating liquors and the keeping of drinking houses and tippling shops.

"Resolved, The House of Representatives concurring, that these resolutions and statements of causes of removal be entered on the Journal of the Senate and a copy of the same be signed by the President of the Senate and served on said Lewis W. Moulton by such person as the President of the Senate shall appoint for that purpose, who shall make return of said service upon his personal affidavit without delay, and that the first day of April, at eleven o'clock in the forenoon, be assigned as the time when the said Lewis W. Moulton may be admitted to a hearing in his defense."

Upon the same day notice and summons were served upon the relator, notifying him to appear before a joint convention of the members of the Seventy-sixth Legislature to answer to the charges set forth in said Resolve; on April 5, 1913, the Legislature proceeded to the hearing upon the resolve, and on the ninth day of April, 1913, both branches of the Legislature concurred in passing an address to the Governor, requesting the removal of the relator from the office of sheriff of Cumberland County for the causes set forth in said resolve. On the twenty-fourth day of April, 1913, the Governor's Council voted to advise the Governor, and consented to the removal of the relator from the office of sheriff of Cumberland County. On the twenty-eighth day of April the Governor of the State notified the relator that, in pursuance of the address of both branches of the Legislature, and with the advice of the Council, he, the relator, had been removed from the office of sheriff of Cumberland County, which removal was to take effect May 8, 1913, and on the same day Everett G. Scully, the respondent, was nominated as the successor to the relator in said Office and duly qualified as sheriff, and on said eighth day of May assumed the office of sheriff of Cumberland County and held the same until the beginning of the proceedings in this case.

The proceedings were claimed to be under Article IX, section 5, of the Constitution of Maine, which reads:

"Every person holding any civil office in this state may be removed by impeachment, for misdemeanor in office, and every person holding any office, may be removed by the Governor, with the advice of the Council, on the address of both branches of the Legislature. But before such address shall pass either house, the causes of removal shall be stated, and entered on the journal of the house in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defence."

First, The last paragraph of the above quoted section of the Constitution, by virtue of which the proceedings were held, provides: "But before such address shall pass either house, the causes of removal shall be stated, and entered on the journal of the house in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defence."

Those provisions were a constitutional restraint upon the Legislature, and, unless complied with, the Legislature had no jurisdiction to pass the address relied upon by the respondent. It always has been, and always will be, in all governments of law, necessary for any court or body of men, before they can render a valid judgment against any person, to have jurisdiction of that person, for without jurisdiction the proceedings of any body is void, and the acts of any court or body of men that are contrary to the Constitution are acts beyond their jurisdiction and are void.

It does not seem necessary to decide whether the Legislature, during these proceedings, were acting judicially, or in the discharge of its legislative functions, but I do not think that *Commonwealth* v. *Harriman,* 134 Mass., 314, gives any support to the claim that the proceedings were legislative. The Constitution of Massachusetts, which was construed in that case, gives the Governor power, upon address of the Legislature, to remove judicial officers. It does not provide, as the Maine Constiution does, for entry upon the journal, notice and a copy of the charges and an opportunity to make a defense, and, as that Constitution does not provide for them, the Legislature in the address proceeding was not bound to do anything,

except as provided for by the Constitution, and, without those or similar provisions, the proceedings would necessarily be legislative.

"The legislature are powerless in any attempt to legislate in violation of, or inconsistent with, constitutional restraints. And when, if ever, the executive or legislative departments have exercised in any respect a power not conferred by the constitution, on a proper submission of the questions arising thereon, we have seen that the judiciary is not only permitted but compelled to sit in judgment upon such acts, and bound to pronounce them valid or otherwise. . . .

"Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and when the will of the Legislature stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

"When the acts of the legislature and the executive departments are found upon full consideration to be inconsistent with this fundamental law, and are so pronounced by that department entrusted with the power and compelled in duty to do so, these acts are simply void. The law, which operates upon all from the highest to the lowest, is made known, and all affected thereby, submit, not to the court, which announces the result of the question presented, but to the majesty of the law which is omnipotent." Davis case, 41 Maine, 38; Opinion of Justices, 70 Maine, 609.

The court can always inquire with reference to the question of jurisdiction, and the power to inquire as to jurisdiction necessarily implies the right to examine into the nature and character of the causes set forth, in order to see whether they are in any proper sense charges within the meaning of the Constitution.

To acquire jurisdiction is was necessary that the charges should have been entered in the journal of the house in which they originated, and a copy thereof served upon the relator, and those charges should have been specific enough to comply with the provisions of the Constitution. If they did not comply with the Constitution, the Legislature did not acquire jurisdiction, and the proceedings are void.

If the Legislature had passed the address without entering the charges upon the journal of the house in which they originated, the proceedings would have been unconstitutional and void, and if the Legislature passes an address, first entering upon the journal of the house in which the proceedings originated, charges that are not in compliance with the requirements of the Constitution, the proceedings were unconstitutional and void.

Before the Legislature acquired jurisdiction, the relator was entitled to have spread upon the journal of the house in which the proceedings originated, the charges against which he was to be given an opportunity to defend himself. The charges of course need not be as specific as in criminal or civil pleadings, but should give him notice that would enable him to make his defense.

The purpose of the provisions is that the officer to be addressed may have an opportunity to make his defense to the charges that are a matter of record. The charges should be so specific that he may know what testimony to produce at the hearing. If charges are so drawn that the officer sought to be addressed cannot tell what evidence to adduce to disprove them, and the Legislature and court hold the charges sufficient, they in effect hold that the provisions of the Constitution are of no effect.

Chapter 41 of the Public Laws of 1905, reads:

"Sheriffs and their deputies and county attorneys shall diligently and faithfully inquire into all violations of law, within their respective counties, and institute proceedings in case of violations or supposed violation of law, and particularly the law against illegal sale of intoxicating liquors, and the keeping of drinking houses and tippling shops, gambling houses or places, and houses of ill fame, either by promptly entering a complaint before a magistrate and executing the warrants issued thereon, or by furnishing the county attorney promptly and without delay, with the names of alleged offenders, and of the witnesses. Any sheriff, deputy sheriff or county attorney, who shall wilfully or corruptly refuse or neglect to perform any of the duties required by this section, shall be punished by fine not exceeding one thousand dollars or by imprisonment not exceeding one year."

Were the charges in the Resolve so specific that the relator could intelligently make his defense? If they were not, the Legislature had no jurisdiction. No particular act, or neglect to act, is set

forth. It is urged that the causes set forth in the Resolve are sufficiently specific to sustain an indictment, and, if they are, the constitutional restraint was complied with. An examination of the elementary rules of criminal pleading shows the position to be unsound. In *Armour Packing Co.* v. *U. S.,* 153 Fed. 1, Sanborn, Circuit Judge, states the rule as follows: "Where a crime is a statutory one, the indictment must set forth with clearness and certainty every essential element of which it is composed. It must portray the *facts* which the pleader claims constitutes the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense so particularly as to enable him to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the *facts* there stated are sufficient to support a conviction." And many cases are cited in support of the rule as above stated.

In *State* v. *Doran,* 99 Maine, 331, the court say: "In all criminal prosecutions the accused shall have a right to demand the nature and cause of the accusation. Cons. of Maine, Art. I, sec. 6. He has a right to insist that the *facts* alleged to constitute a crime shall be stated in the indictment against him with that reasonable degree of fullness, certainty and precision requisite to enable him to meet the exact charge against him, and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense."

In *State* v. *Lynch,* 88 Maine, 195, the court say: "But the question is whether the accusation is set forth with sufficient particularity and certainty to inform the accused of the offense with which he is charged, and to enable the court to see, without going out of the record, what crime has been committed, if the *facts* alleged are true."

An indictment against a sheriff for violation of the law of 1905, to comply with the above rules, should contain the positive averment that he did wilfully and corruptly refuse and neglect to diligently and faithfully inquire into violations of the law against the illegal sale of intoxicating liquors, and the keeping of drinking houses and tippling shops, and (1) to institute proceedings against the violators by wilfully and corruptly refusing and neglecting to

enter complaints before a magistrate, (2) and to execute the warrants issued on said complaints, or, (3), in the language of the statute, "wilfully and corruptly refuse to furnish the county attorney, promptly and without delay, the names of the alleged offenders and of the witnesses," and should also state the names of the offenders and the places where the crime was claimed to have been committed. The charge in the Resolve does not set forth with clearness and certainty every essential element of which the crime is composed. It does not portray the facts which constitute the alleged crime distinctly so as to advise the accused of the charge which he is to meet, and to give him a fair opportunity to prepare his defense.

Neither do the causes set forth in the Resolve follow the language of the statute, which is permissible in some cases, but not in the offense described in the statute under discussion. In *Commonwealth* v. *Raymond,* 97 Mass., 567, cited in the opinion, the indictment alleged, in the language of the statute, that the defendant killed a calf less than four weeks old, with intent to sell the same, and the indictment was held good because all the facts necessary to constitute the crime as set forth in the statute, viz., the killing of the calf less than four weeks old and the intent were alleged. There are no facts necessary to constitute the crime created by chapter 41 of the Laws of 1905 set forth in the Resolve in question. In *Commonwealth* v. *Barrett,* 108 Mass., 302, cited in the opinion, an indictment against an inhabitant of the state, by previous appointment going out of the state, and engaging in fight, the indictment alleged all the facts that the statute prescribed to constitute the crime, and the courts say: "Where the statute sets forth with precision and certainty all the elements necessary to constitute the offense intended to be punished, an indictment or complaint is sufficient which uses the words of the statute." The causes assigned in the Resolve in this case do not set forth with precision and certainty all the elements necessary to constitute the offense intended to be punished. It does not set forth any of the facts and does not use the words of the statute necessary in charging the offense attempted to be set forth.

And it is not sufficient, even, to use the words of the statute unless they contain a reasonably particular statement of all the essentials

which constitute the intended offense. In *State* v. *Lashus,* 79 Maine, 541, Virgin, J., says. "But such a mode of setting out a violation of a penal or criminal statute is not necessarily sufficient. *State* v. *A. & D. R. R. Co.,* 76 Maine, 411; *Com.* v. *Pray,* 13 Pick., 359. The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offense as shall apprize him of the criminal act charged; and to the end, also, that if he again be prosecuted for the same offense, he may plead the former conviction or acquittal in bar." To the same effect is *State* v. *Singer,* 101 Maine, 299.

The crime attempted to be set forth in the Resolve is not one that consists of a series of acts that need not be particularly described, as a brawler, common scold, the keeping of a drinking house and tippling shop, or a common seller of intoxicating liquors.

In those cases the statute makes the continued act a crime. The acts themselves may be crimes, as the sale of liquor drank upon the premises would render the seller liable for a single sale, and a series of the acts would make him guilty of maintaining a drinking house and tippling shop, which is a different crime than each of the acts. The statute under discussion makes each of the prohibited acts a crime, but does not make a series of acts a different crime, or continuous acts a crime, and therefore the acts necessary to constitute the crime should be set forth. As the charges set forth in the Resolve do not set forth with precision and certainty all the elements necessary to constitute the offense, and do not set forth the alleged offense in the language of the statute, and as the offense created by the statute does not consist of a series of acts, but consists of single prohibitive acts, the charges cannot be held sufficient to sustain an indictment without disregarding the elementary rules of law enforced by the courts for centuries to protect persons accused of crime.

Could the relator tell what act, or neglect to act, he should be prepared to disprove? None are set forth in the Resolve. To defend the charges it would be necessary to prove, not only the efforts made by the sheriff and his deputies in all the cities and towns in the county, but also the complaints made by them against alleged

offenders in all the cities and towns in the county, and also of the lists furnished by the sheriff and his deputies of the persons claimed to have been violating the law in the county, to the county attorney together with the names of the witnesses; also to produce witnesses from all cities and towns in the county, showing how the law was enforced in those places, as to whether the sheriff or his deputies were diligent in the enforcement. Could the relator tell whether to take witnesses from the town of Brunswick, or from the town of Scarboro many miles distant, or from Harrison, or the island wards of Portland sixty miles away? How could he tell from which of the twenty-three cities and towns in the County of Cumberland to take witnesses to the Legislature? To have been prepared to disprove the charges, if they were sufficiently set forth, he would necessarily have been obliged to have taken many witnesses from each city and town in the county, and the expense of taking a sufficient number of witnesses from each city and town in the county to Augusta, and keeping them there for a hearing, would bankrupt any sheriff in the State, and it was to protect officers from such hardships that a constitutional restraint upon the Legislature was imposed by the people.

In re Guden, Sheriff, 171 N. Y., 529, the court decided that the Governor in the hearing and removal was acting in an executive capacity and not in a judicial capacity; but the case shows that the charges upon which the Governor acted were specific; that the respondent was charged with giving, or farming out, to a committee the appointment of his deputies. The specific act was charged and the respondent had an opportunity of disproving that charge, and that case would seem to sustain the contention of the relator that the charges should be specific.

Charges as indefinite as to acts and time and place, as charged in the Resolve, are not a compliance with the Constitution. It is not right that a constitutional restraint for the protection of persons holding office should be so construed as to deprive them of the protection intended. It being a constitutional question, this court should rule whether the charges recorded in the journal of the house by the record of the resolve in question are such charges as the Constitution provides for, and that, as the charges are not

certain enough for the relator to be able to intelligently make his defense, they are not charges such as are required by the Constitution, and therefore the Legislature was constitutionally restrained from taking the action it did, and their proceedings in passing the address void.

Second. Part first of Article IV of the Constitution was amended by resolve approved March 20, 1907, so as to read: "The legislative power shall be vested in two distinct branches, a house of representatives and a senate, each to have a negative on the other and both to be styled the Legislature of Maine, but the people reserve to themselves power to propose laws and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, bill, resolve or resolution passed by the joint action of both branches of the Legislature. . . . Part three of Article IV of the Constitution was amended at the same time so that part of section 16 now reads: "No act or joint resolution of the Legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the Legislature, of either branch, or of any committee or officer thereof or appropriate money therefor, or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the Legislature passing it, unless in cases of emergency, (which with the facts constituting the emergency shall be expressed in the preamble of the act), the Legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct," and further provides what an emergency bill shall include.

"It is a common course of proceeding, for the house to agree to certain resolutions, either reported by a committee, or introduced by a member, as the basis of proceedings to be afterwards instituted, in the form of an address, impeachment, or bill; in which case, the practice is to refer the resolutions to a committee for the purpose of being put into proper form. Resolutions of this description are sometimes made the joint act of both branches, by being first agreed to in one branch, and then sent to the other for its concurrence." Cushing's Legislative Proceedings, sec. 800.

The Resolve under which the proceedings complained of were held, was, in the language of the Constitution, "a resolve" or "reso-

lution" passed by the joint action of both branches of the Legislature, and one upon which the people reserved the power, at their option, to approve or reject at the polls. The language of the Constitution is, "to approve or reject at the polls any act, bill, resolve or resolution." It was a joint resolution that did not pertain solely to facilitating the performance of the business of the Legislature, or either branch, or any committee or officer thereof, or appropriate money therefor, or for the payment of salaries fixed by law, because it related to a hearing in which the relator was vitally interested. Nor was it an emergency bill. The Constitution provides causes for which emergency bills may be passed, and this was not one of them, and it did not express in the preamble the facts constituting an emergency, and, unless the preamble did contain such facts, then, by the Constitution, it was not an emergency bill.

The resolution was the basis of the address, and without it the provisions of the Constitution, under which the proceedings were held, were not complied with. I refer to the entering upon the journal of the charges against the relator, and of the furnishing to him a copy of the charges and the opportunity to make his defense, for, unless those things were done, the address and the attempted removal by the Governor were clearly in violation of the Constitution. The resolution would have served that purpose but for the amendment; but the amendment provides that no joint resolution (this was a joint resolution passed by both branches of the Legislature) shall take effect until ninety days after the recess of the Legislature. If the resolve did not take effect until ninety days after the recess of the Legislature, an address founded upon the resolve that had not taken effect could not be passed, or, if it could be passed, it could not take effect until the resolve upon which it was based took effect.

After the resolve had passed both branches of the Legislature, it was then for the people to exercise their option of approving or rejecting at the polls the action of the Legislature, within ninety days after the recess of the Legislature. That constitutional right was ignored, before the adjournment of the Legislature, by the passing of the address which was based upon the resolve, and before the ninety days reserved by the Constitution for the people to

exercise their option of deciding at the polls whether they would approve or reject the resolution as passed, by the Governor, with the advice of the Council, attempting to remove the relator from the office to which he had been elected by the people. As the resolve had not taken effect at that time, and as all of the proceedings upon which the address was based were proceedings upon that resolution, the action of the Governor and Council in giving effect to the resolution before the expiration of the time in which the people had the right to exercise their option of whether they would approve or reject at the polls, was contrary to the Constitution.

We must not forget that a Constitution is the measure of the rights delegated by the people to their governmental agents, and not of the rights of the people. The question for the court to determine upon this branch of the case is, whether the joint resolve, which was the first step in the address proceedings, was such a resolve as is within the scope or contemplation of the referendum; but it should be remembered that the Constitution is the will of the people, that the amendment to the Constitution is the latest expression of the will of the people, and that in amending the Constitution it is not necessary to express a repeal of parts inconsistent with the amendment, all parts inconsistent are repealed by the amendment, as said by the court in *State* v. *Langsworthy,* 55 Oregon, 303, in considering the initiative and referendum provision of their Constitution, although upon a different subject matter, "it must be kept in mind that the addition of this amendment to our organic laws necessarily carried with it all powers essential to make its provisions effective, and any part of the Constitution previously in force, so far as in conflict or inconsistent therewith, was by its adoption necessarily repealed," and the argument that sections of the Constitution were not repealed by amendment, should have no weight, if the sections referred to are inconsistent with the amendment.

It is of more importance to the people that they have the right, at their option, to reject at the polls a resolve or resolution that removes from office a person elected by them to office, than it is to have the right, at their option, to approve or reject at the polls other resolves or resolutions; but whether of more importance or not, the Constitution is the organic law, and not only individuals, but every department of the government is bound by it and must respect it.

The Constitution is the peoples' protection, not only against the will of the majority, but also against acts of the legislative, executive and judicial departments of the government, and by the Constitution they reserve for ninety days after the recess of the Legislature the option of deciding whether they will exercise at the polls their right to approve or reject resolves and resolutions passed by both branches of the Legislature, and that no such resolve or resolution shall take effect until ninety days after the recess of the Legislature. The resolve relied upon in this case was passed by both branches of the Legislature and affects the rights of the relator; by the clear and unambiguous language of the Constitution it could not take effect until ninety days after the recess of the Legislature, and, as the Legislature adjourned on April 12th, it could not take effect until July 12th, 1913, and the attempted removal of the relator by virtue of the resolve was May 8th, and must therefore be held void.

It is said that the people did not intend, by the constitutional amendment, to reserve the power to accept or reject at the polls all joint resolves and resolutions, but that there should be read into the amendment, after the words "no act or joint resolution of the legislature" the words "having the force of law," and as the resolve under discussion did not have the force of law, and did not require the signature of the Governor, but was only the basis of the address proceedings, the people had no right to pass upon it at the polls, and to hold otherwise would practically repeal the power of address.

If the words of the amendment are given the meaning that they plainly and clearly express, the Legislature can pass an address against a public officer, if two-thirds of the members elected to each house so vote, and it may be wise that a bare majority of each house should not have the power to remove from office one elected by the people, unless the people have the power to accept or reject their act at the polls, while if the power can only be exercised by two-thirds of the members elected to each house, as provided by the amendment, there is less danger that the will of the people will be ignored, and to give the amendment the meaning conveyed by the language used would not destroy the power of address, but would make its use conform to the will of the people and prevent its being used against their wishes.

The Constitution says no act or joint resolution, excepting certain enumerated ones, shall take effect for ninety days, and the resolve

in question is not one of the enumerated ones. The English language, if it means anything when it says "no act or joint resolution of the legislature," includes the resolution which was the basis of the address proceedings. By what process of reasoning can any one read into the sentence "no act or joint resolution of the legislature" the words "having the force of law"? The language is as plain as it can be. It needs no construction to ascertain its meaning, and the rule of law is that it is only when words are obscure or doubtful that we have any discretionary power in giving them a construction, or to take into consideration the consequences, that the intention cannot be ascertained, by adding to or detracting from the meaning conveyed by the plain, unambiguous language used; and if the words used convey a definite meaning which involve no absurdity or contradiction between parts of the same writing, that the meaning upon the face of the instrument is the one alone which we are at liberty to say was intended to be conveyed. There is no need of the construction of plain words, whose meaning is understood by all. If the words "having the force of law" are read into the amendment, they render useless the words "except such orders or resolutions as pertain solely to facilitate the performance of the business of the Legislature, of either branch, or of any committee or officer thereof."

The effect of reading the words into the amendment of the Constitution is to add an exception not enumerated in the amendment, and where the statute or Constitution enumerates the things upon which it is to operate or forbids certain things, is to be construed as excluding from its effect all those not expressly mentioned.

The following, from a few of the many cases that are too numerous to cite, conclusively demonstrate that we have no right to construe the language of the amendment so that the people will have no right to accept or reject the joint resolution as a basis for address proceedings, unless it pass both houses by a two-thirds vote of the members elected:

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances and the purpose intended to be accomplished by it, to determine its proper construction. But

where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given it. Heydon's case, 3 Coke, 76; *United States* v. *Freeman,* 3 How., 566; *Smythe* v. *Fiske,* 23 Wall., 374; *Platt* v. *U. P. R. R. Co.,* 99 U. S., 48; *Thornly* v. *United States,* 113 U. S., 310; *Viterbo* v. *Friendlander,* 120 U. S., 707; *Lake County* v. *Rollins,* 130 U. S., 662; *United States* v. *Goldenberg,* 168 U. S., 95. This rule has been repeatedly applied in the construction of the revised statutes." *Hamilton* v. *Rathborne,* 175 U. S., 414.

As stated by Endlich on Interpretations of Statutes, in his chapter treating of constitutions: "And, where a provision general in its language, is followed by a proviso, the rule applicable to such cases occurring in statutes has been applied to constitutions, viz.: that the provision is to be strictly construed, as taking no case out of the provisions that do not fairly fall within the terms of the proviso, the latter being understood as carving out of the provisions only specified exceptions, within the words as well as within the reason of the former." Sec. 526.

"The natural import of words is that which their utterance promptly and uniformly suggests to the mind,—that which common use has affixed to them." *Hughes* v. *May,* 3 Mich., 605.

"To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. * * * The object of construction applied to the constitution is to give effect to the intent of the framers, and the people in adopting it. This intent is to be found in the instrument itself." *Hawkins* v. *Carroll Co. Commissioners,* 50 Miss., 735, quoting *Newell* v. *Phillips,* 7 N. Y., 97.

"It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning." *Breadstown* v. *Virginia,* 76 Ill., 34.

Chief Justice Marshall, in *Gibbons* v. *Ogden,* 22 U. S., 188, says: "The framers of the constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

"We are to suppose that the authors of such an instrument had a thorough knowledge of the force and extent of the words they employed." *Henshaw* v. *Foster,* 9 Pick., 317.

"What the court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require." Cooley on Constitutional Limitations, secs. 54-55.

In *Coffin* v. *Rich,* 45 Maine, 511, the court say: "It is only when the words of a statute are obscure, or doubtful, that we have any discretionary power in giving them a construction, or can take into consideration the consequences of any particular interpretation," and then quotes 4th Bacon's Abridgment, 652; "If the meaning of statutes is doubtful, the consequences are to be considered in the construction of them; but if the meaning be plain, no consequences are to be regarded, for that would be assuming legislative authority."

Clark v. *Railroad,* 81 Maine, 477: "If the language of a statute be clear and plain, courts have no authority, in consideration of the consequences resulting from it, to give it a construction different from its natural and obvious meaning."

"Whenever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of law, and the legislature has made the exception, it would be going far for this court to add to those exceptions." Chief Justice Marshall in *McIver* v. *Regan,* 2 Wheat, 29.

"Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"To get at the thought or meaining expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the

natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. . . .

"There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.

"Such considerations give weight to that line of remark of which *People* v. *Purdy,* 2 Hill, 35, affords an example. There, Bronson, J., commenting upon the danger of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says: 'In this way . . . the constitution is made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a mere dead letter, and that, too where the language is so plain and explicit that it is impossible to mean more than one thing, unless we lose sight of the instrument itself and roam at large in the fields of speculation.'

"Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation." *Board of County Commissioners* v. *Rollins,* U. S. Supreme Court, 130, 662.

"We live under a government of laws, reaching as well to the legislative as to other branches of government; and if we wish to uphold and perpetuate free institutions, we must maintain a vigilent watch against all encroachments of power, whether arising from mistake or design, and from whatever source they may proceed.

The constitution is explicit in its terms, in the particular class of cases upon which the legislature may act." . . .

"Written constitutions of government will soon come to be regarded as of little value, if their injunctions may be thus slightly overlooked; and the experiment of setting a boundary to power, will prove a failure. We are not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language." *People* v. *Prouty,* 2 Hills, 36.

The above has been quoted in many opinions.

In this connection it is well to ponder the oft-quoted words of Chief Justice Bronson in *Oakley* v. *Aspinwall,* 3 N. Y., 368, where he said:

"It is highly probable that inconveniences will result from following the constitution as it is written. . . . It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves; or if under color of construction, or upon any other specious grounds, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government. Written constitutions will be worse than useless. Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow, and so the process goes on,

until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

In *Pelletier* v. *O'Connell,* 111 Maine, (88 Atlantic Reporter, 55), the rule is stated: "It is equally true that that intention cannot be ascertained by adding to or detracting from the meaning conveyed by the plain unambiguous language used," . . . citing from *Davis* v. *Randall,* 97 Maine, 36. "When clear and unequivocal language is used which admits of only one meaning, it is not permissible to interpret what has no need of interpretation." This language was approved in the Opinion of the Justices, 108 Maine, 548, in the following language: "It has accordingly been distinctly stated from early times down to the present day, that 'judges are not to mould the language of statutes in order to meet an alleged inconvenience or an alleged equity, . . . and are not to alter plain words though the legislature may not have contemplated the consequences of using them.'" And also quotes from Endlich on the Interpretation of Statutes, sec. 4: "When indeed the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise. Such language best declares, without more, the intention of the law giver and is decisive of it. The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It is therefore only to the construction of statutes whose terms give rise to ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they supposed to have been the real intention of the law makers. Where the words of the statute are plainly expressive of an intent, rendered dubious by context, the interpretation must conform to and carry out that intent. . . . Where, by the use of clear and unequivocal language capable of only one meaning, anything is indicated by the legislature, it must be enforced, even though that be absurd or mischievous. If the words go beyond what was probably the intention the effect must nevertheless be given to them."

The fact that the Legislature of 1911 passed an address, and that it was acted upon by the Governor precisely as in this case, cannot be considered as of any weight in the construction of the amend-

ment by the court, because the Legislature may suspend laws by virtue of the Constitution, but it cannot suspend the Constitution, nor can it authorize any department of the government to suspend it. "We are bound to take judicial notice of the doings of the executive departments of the government and, when called upon by proper authorities, to pass upon their validity." Opinion of the Justices, 70 Maine, 609.

"Where its terms are plain, clear and determinate, they require no interpretation, and it should therefore be admitted, if at all, with great caution, and only from necessity either to escape some absurd consequence or to guard against some fatal evil. . . . Contemporary construction is properly resorted to, to illustrate and confirm a context, to explain a doubtful phrase, to expound an obscure clause. . . . It can never abrogate the text; it can never narrow down its true limitations; it can never enlarge its natural boundaries. First Story Cons., secs. 405-407. Acquiesence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of constitutional prohibition without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow a contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed. Cooley's Cons. Limitations, 84, 85.

"An examination of the cases in the Supreme Court of the United States will disclose the fact that long usage, contemporaneous construction, and practical interpretation have been resorted to in construing statutes and constitutional provisions only to ascertain the meaning of technical terms, or to confirm a construction deduced from the language of the instrument, or to explain a doubtful phrase or expound an obscure expression. *Calder* v. *Bull,* 3 Dall, 368; *United States* v. *Wilson,* 32 U. S., 150; *Martin* v. *Hunter,* 14 U. S., 304; *Cohens* v. *Virginia,* 6 Wheat., 264; *United*

States v. *Dickson,* 40 U. S., 141; *Pigg* v. *Pennsylvania,* 41 U. S., 539; *Cooley* v. *Philadelphia,* 53 U. S., 299; *Hahn* v. *United States,* 107 U. S., 402; *Burrows Co.* v. *Sarony,* 111 U. S., 53; *Brown* v. *United States,* 113 U. S., 568; *McPherson* v. *Blacker,* 146 U. S., 1." *State of New Jersey, by Morris,* v. *Wightson,* 22 L. R. Ann., 548.

The rule of law that where clear and unambiguous language is used in a statute, that admits of only one meaning, that that meaning must be accepted by the court as the meaning intended, was clearly established in Heydon's Case, 3 Coke, 76, cited in 175 U. S., 409, and the doctrine that the court cannot allow an exception not expressed in the statute containing the exception, subject to the qualification to obviate a construction which would be unjust, oppressive and unreasonable, was established beyond all controversy in the case of *Stowell* v. *Lord Zunch,* Plowd., 350, decided in the year 1569, in which suit there was involved the title to eighty messauges and twenty-two hundred and eighty acres of land, was argued in the Exchequer Chamber before all the Justices of England, presided over by Chief Baron Saunders. So important was the case that at the consultation several of the justices occupied a whole day in stating their views and reasons.

There is an unbroken line of decisions following the rule laid down in those two cases. Only a few of them are cited above, but they have been followed in all common law courts, and unless some valid reason can be given for a change, neither the legislative, executive nor judicial departments of the government should disregard those rules of law enforced by the courts for more than three centuries, to defeat the will of the people plainly expressed in the Constitution, (for the alleged reason, that they did not mean what they plainly expressed); by reading into the Constitution words that changed the meaning as therein expressed and thereby take from the people power they reserved to themselves.

The plain and obvious language of the Constitution, as amended, sustains the position of the relator. The amendments is as plain as the English language can make it. To hold the address proceedings valid, we must disregard the rules of law for the construction of statutes and constitutions that have been followed by courts, without exception, for centuries, and disregard the warning so clearly set forth in the authorities above cited. In view of the

clearness of statement and force of reasoning contained in the eminent authorities cited, this court may well hesitate to enter a field so speculative and dangerous.

The constitutional question is clearly before the court, and as the Constitution prohibits address proceedings in the manner they were passed by the Legislature and acted upon by the Governor and Council, it is the duty of the court to declare them void and the relator entitled to judgment of ouster.

FREDERICK W. DAMON *vs.* WALLACE E. WEBBER.

Androscoggin. Opinion February 28, 1914.

Case. Corporation. Default. Judgment. Limitation of Action. Revised Statutes, Chapter 47, Sections 88-89. Stockholder.

Action on the case under R. S., chap. 47, sections 88-89, in favor of a creditor of the United Photo Materials Company, a Maine corporation, against the defendant a resident of Maine and one of the stockholders in said company. On June 18, 1909, plaintiff, a resident of Massachusetts, recovered judgment in the Municipal Court of Boston against said corporation on the the same debt sued for in this action. On December 12, 1910, plaintiff brought his action on the above named judgment in the Supreme Judicial Court for Androscoggin County and recovered judgment thereon.

Held:

1. The plaintiff's right of action depends upon the possession of a lawful and bona fide judgment against the corporation. When a Maine creditor holds such a judgment he may proceed against the stockholder without taking out an execution, and so upon authority may the holder of a foreign judgment.

2 The rule is well settled that if a judgment is conclusive between the parties in the state in which it is rendered, it is equally conclusive in every other state of the Union.

3. The right of a court to issue executions depends upon its own powers and organization. Its judgment may be complete and perfect, and have full effect, independent of the right to issue execution.
4. The statute is in the first instance a protection to the plaintiff, the limitation provided is for the protection of the defendant, or debtor. The plaintiff had full control of the judgment, and knowledge of its date. The defendant had no such control or knowledge, but we think his liability attached at the date of the Massachusetts judgment, whether he had knowledge of that judgment or not.
5. The recovery of a judgment against a corporation establishes conclusively the plaintiff's right to satisfy his judgment out of any assets belonging to the corporation. The plaintiff's right to relief sought depends upon the existence of his judgment. The defendant's liability exists by virtue of the statute, and it follows that when such liability begins, the statute limitation commences to run in his favor.
6. The statute clearly supports the conclusion that the right of action accrued when it became the duty of the defendant to pay. He was under no obligation to pay until the amount necessary for him to pay was ascertained. Until an unconditional liability to pay is fastened on the debtor, no action can be maintained against him, and the statute of limitations does not run in his favor.
7. The statute of limitations begins to run against a judgment from the date of its rendition or of its entry, provided it is then final and suable, and is not stayed or superseded for any cause, and in computing the period of limitations, the day on which judgment was entered is to be excluded.
8. The creditor of the corporation cannot at once upon the maturity of his debt proceed against the delinquent stockholder. He must obtain a judgment against the corporation. The stockholder cannot be considered delinquent or in default until the creditor has recovered and holds an unpaid judgment.
9. There is no right of action against the stockholder until the corporation makes default, and the amount of the default is judicially established.

Report on agreed statement. Action dismissed.

This is an action on the case under Revised Statutes, chapter 47, sections 88 and 89, in favor of the plaintiff, who is a creditor of the United Photo Materials Company, a Maine corporation, and against the defendant, who is a stockholder in said corporation. On June 18, 1909, the plaintiff, a resident of Massachusetts, recovered judgment against the United Photo Materials Company in the Municipal Court of the city of Boston for $402.15 debt and $8.32 costs of suit. On December 12, 1910, plaintiff brought his action on the above named judgment in the Supreme Judicial Court for

Androscoggin County, and on the third Tuesday of September, 1912, recovered judgment thereon, and on the 25th day of July, 1913, brought this action.

Defendant pleaded the general issue and by brief statement says: that plaintiff obtained a lawful judgment against the United Photo Materials Company of Boston, in the County of Suffolk and Commonwealth of Massachusetts on the 18th day of June, 1909, before the Justice of the Municipal Court of the city of Boston, on the same debt as is sued in this action, and that the present action should be barred under the provisions of chapter 47, sections 88, 89. The case was submitted to the Law Court upon an agreed statement of facts.

The case is stated in the opinion.

Benjamin G. Ward, for plaintiff.

Harrie L. Webber, for defendant.

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

HANSON, J. This is an action on the case brought under the provisions of R. S., chap. 47, sections 88 and 89, in favor of the plaintiff as a creditor of the United Photo Materials Company, a Maine corporation, against the defendant, one of its stockholders, and comes before the court upon an agreed statement of facts.

On June 18, 1909, the plaintiff, a resident of Massachusetts, recovered Judgment in the Municipal Court of the city of Boston against the United Photo Materials Company in the sum of $402.15 debt, and $8.32 costs of suit. The defendant is a citizen of Maine.

On December 12, 1910, the plaintiff brought his action on the above named judgment, returnable at the January term, 1911, of this court, within and for the County of Androscoggin, and thereafter, to wit, on the third Tuesday of September, 1912, recovered judgment therein for the sum of $448.08 debt, and $50.36 costs. The writ in this action is dated July 25, 1913.

The statute under consideration reads as follows:

"R. S., c. 47, sec. 88. No dividend declared by any corporation from its capital stock or in violation of law, no withdrawal of any

portion of such stock, directly or indirectly, no cancellation or surrender of any stock, and no transfer thereof in any form to the corporation which issued it, is valid as against any person who has a lawful and bona fide judgment against said corporation, based upon any claim in tort or contract or for any penalty, or as against any receivers, trustees or other persons appointed to close up the affairs of an insolvent corporation.

"Sec. 89. Any person having such judgment, or any such trustees, receivers or other persons appointed to close up the affairs of an insolvent corporation, may, within two years after their right of action herein given accrues, commence an action on the case or bill in equity, without demand or other previous formalities, against any persons, if a bill in equity, jointly or severally, otherwise severally, who have subscribed for or agreed to take stock in said corporation and have not paid for the same."

AGREED STATEMENT.

1. Domestic Judgment was obtained in this court September 28, 1912, based on a Foreign Judgment obtained by plaintiff in the Commonwealth of Massachusetts June 18, 1909, as above.

2. That the material allegations contained in the declaration in this action are true.

3. The Foreign Judgment set forth in defendant's plea is a bona fide judgment and was lawfully obtained.

4. That the point in controversy submitted to this court is whether the period of limitation (two years) mentioned in said section 89 of chapter 47 begins to run from the date of the Massachusetts judgment, June 18, 1909, or from the date of the Maine judgment, September 28, 1912; if the former, this present action shall be dismissed; if the latter, judgment to be for the plaintiff in accordance with allegations in the declaration.

The plaintiff contends (1) that the judgment of the Massachusetts court had no extraterritorial force as a judgment, that the plaintiff was not a judgment creditor within the meaning of the statute cited, and could not be until a judgment was recovered thereon in Maine. (2) That chap. 47, secs. 88 and 89, R. S., did not include judgments of other states. (3) That "the statute limitation of two years did not begin to run until September 28, 1912, the date of the Maine judgment," and that the present action was

seasonably begun, July 25, 1913. The defendant's counsel opposes each claim of the plaintiff and urges that the statute limitation of the right of action against the defendant began to run at the date of the judgment obtained in Massachusetts, June 18, 1909.

The plaintiff's right of action depends upon the possession of a lawful and bona fide judgment against the corporation. When a Maine creditor holds such a judgment he may proceed against the stockholder without taking out an execution, *Grindle* v. *Stone,* 78 Maine, 176, and so upon authority may the holder of a foreign judgment.

The rule is well settled that if a judgment is conclusive between the parties in the state in which it is rendered, it is equally conclusive in every other state of the Union. *Sweet* v *Brackley,* 53 Maine, 346; *Jordan* v. *Robinson,* 15 Maine, 167; *Rankin* v. *Goddard,* 55 Maine, 389; Am. & Eng. Ency. of Law, Vol. 13, page 977, 983; *Hampton* v. *M'Connell,* 3 Wheat, 234; *Whitney* v. *Berger,* 78 Maine, 287; *Insurance Co.* v. *Harris,* 97 U. S., 331; *Lamberton* v. *Grant,* 94 Maine, 509; *Pulsifer* v. *Greene,* 96 Maine, 438. And such judgments will be given the same effect as they have in the home forum. Am. & Eng. Ency. of Law, Vol. 13, page 1009, and cases cited.

In *Mills* v. *Duryee,* 7 Cranch, 481, 2 Curtis, 631, the question was whether nil debit was a good plea to an action of debt brought in the courts of the District of Columbia on a judgment rendered in a court of record of the State of New York. Proceeding directly to the point the court says: "The decision of this question depends altogether upon the construction of the laws of the United States. By the Constitution it is declared that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.'"

By the act of 26th May, 1790, c. 11 (1 Stats. at Large, 122) Congress provided for the mode of authenticating records and judicial proceedings of the state courts, and then further declared that "the records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state

from whence the said records are or shall be taken." It appeared there, as here, that the judgment was valid in the state in which it was recovered; that it was conclusive upon the parties therein, and the court held "that it must, therefore, be conclusive here also."

It was also claimed, as in this case, that the act cannot have the effect contended for, because it does not enable the courts of this state to issue executions directly on the original judgment, and the court says: "This objection, if it were valid, would apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to issue executions depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution."

See *McElmoyle* v. *Cohen,* 13 Peters, 312; *Bissell* v. *Briggs,* 9 Mass., 462; *Hampton* v. *McConnell,* 3 Wheat., 234.

The plaintiff had a lawful bona fide judgment against the corporation. When did his right of action accrue? Section 89 of c. 47 provides that "Any person having such judgment, or any such trustees, receivers or other persons appointed to close up the affairs of an insolvent corporation, may, within two years after their right of action herein given accrues, commence an action on the case or bill in equity, without demand or other previous formalities, against any persons, if a bill in equity, jointly or severally, otherwise severally, who have subscribed for or agreed to take stock in said corporation and have not paid for the same," etc. The statute is in the first instance a protection to the plaintiff; the limitation provided is for the protection of the defendant, or debtor. The plaintiff had full control of the judgment, and knowledge of its date. The defendant had no such control or knowledge, but we think his liability attached at the date of the Massachusetts judgment, whether he had knowledge of that judgment or not. *Child* v. *Cleaves,* 95 Maine, 498; *Abbott* v. *Goodall,* 100 Maine, 231.

The recovery of a judgment against a corporation establishes conclusively the plaintiff's right to satisfy his judgment out of any assets belonging to the corporation. Morawetz on Private Corporations, Vol. 2, sec. 865. The plaintiff's right to relief sought depends upon the existence of his judgment. The defendant's liability exists by virtue of the statute, and it follows that when such liability begins, the statute limitation commences to run in his favor.

The statute clearly supports the conclusion that the right of action accrued when it became the duty of the defendant to pay. He was under no obligation to pay until the amount necessary for him to pay was ascertained. Until an unconditional liability to pay is fastened on the debtor, no action can be maintained against him, and the statute limitation does not run in his favor. *Scoville* v. *Thayer,* 105 U. S., 143, and cases cited; *Hawkins* v. *Green,* 131 U. S., 319.

The statute of limitations begins to run against a judgment from the date of its rendition or of its entry, provided it is then final and suable, and is not stayed or superseded for any cause, and in computing the period of limitations the day on which judgment was entered is to be excluded. 23 Cyc., 1509, and cases cited. In *Gillen et al.* v. *Sawyer,* 93 Maine, 151, an action on the case was brought by the assignees in insolvency of the Bangor Pulp & Paper Company to recover the value of fifty shares of stock of the insolvent company, the court in construing the statute under consideration here, *held,* that "The creditor of the corporation cannot at once upon the maturity of his debt proceed against the delinquent stockholder. He must obtain a judgment against the corporation . . . The stockholder cannot be considered delinquent or in default until the creditor has recovered and holds an unpaid judgment. *Libby* v. *Tobey,* 82 Maine, 397." And further construing the statute in relation to fixing the liability of the corporation to individual creditors, or to receivers, trustees, etc., it was *held* that "in either case there is no right of action against the stockholder until the corporation makes default, and the amount of the default is judicially established.

"The statute limitation of the right of action against the stockholder does not begin to run in favor of the stockholder until that has been done.

"There is usually no question in what court the individual creditor may proceed to establish the fact and amount of the default of the corporation to him."

It is the opinion of the court that the statute limitation of the right of action against the defendant began to run on June 19, 1909. In accordance with the stipulation the entry will be,

Action dismissed.

MARION DOW BLAINE et als. *vs.* ABBIE R. DOW et al.

Penobscot. Opinion March 24, 1914.

Construction. Gift. Guardian. Joint Tenancy. Minor. Survivor. Will.

Bill in equity for construction of certain parts of the will of Mary Jenness Rawson, late of Boston. An authenticated copy of said will was proved and allowed by Probate Court of Penobscot County and letters testamentary issued.

1. A will is presumed, in the absence of anything to the contrary, to have been drawn in accordance with the law of the testator's domicil and will be interpreted accordingly.
2. Its effect and validity in respect to the disposition of real estate situated in another jurisdiction, or the creation of any interest therein, will depend upon the lex rei sitae.
3. While the word survivor is an apt term for the creation of a joint tenancy in a devise of realty to several, it does not have such effect when used in connection with words "to be divided equally among them."
4. Where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that that same meaning was intended
5. It is not presumed that a testator intends a joint tenancy but the contrary.
6. When a residuary clause of a will provides "all the rest and residue of my estate, I give, devise and bequeath to my sister for her life, the remainder at her death to be divided equally among her three children and the survivor, to them and their heirs and assigns," the words of gift apply to the remainder as well as to the life estate.
7. Under such a residuary clause, the life tenant is entitled to the possession, management and control of the residue.
8. It is an elementary rule of construction that estates legal or equitable, given by will, should always be regarded as vesting, unless the testator has, by clear words, manifested an intention that they should be contingent upon a future event.
9. That the complainants, the minor acting by guardian, can, with the life tenant, convey a good title to the real estate mentioned.

This is a bill in equity in which the construction of the will of Mary Jenness Rawson, of Boston, in the Commonwealth of Massachusetts, is asked. The will was made on the thirteenth day of

February, 1901, and the testatrix died on the 26th day of November, 1903. The will was duly proved and allowed in Massachusetts and an authenticated copy thereof was proved and allowed by the Probate Court of Penobscot County in the State of Maine, and letters testamentary issued. The following questions are asked in the bill, to wit:

1. Under the fourth clause in the will of Mary Jenness Rawson, what kind of an estate did the plaintiffs take?

2. Can the plaintiffs, said minor acting by guardian, join with said Abbie R. Dow and convey good title to real estate, so far as said fourth clause in the will is concerned?

3. Is the defendant, Richard S. Dow, acting as trustee by implication under said will so far as the interests of the plaintiff are concerned, under the fourth clause?

The defendants filed answers to said bill admitting the truth of all the allegations contained in plaintiff's bill. By agreement of parties, upon a hearing of this cause, the case was reported to the Law Court for determination, upon bill, answer, admission and stipulations.

The case is stated in the opinion.

Charles H. Bartlett, for plaintiffs.

Abbie R. Dow, pro se.

Richard S. Dow, pro se.

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

BIRD, J. This bill in equity seeks the construction of the will of Mary Jenness Rawson, of Boston, in the Commonwealth of Massachusetts. It bears date the thirteenth day of February, A. D. 1901 The death of the testatrix occurred on the twenty-sixth day of November, A. D. 1903, and, her will having been duly proved and allowed in Massachusetts, an authenticated copy was proved and allowed by the Probate Court of Penobscot County in this State and letters testamentary issued to Richard S. Dow one of the two executors named in the will, the other declining, at the May term, 1904.

The bill of complaint is brought by Marion Dow Blaine, Dorothy Dow and Elsie Dow, the latter by Charles H. Bartlett, her next

friend, who are the same persons mentioned in the fourth item of the will, against Abbie R. Dow, the life tenant therein named and her husband, the executor.

The portions of the will material to be considered are:

"After the payment of my just debts and funeral charges, I bequeath and devise as follows:—

"3rd. To Marion Dow, Dorothy Dow and Elsie Dow, children of my sister, Abbie R. Dow, all my jewelry, ornaments and clothing to be divided among them.

"4th. All the rest and residue of my estate real, personal, and mixed, of which I may die seized and possessed, I give, devise and bequeath to my sister, Abbie R. Dow, wife of Richard S. Dow, for her life; the remainder at her death to be divided equally among her three children, Marion, Dorothy and Elsie Dow and the survivor, to them and their heirs and assigns.

"5th. If neither my said sister, Abbie R. Dow, nor any one of her three children named above, be living at my death, I give, devise and bequeath the property mentioned in items three and four as follows:"

Here follow sundry bequests and devises among which are:

"To Kenneth and Allen Clark, sons of my friend Bessie P. Clark, of Bangor, Maine, and the survivor, one thousand dollars in money.

"To Henry and Elsie Prentiss, children of my cousin H. M. Prentiss, of Bangor, Maine, and the survivor, the note and mortgage for five thousand dollars, which mortgage covers their present residence on Jefferson Street in said Bangor."

The remaining clauses of this item of the will are:

"All the rest and residue of my estate, real and personal, of which I may die seized and possessed, and in the event of my surviving my sister and her three children as specified in item five, I give, devise and bequeath to Marion Parris and Edward L. Parris, Jr., children of my cousin Edward L. Parris of New York City, Alice and Edward Guyer, children of my cousin, Constance K. Guyer of Rock Island, Illinois, and Helen D. Parris of Paris Hill, Maine, to be divided equally among the five legatees named, and the survivor or survivors.

"I nominate my brother-in-law, Richard S. Dow, of said Boston, and Charles H. Bartlett of said Bangor, and the survivor, to be exe-

cutors of this will and I request that they be exempt from giving a surety or sureties on their bonds as such executors or in any other capacity."

It is alleged in the bill of complaint that at the time of her decease testatrix had title to an interest in real estate in the State of Maine which fell into the rest and residue of her estate and passed to the persons mentioned in the fourth item of the will, "who now own it."

It is admitted that Marion Dow Blaine was born in Bangor, Maine, July 17, 1888, that Dorothy Dow was born in Brookline, Massachusetts, December 22, 1890, and that Elsie Dow was born in Boston, Massachusetts, January 26, 1898, and were all minors and unmarried at the death of the testatrix.

The bill propounds the following questions:

"1. Under the fourth clause in the will of Mary Jenness Rawson what kind of an estate did the plaintiffs take?

"2. Can the plaintiffs, said minor acting by Guardian, join with the said Abbie R. Dow and convey good title to real estate, so far as said fourth clause in the will is concerned?

"3. Is the defendant Richard S. Dow acting as trustee by implication under said will so far as the interests of the plaintiff are concerned under said fourth clause?"

A will is presumed in the absence of anything to the contrary to have been drawn in accordance with the law of the testator's domicil and will be interpreted accordingly, but its effect and validity in respect to the disposition of real property situated in another jurisdiction or the creation of any interest therein, will depend upon the lex rei sitae. *Jacobs* v. *Whitney,* 205 Mass., 477, 480, 481; 18 Ann. Cas., 576; See *Houghton* v. *Hughes,* 108 Maine, 233, 235-236.

In considering the first question it is suggested by counsel that it may be held that an estate in joint tenancy was intended. We are not of that opinion. While it is true that the word survivor in the fourth item taken by itself would be apt for the creation of a joint tenancy, it cannot be considered as having that effect in view of the use of the words "to be divided equally among her three children." Provisions for a division have always been regarded as sufficient to create a tenancy in common: *Stanwood* v. *Stanwood,* 179 Mass., 223, 226; *Whiting* v. *Cook,* 8 Allen, 63; *Shattuck* v. *Wall,* 174 Mass., 167-169; *Griswold* v. *Johnson,* 5 Conn., 363, 365;

Delafield v. *Chipman,* 103 N. Y., 463, 468; *Stones* v. *Heurtly,* 1 Ves. Sen., 165, 166. Nor do we consider that the word survivor as used in the fourth item of the will is employed with reference to the survival of the remainder-men inter sese but that it refers to the survival by them of the testatrix. The word is used four times subsequently in the will and we think in no instance as meaning more or other than surviving me or if they survive me. *Russell* v. *Libby,* 213 Mass., 529, 530. See *Stones* v. *Heurtly,* ubi supra. And the expression in the fifth item, regarding her sister and nieces, "be living at my death" and a similar expression in the second residuary clause strongly support this view. Where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that the same meaning was intended. *Russell* v. *Libby,* supra. It is not presumed, moreover, that a testator intends a joint tenancy, but the contrary. *Stetson* v. *Eastman,* 84 Maine, 366, 375.

The intent of the will was to avoid the intestacy of the testatrix as to any part of her estate and the scheme in the first instance was that the whole estate with two unimportant exceptions should be enjoyed by her sister, during her life, and by the latter's children thereafter, they, apparently, being the special objects of her affection and bounty. The children were of such tender years that the event of either of them marrying, having issue and dying before her decease evidently did not occur to testatrix as within the range of probability. While it is plain that she expected the children of some of the children to inherit her bounty from them, she did not regard as necessary the mention of their issue in the fifth item of the will making provision for the disposition of her estate in event that neither her sister nor any one of her three children be living at testatrix's death: See *Spencer* v. *Adams,* 211 Mass., 291, 294.

It may be urged that the remainder under the fourth item is not vested because there are no words importing a gift other than a direction to divide at a future time and that therefore the gift implied from the direction to divide speaks as of the time of division and not as of the day of the testatrix's death. But we think the words of gift used in the fourth item apply to the remainder as well as to the life estate and that the fourth item should be read as follows: All the rest, residue and remainder of my estate . . .

I give, devise and bequeath to my sister . . . for her life and by way of remainder to her three children . . . and the survivor, to be divided at her death equally among them, Thus there is a present gift, the possession and enjoyment of which is deferred. The will institutes no trust. The life tenant is entitled to the possession, management, and control of the rest, residue and remainder; *Starr* v. *McEwan,* 69 Maine, 334, and, upon her decease, the right of possession passes to the remainder-men as tenants in common. In case of the ordinary trust where the trustee is directed to pay income to a life tenant and on decease of the latter, to divide the corpus among several, the trustee still has possession after the decease of the life tenant to enable him to make the division but under the present will no one other than the remaindermen is entitled to possession or to make division.

Nor can it be contended that the gift of the remainder by the fourth item of the will was to a class. *Lyman* v. *Coolidge,* 176 Mass., 7, 8; *Stanwood* v. *Stanwood,* 179 Mass., 223, 226; *Bryant* v. *Flanders,* 201 Mass., 373, 375.

So strong is the presumption that testators intend the vesting of estates that it is an elementary rule of construction that estates legal or equitable, given by will, should always be regarded as vesting, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event. *Bosworth* v. *Stockbridge,* 189 Mass., 266, 267; *Ball* v. *Holland,* id., 369, 372; *Storrs* v. *Burgess,* 101 Maine, 26, 33; *McArthur* v. *Scott,* 113 U. S., 340, 378. And so clear must be his expression that it is held that in cases of doubt or ambiguity as to the time when it was intended the estate should vest, the remainder will be regarded as vested rather than contingent: *Hale* v. *Hobson,* 167 Mass., 397, 399, 400; *Gray* v. *Whittemore;* 192 Mass., 367, 377 and cases cited.

We have seen that the intention of the testatrix was clear to avoid intestacy, but in the event of her sister and her children surviving the testatrix and the children dying, leaving issue, before the life tenant, intestacy would ensue, if the remainder under the fourth item be held contingent, as the alternative provisions found in the fifth item are inoperative if the children or any of them survive the testatrix. The gift of a residue is construed as vested if possible, especially where intestacy would result, if the gift were held con-

tingent. *Phillips* v. *Chamberlaine,* 4 Ves., (Sumner's Ed.) 51, 59; *Hooper* v. *Hooper,* 9 Cush., 122; *Cushing* v. *Aylwin,* 12 Met., 169, 175; *Danforth* v. *Reed,* 109 Maine, 93, 97. In such case every presumption is to be made that testator did not intend to die intestate.

We conclude upon the whole will that the complainants under the fourth item of the will took a vested remainder as tenants in common.

2. In reply to the second inquiry, it is the opinion of the court that the complainants, the minor acting by guardian, can, with the life tenant, convey good title to the real estate mentioned.

3. There is no occasion for the intervention of a trustee. See *Starr* v. *McEwan,* ubi supra.

Decree accordingly.

ALEXANDER T. LAUGHLIN et als. *vs.* CITY OF PORTLAND.

Cumberland. Opinion April 4, 1914.

Compensation. Constitution. Demurrer. Equity. Legislative Action. Limitations. Municipal Coal and Fuel Yard. Private Property. Public Uses. Taxes.

1. The Legislature has, under the Constitution, full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to the Constitution of Maine, nor to that of the United States.
2. While the executive and the judiciary and other coördinate departments of government can exercise only the powers conferred upon them by the Constitution, the powers of the Legislature are absolute, except as limited by the Constitution.
3. 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.
4. The court is bound to assume that in the passage of any law the Legislature acted with full knowledge of all constitutional restrictions, and

intelligently, honestly and discriminatingly decided that it was acting within the constitutional limits and powers.

5. The power of taxation is akin to the rights of eminent domain, because it rests upon the right of the sovereign power to appropriate the private property of its citizens to public purposes.
6. The power of taxation must rest upon two elements in order to be permitted by the Constitution, first, a public use, and second, a public exigency.
7. The wants and necessities of the people change and the opportunity to satisfy those wants and necessities by individual effort may vary.
8. A class of public uses has grown up and been recognized within a comparatively recent time, due both to the growing needs of the community and to modern inventions calculated to meet those needs, that furnish a logical precedent for the case at bar. These public uses or utilities embrace water, light and heat.
9. R. S., ch. 4, sec. 87, authorizing and empowering cities and towns to establish and maintain within their limits a permanent wood, coal and fuel yard for the purpose of selling, at cost, wood, coal and fuel to their inhabitants, is constitutional.

On report. Bill dismissed with costs.

This is a bill in equity, brought by fifteen taxable inhabitants of Portland, asking that the officers and agents of said City of Portland be restrained and enjoined from establishing a municipal fuel yard and from raising by taxation the money necessary for the purpose and from carrying into effect any of the votes by the city government, or the voters to whom the question of establishing and maintaining such fuel yard was referred. The defendant demurred to the bill and the demurrer was joined. Upon a hearing in this cause, the parties agreeing thereto, the case was reported to the next Law Court at Portland. The bill of complaint and the demurrer thereto to make the report of this cause.

The case is stated in the opinion.

Eben Winthrop Freeman, for complainant.

James H. McCann, for respondent.

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

CORNISH, J. The Legislature of Maine in 1903 enacted the following law: "Any city or town is hereby authorized and empowered to establish and maintain within its limits, a permanent wood, coal and fuel yard, for the purpose of selling, at cost, wood, coal and

fuel to its inhabitants. The term 'at cost' as used herein, shall be construed as meaning without financial profit." Pub. L., 1903, c. 122, R. S., ch. 4, sec. 87.

At the municipal election held in the City of Portland on December 2, 1912, the question of establishing and maintaining a fuel yard under the terms of the above act was submitted to the voters and a majority vote was cast in favor of the proposition. On February 3, 1913, both branches of the city council passed a resolution in favor of the same proposition and on February 4, 1913, this resolution was duly approved by the mayor and became effective. At the same time a special committee was appointed, consisting of the mayor, two aldermen and three councilmen "to investigate and obtain full information as to the cost of plant, machinery, rolling stock, and things whatsoever necessary to the establishment and maintaining a Municipal Fuel Yard, and carry on the business thereof, including sources from which fuel can be purchased, and prices to be paid therefor, with the duty of furnishing a full report of their findings to the City Council; and for the purpose of defraying the expense of said committee, the sum of $1,000 is hereby appropriated, the sum to be charged to special appropriation when made."

On February 4, 1913, this bill in equity was brought by fifteen taxable inhabitants of Portland, asking that the city and its officers and agents be restrained and enjoined from establishing a municipal fuel yard, from raising by taxation the money necessary for that purpose and from carrying into effect any of the votes before recited. The defendant demurred to the bill and the demurrer being joined, the case is before the Law Court on report.

The important question is therefore sharply raised, whether this court must declare unconstitutional this act of the Legislature of 1903. It is not a question whether under the general statutory powers a municipality has the right to take this step, a question that has arisen in many cases, but whether such municipality can exercise the right when conferred upon it by the Legislature in clear and unambiguous terms. In other words, is this court obliged to declare, as the plaintiffs ask us, that this act is so obviously beyond the realm of constitutional legislative action that it must be declared void.

Before considering the main issue it is necessary to restate certain familiar and yet fundamental propositions that lie at the very basis of our inquiry.

First. The Legislature has, under the constitution, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor that of the United States." Const. of Maine, Art. IV, Part III, sec. 1. While, therefore, the executive and the judiciary, the other two coördinate departments of government, can exercise only the powers conferred upon them by the Constitution, the powers of the Legislature are, broadly speaking, absolute, except as limited or restricted 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." *Sawyer* v. *Gilmore,* 109 Maine, 169.

Second. The court is bound to assume that, in the passage of any law, the Legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly and discriminatingly decided that they were acting within their constitutional limits and powers. That determination is not to be lightly set aside. It is not enough that the court be of the opinion that had the question been originally submitted to it for decision it might have held the contrary view. The question has been submitted in the first instance to the tribunal designated by the Constitution, the Legislature, and its decision is not to be overturned by the court unless no room is left for rational doubt. All honest and reasonable doubts are to be solved in favor of the constitutionality of the act. This healthy doctrine is recognized as the settled policy of this court. *State* v. *Doherty,* 60 Maine, 504; *State* v. *Pooler,* 105 Maine, 224. "The power of the judicial department of the government to prevent the enforcement of a legislative enactment by declaring it unconstitutional and void is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. It is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons." *State* v. *Rogers,* 95 Maine, 94.

"In determining the constitutionality of any legislation, all reasonable presumptions are in favor of its validity and the courts will not declare an act of the legislature to be invalid because contrary to the provisions of the organic law unless clearly so. . . . And this is as true respecting legislative enactments by which the power to exercise the right of eminent domain is delegated as in regard to any other species of legislation. The determination by the legislature that the use for which property is authorized to be taken is a public one, is, undoubtedly, subject to review by the court, but all reasonable presumptions are in favor of the validity of such determinations by the legislature, and the act must be regarded as valid unless it can be clearly shown to be in conflict with the constitution." *Ulmer* v. *R. R. Co.,* 98 Maine, 579.

With these principles conceded the precise question before the court is seen to be, whether the act in question, having been passed by the Legislature conformably with what it deemed to be an exercise of its constitutional power, can be set aside by this court as invalid on the ground that it palpably and unquestionably transcends that power. We are unable to go to that extent.

The main ground of attack is that the maintenance of what, in general terms, may be called a municipal fuel yard is not a public use, and as the power of taxation is confined to public purposes, the authority conferred by this act cannot be constitutionally exercised.

The Constitution of Maine, Art. II, sec. 21, provides that "private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it." The power of taxation is akin to the right of eminent domain, because it rests upon the right of the sovereign power to appropriate the private property of its citizens to public purposes. Therefore the power of taxation must rest upon two elements in order to be permitted by the Constitution, first a public use and second a public exigency, the first to be determined, in the first instance, by the Legislature and finally by the court, if cases are brought before it raising the question, and with the limitations before referred to, and the second to be determined by the Legislature without judicial revision. *Brown* v. *Gerald,* 100 Maine, 351; *Hayford* v. *Bangor,* 102 Maine, 340.

Did then the Legislature transcend its constitutional powers when its authorized municipalities to make provision for supplying heat to its citizens? In so doing, was it clearly and unquestionably diverting the power of taxation from a public to a private purpose?

This leads us to consider what is meant by the term "public use," as employed in connection with the power to tax.

The exact line of cleavage between what is, and what is not, a public use, it is somewhat difficult to mark. Some purposes readily align themselves on one side of the line as being clearly public in their nature, while others as readily fall on the other side as being obviously private, and there is a debatable ground between the two. Thus the support of schools, the relief of paupers and the maintenance of highways are clearly public uses for which taxation is permissible and it has also been held that the maintenance of a public clock, *Willard* v. *Newburyport,* 12 Pick., 227, the purchase of a fire engine; *Allen* v. *Taunton,* 19 Pick., 485; the erection of a market house, *Spaulding* v. *Lowell,* 23 Pick., 71; the building of a memorial hall, 153 Mass., 255; the aid of a railroad, *Augusta Bank* v. *Augusta,* 49 Maine, 507; *Dyar* v. *Farmington Village Corp.,* 70 Maine, 515, all come within the scope of the same term.

On the other hand taxes cannot be imposed to aid a private enterprise, and a municipality cannot assist individuals or corporations to establish or carry on such business, either directly or indirectly, nor can it engage in such business itself. Opinion of Justices, 58 Maine, 590; *Allen* v. *Jay,* 60 Maine, 124; *Loan Assn.* v. *Topeka,* 20 Wall, 655; *Parkersburg* v. *Brown,* 106 U. S., 487; Opin. of Justices, 204 Mass., 607. If the direct object is private, the indirect benefits that may result to the public, even in a large measure, are unavailing to remedy the vital defect. *Lowell* v. *Boston,* 111 Mass., 454; Opin. of Justices, 211 Mass., 626; *Brown* v. *Gerald,* 100 Maine, 351.

The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago, may, because of changed conditions, have ceased to be such today. Thus the mill act which

came into being in the early days of our parent Commonwealth of Massachusetts, and was adopted by our own State, was upheld as constitutional because of the necessities of those primitive times. The court in later days have strongly intimated that were it an original question it might be difficult to sustain it in view of present industrial conditions, *Murdock* v. *Stickney,* 8 Cush., 113; *Salisbury* v. *Forsaith,* 57 N. H., 124; *Jordan* v. *Woodward,* 40 Maine, 317.

On the other hand, what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now. As was said in *Sun Printing & Pub. Assn.* v. *New York,* 8 App. Div., 230, affirmed in 152 N. Y., 247. 37 L. R. A., 788: "The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects; gain or less may incidentally follow but the purpose must be primarily to satisfy the need or contribute to the convenience of the city at large. Within that sphere of action novelty should impose no veto. Should some inventive genius bye and bye create a system for supplying us with pure air, will the representatives of the people be powerless to utilize it in the great cities of the state, however extreme the want or dangerous the delay? Will it then be said that pure air is not so important as pure water and clear light; we apprehend not."

Thus a class of public uses has grown up and been recognized within a comparatively recent time, due both to the growing needs of the community and to modern inventions calculated to meet those needs, that furnish in our judgment a logical precedent for the case at bar. These public uses or utilities, embrace water, light and heat. It is common knowledge that in the early days our citizens, even in the more populous towns and cities, obtained their water supply from private wells and cisterns. There was no public supply other than perhaps the town pump in the village square. But in course of time the private sources became both inadequate in quantity and hazardous in quality and private water companies were chartered to meet the changed demands, one of the earliest to do business on

a large scale being the Portland Water Company, chartered in 1866, Priv. and Spec. L., 1866, ch. 159. The purpose of these companies is admittedly public, *Portland* v. *Portland Water Co.,* 67 Maine, 136; *Riche* v. *Bar Harbor Water Co.,* 75 Maine, 91; *Homer* v. *Bar Harbor Water Co.,* 78 Maine, 127. "The supply of a large number of inhabitants with pure water is a public purpose," says Shaw, C. J., in *Lambard* v. *Stearns,* 4 Cush., 60.

Later the municipalities in which some of these water companies were established were given the right by the Legislature to take over and maintain these plants, or municipal water districts were formed to accomplish the same purpose. The compensation for those plants was raised by taxation or by loan, and again the purpose is obviously public, *Auburn* v. *Union Water Power Co.,* 90 Maine, 576; *Mayo* v. *Dover & Foxcroft Village Fire Co.,* 96 Maine, 539; *Kennebec Water District* v. *Waterville,* 97 Maine, 185; *Brunswick & Topsham Water District* v. *Maine Water Co.,* 99 Maine, 371; *Augusta* v. *Augusta Water District,* 101 Maine, 148.

Conditions as to lighting met with similar changes. Candles, lamps, gas and electricity have followed each other in due course of time. As late as 1890, a doubt seems to have arisen in Massachusetts as to the constitutional power of municipalities in respect to public and private lighting and the House of Representatives of that year submitted to the Justices of the Supreme Judicial Court two questions, first, whether the Legislature had the power under the Constitution to authorize the cities and towns within the commonwealth to manufacture and distribute gas or electric light for use in their public streets and buildings and second for the purpose of selling the same to its own citizens. These questions were both answered unanimously in the affirmative. The Justices in the course of their opinion say that "the extent of the right of taxation is not necessarily to be measured by that of the right of eminent domain, but the rights are analogous." So far as the lighting of the public buildings and streets are concerned the court held that it was an incident of their maintenance and tended both to common convenience and common necessity, and then these significant words are added "If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appro-

priate means which it may think expedient." In holding the supply to individuals to also be a public purpose, after discussing the question of water companies the Justices say: "Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town, that it incidentally benefits some individuals more than others, or that from the place of residence or for other reasons every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But in general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the Legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them. If the Legislature is of the opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think the Legislature can confer the power. We therefore answer the second question in the affirmative."

Following the reasoning of the Massachusetts court, if the lighting of private residences and buildings is a public purpose and one

which the municipality can legitimately carry on, the heating of the same buildings is equally public. It is even a greater necessity. Gas and electric lights are in the nature of luxuries, but heat is indispensable. In the regions supplied with natural gas, municipal heating from that source has been adopted, and has been held to be constitutional. *State* v. *Toledo,* 48 Ohio St., 112; 11 L. R. A., 729.

The reasoning of the court is as follows: "Heat being an agent or principle indispensable to the health, comfort and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. . . . It is sufficient 'if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants' . . . The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy, but in deciding whether in a given case the object for which taxes are assessed is a public or private purpose, we cannot leave out of view the progress of society, the change of manners and customs, and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And in deciding whether such taxes shall be levied for the new purposes that have arisen, we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied."

If, then, science had advanced so far that the heating as well as the lighting of houses by electricity were now a practicable method, there would seem to be no doubt that this also would fall within the realm of public purposes. The heat would be conducted from the central power station by means of wires along or under the public streets, the same as light is now. Or suppose it were practicable to install a central heating plant and conduct the heat through pipes in the streets to the various buildings, much the same as water or gas is now conducted, we see no reason why this too should not be called a public use.

Just here, however, the petitioners contend for a distinction between all these illustrations and the case at bar. They say that in

the case of the distribution of water, and of light and heat by gas or electricity, the use of the public highways is required for the mains and the poles and wires, that the purpose is public because it is necessary to obtain permission from public authorities, either state or municipal in order to carry it out. We grant that in those cases this element of public permission exists, but it does not follow that the converse is true and that no purpose is public, where such permission does not exist. How can this criterion be applied to the erection of public buildings, the erection of a park, the building of a memorial hall, or of a market house, or the maintenance of a public clock? In other words under this rule, public service of this sort would be limited to one which can only be performed by a so called public service corporation and not by an individual or corporation, independent of chartered rights. This is, in our judgment, too narrow. It makes an incident to some forms of public service an essential element. It transforms the method or means of rendering the service into the essence of the service itself. It makes the exercise of public rights in supplying the necessities of a community a prerequisite to the public use. But this exercise of public rights can itself be authorized only by the Legislature and if that branch of the government sees fit to bestow the public service in a manner that may obviate the use of the public right they certainly should have the right and the power so to do. It is a matter within their control.

Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and a simpler mode of distribution and, if the Legislature has the power to authorize municipalities to furnish heat to its inhabitants "it can do this by any appropriate means which it may think expedient." The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a

municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams travelling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the Legislature authorizing the former is constitutional but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the Legislature which is the only question before the court and not the wisdom of its exercise which is for the Legislature alone.

Cases directly in point are lacking. We have been unable to find anywhere that the issue has been squarely decided.

The learned counsel for the plaintiffs confidently rely upon the opinions of the Justices in 155 Mass., 598 and 182 Mass., 605, rendered in answer to questions propounded by the House of Representatives as to the constitutionality of proposed acts for the establishment of municipal fuel yards. While such answers are entitled to great consideration they do not have the force of decision. Kent, J., 58 Maine, 573, Tapley, J., 58 Maine, 615, and Libbey, J., 72 Maine, 562-3, "The giving of advisory opinions is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority." Prof. James B. Thayer, 7 Harv. Law Rev., p. 153.

In 155 Mass., 598, the Justices were divided, five advising that the proposed act would be unconstitutional, one, Justice Holmes, that it would be constitutional, and one, Justice Barker, giving a qualified assent to its validity. In 182 Mass., 605, the opinions of the majority in 155 Mass., were adopted without dissent, and these views have been reaffirmed by way of illustration in Opin. of Justices, 211 Mass., 624, the subject matter of that opinion being the power of municipalities to construct houses in the suburbs for wage earners, a power clearly not theirs. A careful study of these opinions shows that the general principles enunciated are in accord with our own views and that in only one particular are we at variance.

The conclusions reached by the majority in the Massachusetts cases seem to be:

(1) That it is beyond the power of a municipal corporation to engage in the sale of commodities which are and can be easily conducted by private business concerns in competition with one another, and which can be sufficiently regulated thereby. In this we most heartily concur.

(2) That the sale of fuel falls within this class of commodities and there is no necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprizes. Here we differ.

(3) That in regard to "a condition in which the supply of fuel would be so small and the difficulty of obtaining it so great, that persons desiring to purchase it would be unable to supply themselves through private enterprises it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use." Here again we concur.

The principle, therefore, seems to be conceded that if the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use. And this is the construction placed upon the Massachusetts opinion by learned text writers. Dillon Mun. Corp. 5th ed., sec. 1292. McQuillan Mun. Corp. (1912) sec. 1809.

In the last analysis this differs but little from the definition of a public use laid down by Judge Cooley in his work on Constitutional Limitations, 6th ed., p. 655, viz.: "That only can be considered a public use where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which on account of their peculiar character and the difficulty—perhaps impossibility —of making provisions for them otherwise, is alike proper, useful and needful for the government to provide." This court in discussing the question of public uses with reference to the power of eminent domain adopted this definition in a very recent case, remarking "there is perhaps no general definition more satisfactory than this one." *Brown* v. *Gerald,* 100 Maine, 351, 370. And this

general definition we adhere to and seek to apply in the case at bar. Its two tests are: first, the subject matter, or commodity, must be one "of public necessity, convenience or welfare." Fuel clearly comes within this category. The second test is the difficulty which individuals have in providing it for themselves. The causes creating the difficulty may vary, but if the difficulty exists, the test is met. For instance, in the case of a water supply the difficulty arises from the fact that individual sources are inadequate or unsanitary and the conditions can be remedied only by the municipality itself providing or allowing some public service corporation to furnish the community at large from a single and common source. This is a matter of common knowledge and the court in passing upon the question of public use cannot ignore it.

In the case of fuel the practical difficulty is caused by the existence of monopolistic combinations. The mining, transportation and distribution of coal, has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of a few. The difficulty and practical impossibility of obtaining an adequate supply for private needs at times in the past, and the consequent suffering among the people, especially in the more populous cities, are matters of history, and this difficulty may as well be caused by unreasonable prices as by shortage in quantity. All this is a matter of common knowledge and cannot be overlooked by the court. The supply of water may be inadequate from one cause, that of fuel from another, but out of each arises the condition which renders the furnishing of it by the municipality a public use.

The majority of the Massachusetts Justices conceded the right to create municipal fuel yards under certain conditions and exigencies, but say that in their opinion fuel is like all other commodities of ordinary purchase and sale in the open market and there is no necessity why cities and towns should undertake that form of business any more than many others which have always been conducted by private enterprise. This might seem to be invading the province of the Legislature, because the determination of the exigency is for that coördinate branch of the government alone, and by the passage of this act that branch has necessarily determined that the exigency exists. If, however, independent of their finding the court has a

right to consider all the conditions and circumstances connected with the subject matter, all the elements which, under the definition of Judge Cooley, make up the public use, then we cannot close our eyes to existing economic conditions and must admit that in determining the existence of the difficulty the finding of the Legislature is not wrong beyond all rational doubt, and therefore under the well settled rules of constitutional construction it should not be disturbed.

But it is urged, why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market or a bakery. The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensable necessity of life, and more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle it would be our duty to pronounce the act unconstitutional, but in our opinion it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost) nor for the sake of the indirect gains that may result to purchasers through reduction in price by governmental competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole. In our opinion it is a proper and constitutional function of government either to itself provide such a necessity under these circumstances or to see to it that it is so provided as to bring it within the reach of the citizens.

A similar inquiry based upon fears for the future was asked as to the limit of legislative power in *Olmstead* v. *Camp,* 33 Conn., 532, and is there answered by the court in these words: "The question is asked with great pertinence and propriety, what then is the limit of legislative power under the clause which we have been considering and what is the exact line between public and private uses? Our reply is that which has heretofore been quoted. From the nature of the case there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts." This furnishes, we think, a safe and sufficient barrier between the Constitution and those who might attempt to break it down.

Nor is the fact that in operation the act may tend to lessen the profits of a few private dealers or even force them from business, a matter of consideration for the court. "It is for the legislature to determine from time to time what laws and regulations are necessary or expedient for the defence and benefit of the people, and however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are held valid unless there can be pointed out, some provision in the State or United States Constitution, which clearly prohibits them." Opinion of Justices, 103 Maine, 506.

The brief opinion of Mr. Justice Holmes now of the Supreme Court of the United States, in 155 Mass., 607 supra, goes even farther than the rule which we have laid down. He says: "I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity the purpose is no less public when that article is wood or coal than when it is water or gas or electricity or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets. I see no ground for denying the power of the Legislature to enact the laws mentioned in the questions proposed. The need or expediency of such legislation is not for us to consider."

Our attention is further called by the plaintiffs to *Baker* v. *Grand Rapids,* 142 Mich., 687, 106 N. W., 208, but that case has no bearing upon the question at issue. There, the city government without authority from the Legislature transferred $10,000 from the contingent fund to the poor fund for the purchase and distribution of coal when the price of coal was rapidly rising and a combination had been formed to exist among the local dealers. A bill in equity was brought by one of these dealers to prevent the action, and was held not to be maintainable, first because the plaintiff being engaged in the unlawful combination did not come into court with clean hands, second because the act had already been done and the city had ceased to carry on the business, and third because the plaintiff was not damaged. This case certainly furnishes no authority for the plaintiffs; and no others in point have been cited.

On the other hand the very recent case of *Holton* v. *Camilla,* 134 Ga., 560, 68 N. E., 472, 31 L. R. A. N. S., 116 (1910), cited by the defendant is an important precedent by analogy. In that case the court held constitutional a legislative act authorizing the city to establish and maintain a municipal ice plant in connection with its water works. In discussing the question of public use after referring to water, light and heat, the court says:

"If a city has the right to furnish heat to its inhabitants, because conducive to their health, comfort and convenience, we see no reason why they should not be permitted to furnish ice. . . . Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in a liquid form, we fail to see any reason why it cannot furnish it to them in a frozen condition. . . . If the furnishing of ice to its inhabitants is conducive generally to their health, comfort and convenience it is certainly being furnished for a municipal or public purpose." It requires no argument to prove that coal is as conducive to the health, comfort and convenience of the inhabitants of this northern latitude as is ice to that of the inhabitants of Georgia.

Without discussing the question further it is sufficient to say that

we see in this act of the Legislature a sign neither of paternalism nor of socialism. We do not regard it as a departure from previous legislation but in line with it, although perhaps one step further. The direction however is the same and the advance is caused by the development of a new want which has called for a new exercise of legislative power, not an exercise of new legislative power, and such an advance is both legitimate and commendable.

Our conclusion, therefore, is that the acts threatened by the defendant are not an invasion of the constitutional rights of the plaintiffs and that the plaintiffs are not entitled to a perpetual injunction as prayed for.

Bill dismissed with costs.

STATE *vs.* THOMAS SHEEHAN.

Hancock. Opinion April 11, 1914.

Appeal. Complaint and Warrant. Demurrer. Exceptions. Records. Revised Statutes, Chapter 29, Section 49. Revised Statutes, Chapter 133, Section 18. Search and Seizure.

Search and seizure warrant, issued from Western Hancock Municipal Court. The respondent pleaded not guilty. Was found guilty and appealed to the Supreme Judicial Court. At appeal term of Supreme Judicial Court, respondent filed a demurrer to complaint and warrant.

Held:

1. That upon demurrer, "A certain store and its appurtenances, situated on the southwesterly side of Main Street, in said Bucksport, commonly known as the Homer Store, and occupied by said Thomas Sheehan," is a sufficient description.
2. That failure of a magistrate to send to the appellate court a copy of the whole process and of all writings in the case before the magistrate cannot be taken advantage of by demurrer.

On exceptions by respondent. Exceptions overruled.

This is a process of search and seizure under Revised Statutes, chapter 29, section 49, issued from the Western Hancock Municipal Court. The respondent was arraigned before the Judge of said court, pleaded not guilty, was found guilty, and appealed to the Supreme Judicial Court in and for said county. At the appellate term of said court, the respondent filed a general demurrer to complaint and warrant. The grounds of demurrer, upon which the respondent relied, were, first, that the description of the place searched was not sufficient, and second, that the magistrate below did not send to the appellate court a copy of the whole process, and of all writings before the magistrate, as required by R. S., c. 133, section 18. The presiding Justice overruled the demurrer and the respondent excepted to said ruling.

The case is stated in the opinion.

Herbert L. Graham, for the State.

Daniel S. Hurley, for respondent.

SITTING: SAVAGE, C. J., SPEAR, HALEY, HANSON, PHILBROOK, JJ.

PHILBROOK, J. Under a search and seizure warrant issued from the Western Hancock Municipal Court the respondent was arraigned before the Judge of that court, pleaded not guilty, waived examination, was found guilty, appealed to the Supreme Judicial Court, and at the appellate term filed a general demurrer to the complaint and warrant. The demurrer was overruled, exceptions taken, and the same having been allowed, the case is before us upon the exceptions thus taken.

In support of his demurrer the respondent urges two claims; *first,* that the complaint and warrant do not sufficiently describe the place to be searched; *second,* that the magistrate below did not send to the appellate courts "a copy of the whole process, and of all writings before the magistrate," as required by R. S., c. 133, sec. 18.

The description of the place to be searched is the same in both complaint and warrant and is as follows: "A certain store and its appurtenances, situated on the southwesterly side of Main Street, in said Bucksport, commonly known as the Homer store, and occupied by the said Thomas Sheehan." It is the opinion of this court

that this description is sufficient. In *State* v *Robinson,* 49 Maine, 285, the premises in a search and seizure process were described as "the store occupied by said Robinson, situated on the northerly side of Fore street, in said Portland, being numbered 197 on said street." The court there held that the description was sufficient even without the number.

The failure of the magistrate to send papers to the appellate court, if such were the case, will avail the respondent nothing in support of his demurrer. The exact point has been already decided by this court. In *State* v. *Kyer,* 84 Maine, 109, the respondent filed a general demurrer, as in the case at bar, claiming that the copies of the complaint, warrant and record of conviction were not properly certified by the magistrate. In over-ruling exceptions the court said: "The demurrer strikes only at the complaint and warrant. . . . For want of a sufficient complaint and warrant only does the respondent pray judgment. The joinder on the part of the state relates solely to that. The judgment of the court in adjudging the complaint and warrant good related to the same." The same principles are also discussed and affirmed in *State* v. *Walsh,* 96 Maine, 409.

Exceptions overruled.

STATE *vs.* HARRY L. PIO.

Hancock. Opinion April 11, 1914.

Complaint and Warrant. Description. Demurrer. Exceptions. Records. Search and Seizure.

1. The point that the copies sent up, from the Municipal Court on appeal were certified by the recorder and not by the Judge is not open on demurrer.
2. The words "in a certain automobile, numbered 9193, standing in the highway in said Ellsworth, leading from Ellsworth to Washington Junction, and at a point in said highway about fifty feet westerly of the way leading to the Powder House of Morrison Joy Co." is a sufficient allegation of a place in a complaint and warrant for the seizure of intoxicating liquors, intended for unlawful sale, under R. S., chap. 29, sect. 48.

On exceptions by respondent. Exceptions overruled. Judgment for the State.

This is a search and seizure process, under Revised Statutes, chapter 29, section 48, from the Ellsworth Municipal Court. The respondent was arraigned before the Judge of said court and pleaded not guilty. Was found guilty and sentenced to pay a fine of one hundred dollars and costs, and to serve sixty days in jail, and in default of payment of fine and costs, to serve sixty days additional in jail. From this sentence, the respondent appealed to the Supreme Judicial Court, October term, 1913, and at said term, filed a general demurrer to complaint and warrant. The presiding Justice overruled the demurrer and the respondent excepted to said ruling.

The case is stated in the opinion.

Herbert L. Graham, for State.

Daniel E. Hurley, for respondent.

SITTING: SAVAGE, C. J., SPEAR, HALEY, HANSON, PHILBROOK, JJ.

SAVAGE, C. J. Demurrer to complaint in search and seizure process, under R. S., chap. 29, section 48, which chapter is the prohibitory liquor statute of this State.

The defendant contends in support of the demurrer, first, that the copies sent up from the Municipal Court on appeal were certified by the recorder and not by the Judge. This point is not open on demurrer. *State* v. *Kyer,* 84 Maine, 109.

The defendant contends, secondly, that the words in the complaint designating the place where the liquor was found and seized, were not a sufficient allegation of "place," so as to authorize a seizure under section 48. The words are "in a certain automobile numbered 9193 standing in the highway in said Ellsworth, leading from Ellsworth to Washington Junction and at a point in said highway distant about fifty feet westerly of the way leading to the Powder House of Morrison Joy Co." The contention is that these words do not describe a "place." We think they do, and quite definitely. Intoxicating liquors intended for unlawful sale are seizable, if found in an automobile, the same as if found in any other place.

The defendant cites and relies upon *State* v. *Fezzette,* 103 Maine, 467. But that case was different. There it was held that a valise, a piece of hand baggage, was not a "place." But we can discover no points of similarity, as to what is in law a place, between a valise and an automobile. There is no analogy.

Exceptions overruled.
Judgment for the State.

SAM SERUTA *vs.* VINCENZO SURACE et al.

Cumberland. Opinion April 11, 1914.

Administration. Assignment. Equitable Assignment. Exceptions. Nonsuit. Partnership. Revised Statutes, Chapter 84, Section 146. Set-off.

The plaintiff, as a member of a copartnership, after the decease of his copartner brought the action in his own name, without declaring in the capacity of surviving partner.

Held:

1. It is evident that the plaintiff's assignment must be regarded as an equitable assignment.
2. Such an assignment would carry with it the undoubted right to bring suit in the name of the assigner, but not in his own, as the statute limits the right of an assignee to bring suit in his own name to the method prescribed in Revised Statutes, chapter 84, section 146.
3. As the verbal assignment was made to the plaintiff as a member of the firm, the law required him to bring suit in name of firm, if his copartner, the assigner, was living and as surviving partner, if he was deceased.
4. As surviving partner, the plaintiff was entitled to the control and administration of the assets by filing a statutory bond.
5. At common law, he was entitled to such control and administration without filing bond, but our statute has modified the common law to the extent of requiring a bond.
6. Having brought the suit in his individual capacity, the general issue required him to establish the right to maintain his action in that form.

On exceptions by the plaintiff. Exceptions overruled.

This is an action of assumpsit upon an account annexed to recover for services alleged to have been performed by a certain partnership of which the plaintiff was a member, for the defendants. The plaintiff alleged that Henry Lamon, plaintiff's copartner, verbally gave up and turned over to the plaintiff his interest in the account sued. The action was commenced after the decease of the plaintiff's copartner and entered at the January term, 1913, of the Superior Court for Cumberland County. The defendants pleaded the general issue. At the conclusion of the evidence, the Judge of

the Superior Court for said Cumberland County ordered a nonsuit and the plaintiff excepted to said order.

The case is stated in the opinion.

Dennis A. Meaher, and Henry N. Taylor, for plaintiff.

Connellan & Connellan, for defendants.

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

SPEAR, J. This case comes up on exceptions by the plaintiff to a nonsuit ordered by the court at the conclusion of the plaintiff's testimony. A partnership, of which the plaintiff was a member, had an account against the defendants for services alleged to have been performed for them. After the decease of the plaintiff's copartner he brought suit upon the account in his own name, without declaring in the capacity of surviving partner, and without filing with his writ any assignment of the account, or copy thereof, although claiming that his partner's interest had been verbally "made over" to him. After a careful examination of the authorities the court is of the opinion that the nonsuit was properly ordered. From the testimony in the case it is very evident that the plaintiff's assignment, if as he claimed it, must be regarded as an equitable assignment. Such an assignment would carry with it the undoubted right of the assignee to bring suit in the name of the assignor but not in his own, as the statute limits the right of an assignee to bring suit in his own name to the method therein prescribed. R. S., chap. 84, sec. 146. The right of set off is also preserved. As the verbal assignment, which the plaintiff claims, was made to him as a member of the firm, the law required him to bring suit in the name of the firm. If his copartner, the assignor, was living; and as surviving partner if he was deceased; since, as surviving partner, he was entitled to the control and administration of the assets by filing the statutory bond. At common law he was entitled to such control and administration without filing bond, but our statute has modified the common law to the extent of requiring a bond. It is not contended that he filed any bond. Yet, had he brought suit in his capacity as surviving partner, his failure to file a bond could have been taken advantage of only by a plea in abatement. *Strang* v. *Hirst,* 61

Maine, 9. The general issue would have admitted the capacity in which he sued. *Strang* v. *Hirst,* supra. But having brought suit in his individual capacity the general issue required him to establish the right to maintain his action in that form. His proof failed to do this. It showed that the account upon which he brought suit was due, not to him in his individual capacity, but to the partnership of which he was the surviving member. Accordingly whether the account could be regarded as equitably assigned to him, or as an account due the partnership, he should have instituted his suit in the capacity of surviving partner. *Strang* v. *Hirst,* supra.

Again, as only a plea in abatement could reach the plaintiff's failure, in a suit as surviving partner, to file a bond, it is evident that, in bringing a suit in his individual capacity, he deprived the defendants of the opportunity to avail themselves of this defense, since they could not be required to anticipate or assume that he was prosecuting as surviving partner. In other words, the plaintiff by declaring individually deprived the defendants of one of the defenses which would otherwise have been open to them.

The order of nonsuit must be sustained.

Exceptions overruled.

CHARLES B. BRYANT et al., in Equity *vs.* LOUISA S. PLUMMER et als.

Cumberland. Opinion April 16, 1914.

Class Bequest. Construction. Contingency. Equity. Joint Tenancy. Legacy. Residue. Trust. Will.

Bill in equity for the construction of a certain portion of the last will and testament of Hiram T. Plummer.

1. It is an elementary, fundamental and prevailing rule, which must govern in the construction of a will, that the entire document should be carefully examined, parts compared with other parts, provisions considered with reference to other provisions, and from the whole instrument, from all that it disclosed, relative to the nature and extent of the estate of testator, the size of his bounties, the relationship, needs, conditions and environments of his beneficiaries as well as from the precise language used to ascertain the intention of the testator.
2. When there is a gift of a legacy, or a share of a residue to be paid, at or when the legatee shall attain twenty-one years, or any specified age, or at the death of a particular person, or when the legatee shall have served out his apprenticeship, the gift vests in the legatee at the death of testator, the time only applies to the payment.
3. When the gift of a legacy is absolute, and the time of payment only is postponed, the time not being of the substance of the gift is held to postpone the payment, but not the vesting of the legacy.
4. The legacy must be regarded as vested when there is no provision for the lapsing of the legacy and no disposition of any remainder, if there should be any, after the death of the legatee.
5. It is among the elementary rules of construction that no remainder will be construed to be contingent which may consistently with the intention of the testator be deemed vested.
6. The general rule is that a devise or bequest to children gives a vested interest, unless the contrary intention is shown by the will.
7. It is also a well settled rule that in the case of a bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants, and in the case of the death of a legatee before the termination of the trust, the income must be paid to the legal representatives of the estate of the deceased legatee.

On report. Decree in accordance with this opinion.

This is a bill in equity by trustees, under the will of Hiram T. Plummer, late of Portland, deceased, asking for the construction of a portion of the residuary bequest in said will. All of the parties defendant filed answers, admitting all of the allegations in the bill. At the close of the hearing in the cause, the same, by agreement of parties, was reported to the Law Court next to be held at Portland, 1913. The bill and answers, with the order of the court thereon, to make the report of said cause.

The case is stated in the opinion.

Symonds, Snow, Cook & Hutchinson, for complainants and M. Alice Plummer and Frank W. Robinson, admr.

Forrest Goodwin, White & Carter, and Fred F. Lawrence, for Edna Mabel Waterman, Louisa E. Plummer, Carrie D. Drew and Edna Mabel Waterman, admx.

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

PHILBROOK, J. Bill in equity for the construction of a certain portion of the last will and testament of Hiram T. Plummer. The single question which the parties submit to the court relates to the construction of the twenty-seventh paragraph of the will which is as follows:

"27th. All the rest, residue and remainder of my estate, of whatsoever name or nature and wheresoever situated, of which I may die seized or possessed, or to which at the time of my decease I may be in any way entitled, including all and any of the foregoing legacies, devises and trust provisions, which may in whole or part lapse or for any reason fail, I dispose of as follows:

"I give, bequeath and devise one-third of the whole of said residue and remainder of my said estate to my beloved wife, Louisa S. Plummer; to have and to hold the same to her, her heirs and assigns, forever.

"I give, bequeath and devise one-third of the whole of said residue and remainder of my said estate to my beloved children, Edna Mabel Davis and John M. Plummer, share and share alike, to have and to hold the same to them,their heirs and assigns, forever.

"I give, bequeath and devise the remaining one-third of the whole of said residue and remainder of my said estate to my trustees hereinafter named, upon trust to manage and invest said trust property according to their best judgment and discretion for the period of ten years from my death, with full power and authority either to permit said trust property to continue in the state in which it shall be found at my death, or to convert it, or from time to time parts of it, into money, and to invest and re-invest said proceeds, together with the income, accumulations and gain therefrom resulting, as said trustee may think expedient, but in trust, nevertheless, as herein provided. At the expiration of said period of ten years from my death, said trustees shall convey, transfer and pay over said trust property with the net income and accumulation thereof, free of trust, to my beloved children, Edna Mabel Davis and John M. Plummer, share and share alike; to have and to hold the same to them, their heirs and assigns, forever."

The testator died December 26, 1902. His son, John M. Plummer, died July 26, 1904, which date was before the expiration of the ten year period subsequent to the death of the testator, as will be readily seen. The daughter, Edna Mabel Davis, mentioned in the will, still survives as Edna Mabel Waterman, and is one of the defendants. The real contention is over the meaning of the last clause of the above quoted paragraph. John M. Plummer left no children but left a widow, M. Alice Plummer. The administrator of his estate, together with his widow, contends that the interest of the two children, Edna Mabel Davis and John M. Plummer, in the final third of the residue, vested in them upon the death of the testator and that the half thereof, which would have belonged to John M. Plummer, had he survived the period of ten years, now makes part of his estate. The daughter of the testator, Edna Mabel Davis (Waterman), states her contentions as follows:

I. The equitable interests which testator created for his two children in this final third of the residue were contingent upon their surviving the period fixed by him, or if vested were subject to being divested by death.

II. The bequest to the two children being in the nature of a joint tenancy or a "class" bequest, the entire equitable interest vests in Edna Mabel Davis (Waterman) as the survivor.

III. If the court should be of opinion that the bequest was contingent, but that there is no survivorship in the daughter, and a trust results to testator's heirs, then those heirs should be determined as of the date of the expiration of the ten year period, and not of testator's death.

It is an elementary, fundamental and prevailing rule, which must govern in the construction of a will, that the entire document should be carefully examined, parts compared with other parts, provisions considered with reference to other provisions, and, from the whole instrument, from all that it discloses, relative to the nature and extent of the estate of the testator, the size of his bounties, the relationship, needs, conditions and environment of his beneficiaries, as well as from the precise language used in the parts over which doubts have arisen, ascertain if possible the intention of the testator when he used that language. This rule is of such long standing and wide adoption that citation of authorities would seem unnecessary.

By this standard we have attempted to weigh and measure the particular clause of this will which is before us. In the first twenty-three paragraphs of the will the testator makes bequests to brothers, sisters, nieces, nephews and to other persons related to him by marriage as well as by blood, including bequests also to persons apparently not related except by the ties of friendship, and, with the exception of bequests to two nephews, in every instance there is provided a contingency that the legatees survive the testator. He then provides a trust fund for the benefit of the daughter of his brother, Charles M. Plummer, and carefully states the conditions under which this fund might revert and become a part of the residue of his estate. He next provides a trust fund for the benefit of Miss Ellen A. H. Mitchell, not declared to be a relative, and with equal care states the conditions under which this fund shall become a part of the residue of his estate. It should here be observed that in a codicil, made nearly a year later than the will, the same care is observed relative to the bequests and to a new trust fund for Susie Barrett Jones. Returning to the will itself we observe that the testator then proceeds to consider bequests in favor of his immediate family which consists of a wife, one daughter and one son. After specific bequests to his wife of the homestead, and the personal estate which would tend to the enjoyment of that homestead, as

would be natural and proper, he divides all the rest, residue and remainder into three equal parts. One of those parts he gives unqualifiedly to his wife. Instead of giving one of each of the other thirds to his daughter and the other to the son, for their free, full and immediate enjoyment, he takes one of those thirds, divides it into equal parts, and gives one of these parts to the daughter, the other to the son, "share and share alike, to have and to hold the same to them, their heirs and assigns forever." Thus far he has dealt out even handed justice to each of his children and to the heirs of those children. The disposition of the remaining third of the residue has occasioned these proceedings. If the contention of the defendant daughter should prevail it must be because the testator at this point has abandoned his intent to deal equally with his two children and their heirs. What cause can the daughter assign for this strange inconsistency on the part of her father? We have not been shown any cause which to our minds seems decisive and controlling, and we therefore declare the intention of the father to have been to do absolute equality towards his two children and their heirs in the disposition of the last third of the residue of his estate.

Does the language of the will, construed according to legal principles, and in the light of all the circumstances, permit that intention of absolute equality to be carried out or must that intention be thwarted? "When a legatee dies before the time of payment, the legacy, if vested, goes to his representative, but will fail if contingent." 40 Cyc., 1683, and cases there cited. Thus the issue is squarely presented, namely, did the legacy to John M. Plummer, and to his "heirs and assigns," vest at the death of the testator, and before the death of John, or otherwise. The following principles of law are familiar and well established in the courts of this State.

"When there is a gift of a legacy, or a share of a residue to be paid at or when legatees shall attain twenty-one years, or any specified age; or at the death of a particular person; or when legatee shall have served out his apprenticeship, the gift vests in the legatee at the death of testator, the time only applies to the payment," 6 Bac. Abr., 263; Tit. Legacy, E. This language was adopted by our court nearly fifty years ago in *Kimball* v. *Crocker,* 53 Maine, 263, and has never been abandoned. In the same case we find, upon authority of the English courts, *Duffield* v. *Duffield,* 1 Dow & Clark,

311: "It has long been an established rule for the guidance of the Courts of Westminster, in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession." This rule also has been oft-quoted by our courts. It still obtains. It links a venerable past in judicial history with an active present. Its salutary results bespeak the cause of its long existence.

When the gift of a legacy is absolute, and the time of payment only is postponed, the time not being of the substance of the gift is held to postpone the payment but not the vesting of the legacy. *Patterson* v. *Ellis,* 11 Wend., 259; *Blanchard* v. *Blanchard,* 1 Allen, 223; *Brown* v. *Brown,* 44 N. H., 281; *Kimball* v. *Crocker,* supra.

The legacy must be regarded as vested when there is no provision for the lapsing of the legacy and no disposition of any remainder, if there should be any, after the death of the legatee. *Prescott* v. *Morse,* 62 Maine, 447.

"It is among the elementary rules of construction that no remainder will be construed to be contingent which may consistently with the intention of the testator be deemed vested." *Danforth* v. *Reed,* 109 Maine, 93.

"The general rule is that a devise or bequest to children give a vested interest unless the contrary intention is shown by the will, . . . It is also a well settled rule that in the case of the bequest of *income* to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants and in the case of the death of a legatee before the termination of the trust, the *income* must be paid to the legal representative of the estate of the deceased legatee." *Morse* v. *Ballou,* 109 Maine, 264. If this rule be true as to bequest of *income* why should it not apply to the fund which yields that income?

"The broad distinction between vested and contingent remainders is this: In the first there is some person in esse known and ascertained, who, by the will or deed creating the estate, is to take and

enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect." *Woodman* v. *Woodman,* 89 Maine, 128.

The defendants claim that there are no words of present gift, but, although there were no such words in *Moulton* v. *Chapman,* 108 Maine, 417, it was *held* that where the gift is to legatees by name the court would hestitate to apply the rule that a legacy is contingent when there are no words importing a gift other than a direction to divide or pay at a future time.

Let us now apply these rules to the case at bar. The legacy under consideration was to take effect at a certain time which time applied "only to the payment;" there was no condition precedent to the vesting, so clearly expressed that the court cannot treat the legacy as vested "without deciding in direct opposition to the terms of the will;" *Kimball* v. *Crocker,* supra; there is "no provision for the lapsing of the legacy and no disposition of any remainder, if there should be any, after the death of the legatee;" *Prescott* v. *Morse,* supra; the legacy may be deemed vested "consistently with the intention of the testator;" *Danforth* v. *Reed,* supra; the gift being to a child (John) calls for the general rule that there is "a vested interest unless the contrary intention is shown by the will;" *Morse* v. *Ballou,* supra; the passage of time, ten years, cannot be said to be in this case an event which "may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect;" *Woodman* v. *Woodman,* supra.

The defendant relies with much confidence upon *Giddings* v. *Gillingham,* 108 Maine, 512, and *Andrews* v. *Lincoln,* 95 Maine, 541. In the former the court declared that the reasons which led that tribunal to find the several bequests in the will then under consideration to be contingent rather than vested, were based upon the general scope and purpose of the will, as well as upon the particular language of the will, thus adhering to the broader and safer rule

that the intention of the testator must govern when that intention is ascertainable. There it was said, "that the clear purpose of the testator was to have his estate converted into a single trust fund and that it should continue a unit during the life of his wife." These and other reasons were sufficient in that case to warrant the court to declare the contingency of certain bequests but those reasons are not applicable to the case at bar. Indeed, the "general scope and purpose" of the will in the present case seem to plainly point to a vested legacy for the son John. In *Andrews* v. *Lincoln,* also relied upon by defendant, the rule of perpetuity was an essential element in the decision of the court, and in that case also there were certain contingencies of life and survivorships which do not exist in the case at bar and clearly differentiate the two.

The defendant also suggests, but does not strongly urge, that if the legacy to John were vested it was divested by his death. A will may be so expressed that an estate once vested may be divested on the happening of a contingency or on non-performance by the devisee of some condition imposed, 40 Cyc., 1681, and cases there cited. There seems to be no expression in the will in this case requiring discussion of this principle, nor do the other positions taken by the defendant seem to need discussion in view of the conclusions which we have reached. The elaborate, learned and painstaking brief of the defendant has brought to our attention some decisions of other jurisdictions which it is claimed are not in harmony with the position which we take, but so far as we have been able to examine those decisions they all concede the overwhelming force of the rule that the intention of the testator must govern when that intention can be ascertained from a study of the entire will unless that intention is so expressed as to be thwarted by established rules of construction.

Our conclusion is that the legacy to John M. Plummer, contained in the last clause of the twenty-seventh paragraph of the will of Hiram T. Plummer, vested in John at the death of the testator and that the half of the final third of the residuum of the testator passes to the estate of John M. Plummer.

Decree in accordance with this opinion.

CHARLES S. HICHBORN et als. *vs.* CHARLES BRADBURY et al.

Kennebec. Opinion April 11, 1914.

Advancements. Construction. Demurrer. Discretion. Equity. Parties. Power. Remainderman. Trustees. Will.

Bill in equity for the construction of the will of Eliza Ann Bradbury, and asking the court to define an interpret the limit and extent of the discretionary power given the trustees thereunder.

Held:

1. The denial by demurrer that the allegations of the bill sufficiently specify the particular clauses or phrases in the will which the court is requested to construe is untenable.

2. R. S., chapter 79, section 6, Paragraph VIII, gives the court power to determine the construction of wills, and in cases of doubt, the mode of executing a trust, and the expediency of making changes and investments of property, held in trust.

3. The trustees are authorized, by observing the requirements, to examine, find and certify, to advance to Charles Bradbury such part, or even all, of the principal, as they shall deem for the best.

4. The discretionary power given to the trustees, originally named in the will of Eliza Ann Bradbury, as to advancements of principal to Charles Bradbury, vested in their successors.

On report. Case remanded to the sitting Justice, when the children of Mrs Wilson may be made parties by guardian ad litem on motion by the plaintiffs. When the proper parties are before the court, the sitting Justice may enter a decree in accordance with this opinion. So ordered.

This is a bill in equity asking the construction of the will of Eliza Ann Bradbury and asking the court to define and interpret the limit and extent of the discretionary power given the trustees thereunder. The defendant, Charles Bradbury, joined in all the prayers in said complainants' bill and asked the court to advise and instruct the trustees. The defendant, Eliza Louisa Bradbury Wilson files an answer with demurrer. Upon hearing, it appearing to the Justice

presiding that important questions of law are involved, the case was reported to the Law Court for its decision upon bill, demurrer and answers.

The case is stated in the opinion.

Wm. P. Whitehouse, and James O. Bradbury, for plaintiffs.

Andrews & Nelson, for Charles Bradbury.

Williamson, Burleigh & McLean, for Eliza Louisa Bradbury Wilson.

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

SPEAR, J. This is a bill in equity seeking the construction of the will of Eliza Ann Bradbury, particularly the provisions of the third clause, and asking the court to define and interpret the limit and extent of the discretionary power given the trustees thereunder.

The defendant, Charles Bradbury, in his answer joins in all the prayers of the complainants' bill, asking the advice of the court.

The defendant, Eliza Louisa Bradbury Wilson, files an answer with demurrer inserted therein, and for cause of demurrer shows: First: That the bill asks general and indefinite instructions from the court as to the manner of execution of a trust without seeking any instructions as to any definite action proposed or otherwise on the part of said trustees. Second: That the bill asks general construction and interpretation of the third clause of said will without seeking any construction or interpretation of any definite matter contained therein or in reference thereto. Third: That the prayers of the plaintiffs' bill are so vague, indefinite, ambiguous and uncertain that the defendant cannot ascertain the meaning thereof or obtain sufficient information therefrom as to what specific matters contained in or arising under said will the court is asked to construe and interpret. In her answer she admits the first, second and third paragraphs, but in the fourth denies that the word "family," as used in the third clause, relates to the wife of Charles Bradbury, and therefore denies that the family of Charles Bradbury consists of himself and wife. She admits the fifth paragraph. She admits all the allegations in paragraph six except that she denies the interpretation intended for the word "family" for the same reasons given under paragraph four of her answer. She admits paragraph seven.

Eighth: She denies that it is important that the plaintiffs be advised as to their rights under said will or how far they may exercise their discretion thereunder, because she says that as far as their discretion extends to the disposition of the income of said estate, it is not questioned, and she says that as to the disposition of the principal thereof, they have no discretion.

In argument under the demurrer it is denied at the outset that all those interested are made parties to the bill. This contention will be considered later. The demurrer next denies that the allegations of the bill sufficiently specify the particular clauses or phrases in the will which the court is requested to construe. This position is untenable. R. S., chapter 79, section 6, Paragraph VIII, gives the court power "to determine the construction of wills . . . and in cases of doubt, the mode of executing a trust, and the expediency of making changes and investments of property held in trust." A bill for this purpose may also be brought under the general equity powers of the court. Whitehouse's Equity Practice, section 237. Where no controversy has arisen, if any trust officer is in doubt, it will be sufficient for him to point out the nature of the doubt. It is accordingly clear that if a controversy has arisen, then the proper allegation would be to point out the controversy, and the issue raised thereby. That is precisely what is done in the plaintiff's bill with reference to the only question involved. The court will not assume to decide any other.

Paragraph three of the will provides: "Said Trustees are to apply the income of said amount in their hands as trustees for the support of said Charles and his wife and children, if he has any, in sickness and health in such manner as they shall judge will best minister to his and their comfort and happiness. If all of said trustees shall at any time be satisfied that it will be for the best interests of him the said Charles Bradbury and his family for the said trustees to advance more or less of the principal to him, and they shall upon examination so find and certify they may then make such advance as they shall deem for the best." Paragraph 6 of the bill alleges a payment of twenty thousand dollars to Charles Bradbury by the former trustees, under this provision. Paragraph 7 alleges: "That said Eliza Bradbury Wilson has notified the present trustees that she would oppose any further advance of principal to

the said Charles Bradbury and questions the right of the trustees to make any further advances of principal under the provisions of said will of Eliza Bradbury."

Mrs. Wilson in her answer, paragraph eight, says, "that as to the disposition of the principal thereof they have no discretion." These paragraphs of the bill and answer directly put in issue the right of the trustees to make further advances of principal, under the language of clause three of the will, and raise a sufficient doubt as to their duty to justify the trustees in invoking the aid of the court.

It may be here noted that paragraph three recognizes two distinct dispositions of the estate therein bequeathed. It first disposes of the income; then the advances of the principal. But no question is raised regarding the income, as Mrs. Wilson in her answer says, "that so far as their discretion extends to the disposition of the income of said estate, it is not questioned." While the trustees are to consider Charles Bradbury and his family, in exercising the discretion of making advances, they are not authorized nor required to pay any part of the principal directly to his wife, or children if any. The benefit to his family, of whomsoever composed, must come indirectly through payments to him. The advances, when made, become his property, absolutely. This appears from the provisions of the will. Accordingly, it was not necessary, as intimated in the argument it might be, to join the wife of Charles Bradbury as a party. We may here say, however, as the question is incidentally raised as an element for consideration in making advances, that it is too well settled to require citation that a man's wife is a part of his family. *Clifford* v. *Stewart,* 95 Maine, 38; *Kehoe* v. *Ames,* 96 Maine, 155; *Stone* v. *McGain,* 102 Maine, 168; *Dodge* v. *Boston and Providence R. R.,* 154 Mass., 299. As Charles Bradbury's family at the time this will was executed consisted of only a wife, it is inconceivable that the testatrix should at that time have used the word "family," as she did in the clause providing for advances to Charles, without having immediately and directly contemplated his wife as a part of his family and at that time as all of his family. And we are unable to discover any legal distinction between a first wife and a second wife. And the provision of clause three has certainly made none, as it might easily have done if one had been intended.

Limited to the single inquiry, what, then, is the power of the trustees under the language of this paragraph with regard to their right to make advances of "more or less of the principal?" It seems to us that to define the power we have but to repeat the phraseology of the will: "If all of said trustees shall at any time be satisfied that it will be for the best interest of him the said Charles and his family for the trustees to advance more or less of the principal to him, and they shall upon examination so find and certify they may then make such advance as they shall deem for the best."

It is the opinion of the court that the trustees have power to do just what this language naturally imports. They are authorized by observing the requirements to examine, find and certify, to advance to Charles Bradbury such part or even all of the principal "as they shall deem for the best." The safeguard in the mind of the testatrix in conferring this unlimited power is undoubtedly to be found in the requirement that the action of the trustees shall be unanimous. But whatever the reason, the bestowal of the power is made plain. Interference with the exercise of this power, will be employed on the part of the court only when there is made to appear an abuse of discretion by proof "of the fullest and clearest character." *Morton* v. *Smithgate,* 28 Maine, 41.

Having confined our interpretation of the will to the single provision of clause three, regarding the discretionary power of the trustees to make advances of the principal, it becomes unnecessary to examine the many questions involving the constructions of wills generally, raised in the able and ingenious argument of counsel for Mrs. Wilson, upon the question of construction.

Another question is raised, however, which it may be proper to examine. Does the discretionary power given to the trustees, originally named in this will, as to advancements of principal to Charles Bradbury, vest in their successors? *Chase* v. *Davis,* 65 Maine, 102, construing R. S., chapter 70, section 17, holds that it will so vest in the absence of any provision showing a different intention. We are unable to discover anything in the provisions of the will or its language which we think was calculated to limit the discretionary power of the trustees to the personnel of the board named in the will. Had it been the intention of the testatrix to cut

off any advancements to her son Charles, upon the refusal or declination of Henry to act, or his death, which might have occurred at the threshold of the trust, we cannot avoid the conclusion, that she would have given expression to that intention in some more conclusive way, than leaving it to the uncertainty of an inference from the general language of the will. A few words would have made definite her intention in this regard.

It is the opinion of the court, that a justifiable inference cannot be deduced from the language of the will, showing an intention to confer upon the original board of trustees any powers, not calculated to be vested in their successors, under the general rule laid down in *Chase* v. *Davis,* supra.

Reverting, now, to the demurrer, we find the first objection directed to the want of proper parties; this objection is valid and, although not raised in the demurrer, answer or at the hearing, the court is bound to take notice of it. *Beale* v. *Cobb,* 51 Maine, 348. There can be but little doubt that Mrs. Wilson's children, though minors, should be made parties and represented by a guardian ad litem. While Mrs. Wilson represented the identical interest which they may, in the future have, she did not represent them. The interest of Mrs. Wilson is a contingent remainder which will not become vested except upon two contingencies, (1) The death of Charles without children; (2) The survival of Charles. *Hunt* v. *Hall,* 37 Maine, 363; *Spear* v. *Fogg,* 87 Maine, 132; *Hopkins* v. *Kezar,* 89 Maine, 347. The interest of the children is also a contingent remainder, which will not become vested except upon the happening of three contingencies. (1) The death of their mother: (2) the death of Charles without children; (3) the survival of both.

In a bill for the construction of a will one contingent remainderman without a vested interest cannot represent a subsequent remainderman or tenant in tail. 15 Ency. Pl. & Pr., 650; Story Eq. Pl. & Pr. Paragraph 145-147. *Cannon* v. *Beny,* 59 Miss., 305. Mrs. Wilson is not a vested remainderman.

This rule is based upon reason as well as authority. If the subsequent contingent remainderman were not made parties and were bound by the judgment, in a suit represented by the first remainderman, they might loose their rights, through want of proper defense, or even by a collusive judgment intended to defeat their interests.

The children must be made parties. But in view of the fact that the only issue on the merits is clearly raised and fully decided, we do not think that necessity or justice requires a dismissal of the bill.

The case may, therefore, be remanded to the sitting Justice where the children of Mrs. Wilson may be made parties by guardian ad litem on motion by the plaintiffs. *Haughton* v. *Davis,* 23 Maine, 28; *Hussey* v. *Dole,* 24 Maine, 20; *Miller* v. *Whittier,* 33 Maine, 521; Anson et als.. ptrs., 85 Maine, 79.

As the question of parties was not raised by the demurrer or the answer, nor at the hearing, the amendment may be made on such terms as justice and equity require. *Hussey* v. *Dole,* supra.

As the case has been fully heard upon its merits, and the interest of the children of Mrs. Wilson, which is identical with hers, has been fully considered, when the proper parties are before the court, the sitting Justice may enter a decree in accordance with this opinion. *Haughton* v. *Davis,* 32 Maine, 23. If a motion for amendment is not offered, the bill to be dismissed.

So ordered.

FLORA E. LEIGHTON *vs.* FANNIE P. NASH, Exrx.

Cumberland. Opinion April 28, 1914.

Assumpsit. Contract. Gratuitous Services. Implied Contract. Legal Obligation.. Services. Will.

1. To recover upon an implied promise to pay for services, it must appear that the services were rendered by the plaintiff, either in pursuance of a mutual understanding between the parties that the services were to be paid for, or in the expectation and belief on the part of the plaintiff that payment was to be made, and that the circumstances of the case and the conduct of the defendant justified such expectation and belief.
2. The evidence does not warrant the inference that the plaintiff expected pay for the services rendered to her mother, nor that the defendant understood or ought to have understood that she so expected.

On motion by defendant for a new trial. Motion sustained. Verdict set aside.

This is an action of assumpsit upon an account annexed to the writ, brought by Flora E. Leighton against Fannie P. Nash, as the executrix of the last will and testament of William H. Pearson, late of Skowhegan, in the County of Somerset, to recover the sum of six hundred and ninety dollars and seventy-five cents, for services in caring for and nursing Mr. and Mrs. Pearson when sick. general housework and various other kinds of labor, between 1904 and 1910. The defendant pleaded the general issue. The jury returned a verdict for the plaintiff for $725.71, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Foster & Foster, William Lyons, and John B. Thomes, for plaintiff.

Merrill & Merrill, for defendant.

SITTING: SAVAGE, C. J., SPEAR, KING, HALEY, HANSON, PHILBROOK, JJ. SPEAR, J., did not concur.

SAVAGE, C. J. The plaintiff brings this action against the estate of her stepfather, William H. Pearson, to recover for services rendered and cash paid in his lifetime, and alleged to have been at his request. There are some small items for services rendered to Mr. Pearson personally both before and after the death of Mrs. Pearson, the plaintiff's mother. But the main item, and the one to which attention must be particularly directed, is for "work and labor caring for Mr. Pearson and wife, and for labor performed at Mr. Pearson's request in general work and general care and nursing Mr. and Mrs. Pearson when they were sick, and also in taking care of their hired girl, Hannah Johnson, during her sickness, all at the request of Mr. Pearson, from October 10, 1904 to October 10, 1910, $600.00."

It appears that more than twenty years ago Mr. Pearson built a two tenement house. And from the time it was built until the death of Mrs. Pearson in 1910, Mr. and Mrs. Pearson occupied the downstairs tenement, and the plaintiff and her husband the upper one, the husband regularly paying rent each month.

It is not disputed that during the period covered by the item in question the plaintiff performed many valuable services in caring for and nursing her mother, and perhaps rendered some service to Mr. Pearson personally. The controversy, however, hinges chiefly on the service to the mother. And the question at issue is whether the service was gratuitous, or rendered under an implied contract. Express contract there was none.

In 1904, Mr. and Mrs. Pearson were each about seventy years of age. Mrs. Pearson was then feeble and continued to grow feebler, though she continued to labor more or less up to the time of her last illness, a few days before her death. But she had a "heart trouble" and a "nervous trouble" and perhaps other complications. She frequently had "sick spells," when care and nursing were necessary. At such times no outside nurse was employed, but when necessary the plaintiff came down from her tenement upstairs and cared for and nursed her mother, rubbed and bathed her, gave her medicine and food, and in every needful way ministered to her. At times when her services were needed, Mr. Pearson sometimes would call to her from the foot of the stairs, and sometimes would attract her attention by rapping on the connecting pipes. It also appears that there were times when the plaintiff brought down cooked food for Mr. and Mrs. Pearson, and performed some housewifely service about the house, like cleaning, sweeping, dusting, and cooking. This, we assume, was when her mother was temporarily incapcitated. The two families seem to have maintained the most amicable relations. It further appears that during her last illness, in the last week of her life, Mrs. Pearson, at two different times, asked her husband to "give," or "leave," the house where they lived to "Flora," the plaintiff, and that he replied "I will do what is right." One witness, after giving the statement in that form, was recalled later in the trial, and testified that at one of the times he replied, "I will do as you want me to." The case does not show that the plaintiff had any knowledge of these conversations, until after her mother's death. Three years before, Mr. Pearson had made a will in which he gave the plaintiff five hundred dollars in case she survived her mother. That will was in existence at the time of these conversations, and after his death was probated. The foregoing statement embraces all of the essential facts. The jury found for

the plaintiff, and the case comes up on the defendant's motion for a new trial.

There having been no express agreement to pay, it was incumbent on the plaintiff to prove that the services were rendered by the plaintiff either in pursuance of a mutual understanding between the parties that she was to receive payment, or in the expectation and belief that she was to receive payment and that the circumstances of the case and the conduct of the defendant justified such expectation and belief. *Saunders* v. *Saunders,* 90 Maine, 284. It is not enough to show that valuable service was rendered. It must be shown also that the plaintiff expected to receive compensation, and that the defendant's intestate so understood, by reason of a mutual understanding or otherwise, or that under the circumstances he ought so to have understood. Both propositions are essential and must be proved. This is the law of implied contracts. Whether the plaintiff expected compensation, and whether the defendant's intestate so understood, or ought so to have understood, are questions of fact, and must be determined in a case like this, where there is no testimony from either of the parties, by a consideration of the circumstances, of their relations to each other, of their conduct respectively, and of the probabilities.

We think the case is barren of evidence to warrant the inference that when the plaintiff rendered these loving and filial services to her mother she expected to be paid for it,—that she was doing the services for pay,—that she was thereby making Mr. Pearson her debtor. It may very well be believed that she hoped that her stepfather would recognize her service in some way, as by legacy, which indeed he did. But that she regarded him as her debtor is wholly improbable under the evidence. To say so would be mere guesswork. The probabilities are all the other way. And there is no evidence which warrants the inference that Mr. Pearson understood or ought to have understood that he was becoming indebted to the plaintiff every time he called the plaintiff down stairs to minister to her mother. Not once during the six years it is shown that there was any conversation between the parties indicating that either of them understood that the service was rendered on a commercial basis. The subject is not shown ever to have been referred to by either. And during all the time, the plaintiff's husband was

regularly paying rent for the tenement they occupied, month after month. If the plaintiff then expected to be paid for her services, it would seem likely that she would have attempted to have her claim used in diminution of rent, although the rent was for her husband to pay, and not for her, unless she wished to conceal her expectation from Mr. Pearson, and make claim for compensation only after his death, when he could no longer dispute it. Such an assumption would not be creditable to the plaintiff, nor helpful.

The plaintiff places much reliance upon the fact that when Mrs. Pearson asked her husband to give or leave the house to the plaintiff, he replied that he would do what was right, or that he would do as she wished, as one witness puts it. But this statement was not made to the plaintiff, nor in her presence. It does not appear to have come to her knowledge at the time, and no service was rendered in reliance upon it. And we may add that such a statement made to a dying wife cannot fairly be regarded as an acknowledgement of a legal obligation to the plaintiff. So to hold would do violence to human experience. It may be that he recognized a moral obligation, and it may be regarded as quite certain that he did not wish to disappoint the expectations of his aged and beloved wife, so soon to breathe her last. Weighed in the light of these circumstances, this evidence lends no probability to the plaintiff's contention.

As to the other items in the plaintiff's writ, it is only necessary to say that we think they fall within the principles already stated. The evidence entirely fails to show that the services were rendered in expectation of payment. They appear to have been gratuitous.

It is quite manifest that the jury mistook the principles of law laid down for their guidance. They failed to distinguish, it may be, between moral obligation and legal obligation. There is no evidence to sustain their inference that Mr. Pearson became the plaintiff's debtor. The verdict is unmistakably wrong.

Motion sustained.
Verdict set aside.

FRANK P. SPOSEDO, in Equity, *vs.* CHARLES F. MERRIMAN et als.

Cumberland. Opinion April 29, 1914.

Appeal. Decree. Equitable Mortgage. Equity. Foreclosure. Improvements. Redemption. Rents and Profits.

1. It is the well established rule in this State that the decision of a single Justice upon matters of fact in an equity case should not be reversed, unless the appellate court is clearly convinced of its incorrectness, the burden being on the appealing party to prove the error.
2. There is good reason for the rule in our practice, as cases are now heard before a single Justice, mostly upon oral evidence, and when the testimony is conflicting, the Judge has an opportunity to form an opinion of the credibility of witnesses, not afforded the full court.
3. A failure to maintain all the allegations of the bill does not preclude the plaintiff from equitable relief if those sustained are sufficient to entitle him to a decree.
4. Since the statutes were enacted allowing much freedom as to amendments, it has been the general rule that no variance between the allegations and proof is to be deemed material, unless it is such as must have reasonably misled the adverse party to his prejudice in maintaining his action or defense.
5. A mortgagee is not to be allowed for permanent improvements in the way of new structures not necessary for the preservation of the estate, or to make the premises tenantable, and made without the consent of the mortgagor.

On appeal from final decree below. Decree below affirmed with additional costs.

This is a bill in equity, brought under the provisions of Revised Statutes, chapter 92, section 15, to redeem certain real estate, situated at junction of Portland and Oxford Streets in Portland, Maine, from certain conveyances claimed by the plaintiff to be equitable mortgages, and which he has a right to redeem. The cause was heard by a single Justice of this court, who sustained the bill against Percival P. Baxter, George E. MacGowan and Charles F. Merriman and dismissed the bill as to James P. Baxter. A final

decree was made and entered and the defendants, Percival P. Baxter, George E. MacGowan and Charles F. Merriman appealed from said decree to the Law Court.

The following facts appear to have been undisputed.

On the first day of March, 1911, the plaintiff was the owner of the premises subject to the following incumberances: (1) a mortgage for $5000 dated October 6, 1905, to the Portland Savings Bank; (2) a mortgage for $1000 dated October 6, 1905, to Edward K. Chapman, and (3) a mortgage for $1080 dated June 29, 1908, to said Chapman. Foreclosure proceedings of the $1080 mortgage had been instituted and the equity of redemption therefrom would expire March 4, 1911. On said March 1, 1911, the plaintiff to protect his interest in the property against said foreclosure entered into an arrangement whereby he conveyed the premises by quitclaim to Charles H. Allen and Clara M. Libby and they gave back to him a bond to reconvey the property to him at any time within one year upon payment to them of $3550 with interest thereon and all other sums that they might expend for taxes, etc., as therein provided for. From the $3550 the two Chapman mortgages were to be taken care of and some other obligations paid which the plaintiff was then owing. The Chapman mortgages were assigned to Allen and Libby. On June 5, 1911, the plaintiff assigned and transferred the bond for the reconveyance of the property given to him on March 1, 1911, by Mr. Allen and Mrs. Libby, to the same Mr. Allen. The instrument of transfer is absolute in form reciting as the consideration "one dollar and other valuable considerations." The plaintiff claimed that the consideration for the assignment was an agreement on Allen's part to pay certain bills against the property including interest and insurance amounting in all to $427.67, and Mr. Allen's answer to the question, "Tell just what consideration you gave for that assignment," was "That it shouldn't exceed $500." August 16, 1911, Percival P. Baxter procured an assignment of the $5000 mortgage from the Portland Savings Bank to himself, and on the same day he assigned it to George MacGowan, his clerk, and he holds it for him. October 10, 1911, MacGowan began foreclosure proceedings under that mortgage. October 5, 1911, Percival P. Baxter purchased from Mr. Allen and Mrs. Libby their interest in the propery and took a quitclaim deed from them to Merle R. Grif-

feth of Providence, Rhode Island, and on the same day the said Charles H. Allen assigned to said Griffeth all his right, title and interest in the bond for a deed given March 1, 1911, to the plaintiff by him and Mrs. Libby, and which the plaintiff had assigned to him on June 5, 1911. Subsequently, December 13, 1911, Merle R. Griffeth by quitclaim deed conveyed all his right, title and interest in the property to Charles F. Merriman, a clerk for Mr. Baxter, and he holds it for him.

The plaintiff claimed that the assignment and transfer from him to Charles H. Allen made June 5, 1911, of the bond for a deed that Mr. Allen and Mrs. Libby had given him on March 1, 1911 was given as security only for the advances that Allen was then to make amounting to less than $500, and that when Mr. Baxter on October 5, 1911, took the quitclaim deed from Mr. Allen and Mrs. Libby to Griffeth of their interest in the property, and also the transfer from Mr. Allen of his assignment of the bond for a deed, he knew that the plaintiff claimed that the transfer he had made to Charles H. Allen of his bond for a deed was given as security only, and that he had a right of redemption in the property.

On the other hand, it was claimed on the part of the defendants that the assignment and transfer of June 5, 1911 was unconditional and represented what was in fact an absolute sale to Mr. Allen by the plaintiff of all his interest in the property; and, further, that Mr. Baxter purchased the property without any notice or knowledge express or implied that the plaintiff claimed any right or interest therein.

The justice who heard the cause filed a full statement of the facts as found by him to have been proved, and thereupon ruled as follows (corrections of evident clerical errors bracketed):

"On the foregoing facts, which are fully proved, I rule:

"That the plaintiff made a sufficient demand upon said MacGowan and Percival P. Baxter for a true account of the sum due on the mortgage dated August [October] 6, 1905, to the Portland Savings Bank, and assigned by said bank to said Percival P. Baxter August 16, 1911, and on the same day assigned by said Baxter to said MacGowan, and of the rents and profits and money expended in repairs and improvements, if any, and that they unreasonably refused or

neglected to render such account in writing, as required by statute, and that the plaintiff is entitled to redeem the premises described in his bill from said mortgage.

"That, the agreement between the plaintiff, Charles H. Allen and Clara May Libby, and the deed and bond dated May 11, [March 1,] 1911, constituted an equitable mortgage, and that said Allen and Libby were bound by their said agreement and bond to pay the two mortgages of Edward K. Chapman dated October 6, 1905, [and June 29, 1908,] respectively, and that said Allen and Libby having taken an assignment of said mortgages instead of paying them as they had agreed to do, and the amount due upon said mortgages having been made a part of the $3550 mentioned in said bond that the plaintiff was to pay said Allen and Libby to redeem said premises, that equity will consider done what ought to have been done, and as the parties agreed that said Allen and Libby should pay said Chapman mortgages, and that the money they paid said Allen and Libby, for which they took an assignment of said mortgages, paid said mortgages.

"That by the agreement between the plaintiff, Charles H. Allen and Clara May Libby, the deed and bond dated March 11, [March 1,] 1911, constituted an equitable mortgage, and that the plaintiff had a right to redeem from the mortgage by payment of the amount advanced by said Allen and Libby, according to the terms of said agreement.

"That by the agreement of June 5, 1911, and the assignment of the bond of Allen and Libby to said Allen by the plaintiff constituted an equitable mortgage between said Allen and the plaintiff, and that the plaintiff was entitled to redeem from said equitable mortgage.

"That when said Percival P. Baxter purchased said premises by quitclaim deed from said Allen and Libby and took an assignment of said bond from said Allen in the name of Merle R. Griffeth, in addition to the notice of the plaintiff's interest in the property given him by the plaintiff before that date, he had notice of the plaintiff's claim by the language of the deed and the language of the assignment of the bond; that the language used in said deed and assignment would lead an ordinarily prudent man, using ordinary care, to make further inquiries; that the circumstances of the case, if the

plaintiff had not notified him of his claim prior thereto, required an investigation upon the part of Mr. Baxter, and that there was no sufficient investigation on his part to justify him in claiming that he had no notice or reason to believe that the plaintiff had an interest in the property as to simply inquire of the person who was selling to him and who insisted upon inserting in the deed and assignment a clause that the purchaser should take care of the plaintiff's claim was not due diligence; that, under the circumstances, he should have inquired of the plaintiff; that he did not use ordinary caution and diligence, and that the notice in said deed and assignment was sufficient to notify Mr. Baxter and Mr. Griffeth that the plaintiff had an interest in said property, and that Mr. Griffeth and Mr. Merriman, to whom Griffeth conveyed to hold for Mr. Baxter, and Mr. Baxter all knew that Libby and Allen held the property as security, that they became equitable mortgagees and that the plaintiff is entitled to redeem said property from the equitable mortgage held by Mr. Merriman for the benefit of Mr. Baxter, which was conveyed to him by said Allen and Libby.

"That Mr. Baxter knew, and ought to have known had he exercised ordinary prudence, that he was only a mortgagee of the premises, and that he had no right to add to the burden of redeeming the property the cost of remodeling and rebuilding the building, as he did at an expense of some $13,000; that the buildings were remodeled and rebuilt with the expectation upon the part of Mr. Baxter that the plaintiff would not be able to redeem the premises from the foreclosure proceedings started by Mr. MacGowan upon the original Portland Savings Bank mortgage; that it was neither necessary for the preservation of the property, or done with the consent of the mortgagor, or to make the premises tenantable, and that he should not be allowed for the permanent improvements in the way of new structures not necessary for the preservation of the property made without the consent of the plaintiff. He is only entitled to be allowed for all improvements and repairs made by him that were necessary for the preservation of the estate, or to make the premises tenantable.

"That the bill be sustained, with cost, against Percival P. Baxter, George MacGowan and Charles P. Merriman, and discontinued as to James P. Baxter.

"That the case be sent to a master, to ascertain the sums due on the mortgages above specified and of the rents and profits received, or that would, by the exercise of ordinary care, have been received from the premises as they were when the possession was taken by said MacGowan for said Baxter, and for the money expended in repairs and improvements, if any.

"Decree according to the above."

Thereafter the following decree dated August 18, 1913, was signed and filed.

FINAL DECREE.

This cause came on to be heard June 25th, 26th and 27th, A. D. 1913, upon bill, answers, replications and proofs, and was heard and was argued by counsel; and thereupon, upon consideration thereof, It is *ordered, adjudged* and *decreed* as follows:

1. That the bill be sustained with cost against Percival P. Baxter, George E. MacGowan and Charles F. Merriman, and the bill is dismissed as to the defendant James P. Baxter.

2. That the plaintiff has the right to redeem the premises described in said bill from the mortgage dated October 6, 1905, from the plaintiff to the Portland Savings Bank, to secure a loan of $5000, recorded in Cumberland County Registry of Deeds, volume 750, page 212, and assigned August 16, 1911, by said Portland Savings Bank to Percival P. Baxter, by assignment recorded in Cumberland County Registry of Deeds, volume 859, page 453; and on the same date assigned by said Percival P. Baxter to George E. MacGowan by assignment recorded in Cumberland County Registry of Deeds, volume 859, page 454, the legal title to which mortgage is now held by said MacGowan for the use and benefit of said Percival P. Baxter.

3. That the quitclaim deed, dated March 1, 1911, given by the plaintiff to Charles H. Allen and Clara May Libby of all the plaintiff's interest in the premises described in the bill in this case, recorder in Cumberland County Registry of Deeds, volume 873, page 1, and the bond dated March 1, 1911, executed by said Allen and Libby to the plaintiff in the penal sum of $7000, recorded in Cumberland County Registry of Deeds, volume 878, page 38, are together adjudged and decreed to constitute an equitable mortgage, and the plaintiff has a right to redeem from said mortgage the

premises described in the bill, which was conveyed by said Allen and Libby October 5, 1911, to Merle R. Griffeth by deed recorded in Cumberland County Registry of Deeds, volume 884, page 8, and that said Merle R. Griffeth conveyed December 13, 1911, to Charles F. Merriman by deed recorded in the Cumberland County Registry of Deeds, volume 884, page 179, said Merriman holding the legal title for the use and benefit of said Percival P. Baxter.

4. That the assignment of the bond for $7000 given to the plaintiff by said Charles H. Allen and Clara May Libby, dated March 1, 1911, said assignment being recorded in Cumberland County Registry of Deeds, volume 878, page 39, constituted an equitable mortgage, and the plaintiff has a right to redeem the premises described in his bill from said equitable mortgage, the legal title of which is now held by Charles F. Merriman for the use and benefit of Percival P. Baxter, who is the equitable owner thereof.

5. That the said Griffeth in purchasing said property from said Allen and Libby acted as agent for said Percival P. Baxter; as also did said Merriman when he purchased from said Griffeth; and that the said MacGowan acquired said Savings Bank mortgage described in paragraph 1 of the plaintiff's bill at the request of said Percival P. Baxter.

6. That the said Percival P. Baxter, George E. MacGowan and Charles F. Merriman render an account as mortgagees in possession of the sums due the respondents on each of the mortgages above specified, and of the rents and profits received or that would, by the exercise of ordinary care, have been received from the premises described in the bill, as they were and from the time when possession thereof was taken by said MacGowan for said Baxter, and the money expended in repairs and improvements, if any; and of other expenditures properly made in accordance with the provisions of said bond.

7. That the case be referred to a master in Chancery, to take an account and make computations and ascertain the sum due to each of said defendants on said mortgages, to wit, the mortgage given by Frank P. Sposedo to the Portland Savings Bank, dated October 6, 1905, and assigned by said Portland Savings Bank to

Percival P. Baxter, and assigned by said Percival P. Baxter to George E. MacGowan; also the quitclaim deed given by Frank P. Sposedo to Charles H. Allen and Clara May Libby, dated March 1, 1911, and the $7000 bond from said Allen and Libby to said Sposedo, dated March 1, 1911, which together are adjudged to be an equitable mortgage, and deeded by quitclaim deed by said Allen and Libby to Merle R. Griffeth, and by said Merle R. Griffeth conveyed to Charles F. Merriman; also the assignment of the $7000 bond given by Charles H. Allen and Clara May Libby to Frank P. Sposedo and assigned by said Sposedo to said Charles H. Allen, and by said Allen assigned to said Merle R. Griffeth, and by said Merle R. Griffeth assigned to said Charles F. Merriman, which has been adjudged to be an equitable mortgage.

8. That the master take an account and make computations and ascertain the amount of the rents and profits received, or that would, by the exercise of ordinary care, have been received from the premises as they were and from the time when the possession was taken by said MacGowan for said Baxter, and of the money expended in repairs and improvements, if any. Said master in computing the amount due is to allow the defendants for all improvements and repairs made by them that were necessary for the preservation of the estate or to make the premises tenantable or that were made with the consent of the mortgagor, but the cost of remodeling and rebuilding the building, and the cost of making new structures on the premises are not to be allowed to the defendants except as above. In computing the amount due, the master is not to charge the defendants with any excess in the rents and profits received solely by reason of such improvements as the plaintiff is not required to pay for in redeeming the property. The master is also to allow such other expenditures as were properly made in accordance with the provisions of said bond.

9. It is further decreed that the defendants from the income of said premises shall keep the premises insured in a reasonable sum in such reliable insurance company or companies as they elect for the benefit of the plaintiff and defendants as their interests shall appear; also make such repairs as are necessary for the preservation of the estate or to make the premises tenantable; also pay the

water rates and taxes, and deduct the cost of said premiums, repairs, water rates and taxes from the income of the premises while in possession of the defendants.

10. It is further decreed that the plaintiff shall pay to the defendants the amount found by said master to be due to them, such payment to be made within sixty days from the date of the acceptance of the master's report, and the defendants shall thereupon surrender possession of said premises to the plaintiff, and the said Percival P. Baxter, George E. MacGowan and Charles F. Merriman shall execute and deliver a deed of release to the plaintiff of the premises described in said bill and referred to in the mortgage to the Portland Savings Bank and in the aforesaid equitable mortgages.

11. The bill is retained for any further orders that may be necessary as to an accounting between the parties.

Dennis A. Meaher, for plaintiff.

George M. Seiders, and Verrill, Hale & Booth, for defendants.

SITTING: SAVAGE, C. J., SPEAR, KING, HANSON, PHILBROOK, JJ.

KING, J. The well established rule in this State is that the decision of a single Justice upon matters of fact in an equity case should not be reversed unless the appellate court is clearly convinced of its incorrectness, the burden being on the appealing party to prove the error. *Young* v. *Witham,* 75 Maine, 536; *Paul* v. *Frye,* 80 Maine, 26; *Sidelinger* v. *Bliss,* 95 Maine, 316; *Herlihy* v. *Coney,* 99 Maine, 469; *Railroad Co.* v. *Dubay,* 109 Maine, 29. In *Young* v. *Witham,* supra, Peters, C. J., well said: "There is good reason for the rule in our practice. Cases are now heard befort a single Judge mostly upon oral evidence. When the testimony is conflicting, the Judge has an opportunity to form an opinion of the credibility of witnesses, not afforded the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record."

There were two issues of fact of essential importance in the case: First, whether the assignment, made June 5, 1911, by the plaintiff to

Charles H. Allen, of the bond for a deed, was made as security for a loan, or made as an absolute unconditional transfer of all the plaintiff's right in the property; and, second, whether Percival P. Baxter had notice prior to October 5, 1911, that the plaintiff claimed that the assignment of June 5, 1911, was given for security only. On both of those issues the oral evidence was very conflicting.

The plaintiff testified that the transfer of his bond for a deed to Mr. Allen was made in pursuance of an oral agreement between them whereby Allen was to furnish not exceeding $500 to pay certain specified bills, and he was to transfer the bond to him as security only for that loan or advancement. His testimony recites in detail the agreement, as he claims it was made. The incumbrances against the property at that time amounted to a little less than $9000, and the plaintiff claimed that it was worth $20,000, and that he had refused offers of $16,000 for it. Wesley M. Snow, testified that in the spring of 1911 he offered the plaintiff $16,000 for the property which he refused, and Fred M. Miller testified that he offered the plaintiff $16,000 for it during 1911.

On the other hand Mr. Allen testified that the assignment of the bond to him was not made for security but as an unconditional transfer of all the plaintiff's rights and interests in the property. And he claimed, and there was other testimony in behalf of the defendants tending to show, that the property at the time was much out of repair and that $9000 was a fair valuation of it.

As to the other issue, that of notice to Mr. Baxter, the oral evidence was also much in conflict. The plaintiff claimed that after he learned that Mr. Baxter had obtained an assignment of the $5000 mortgage he went to him and explained his interest in the property, and that he had a right to redeem it. On the other hand Mr. Baxter testified that the plaintiff had no such conversation with him at any time, and none whatever until after he had purchased the property from Allen and Libby. That after that time the plaintiff came to his office and asked if he had bought the property, and being told that he had, asked if he could get it back again, and that he told him he had bought it out-right in good faith and did not care to sell it to anybody. There was much other evidence introduced tending to support the contentions of the one side and the other on the issues of fact involved. But it will serve no useful purpose to

attempt here any detailed analysis of all the evidence, which we have carefully examined together with the exhaustive briefs of counsel.

The question now before this court on this branch of the case is not determined by a weighing and balancing of the conflicting evidence, as disclosed in the record, and ascertaining on which side it appears to preponderate. The court must be clearly convinced that the findings of fact by the single Justice are manifestly wrong, otherwise they must stand.

After full consideration of all the evidence, and applying the rule above stated, the court is not clearly convinced that the decision of the single Justice on the contested issues of fact in the case was wrong. He saw and heard the witnesses and had a better opportunity to judge of the weight of the conflicting testimony than this court now has.

1. The learned counsel for the defendants has argued several objections to the decree, some of which depend upon a state of facts which he contends was established by the evidence, but those objections necessarily appear to be unsustainable when examined in the light of the facts as found by the single Justice, and for that reason they need not be here particularly considered. Such is the objection that the assignment of June 5, 1911, cannot be declared to be an equitable mortgage "because the grantee, Charles H. Allen, had no intent that this conveyance be one for security only." The findings of fact however expressly show the contrary as to Mr. Allen's intention. Such also is the objection that the plaintiff has no right to redeem from the defendants because they are "bona fide purchasers" of the property. But as to that fact, too, the finding is otherwise.

2. The objection that the plaintiff is barred by his own laches from seeking to have the assignment of June 5, 1911, declared one for security only does not, we think, have sufficient support in the evidence. Moreover, the facts found are to the effect that prior to the purchase by Mr. Baxter from Allen and Libby of their interest in the property, including Allen's interest under the assignment of June 5, 1911, Mr. Baxter was notified of the plaintiff's claim that the assignment was given for security only, and was subject to redemption.

3. It is argued that there is a variance between the ground of relief set forth in the bill and that claimed by the plaintiff in his proofs. The variance claimed centers about the transfer of June 5th, 1911, and it relates to the allegations and proofs concerning the alleged oral agreement in pursuance of which that transfer is claimed by the plaintiff to have been made, and to the purpose, effect and validity of the transfer. The allegations of paragraph 4 of the bill are as follows:

"On or about the first day of June, 1911, an oral agreement was entered into between the plaintiff and said Allen whereby the plaintiff agreed to convey to Allen by way of security his interest in the premises, and said Allen agreed to advance to the plaintiff in cash such sum as should be needed, not exceeding a maximum amount of $500.00, to be used by the plaintiff to satisfy the claim of one H. F. Farnham Co., against the plaintiff, and to pay the claims of such other creditors as would agree to accept ten per cent of the face of their claims against the plaintiff in full settlement thereof; and said Allen further agreed that he would reconvey to the plaintiff the interest of the plaintiff so to be conveyed to him as aforesaid, at any time prior to March 1, 1912, when the plaintiff should repay to him the amount advanced as aforesaid. Said Allen agreed that the plaintiff should remain in possession of said premises and collect and retain the rents and profits therefrom."

In paragraph 6 it is alleged in substance that Mr. Allen did not give the plaintiff any writing expressing the terms of his oral agreement to reconvey the bond to the plaintiff; "nor did said Allen either on said June fifth, or at any time before or since, pay the plaintiff any consideration whatever in return for the instrument in writing executed by the plaintiff as aforesaid on June 5th." It is also alleged in paragraph 6 that the plaintiff was physically and mentally unable to understand the nature of his acts in signing the instrument, and to protect himself in respect to his own rights under the oral agreement previously entered into between himself and Allen. And it is also alleged that after June 5th the plaintiff obtained the assent of several of his creditors to accept ten per cent of their claims against him, and that when Mr. Allen was informed of that he repudiated and denied his agreement.

The plaintiff's proof was that the assignment of June 5th, 1911, was made as security, and that was found to be the fact by the single

Justice. But as to the bills that were to be paid by the money that Allen was to furnish, the plaintiff's proof differed materially from the allegations of the bill. He testified that the money so to be furnished was to pay interest to the bank of $75, an insurance bill which had been reduced by discount to $87.67, the bill of H. F. Farnham Co. of $87.50, and interest due Allen and Libby of $177.50, the whole amounting to $427.67; and he denied all the allegations of the bill as to a compromise of claims due his creditors on the basis of ten per cent, saying that he then had practically no other creditors, and that he did not understand why such allegations were made in the bill. There was evidence tending to show that the plaintiff was subject to frequent fits as the result of a previous serious injury, and that for a time after suffering a fit he was weak and somewhat incapacitated, but it was not shown that he had a fit on or about June 5th, 1911.

As to the allegation that Mr. Allen did not pay the plaintiff any consideration for the assignment of the bond, an explanation of it may be that it was an imperfect allegation of the fact, as testified to by the plaintiff, that Mr. Allen did not pay or furnish to the plaintiff personally any of the money that was to be furnished as the consideration for the assignment.

Variance, in its legal sense, means a substantial departure in the evidence adduced from the issue as made by the pleadings. It is a disagreement between the allegation and the proof in some matter which, in point of law, is essential to the claim relied upon for relief. *House* v. *Metcalf,* 27 Conn., 631. It is not indispensable to recovery that a party should make good his allegations to the letter. A failure to maintain all the allgegations of the bill does not preclude the plaintiff from equitable relief if those sustained are sufficient to entitle him to a decree. *O'Brien* v. *Murphy,* 189 Mass., 353, 357. Since the statutes were enacted allowing much freedom as to amendments it has been the general rule that no variance between the allegations and proof is to be deemed material unless it is such as must have reasonably misled the adverse party to his prejudice in maintaining his action or defense.

The important and essential allegation of the plaintiff's bill respecting the assignment to Allen of June 5, 1911, is that the trans-

fer was made "by way of security" for money to be furnished, not to exceed $500, to pay debts of the plaintiff. The proof adduced tended to sustain that allegation, and it was so found. If the allegations were not sufficient for the reception of that proof, the evidence could have been excluded, but we do not find that the question was raised in the court below. Such disparity as there appears to be between the allegations and the proof relating to the particular debts to pay which Allen was to furnish not exceeding $500 is not, we think, of vital importance. It relates to immaterial details rather than to the essential substance of the ground for relief relied upon and proved. Such disparity as there was bore upon the genuineness of the plaintiff's alleged claim, and upon his credibility as a witness, but the court is of opinion that it does not constitute such a material variance between the plaintiff's proof and the allegations of the bill respecting the essential claims relied upon for relief as can now avail the defendants in the appellate court.

4. It is further contended that the decree below is erroneous because it provided that the defendants are to be allowed only "for all improvements and repairs made by them that were necessary for the preservation of the estate or to make the premises tenantable or that were made with the consent of the mortgagor, but the cost of remodeling are rebuilding, and the cost of new structures on the premises are not to be allowed to the defendants except as above." It is not claimed that the provisions of the decree are not in conformity with the well settled rule that a mortgagee is not to be allowed for permanent improvements in the way of new structures not necessary for the preservation of the property and made without the consent of the mortgagor. *Bradley* v. *Merrill,* 88 Maine, 319.

It is urged, however, that Mr. Baxter purchased the property with a bona fide belief that he acquired the absolute title to it, and that the plaintiff's equity of redemption had become barred, and accordingly that an exception to the general rule as to compensation for permanent improvements should have been applied in this case. But the objection to the allowance of this contention is that the findings of fact do not sustain it. The decree is predicated on facts found that created a relation between the plaintiff and the defendants equivalent to the ordinary relation between mortgagor

and mortgagee. As applied to such a relation the provisions of the decree complained of are not erroneous.

5. Objection is also made that the decree provides that the defendants shall keep the premises insured for the benefit of the plaintiff and defendants as their interests may appear, make such repairs as are necessary for the preservation of the estate or to make the premises tenantable, and pay the water rates and taxes, and deduct the cost thereof from the income of the premises while in their possession. We do not think this objection should prevail.

Without doubt it is within the authority of the court, under the jurisdiction given it in equity by statute "for the redemption of estates mortgaged," in a proper proceeding to redeem, to make such decrees agreeably to equity and good conscience as may be deemed by it necessary to effect justice between the parties. And we think that under this bill to redeem, where the defendants were in possession and contested the plaintiff's right to redeem, and it was necessary to send the case to a master to ascertain the amount due the defendants, the court had authority over the income from the premises received pending the proceedings and could properly direct that it be used for the purposes specified in the decree. The provision will work justice rather than injustice between the parties.

6. Again, an objection is made because the decree provides that upon payment by the plaintiff to the defendants of the amount found due them, Baxter, MacGowan and Merriman shall execute and deliver to him a deed of release of the premises. The provision complained of was both proper and necessary, because the $5000 mortgage which was assigned to MacGowan has now been foreclosed, and the plaintiff gave a quitclaim deed of the premises to Allen and Libby who in turn conveyed, through Griffeth, to Merriman to hold for Baxter. Therefore such a deed of release as is provided for in the decree will be necessary to reconvey the record title to the plaintiff.

7. Lastly, it is contended that the decree should have provided that in case of failure on the part of the plaintiff to pay the sum found due the defendants within the time specified therefor in the decree, the bill shall be dismissed. It is the usual practice to provide, in the decree for redepmtion, for the dismissal of the bill in

case of failure of the plaintiff to pay within the time specified, and no doubt the omission in this case was inadvertent. The point urged in support of the contention is, that a decree dismissing the bill upon failure to pay within the time limited in the decree operates as a foreclosure of the mortgage, and that the defendants were entitled to such a provision for dismissal in this decree so that if the plaintiff fails to pay it will operate through the decree of dismissal as a foreclosure of the alleged mortgages.

In *Stevens* v. *Miner,* 110 Mass., 57, it was held, that no formal decree dismissing the bill is necessary to operate as a foreclosure of the mortgage, because that is the legal effect of the plaintiff's failure to pay within the time specified in the decree. This case is cited in *Pitman* v. *Thornton,* 66 Maine, 469, with the following quotation therefrom: "when a mortgagor obtains a decree of redemption his right is thereby defined, and no other or different right remains to him. It is the right of which he must avail himself, if he would redeem at all, and it is cut off when it expires by the terms of the decree." We do not think that the omission from the decree of an express provision for dismissal of the bill upon failure of the plaintiff to pay within the time limited in the decree is materially prejudicial to the defendants' rights. The decree fixes definitely the time within which the plaintiff must pay the amount found due by the master. If he does not so pay his right of redemption then expires, and becomes forever barred.

It is accordingly the opinion of the court that the decree below must be affirmed with additional costs, and it is,

So ordered.

HERBERT A. FOGG, in Equity, *vs.* LINWOOD C. TYLER.

Penobscot County. Opinion May 4, 1914.

Bill in Equity. Commissioners. Creditors. Decree. Equity. Findings. Insolvency. Interlocutory Proceedings. Partnership. Receivership.

This petitioner presented his claim to the receiver, but without fault on his part failed to present said claim before the commissioners appointed by the Probate Court.

Held:

1. The funds of the partnership and the individual funds of the persons composing that partnership, subject to the payment of individual debts, are all holden as assets for the payment of partnership liabilities.

2. The assets thus existing, whether in the custody and control of the partnership or in the custody and control of the individual, when needed for payment of partnership debts, constitute a joint fund and not separate funds.

3. The fact that our statute requires the individual assets of a member of the partnership under guardianship to be administered according to certain statutory requirements, does not change the joint nature of partnership assets when needed to pay partnership debts.

On report. Decree according to the opinion.

This is an interlocutory proceeding arising from the above entitled cause, in which C. J. Gilfillan is petitioner and plaintiff in interest. The cause is in equity and is reported to the Law Court for determination upon the petition and findings of facts and conclusions by the sitting Justice, asking that the receiver of the late copartnership of Tyler, Fogg & Company be directed to pay him, from the funds in his hands, thirteen hundred twenty-seven dollars and twenty-two cents, in order that he may receive the same percentage of his claim that other creditors of the copartnership have received.

The case is stated in the opinion.

E. C. Ryder, for petitioner.

C. H. Bartlett, pro se.

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

PHILBROOK, J. This is an interlocutory proceeding arising from the above entitled case in which C. J. Gilfillan is petitioner and is the plaintiff in interest. The proceedings are in equity and come to the Law Court on report for determination upon the petition and upon the findings of facts and conclusions by the sitting Justice.

The petition is as follows:

1. That the late copartnership of Tyler, Fogg & Co. consisted of the above named Linwood C. Tyler and Herbert A. Fogg, the said Herbert A. Fogg being a person of unsound mind whose estate is being settled in the Probate Court within and for said county, by Thomas R. Savage, his guardian.

2. That between April 11, 1907, and May 25, 1911, the petitioner made general deposits of money with the late copartnership of Tyler, Fogg & Co., and that on said 25th day of May, 1911, there was due the petitioner from said copartnership a balance of twenty-one hundred sixty-one dollars fifty-nine cents ($2161.59) as appears by the deposit book now in the possession of the petitioner and also by the books of said late copartnership, which amount is still due the petitioner.

3. That the petitioner filed proof of his claim against the firm of Tyler, Fogg & Co. with Charles H. Bartlett, receiver and the special master appointed by the court, and received a dividend of five per-cent of the amount of his claim from the funds in the hands of said receiver, but filed no proof of his claim with the commissioners appointed by the Probate Court to pass upon claims against the individual estate of Herbert A. Fogg, and, therefore, he has received no dividend from the estate of said Herbert A. Fogg.

4. That he employed Leon F. Higgins, of Brewer, in said county as his agent to look after his interest and do whatever was necessary to secure his claim against said copartnership or any individual thereof; that later he was notified that a committee had been selected by the unsecured creditors, represented by competent local attorneys, to look after their interest and do whatever was necessary to secure their claims; that he signed a contract to pay his proportional part of the expenses of such committee, and that he relied upon said

Higgins and said committee to protect his interest and do whatsoever was necessary to secure his claim.

5. That it was without fault or negligence on his part that he failed to prove his claim against the individual estate of Herbert A. Fogg, having no knowledge that there were funds belonging to the individual estate of Herbert A. Fogg, or that commissioners had been appointed to pass upon such claims.

6. That he has received no dividend on account of the individual estate of Herbert A. Fogg; that the only money he has so far received on account of his claim, either from the receiver of the late copartnership or from the guardian of Herbert A. Fogg, is a dividend of five per cent paid by the receiver of said late copartnership.

7. That all the assets belonging to the individual estate of Herbert A. Fogg have been distributed; that all other creditors of said late copartnership have received 66.4 per cent of their claims, while he has received but five per cent of his claim, and that the receiver of said late copartnership has in his possession funds not yet distributed.

Wherefore in as much as the omission to prove his claim with the commissioners appointed to pass upon the claims against the individual estate of Herbert A. Fogg was without fault or negligence on his part, and, in as much as sufficient funds remain in the hands of said receiver to pay the amount equitably due the petitioner, and the payment to him on 61.4 per cent of his claim will not work an injustice to other creditors, he respectfully petitions and prays that this court upon hearing will order and direct said Charles H. Bartlett, receiver as aforesaid, to pay to him the sum of 61.4 per cent of his claim, amounting to $1327.22.

After proper notice to all parties interested there was a hearing upon the petition before a single Justice who made the following findings:

1. The late copartnership of Tyler, Fogg & Co. consisting of Linwood C. Tyler and Herbert A. Fogg, is insolvent and its affairs are in the process of settlement by Charles H. Bartlett, Esq., receiver, appointed by this court.

2. Herbert A. Fogg has been adjudged of unsound mind and his estate has been settled in the Probate Court as an insolvent estate

by Thomas R. Savage, his guardian, under the provisions of chapter sixty-eight, Revised Statutes.

3. The copartnership of Tyler, Fogg & Co. at the time it was adjudicated insolvent, was indebted to the petitioner in the sum of twenty-one hundred sixty-one dollars fifty-nine cents ($2161.59).

4. The petitioner filed proof of his claim with the special master appointed by the court to receive and pass upon claims against the copartnership, who returned as due the petitioner, including interest, twenty-one hundred sixty-six dollars ninety-nine cents ($2166.99).

5. The petitioner filed no proof of his claim with the commissioners appointed by the Probate Court to pass upon claims against the insolvent estate of Herbert A. Fogg, but from evidence presented to me, I find that the omission of the petitioner to present his claim to the commissioners was without fault on his part and that he had a reasonable excuse for omitting to do so.

6. All creditors of the copartnership of Tyler, Fogg & Co., whose claims were seasonably proved, except the petitioner, have received or will receive sixty-six and four-tenths (66.4) per cent of their claims, sixty-one and four-tenths (61.4) per cent from the guardian of Herbert A. Fogg and five (5) per cent from the receiver, while the petitioner has received but five (5) per cent of his claim, paid by the receiver. He has received no dividend from the estate of Herbert A. Fogg.

7. All available assets of the estate of Herbert A. Fogg have been distributed. The claim of the petitioner is barred, not having been presented to the commissioners within the time allowed by statute.

8. All claims are of one class and all are against the copartnership. There are no claims against the individual members of the firm and there are not sufficient assets of the copartnership and of the individual members thereof to pay the claims in full.

9. There remains in the hands of the receiver undistributed sufficient assets to pay the petitioner the amount he would have received, had he filed his claim with the commissioners appointed to pass upon claims against the individual estate of Herbert A. Fogg, in excess of any future charges and expenditures of the receiver and such payment will not interfere with payments already made to

other creditors. And the receiver will then have assets to be distributed to the creditors when hereafter ordered by the court.

To condense the prayer of the petitioner and the findings of the Justice it may be said that the gist of the matter before us is this: The individual assets of Fogg having been administered by the Probate Court, and all paid out to creditors who presented their claims before the commissioners, appointed by that court, this petitioner having failed through no fault of his own to present his claim before those commissioners, shall we now order the receiver to pay to this petitioner the amount which he asks for out of funds in the hands of the receiver before making any further dividends to creditors?

Our attention has not been called to any case adjudicated in our courts or elsewhere which is on a parity with the one under consideration. No exact precedent is before us. We must, therefore, resort to fundamental principles and reason, as well as underlying principles of equity, in reaching our conclusion. It will be conceded without citation of the authorities that when a partnership is formed the property of the partnership, and, subject to individual debts, the property of the several partners, stands as an initial asset for the payment of all debts which the partnership may incur and that after acquired property of partnership or individual continues as such an asset. Ordinarily, therefore, the receiver of a partnership would be under the duty of taking into his custody all partnership assets and all assets of each individual partner which were not required to pay the individual debts of those partners respectively. Assets thus taken into custody would be reduced to cash and, under proper orders of the court, used to pay the expenses of receivership and liquidating claims of creditors against the partnership.

In the case at bar a seeming complication arises from the fact that one of the partners, Herbert A. Fogg, was an insane person under guardianship. R. S., chap. 68, sec. 23, provides that the insolvent estate of an insane person under guardianship is to be settled according to the general provisions of the statute for the settling of insolvent estates of deceased persons. Consequently commissioners were appointed by the Probate Court to hear claims against the estate of Herbert A. Fogg, but this petitioner, through

no fault on his part, failed to present his claim before those commissioners. Other creditors of the partnership did so present their claims and the aggregate of them being greater than the amount of the individual Fogg estate, that estate was applied pro rata to the payment of claims presented to the commissioners, and the individual estate of Fogg was thereby exhausted. At this point, it should be observed that the individual estate of Fogg never came into the actual custody of the receiver but was paid out by the guardian of Fogg under the decree of the Probate Court. It has been suggested that the partnership funds in the hands of the receiver and the funds of the estate of Herbert A. Fogg in the hands of his guardian constituted two separate and distinct funds. We cannot endorse this view because, as already stated, his personal estate, subject to payment of individual debts, and there were none in this case, formed part and parcel of an initial and continuing fund which all through the partnership stood as assets for the payment of partnership debts. It is true that under the peculiar circumstances arising in this case, and by virtue of the statute just referred to, it became necessary to have the individual estate of Fogg administered through statutory methods but such administration being a means of distribution did not make his personal estate a separate fund which up to that time was, in law, part and parcel of the partnership assets for the payment of partnership debts. It happened, therefore, that when other creditors presented their claims to the commissioners and this petitioner did not, that those other creditors obtained a larger proportion of partnership assets for the payment of their claims than this petitioner did. But partnership assets applicable to debts of the same class should be distributed equally among creditors of the same class. Still bearing in mind the unity of the partnership assets composed of partnership property and individual property, it follows by the rules of receivership, as well as by the rules of equity, that this petitioner should share with other creditors of the same class equally in all the assets applicable to the payment of debts in the class to which this petitioner's debt belonged. Such sharing can only be accomplished now by directing the receiver to pay to this petitioner the amount prayed for before making a further dividend among creditors of the same class to which the petitioner belongs. Thus we

shall preserve the idea of the unity of the different component parts which make up the assets of a copartnership and deal equitably and fairly with all creditors of the same class. So without violation of any principles of law or equity, but rather in harmony with all fundamental principles, we shall do substantial justice and equity by ordering the receiver, before making any further payments or dividends to creditors of the class to which this petitioner belongs, to pay to this petitioner the sum of $1327.22.

Decree accordingly.

STATE OF MAINE *vs.* EDMUND TARDIFF.

Penobscot. Opinion May 5, 1914.

Cars. Demurrers. Exceptions. Indictment. Locomotive Engine.

1. The undoubted purpose and object of the statute is not only to prevent annoyance and damage to the railroad itself, but to protect the traveling public against accident from any possible collision with a railroad car which might thus be moved or set in motion upon the track.
2. The broadest possible definition should be given to the words "railroad car," and it should include any and every vehicle constructed and calculated for operation over railroad tracks, since any vehicle capable of being so operated whether moved and running wild, or in the hands of an irresponsible person, may be the efficient cause of a serious railway accident.

On exceptions by defendant. Exceptions overruled.

This is an indictment against the respondent under section 6 of chapter 126 of the Revised Statutes for wilfully, mischievously and maliciously entering upon a railroad track of the Bangor and Aroostook Raliroad Company, a corporation then and there owning and operating a steam railroad in and through the State of Maine, and without consent of, or permission from said Bangor and Aroostook Railroad Company, and then and there wilfully, mischievously

and maliciously set in motion on the track of said Railroad Company, in the town of Glenburn, a railroad car, to wit, a railroad hand car, and propelled the same for a great distance along said track.

At the September term, 1913, of said court, the defendant was arraigned and pleaded that he was not guilty. The defendant filed a demurrer, which was overruled by the presiding Justice, from which ruling the defendant excepted.

The case is stated in the opinion.

Donald F. Snow, County Attorney, for the State.

George E. Thompson, for defendant.

SITTING: SAVAGE, C. J., SPEAR, KING, HANSON, PHILBROOK, JJ.

SPEAR, J. This case comes up on exceptions to the overruling of a demurrer to the following indictment: "The Grand Jurors for the state aforesaid, upon their oath present that Edmund Tardiff otherwise known as Edmond Tardiff of Brewer in the County of Penobscot on the twelfth day of August in the year of our Lord one thousand nine hundred and thirteen at Glenburn in the County of Penobscot, aforesaid, wilfully, mischievously and maliciously entered upon the railroad track of the Bangor and Aroostook Railroad Company, a corporation then and there owning and operating a steam railroad in and through the State of Maine, and without consent of or permission from said Bangor and Aroostook Railroad Company then and there wilfully, mischievously and maliciously set in motion on the track of said Railroad Company in said Glenburn a railroad car, to wit, a railroad hand car, and propelled the same for a great distance along said track, against the peace of said state, and contrary to the form of the statute in such case made and provided." The statute upon which this indictment was based reads as follows: "Whoever wilfully, mischievously or maliciously breaks and enters any railroad car on any railroad in the state, or destroys, injures, defiles or defaces any railroad car on any railroad in the state, or mischievously or maliciously releases the brakes upon, moves or sets in motion any railroad car on the track or side track of any railroad in the state, shall be punished by imprisonment

not exceeding two years, or by fine not exceeding five hundred dollars, and shall also be liable to the corporation injured in an action of trespass for the amount of injury so done, and for a further sum not exceeding in all three times such amount as the jury deems reasonable." The only question involved is, Does the term "railroad car," as used in the above section, include a "hand car?" Or, in other words, is a "railroad handcar" a "railroad car" within the meaning of the statute. We think it is. This statute embraces several offences each punishable by the same penalty. The offence for which the respondent was indicted is found in this clause: "Whoever wilfully, mischievously or maliciously . . . removes or sets in motion any rairload car on the track or side-track of any railroad in this state shall be punished," etc. The undoubted purpose and object of this statute was not only to prevent annoyance and damage to the railroad, itself, but to protect the traveling public against accident from any possible collision with a railroad car which might thus be moved or set in motion upon the track. It is not improbable that the dominant purpose of this clause was to protect travelers against accident and injury. If this interpretation of the purpose is correct, then the broadest possible definition should be given to the words "railroad car." It should include any and every vehicle constructed and calculated for operation over railroad tracks, since any vehicle capable of so being operated, whether moved and running wild, or in the hands of an irresponsible person, may be the efficient cause of a serious railway accident. The dictionary definitions are in harmony with this view. As applied to a railload, Webster defines "car," "a vehicle adapted to the rails of a railroad;" the Century Dictionary, "a vehicle running upon rails." We think the word "car" as used in the clause of the statute under consideration should be regarded as a generic term and intended to cover every kind of a vehicle adapted to the use of rails.

This construction of the statute is not only in harmony with the lexicon and sound reasoning, but, so far as we have been able to discover, universally sustained by the decisions of the courts. *State* v. *Nichols,* 68 Wis., 423, while not defining the term "hand car," yet holds that the word "car" imports a carriage running on the rails of a railway. *Crocker* v. *Kansas St. R. R.,* 95 Ala., 422, is a case in point. A statute provided that the master should be liable

for a personal injury "when such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, point, locomotive, engine, switch, car or train upon a railway." It was contended that this statute did not render the master liable for the negligence of the employee having charge of a hand car. But the court declined to sustain this view, saying: "It is not difficult to select from several definitions of the word "car" as found in the dictionaries, one which is applicable to the word as used in the statute. The Century dictionary gives this among other definitions: "A vehicle running upon rails." One of Webster's definitions is, "A vehicle adapted to the rails of a railroad." We find nothing in the language of the statute to suggest that the words there used were intended to convey a meaning which excludes the idea of a hand car or lever car. Such cars are used in the ordinary business of railroads." In *Thomas* v. *Georgia R. R. Co.,* the statute provided that railroad companies should be liable in any county in which any person or property had been injured by the running of its cars or engines. It was held that the word "car" thus used included hand cars. In *O'Hara* v. *East St. Louis Connecting R. R. Co.,* 150 Ill., 587, the courts say: "The term car in its proper significance includes many, if not all, classes of vehicles on wheels, and we see no reason why in its proper generic sense it may not be held to embrace locomotive engines as a species of cars." *Perez* v. *San Antonio and A. P. Ry. Co.,* Texas 67 S. W., 137, reviews some of the cases above cited and holds that in a statute using the words "cars," "locomotives" or "trains" the word "cars" signifies any vehicle adapted to the rails of a railroad, and would embrace in its meaning a hand car as well as a freight or passenger car."

It is the contention of the respondent that this statute must be interpreted as a whole and not by clauses, and that accordingly the phrase "railroad car" would have but one and the same meaning throughout every clause of the statute. And upon this premise concludes that, inasmuch as there is no such thing as breaking and entering a hand car, the words "railroad car" excludes the idea of hand car. This interpretation cannot prevail. As before stated, several distinct offences are described in this section of the statute,

each punishable by the same penalty. It is perfectly evident that the first clause was intended to apply to cars capable of being broken and entered. This clause would evidently apply to any passenger coach, mail car or enclosed freight car. It is equally evident that it would not apply to an open, flat car. But an open, flat car would as readily come within the mischief to be prevented by the clause of the statute under which the defendant was indicted, as would a passenger coach. The interpretation claimed cannot, therefore, be applied.

Exceptions overruled.

WILBUR F. LAKIN AND GEORGE F. GOULD, in Equity,

vs.

THE CHARTERED COMPANY OF LOWER CALIFORNIA.

Cumberland. Opinion May 5, 1914.

Amendment. Bonds. Creditors' Bill. Demurrer. Exceptions. Injunction. Jurisdiction. Revised Statutes, Chapter 79, Section 6, Par. 9. Stock.

1. In equity proceedings, the court has ample power to allow proper amendments at any time, but it has also as ample power to refuse them at any time. The whole matter of amendments is within the discretion of the court. This discretionary power is not open to exceptions.

2. The jurisdiction of the court must be decided upon the allegations found in the original bill.

3. The creditor's right to relief in such case depends upon the fact of his having exhausted his legal remedies, without being able to obtain satisfaction, and the only evidence of this is the actual return of an execution unsatisfied.

4. The creditor must obtain judgment, issue an execution and procure a return of nulla bona before he can file a bill in equity to obtain satisfaction out of the property of the debtor which cannot be reached at law.

5. A court of equity will not assume jurisdiction merely because the property, being beyond the territorial jurisdiction, a court of law cannot entertain an action in respect of it.

On exceptions by plaintiff. Exceptions overruled.

This is a creditor's bill in equity in which the plaintiffs seek to reach and apply, in payment of debts, brought under the provisions of Revised Statutes, chapter 79, section 6, paragraph 9. On May 16, 1912, plaintiffs filed a motion to amend the bill and the sitting Justice denied the same. October 22, 1912, the plaintiffs filed a motion to amend the amendment, and upon hearing, the motion was denied. The defendant demurred to the bill and the sitting Justice sustained the demurrer and dismissed the bill with costs. To these rulings, the plaintiffs excepted and their exceptions were duly allowed.

The case is stated in the opinion.

George F. Gould, Francis Hurtubis, Jr., Whipple, Sears & Ogden, and Edwin C. Gilman, for plaintiffs.

John W. McAnarny, and Verrill, Hale & Booth, for defendant.

John F. A. Merrill, for Reed, pet'r.

SITTING: SAVAGE, C. J., SPEAR, KING, HANSON, PHILBROOK, JJ.

SPEAR, J. This case comes up on exceptions to the ruling of the sitting Justice sustaining a demurrer to the plaintiffs' bill, and denying an amendment offered by them. The plaintiffs claim that "this is a creditors' bill, to reach and apply, in payment of debts, property of the defendant," brought under the last part of paragraph 9, section 6, R. S., chapter 79, which reads: "The Supreme Judicial Court has equity jurisdiction in suits . . . by creditors to reach and apply in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, or debtors, which cannot be come at to be attached on writ, or taken on execution in a suit at law." The defendant, in its brief, also concedes that the proceeding "appears to be purely a creditors' bill in which the plain-

tiffs rely on one or both of two grounds, namely, either on the ground that they have no plain, adequate and complete remedy at law and are, therefore, entitled to relief in equity, or on the ground that the case comes within the provisions of Revised Statutes, chapter 79, section 6, clause IX." The bill alleges the defendant company to be a Maine corporation and having its principal place of business at Portland, Maine; the purpose for which it was organized; and in pursuit of that purpose the acquisition of a large tract of land in the territory of Lower California in the Republic of Mexico; that Lakin, one of the complainants, was the owner of a large block of bonds of the defendant company of the par value of one million dollars, and of shares of its capital stock to the value of $7,700,000; that he loaned his stock and bonds to the defendant to be used by it as collateral security for raising money; that the bonds and stock were used as collateral to secure the payment of notes of the company for $200,000; that it was agreed, if the stock and bonds were used as collateral, the defendant company would stand indebted, and would repay the complainant the amount of collateral applied to the payment of the loan, and return the balance; that the value of the collateral used should be taken at is par value and notes immediately issued therefor by the defendant to the plaintiff; that all the bonds and shares of stock so loaned were used in payment of the loan of $200,000; that the defendant stands indebted to the complainant for the par value of all the bonds and all the shares of capital stock loaned; that the plaintiff demanded of defendant promissory notes for the amount due him in accordance with their mutual agreement; that the defendant has declined and refused to issue the notes; that Lakin is a creditor of defendant corporation. George F. Gould, the other complainant, alleges that the defendant company owes him $1,516.90 for services and that he is a creditor of the defendant company.

It is then further alleged that the defendant corporation has no property of any name, kind or description "in this state which can be come at to be attached on a writ, or taken upon execution in a suit at law, and not exempt from attachment or seizure; but is the owner of the real estate described in paragraph 2 and that this real estate ought to be taken and applied in equity to satisfy

the complainants several claims. This is the same real estate above referred to as situated in Lower California. The bill applies for a subpoena; for a restraining order pending these proceedings enjoining the defendants from alienating the property; and that a receiver may be appointed to sell or otherwise dispose of the whole or enough of the property, as the court may direct, for the payment of the plaintiffs' claim. Upon the prayer for temporary injunction the court issued a restraining order, and set the case for hearing on the prayer for injunction, on the 13th day of April, 1912. No hearing seems to have been held upon the question of injunction, the matter having been continued from time to time until superseded by a hearing upon the demurrer and motion to amend. It appears by the docket entry that a motion to amend the bill was filed June 4, 1912. The amendment consisted of a new paragraph alleging material facts as the basis for a decree for injunction, but was not verified by oath. This amendment was granted July 25th. July 31st a demurrer was filed. On July 2nd, 1913, upon hearing the demurrer was sustained. October 6th a draft of final decree was filed. October 22nd a motion was filed to amend the amendment, already allowed as paragraph 8. This amendment amended paragraph 8 by inserting new material matter, and then repeating the whole paragraph as amended. This paragraph, as amended, was verified by the oath of George F. Gould, for himself and for the plaintiff, Wilbur F. Lakin. A hearing was had upon this motion to amend and the amendment denied by the sitting Justice. The demurrer was sustained and the bill dismissed with costs. It is apparent that section 8, the amendment allowed, is not well pleaded since it contains allegations of material fact and is not sworn to. *Farnsworth* v. *Whiting,* 104 Maine, 488. It becomes important, therefore, to determine whether the last amendment, which contained new material matter for injunction and was verified by oath, should have been allowed. We are of the opinion that this question is not now open. The granting or denying the amendment was within the discretion of the sitting Justice. R. S., chapter 79, section 12 touching the question of amendment provides: "The bill of complaint, etc., may be amended or reformed at the discretion of the court." In *Shaw* v. *Slate Company,* 96 Maine, the power of

the court over amendments is thus stated: "In equity proceedings the court has ample power to allow proper amendments at any time, but it has also as ample power to refuse them at any time. The whole matter of amendments is within the discretion of the court." The refusal of the amendment on the part of the sitting Justice was an exercise of discretionary power. But the exercise of discretionary power is not open to exception. This rule is too well established to require citation. It, therefore, follows, the last amendment having been denied, that section 8, the amendment allowed, having introduced new material matter, as the basis for injunction without verification, adds nothing to the allegations in the original bill by way of bringing the case within the equity jurisdiction of the court.

The jurisdiction of the court must, therefore, be decided upon the allegations found in the original bill. This brings us back to the original inquiry, has the court jurisdiction (1) by reason of its general equity powers; (2) by reason of authority conferred by the paragraph of the statute already cited. Under the first inquiry, it may be said, that equity is not a primary process for the collection of debts. Yet, the original bill clearly recites a proceeding for that purpose. But in order to do this, under general equity powers, it is necessary to observe certain essential preliminaries, precedent to bringing the bill. These preliminaries are wanting in the bill before us, as will appear by a reference to *Baxter* v. *Morse,* 77 Maine, 465, involving "a creditors bill to collect certain debts" as stated by the court. The opinion says: "The first objection urged by the respondents against the bill is a want of jurisdiction in the court to act because the bill contains no allegation that an execution was taken out upon a judgment and nulla bona returned thereon. This defense must prevail for the reason stated by Shepley, J., in *Webster* v. *Clark,* 25 Maine, 313, who says: "The courts of equity are not tribunals for the collection of debts." It is further said: "The creditor's right to relief in each case depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction. The best and the only evidence of this is the atcual return of an execution unsatisfied. The creditor must obtain judgment, issue an execution and procure a return of nulla bona, before

he can file a bill in equity to obtain satisfaction out of the property of the debtor which cannot be reached at law." In *Pride in Equity* v. *Pride Lumber Company,* 109 Maine, 452, it is said that it is not the province of equity to collect debts. It is unnecessary to cite further authorities to show that this case does not fall within the general equity powers of the court. We are not sure the plaintiffs contend that it does; but this question is discussed by defendants and we thus briefly allude to it.

The plaintiffs do assert, however, that the case falls within the equity powers of the court under the last part of paragraph 9, section 6, R. S., chapter 79, above cited. They do not pretend to bring their bill under the very last clause of this paragraph which provides that a bill may be maintained to reach "any property or interest conveyed in fraud of creditors," but seek to reach property "which cannot be come at to be attached on writ, or taken on execution in a suit at law." It is undoubtedly well established, that if a creditor brings himself within the perview of this statute, he can maintain a bill in equity, without having first reduced his claim to a judgment and alleging the issue of an execution and a return of nulla bona. *Brown* v. *Kimball,* 84 Maine, 495; *Annis* v. *Butterfield,* 99 Maine, 189; *Sneiders* v. *Smith,* 185 Mass., 62; *Donnell* v. *Railroad Company,* 73 Maine, 567. In the last case, referring to the statute now under consideration, the court say: "The intent of the statute, therefore, is to enable a single creditor alone, without first fruitlessly exhausting all legal remedies or reducing his claim to judgment, by this one proceeding in the nature of an equitable trustee process, to establish the validity and amount of his claim against his debtor and compel the appropriation of the debtors property, of whatever kind, provided it be not exempt or within the reach of legal process, in the hands of some third person, to the payment of his debt."

The demurrer admits all allegations well pleaded. The test question accordingly is, does the bill contain proper allegations to bring the case within the equity jurisdiction of this statute? We think not. It is apparent without further analysis that the bill contians no allegation that brings the case within the statute, except that the property sought to be reached is situated in a foreign country, beyond the jurisdiction of the court. It nowhere alleges that this

property cannot be attached and appropriated in a suit at law instituted in the jurisdiction in which it is situated. But the fact that the land sought to be reached is located in a foreign jurisdiction is not sufficient. It is incumbent upon the plaintiff to allege the same jurisdictional facts to give equity jurisdiction, in a proceeding involving a decree affecting the control or appropriation of land in a foreign country or another state, as would be required if the land was situated within the jurisdiction of the court. In *Proctor* v. *Proctor,* L. R. A., Book 69, 673, note, page 675, the principle is stated in this way: "It follows that a court of equity of one state or country will not assume jurisdiction of a suit that in its essence involves merely the title or possession of land in another, and presents no ground of equitable intervention. In other words, if the action is one which, if it related to real property within the territorial jurisdiction, would be at law, and not in equity, a court of equity will not assume jurisdiction merely because, the property being beyond the territorial jurisdiction, a court of law cannot entertain an action in respect of it." There could be no question were the real estate of this corporation situated in the State of Maine that the plaintiffs could reach it in an action at law. The allegations in the plaintiffs' bill clearly show, that they have have a claim against the defendant, upon which they have a clear remedy at law, and right of attachment upon any of its real estate, were it located within the State of Maine. While the bill is silent upon the right of the defendant to bring an action at law in the Republic of Mexico and make an attachment of real estate there situate, yet in the absence of a negation in the bill of such right, we think the presumption is that such remedy exists. In other words, if the plaintiffs seek in their bill to take advantage of the absence of such remedy, it is incumbent upon them to allege it. Accordingly, it is the opinion of the court that the plaintiffs' bill fails to contain the necessary allegations to give the court jurisdiction. This conclusion makes it unnecessary to discuss the other questions raised by the defendant. It is not our purpose, however, to determine or intimate that a bill, containing power allegations, cannot be sustained in personam, and a decree issued against the persons within its jurisdiction, relating to real estate without its jurisdiction.

Exceptions overruled.

ALPHEUS A. PENDLETON *vs.* O. W. POLAND.

Knox. Opinion May 5, 1914.

Conditional Sale. Lease. Replevin. Sale. Title.

No agreement that personal property, bargained and delivered to another shall remain the property of the seller till paid for, is valid, unless the same is in writing and signed by the person to be bound thereby.

On motion and exceptions by plaintiff. Motion and exceptions overruled.

This is an action of replevin in which the following goods and chattels were replevied, to wit: One No. 3 Keystone Non-Fraction Well Drilling Machine and equipment belonging thereto, of the value of six hundred dollars, belonging to the plaintiff, taken and detained by the defendant. The plaintiff, on May 21, 1907, leased to the defendant the above named well drilling machine by written lease. The defendant agreed to pay as rental one dollar for each foot drilled by the machine and to redeliver the machine to plaintiff within five days after being notified. At the same time, the plaintiff gave the defendant a written option to purchase said machine for the sum of nine hundred dollars. The defendant was to pay three hundred dollars in cash when the offer was accepted and the rental paid to that time to be credited on purchase price and the balance in monthly payments, with interest. December 4, 1909, the defendant made to plaintiff a proposition for purchasing said machine on similar terms, which the plaintiff declined, and replevied the machine. The defendant pleaded the general issue, and by way of brief statement claimed that the goods and chattels in the declaration mentioned at the time the same were replevied were the property of said defendant and not the property of the plaintiff. The jury returned a verdict for the defendant. The plaintiff excepted to certain rulings by the presiding Justice and filed a general motion for a new trial.

The case is stated in the opinion.

A. S. Littlefield, for plaintiff.

B. F. Maher, for defendant.

SITTING: SPEAR, KING, HALEY, HANSON, PHILBROOK, JJ.

SPEAR, J. This case comes to the Law Court upon motion and exceptions.

The facts show that on May 21, 1907, the plaintiff leased to the defendant a well drilling machine by written lease. The defendant agreed to pay as rental one dollar for each foot drilled by the machine, and to redeliver the machine to the plaintiff within five days after being notified to do so. At the same time the plaintiff gave to the defendant a written option to purchase the machine in the form of a letter, which offered to sell to the defendant the machine at any time while it was in his possession for the sum of nine hundred dollars, $300 in cash when the offer was accepted; the rentals paid to that time to be credited on the purchase price and the balance in monthly payments with interest; the machine to remain in the plaintiff until paid for.

On December 4th, 1909, the defendant made to the plaintiff a proposition for purchasing the machine on similar terms but with a variation in the conditions, and in that providing, "you will still own the machine till it is paid for." The plaintiff declined this proposition, and replevied the machine in November, 1910, on the strength of the original lease, that the title remained in him. On the other hand, the defendant claims that in February, 1910, the plaintiff made him a new and distinct oral offer to sell the machine, which he accepted; that this offer was without condition; that pursuant to it the defendant paid the plaintiff on the 30th day of May, 1910, $300.00, and thereby became the absolute owner of the machine with a very small balance due the plaintiff.

The plaintiff denies the sale of the machine of February 10 and the payment of $300.00 on May 30, as claimed by the defendant, and asserts that the original contract of sale controls the title of the machine, and by that contract the title remained in him until it was paid for. The plaintiff does not contend that any agreement in writing to this effect, was signed by the defendant. Accordingly,

upon the contention of the plaintiff, that the title of the machine remained in him, by virtue of the letter in which he said the title was to remain in him until paid for, the court ruled as follows: "Now the interpretation of a writing, a letter, the legal consequences that flow from the words in the letter, are matters of law for the court to determine. And although Mr. Pendleton in his letter, in his first proposition, which he said was the one that was finally accepted, in a way, that is, accepted if the money was paid in February, 1910,—I say, that although in that letter he stated that the machine was to be his until fully paid for, that last provision was not lawful—was not in force.. We have a statute in this state which provides that no agreement that personal property, bargained and delivered to another, shall remain the property of the seller till paid for is valid unless the same is in writing, and signed by the person to be bound thereby. This letter is signed by Mr. Pendleton. In order to make that a valid agreement, it would be necessary to have that agreement signed by the defendant, who would be the party to be bound by that agreement. So that any of the talk in either of the propositions with regard to that particular feature, that the machine was to remain the property of Mr. Pendleton until paid for is not effective in this case, the second one, the proposition of the defendant, because it was rejected, the first one because it was not signed by the defendant. So you will have no occasion to consider that as a part of the case."

While the exceptions are not necessarily involved in the decision of the case, it is nevertheless the opinion of the court that the ruling of the presiding Justice was correct. The clause in the letter, claimed as evidence of title in the plaintiff, was eliminated by R. S., chapter 113, section 5, as stated by the court.

But we think the verdict of the jury upon the facts determines the rights of these parties. From a careful reading of the evidence, we are unable to say that the jury erred in arriving at the conclusion, that in February, 1910, the plaintiff and defendant made a new oral agreement, which was consummated by the payment of $300.00 on May 10th following, and succeeded all previous contracts for the sale and purchase of this machine. While the evidence which is relied upon to establish this transaction is capable of an analysis, in the light of all the facts and circumstances, that

will reasonably support the contention of either side, we yet do not feel authorized to say that the verdict, if the jury believed the testimony of the defendant, comes within the rule which requires it to be disturbed. Nor do we think that the verdict was so inherently wrong, or inconsistent with the probabilities and circumstances, as to require condemnation at our hands. It was purely a question of fact for the consideration of the jury, and their determination must stand.

Motion and exceptions overruled.

INHABITANTS OF MARION *vs.* FREDERICK TUELL.

Washington. Opinion May 5, 1914.

Bridge. Damages. Dynamite. Exceptions. Explosives. Highway. Navigation. Negligence. Private Nuisance. Public Nuisance.

1. That upon the assumption that the bridge was a nuisance, it was the undoubted right of the defendant to do whatever was reasonable and necessary to remove so much of the structure as deprived him of the lawful use of the stream for driving his logs. This rule is founded, not only upon authority, but necessity.

2. The law does not require a resort to the courts for abatement of such a nuisance, for it would be entirely inefficient and futile.

3. In a broad sense, a common nuisance is an unlawful condition, and a municipality has no right to establish such a condition than an individual.

4. The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action.

5. When a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing.

6. But in doing this, it was incumbent upon the plaintiff to do as little damage as was consistent with the accomplishment of his purpose.

On exceptions by the defendant. Exceptions sustained.

This is an action on the case for the recovery of damages alleged to have been sustained by the plaintiffs by reason of injury to a public bridge, being part of the highway known as Bridgham's Corner road and crossing Cathance Stream in the plaintiff town. Said injury is alleged to have been caused by the wrongful act of the defendant by placing a stick of dynamite under the abutment at the easterly end of said bridge and exploding said dynamite, thereby tearing said abutment apart and causing the damage complained of. The stream was a floatable highway and has been used by the public from time immemorial for the purpose of floating logs and timber to the mills. At the time of the alleged wrongful act, the defendant was engaged in the performance of his contract to drive a large amount of logs from Cathance lake down said stream to the pond of Dennysville Lumber Company at Dennysville.

The defendant pleaded the general issue and the jury returned a verdict for the plaintiff for $92.75. The defendant excepted to various rulings of the presiding Justice in his charge to the jury.

The case is stated in the opinion.

Ashley St. Clair, and J. H. Gray, for plaintiffs.

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

SITTING: SAVAGE, C. J., SPEAR, KING, PHILBROOK, JJ.

SPEAR, J. This is an action on the case in which the plaintiff town seeks to recover damages of the defendant for wilfully, negligently and wrongfully damaging a bridge, by using dynamite or other explosives in such close proximity to the abutment of the bridge as to tear it apart and damage it, thereby rendering the superstructure unsafe and dangerous for public travel, so that they were obliged to close the bridge and repair it at a large expense. At the trial of the case it was admitted that the bridge was a part of the highway crossing Cathance stream in Marion. By the exceptions it appears that the stream was "a floatable highway, and has been used by the public from time immemorial for the purpose of floating logs and timber from the forests to the mills; that the defendant at the time of the alleged wrongful act was engaged with his crew in the performance of his contract to drive approximately 1,100,000

feet of logs from Cathance lake in and down said stream to the mill pond of Dennysville Lumber Company of Dennysville." The exceptions further show that the explosive was never used unless absolutely necessary, and that in getting the logs by the abutments, the defendant and his servants were in the constant exercise of due care; that if he or they caused any injury to the bridge or abutments by the use of dynamite, or otherwise, such injury was wholly unintentional. The defendant also denies that any damage to the structure was caused by the explosion, claiming that if any injury was occasioned to the bridge by the passage of his logs, it was done by the impacts of the logs against the abutments, and by the logs frequently being driven by the force of the current into the openings, and in the process of disengaging the logs when so interposed.

The declaration does not allege nor is it anywhere contended that the defendant, in the use which he made of dynamite, had any intention of disturbing any part of the bridge, simply because it was a public nuisance. The exceptions show that "there was no evidence that defendant, his servants or agents, placed or exploded any dynamite or other explosive substance under the abutment; nor was there any evidence that the defendant, his servants or agents, did any act with the direct purpose or intention of injuring the bridge or abutments."

The case comes up on motion and exceptions, but the motion is withdrawn. It seems to have been conceded, if this bridge was an obstruction to public navigation so that it impeded the passage of the defendants logs, it was a public nuisance. The court in its treatment of the case seems to have assumed that the bridge was a public nuisance, and to have based his rulings upon the theory, that the plaintiff, in the use of dynamite to extricate his logs from the bridge, was undertaking to abate a public nuisance; and acted upon the assumption, if it was a public nuisance, and the defendant's logs were impeded in their progress by it, that the defendant, although in the exercise of due care in the process of removing his logs, would be responsible for any injury to the abutment, in so doing. That this was the theory of the ruling will appear from the following testimony and colloquy: John A. Robinson, called by defendant, was asked on direct examination: Q. When a log was under water what did you do? A. If the log was under water we

cut it with dynamite. Q. Why didn't you shut the gates down above and let the water run out, so it would be on the surface? A. No river driver does that. Q. Why didn't you do it? The court: It don't make any difference why he didn't do it. We are not trying out the right of Mr. Tuell to drive logs there because he had a right to. He has got a suit against the town for being obstructed in doing it. That don't have anything to do with this case. Whether they did this or didn't do that don't have anything to do with it." Mr. E. C. Donworth: If the court please, our contention is that if this man Tuell used reasonable care, and used dynamite when it was reasonably necessary and the bridge was injured thereby, we are not chargeable. The court: I shall rule that if he blew this bridge up, or an abutment to it, by the use of dynamite and thereby destroyed it, he is liable in this action. A man cannot abate a public nuisance by saying that he exercised reasonable care. He may abate a private nuisance and may not be liable in damages, but a public nuisance must be abated by officers chosen by the public to do it. If you leave it for every man to determine whether he may abate a public nuisance, we shall be blowing up all the bridges in the State. The law says Mr. Tuell had no right to blow the bridge up, if he did. Mr. E. C. Donworth: He is chargeable in damages if he did it accidentally? The court: Yes, I shall so instruct the jury. And the court did so instruct them, saying: (1) If it was a public nuisance neither the defendant nor his servant or agent had any right to abate it, or remove it or destroy it; (2) If you should find it was an obstruction to public navigation so that it impeded the passage of the defendant's logs, it was a public nuisance, and neither he nor his servants had any right to remove or destroy it." The court proceeded to say: "Now, you will determine first, gentlemen, whether the defendant or his servant or agent did explode this dynamite there, as it is claimed. If they did, I instruct you that they are liable for it, and the defendant must make the town whole for the damage he caused in blowing up or damaging the abutment there, if he did it either by himself or his servant or agent." These rulings are erroneous. As already noted, they proceed upon the ground that the bridge was a public nuisance, and because it was a public nuisance the defendant had

no right to do it any injury, although it was necessary, in order to enable him to extricate the logs that had been driven into the openings of the abutment, and remove those that had jammed against it, so that perhaps the whole drive should not be held up.

We do not understand this to be the law. Upon the assumption that the bridge was a nuisance, which the jury might have found if the question had been open to them, it was the undoubted right of the defendant to do whatever was reasonable and necessary, to remove so much of the structure as deprived him of the lawful use of the stream for driving his logs. This rule is founded not only upon authority but necessity. In the case at bar the defendant was driving down this floatable river, a legal highway for the passage of all lawful traffic, more than a million feet of logs, worth from ten to twenty thousand dollars. It is common knowledge that the driving pitch of water at best is short, and at times very limited. It is equally well known, if a drive of logs is stalled and has to lie over for a season, there is a great depreciation of value. Accordingly, unless the defendant was permitted to interfere with this nuisance in his path, to the necessary extent of making a passage-way, his whole drive might have been held up on the river for a year. Resort to the courts for the abatement of such a nuisance would be entirely inefficient and futile. And the law does not require it.

The plaintiffs, however, contend that the bridge having been located by municipal authority is a legal structure, and, if a common nuisance, cannot be abated by a private individual, and cites *State* v. *Leighton,* 83 Maine, 419, as authority for this doctrine. The brief interprets the opinion in this language: "A lawful structure, though a public nuisance, cannot be removed, or the public nuisance abated by one whose individual rights are affected thereby." This statement is inconsistent with itself. A lawful structure is not a common nuisance. In other words, a common nuisance is not lawful. Nor does this case hold or intimate that the bridge destroyed by the defendant was a common nuisance. The decision is based solely upon the ground that the bridge was authorized to be built over tide waters, not under the general powers of municipal officers to lay out highways, but by an act of the Legislature giving specific

authority to build over this specfic water. The word "nuisance" is not to be found in the opinion. True, a bridge built by municipal authority is not of itself a common nuisance. In the case at bar the offending thing is not the bridge itself, but the manner of the placing and construction of it. The town had a right to build this bridge under authority of the general statute. But a bridge built by such authority over a navigable or floatable stream, in such a manner as to unreasonably interfere with navigation or the use of a stream for floatable purposes is, per se, a common nuisance. *Windfall Mfg. Co.* v. *Patterson,* 148 Ind., 414, 62 Am. S. R., 532. In a broad sense a common nuisance is an unlawful condition. A municipality has no more right to establish such a condition than an individual. *Mootry* v *Danbury,* 45 Conn., 550, is a case which seems to be on all fours with the case at bar. It involved the erection of a bridge that flowed the water back upon the plaintiff. A general demurrer was filed to the declaration and argued upon the ground, that the duty of towns to keep their highways in repair was imperative under the statute. Upon this contention after alluding to the statute regarding the liability of towns for defects, the court say: "The liability of the defendants, however, if liable at all, must rest upon broader ground than that statute. The statute simply compels them to do by making them liable in damages if they fail to do. The principle of universal application—that every man shall transact his lawful business in such a manner as to do no unnecessary injury to another—compels them to do what they are required to do in a proper manner. In other words, towns will not be justified in doing an act lawful in itself in such manner as to create a nuisance any more than individuals and if a nuisance is thus created, whereby another suffers damages, towns like individuals are responsible. To the same effect is *Danbury R. R. Co.* v. *Norwalk,* 37 Conn., 109.

Upon this theory of the law that a town has no right to create a nuisance, the principle laid down in *Brown* v. *Perkins et al.,* 12 Gray, 89, must control this class of cases. Shaw, C. J., clearly states the rule as follows: "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also,

when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water course, if he has occasion to use it, he may remove it by way of abatement." This theory of the law was followed in *Mann* v. *Marston,* 12 Maine, 32, and in *Hamilton* v. *Goding,* 55 Maine, 419, in which the language of *Brown* v. *Perkins* is cited with approval. In *Corthell* v. *Holmes,* 87 Maine, 24, the court say: "When a public nuisance obstructs an individual's right, he may remove it to enable him to enjoy that right," and also cites *Brown* v. *Perkins.* In a case between the same parties in 88 Maine, 376, the court sustained this doctrine, citing many cases.

Upon authority as well as reason the defendant had a right to interfere with the bridge to the extent of removing so much of it as became a nuisance in the path of his logs in their course down the stream.

But in doing this it was incumbent upon the defendant to do as little damage as was consistent with the accomplishment of his purpose. Accordingly, the defense offered, tending to show due care on the part of the defendant, in extricating his logs from the abutment, was admissible, and the ruling excluding it, erroneous. It was the duty of the defendant, in pursuing the lawful right of passage through this bridge, to do only what was reasonable and necessary to attain his end. He was bound to act within the standard of due care. He could not wantonly and wilfully do damage that was unnecessary. The last paragraph of *Corthell* v. *Corthell,* 88 Maine, supra, confirms this view. It says: "The defendant's plea avers that he removed the incumbrances placed in the way by the plaintiff, with due care and without damage more than was necessary to secure the passage for himself and his teams, agents, and servants over the same." All this is admitted by the demurrer, and is a good defense.

Exceptions sustained.

STEWART W. PRICE *vs.* ALEXANDER MCEACHERN et al.

Kennebec. Opinion May 5, 1914.

Assumpsit. Check. Exceptions. Instructions. Motion. Ordinary Work. Per Diem. Settlement.

1. When the offer of money or check is made upon the condition that the other parties accept it in full payment of the claim in controversy, they are bound by the condition.
2. The party to whom the offer is made can accept or reject the offer upon his own volition, but cannot change its terms.
3. He cannot accept part of it and reject part of it. It is an entirety.
4. If he uses the money or check upon the terms prescribed by the debtor, it is an acceptance, precisely as it would be if he had used any commodity upon condition that if he kept it, he should pay a certain price for it.
5. The use of the money, or check, would be an implied acceptance of the condition of payment.
6. In order to make a payment in full by money or check in this way, there must be proof of a new contract upon which the check or money is offered and used, and the burden is upon the defendants to prove the new contract which they set up in defense.

On motion and exceptions by the defendant. Exceptions overruled. Motion sustained, unless within thirty days from the certifying of this case, the plaintiff file a remittitur of the verdict to $72.47 and interest from April 24 to September 10, 1912.

This is an action of assumpsit brought in the Superior Court for Kennebec County and tried in said court at the September Term thereof, 1912. In this case, the plaintiff sues to recover the sum of $111.00 for labor. The defendant excepted to certain portions of the Judge's charge to the jury, particularly notice in the opinion. The defendant pleaded the general issue.

A verdict was returned by the jury for the plaintiff for $105.39, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

F. W. Clair, for plaintiff.

Williamson, Burleigh & McLean, for defendant.

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

SPEAR, J. This is an action of assumpsit, tried in the Superior Court, in which the plaintiff seeks to recover of the defendants the balance alleged to be due him for labor performed for the defendants. The defendants are lumbermen and operated a camp in Bowdoin Township during the winter of 1911 and 1912. In the fall of 1911 the plaintiff, who had been in the defendants' employ about four years before, was hired by them with the understanding that he should do "ordinary work" until they came to use their log hauler, when he was to act on that as engineer. The plaintiff testified that there was no understanding as to what he should receive for the "ordinary work" but that it was agreed that he should receive the same wages which he had "received before" for working on the log hauler.

The defendants denied any such agreement and testified that no wages were set with the plaintiff at the time he entered their employ but that just before beginning work on the log hauler it was agreed that he should receive both for the "ordinary work" and his work as engineer the same wages that defendants were paying their other help for similar services. It is not in controversy that they were paying for "ordinary work" $30.00 per month and their engineers, $3.00 per day. The plaintiff makes no question regarding the amount he was to receive for ordinary work but claims that he was entitled under his agreement to $4.00 a day while employed as engineer upon the log hauler, the same per diem he had received before from these same defendants for similar work. That the plaintiff received $4.00 a day for his former employment upon the log hauler is sufficiently proven. Accordingly, the only controversy upon this feature of the agreement is whether it was understood that the plaintiff was to receive the same wages he had "received before" or the same wages the defendants were paying their other help for similar services. Nor is there any controversy that the defendants were paying their engineers on the log hauler $3.00 per day. Whether this agreement was as claimed by the plaintiff or as claimed by the defendants, was a pure question of fact, which the jury found in favor of the plaintiff. That is, the jury found

that the plaintiff was entitled to $4.00 a day. And we do not think it is so clearly wrong as to require us to disturb the verdict upon this issue.

But the defendants contend that, even though the plaintiff was entitled to $4.00 a day for his services on the log hauler, they paid him by check at the rate of $3.00, under such circumstances as to compel the legal conclusion, that the plaintiff received the check in full settlement for all that was due him; and upon refusal of the presiding Judge, at the close of the testimony, to order a verdict upon the theory of such a settlement, exceptions were taken and allowed. Exceptions were also taken to specific parts of the charge of the Judge upon this question, but we think the exception to the refusal to direct a verdict for defendant raises every legal question in issue. Under the verdict of the jury, in determining what took place at the time of the alleged settlement, we should give full credit to the testimony of the plaintiff. His testimony upon this point is found upon cross examination and is as follows: Q. Now, on what day did you settle with the defendants? A. I think the 27th day of March. Q. Were the defendants settling with all their help at that time? A. I think so. Most of it, anyhow. Q. Just how did they settle? What was the procedure they went through? A. Well, they paid them a check in there—they paid them off with a check. Q. How did they determine how much was due them? A. I didn't see them settle with no man. Q. How did they settle with you? A. They wrote me out a check; they said my bill was $106.00, and they wrote me a check. Q. Who wrote the check? A. I think the younger Mr. McEachern, Collin. Q. So, as a matter of fact, the clerk read off the time in your presence, didn't he? A. No. He told me it was 120 days. Q. Did he read off all your time at that time? A. That wasn't all of it. Q. Didn't the clerk at that time read off to you all your time as it appeared upon his books? A. I couldn't say. I didn't see his books. Q. What did you say to them, anything? A. I told him that he promised to pay me the same as he paid me before, $4.00 a day. Q. What did he say? A. He said he was to pay me the same as he paid the other man, or something to that effect. I didn't know what the other man got, so I didn't know what I was getting as he told it. Q. How much did he say he would pay you? A. $3.00 a day. Q.

And he gave you a check in full settlement at $3.00 a day? A. No, sir. Q. What did he do? A. He wrote a check and handed it to me before any talk was made. Q. Didn't he say it was in full settlement? A. No, sir, he didn't say it. Q. What did he say? A. I told him that was a mistake, that the pay was not right, that he was to pay me $4.00 a day, what he paid me before. He said no, he didn't say so, and the team was standing at the door, and to tell the truth I was crippled so that I could not walk. I had strained myself the Sunday before, and I could not have walked out, and it was a case of settle or walk, and I thought we were so far apart that we would not come together, and I started. Q. When did you say that, before or after he handed you the check. A. After. He didn't say what he would pay me. Q. Wasn't the check written out by the young Mr. McEachern pursuant to the time given him by the clerk? A. I think so. Q. You knew when you took the check that it was in full settlement according to their books, didn't you? A. No, I didn't know. It didn't look to be full settlement to me. Q. You knew that they gave it to you in full settlement? A. No, sir, I didn't. I thought they were trying to beat me out of a winter's work. Q. Did you tell them so? A. I told them so afterwards. I didn't make any conversation then. Q. You did not give the check back to them? A. No, sir, he didn't ask me. Q. You accepted it? A. I was to Moosehead Lake and had to have something to get home with.

Upon this testimony and, of course, the testimony of the defendants the Judge instructed the jury. "If you come to the conclusion under all this testimony that there was an understanding between both these parties, the plaintiff and the defendant, that the check was given in full settlement of all matters up to that time in full payment of his wages and was accepted by the plaintiff at that time in full settlement of all due him for his wages, that is the end of the case and you need not consider these other questions. On the other hand, if you come to the conclusion that the check was not accepted by the plaintiff as full settlement, if he called the attention of the defendants at that time to the fact that he was not receiving his compensation of $4.00 a day, as he expected it, and that he simply took that check as part payment, then there was no settlement, and you should go on to the other points of the case, as I have indi-

cated." The defendants say that this quotation is subject to exceptions in at least two particulars: "(1) It requires the defendants in order to prove a settlement to show something more than an acceptance of the check with full knowledge that it was given in full settlement; and (2) it permits the plaintiff to accept the check offered in full settlement and apply it on account, provided he called the defendants' attention to the fact that he took it as part payment." Under the first particular the defendants claim that "the inference is that words of assent were necessary;" under the second particular, that the court in substance says that, "calling the attention of the defendants . . . to the fact that he was not receiving his compensation of $4.00 a day, as he expected, and that he simply took the check as part payment," would amount to a non-acceptance of the check, notwithstanding the fact that the plaintiff took and kept the check with knowledge that it was offered in full settlement. In other words, defendants claim the rule of law to be (1), that money taken on condition though without words of assent is taken subject to the conditions; and (2), that a party accepting a check offered in full settlement is bound by the conditions although protesting that he does not accept it in full. In support of this contention, *Anderson* v. *Standard Granite Co.*, 92 Maine, 429, is cited. This opinion says: "The amount having been offered in full settlement, and having been accepted as such, impliedly at least, the plaintiff can not treat this sum as a payment pro tanto and recover the balance as due on the original claim."

As we understand this case, and the other cases cited by the defendants, they hold, where the offer of money or a check is made upon the condition that the other parties accept it in full payment of the claim in controversy, they are bound by the condition. This rule of law, when analyzed, involves a simple principle of contract. The debtor says, "I will give you this check or pay you this amount of money on condition you accept it in full payment of your claim." By this language, a contract entirely independent of the original controversy is offered to the creditor. He can accept or reject it upon his own volition, but he cannot change its terms. He cannot accept part of it and reject part of it. It is an entirety. If he uses the money or the check, upon the terms prescribed by the debtor, it is an acceptance, precisely as it would be if he had used a barrel

of flour, upon condition that if he kept it he should pay a certain price. The use of the flour would be an implied acceptance of the contract of sale, precisely as his use of the money or check would be an implied acceptance of the condition of payment. This is undoubtedly the law. From this brief analysis, it appears perfectly clear that to make a payment in full by money or check in this way there must be proof of a new contract upon which the check or money is offered and used. *Fuller* v. *Smith,* 107 Maine, 161, is a case in which a check was tendered to a creditor "in full satisfaction of his claim for damages for breach of a contract of employment, as well as the payment of the balance due him for wages and expenses;" and was claimed to have been "tendered under such circumstances or accompanied with such declarations that the plaintiff knew, or was bound to know therefrom, that it was tendered on such condition." The principle involved in this case is precisely the same as that involved in the case at bar; that is, the defendants claimed that they tendered a new contract by offering the check on condition, which the plaintiff accepted. Yet the court say: "The proof should be clear and convincing that the creditor did understand the condition on which the tender was made, or that the circumstances under which it was made were such that he was bound to understand it. If the debtor undertakes to state the condition on which he makes the tender, his statement should be explicit, and all uncertainty and doubt should be resolved against him." The cases cited by the defendants contain written proof that the check or money, if accepted, was in full payment. The contract of acceptance was made clear. But in the case at bar no such evidence appears. The testimony does not show that the defendants presented any new contract or prescribed any conditions, upon the offer of the check to the plaintiff. The only suggestion of this kind in the exceptions is found in the following question and answer by one of the defendants: Q. He accepted the check in full payment? A. Yes, sir. This, of course, is not proof of such acceptance as, what is the meaning of "acceptance in full payment" is the very question in issue. And the rest of the evidence of Collin W. McEarchern, in which he describes what took place, does not even intimate that he informed the plaintiff of any condi-

tion. Nor does the evidence of his clerk. The burden was on the defendants to prove the new contract, which they set up as a defense.

The cases cited, therefore, do not apply to the facts in the case at bar for two reasons. (1) The evidence above quoted, and upon which the jury had a right to rely, does not impose any condition of payment in full, upon acceptance. (2) There are no circumstances, attending the delivery of the check, from which could be inferred an implied acceptance on the part of the plaintiff; but testimony directly in contradiction of such inference. The evidence clearly shows that the plaintiff took this check under stress of circumstances. He was far in the woods; lame; unable to walk out; the team was waiting; his only visible way of getting out; he was through work and apparently without money; he wanted to get home. The testimony of the defendants corroborates these facts. When they passed him his check there was no time for controversy, and his explanation of why he took the check, is straight-forward and reasonable. He says: "I strained myself the Sunday before, and I could not have walked out, and it was a case of settle or walk, and I thought we were so far apart that we could not come together and I started." Under these circumstances, and upon this statement, neither an actual nor an implied acceptance of the check in full payment of plaintiff's claim can be justly or fairly inferred. But *Anderson* v. *Standard Granite Co.*, supra, requires proof of an offer and an acceptance, express or implied; the amount must be "offered in full settlement" and be "accepted as such, impliedly, at least." See also *Chapin* v. *Little Blue School,* 110 Maine, 415, in which a check was sent accompanied by a letter, saying: "Please find check . . . which it is hoped will be accepted by you as a just settlement of your son's account." The creditor wrote saying if he didn't hear from the debtor to the contrary he would assume he could use the check on account. To this he received no reply. But the court held that the use of the check did not operate as an accord and satisfaction and declared on page 421: "The evidence shows no agreement or intention on the part of the plaintiff to accept the check in full satisfaction. It shows no agreement or compromise and no accord and satisfaction." The receipt of a check purporting to be for the balance of an account, and the use

of it, in the absence of an agreement to accept in payment in full is not an accord and satisfaction. *Tompkins* v. *Hill,* 145 Mass., 379. Inasmuch, therefore, as the evidence does not show that the defendants imposed, upon offering this check, the condition that it should be received as payment in full, nor that there was an acceptance of it as such, the instruction cannot be regarded as erroneous in omitting to refer to an acceptance of a condition or contract, in proof of which no adequate evidence was offered.

The defendants also excepted to the following portion of the Judge's charge: "There is one other point which I think is raised by plaintiff's counsel in the case, and that is this; that even if you should find that there was an agreement and an understanding that a settlement was accomplished by these parties at the time, but yet that a mistake has been made concerning it as to the time, at $3.00 per day even; that this was not the amount due to him, and then that settlement would not cover that mistake. I give you that rule as plaintiff's counsel has argued it should be." It is evident from the testimony, and the verdict of the jury, that their finding was not influenced by this instruction. It was, therefore, harmless if erroneous.

Upon the motion, however, we are inclined to the defendants' contention as to the plaintiff's time upon the log hauler, and that the verdict should be cut down to $72.47 and interest from April 24, 1912 to September 10.

Exceptions overruled.

Motion sustained unless within 30 days from the certifying of this case the plaintiff file a remittitur of the verdict to $72.47 and interest from April 24 to September 10, 1912.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

ALFRED E. BRACKETT *vs.* ERNEST P. PIPER.

Waldo County. Decided November 19, 1913. This is an action to recover damages for an assault and battery made by the defendant upon the plaintiff. At the trial before a jury, a verdict was rendered in favor of the plaintiff in the sum of four hundred fifty dollars.

The defendant submits a motion for a new trial; but after a careful reading of the evidence, we cannot discover any reason why the verdict of the jury should be set aside. Motion overruled. *Dunton & Morse,* for plaintiff. *H. C. Buzzell,* for defendant.

JEANETTE HILTON *vs.* WASHINGTON D. HARRINGTON.

Kennebec County. Decided November 29, 1913. In this case, the jury returned a verdict for the plaintiff for eight hundred and forty dollars, for damages sustained by reason of a collision with defendant's automobile. Defendant filed motion for new trial. Motion sustained. New trial granted. *B. F. Maher and H. H. Murchie,* for plaintiff. *G. W. Heselton,* for defendant.

JETHRO D. PEASE *vs.* J. H. MONTGOMERY.

Knox County. Decided December 6, 1913. This is an action brought by the plaintiff to recover damages alleged to be sustained by a collision between the plaintiff's team and the defendant's automobile. Damages were claimed for injury to the team and personal injuries to the plaintiff. The jury returned a verdict for the plaintiff in the sum of four hundred seventy-five dollars.

The defendant presents a motion for a new trial on several grounds; but it seems to be necessary to consider only one of them, namely, that the defendant, although the owner of the automobile, was not in the possession, control and management of it, nor was the chauffeur acting as his servant, at the time of the accident. Motion sustained. New trial granted. *C. T. Smalley,* for plaintiff. *Montgomery & Emery,* for defendant.

EDDIE PARADIS

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin County. Decided December 10, 1913. This is an action of tort to recover damages for personal injuries sustained on account of the alleged negligence of the defendant on the 2d day of February, 1912, at or near Thompson's Crossing, so called, on the line of said road between Gardiner and Lewiston. The jury rendered a verdict for the plaintiff for $2185.84. The defendant filed a motion to set the verdict aside and for a new trial. Motion sustained. New trial granted. *McGillicuddy & Morey,* for plaintiff. *Newell & Skelton,* for defendant.

GEORGE W. HESELTON

vs.

JAMES E. CAMPION AND CHARLES W. JONES, Trustee.

Kennebec County. Decided December 12, 1913. The action is debt on judgment. The defendant is a non-resident, and the alleged trustee is a resident of Kennebec County and holds the office of Clerk of Courts.

The case was heard by the Judge of the Superior Court, who was asked by the defendant to make a finding that the action could not be maintained on the ground that the capacity in which the alleged trustee held the money was that of a public officer; and that, therefore, there was no legal attachment of goods and estate of the defendant in this State, and consequently no jurisdiction over the defendant, he being a non-resident. The Judge declined to so rule, but took jurisdiction of the cause, giving judgment for the plaintiff and charging the trustee. To such rulings and refusal to rule, the defendant took exceptions; and thus the matter is presented to this court.

An examination of the evidence reported shows the contention of the defendant to be untenable, because the trustee was neither holding the funds as a public officer nor as a part of his official duty. Exceptions overruled. *G. W. Heselton,* pro se. *J. E. Campion and P. J. Casey,* specially for defendant.

MARY E. HOLLAND *vs.* ALANSON J. MERRILL, Admr.

Penobscot County. Decided December 13, 1913. This is an action of assumpsit on an account annexed for board, care and nursing the defendant's intestate for 805 days, for which she charges three dollars per day. She gives credit on said account for $120 on account. The jury returned a verdict for the plaintiff for

$1250, and the defendant moved to have the verdict set aside. Motion overruled. *E. M. Simpson and Matthew Laughlin,* for plaintiff. *John B. Merrill and Alanson J. Merrill,* for defendant.

KATHERINE SULLIVAN *vs.* ANNIE CARNEY AND MARY SULLIVAN.

Kennebec County. Decided December 13, 1913. This suit in equity is before the court on an appeal from the final decree of the sitting Justice. The cause was heard upon bill, answer, replication and proofs, and was argued by counsel.

Annie Carney is a sister of the plaintiff. Mary Sullivan is the plaintiff's daughter.

In August, 1893, the plaintiff held the agreement of the Hallowell Savings Institution to convey to her a house and lot of land in Hallowell. By agreement of the parties the property was conveyed to Annie Carney, the defendant, on payment by her to the grantor of the sum then due from the plaintiff to the grantor on account of the purchase price. In July, 1909, Annie Carney conveyed the property to Mary Sullivan, the other defendant. From 1887 to the date of the filing of the bill, the property has been the homestead of the plaintiff, and the defendants made their home with the plaintiff while not employed elsewhere.

The prayer of the bill is that said real estate may be decreed to have been held in trust by said Annie Carney, and now by said Mary Sullivan, and that the defendants be ordered to reconvey to the plaintiff the land and buildings described in the bill.

Counsel were in substantial agreement as to the questions of law involved, but sharply contended as to the terms of the agreement claimed by the plaintiff.

The sitting Justice decided all matters of fact in the plaintiff's favor, and made his decree accordingly. That decision will not be reversed unless it clearly appears to be erroneous. The burden of showing the error lies on the appellant. From a careful reading of the testimony we are satisfied that the decision of the single Justice

is supported by the evidence. Appeal dismissed. Decree below affirmed with additional costs. *Beane & Beane,* for plaintiff. *B. F. Maher,* for Mary Sullivan. *M. E. Sawtelle,* for Annie Carney.

RICHARD PATZOWSKY, et als.

vs.

MUTUAL SHOEMAKERS, INCORPORATED.

Somerset County. Decided December 13, 1913. This is an action of assumpsit for goods sold and delivered. The plaintiffs are assignees of a firm, doing business in Boston, Mass., under the name of The Newcastle Leather Company, and the defendant is a corporation engaged in the manufacture of shoes at Norridgewock, Me. Plea was the general issue.

At the conclusion of the evidence, the case was reported to the Law Court for its determination upon so much of the evidence as is legally admissible. Judgment for plaintiff for $1426.47, with interest from the date of the writ. *Harold J. Phillips and Maurice P. Merrill,* for plaintiffs. *LeRoy R. Folson and Harvey D. Eaton,* for defendant.

INHABITANTS OF ROCKPORT *vs.* CITY OF ROCKLAND.

Knox County. Decided December 23, 1913. Two actions tried together to recover from the defendant city, one for pauper supplies furnished by the plaintiff town to George L. Barter and family from December 24, 1908 to June 16, 1910, and for funeral expenses of said Barter in June, 1910; the other for pauper supplies furnished

to Mary A. Barter, his widow, from June 17, 1910 to October 1, 1910. Verdict for plaintiff in both cases. Defendant filed exceptions and motion for new trial. It is unnecessary to consider the exceptions. Motion for new trial sustained. *L. M. Staples,* for plaintiff. *E. K. Gould,* for defendant.

NEWTON I. WINSLOW *vs.* EUGENE H. DAKIN.

Penobscot County. Decided December 27, 1913. A majority of the Justices being unable to concur, in this case, the report is hereby discharged. *Mayo & Snare,* for plaintiff. *Matthew Laughlin,* for defendant.

HERBERT L. BLAIR, Admr.

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RY.

Kennebec County. Decided December 30, 1913. The only question involved is whether the verdict for the plaintiff is excessive. The court is of opinion that the evidence did not warrant a verdict for $2,234.66, and that $1200 is the limit beyond which it ought not to be allowed to stand. If the plaintiff within 30 days after the certificate is received remits all of the verdict in excess of $1200, motion overruled; otherwise, motion sustained. *B. F. Maher,* for plaintiff. *Andrews & Nelson,* for defendant.

GRACE A. BAILEY *vs.* INHABITANTS OF THE TOWN OF ALNA.

Lincoln County. Decided March 11, 1914. At the December Term, 1913, of the Law Court, the following docket entry was made: "In writing. Defendant's brief by February 15, 1914, or motion over-ruled." The time within which this order of court was to be complied with having expired, it is ordered that the motion be over-ruled for want of prosecution. *Chas. L. Macurda and A. S. Littlefield,* for plaintiff. *W. M. Hilton and W. H. Newell,* for defendant.

PHEBE SNOWMAN, In Equity, *vs.* MILTON W. HERRICK, et als.

MERRILL C. HERRICK, In Equity, *vs.* PHEBE SNOWMAN, et als.

Hancock County. Decided April 29, 1914. These cases are founded upon the same evidence and embrace the same transactions, and relate to the property demised and bequeathed by the will of Merrill C. Herrick, late of Penobscot, Hancock County, deceased, who was the father of all the parties to the suits. The case of *Phebe Snowman* v. *Milton W. Herrick, et als.,*—Bill dismissed with costs.

In case of *Merrill C. Herrick* v. *Phebe Snowman, et als.,*—Bill dismissed with costs. *Coggan & Coggan & Dillaway,* for Phebe Snowman, et als. *Montgomery & Emery,* for Merrill C. Herrick. *Forrest B. Snow,* for Milton W. Herrick, et als.

HASSAM PAVING COMPANY *vs.* JOHN M. DAVIS, Deputy Sheriff.

York County. Decided May 7, 1914. Action of replevin for the following goods and chattels: One 10x18 stone crusher, four wheel

truck, with folding elevator, one 30x12 revolving screen, with dust jacket, one 30 ton main driving belt, one second hand boiler and engine belonging thereto. At the close of the evidence, the case was reported to the Law Court for determination of the rights of the parties. Report discharged. *Howard Davies,* for plaintiff. *Robert Payson, and Sidney St. F. Thaxter,* for defendant.

EDWIN F. LUFKIN, et als., In Equity, *vs.* ELIZABETH E. LUFKIN.

Penobscot County. Decided May 9, 1914. This is a bill in equity asking the court to construe the will of Porter Lufkin, late of Newburg, in said county, and particularly to determine whether or not Elizabeth Lufkin is entitled thereunder to the entire amount of the deposit in the Searsport Bank, to wit $1280.19, or to the sum of $1000 only. The intention of the testator as disclosed by the will was to bequeath to his wife, Elizabeth Lufkin, the sum of one thousand dollars only, and not to make a specific bequest to her of the deposit in the Searsport Bank.

Decree is to be made in accordance with this rescript, and the plaintiff may be allowed taxable costs and a reasonable counsel fee to be paid out of the estate. So ordered. *U. G. Mudgett,* for plaintiffs. *W. B. Pierce,* for defendant.

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

County of Penobscot. Decided May 23, 1914. An action on the case to recover damages alleged to have been sustained by plaintiff to his properties, by reason of the negligence of the defendant corporation. Plea, general issue. The jury returned a verdict for

plaintiff of $700. Defendant filed a general motion for new trial. Motion sustained. *F. W. Halliday,* for plaintiff. *W. H. Mitchell and John E. Nelson,* for defendant.

GEORGE PARTRIDGE

vs.

NORTHERN MAINE SEAPORT RAILROAD COMPANY.

Waldo County. Decided May 28, 1914. An action of assumpsit to recover the balance of nine hundred forty-eight dollars and seventy-two cents, with interest from the first of January, 1907, for piling. Plea, general issue with brief statement of Statute of Limitations. Reported to the Law Court for determination. Judgment for the defendant. *A. S. Littlefield and H. E. Bangs,* for plaintiff. *L. C. Stearns and R. F. Dunton,* for defendant.

JENNIE H. GATES *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided June 1, 1914. Action on the case for negligence, brought under section 5 of chapter 285, Public Laws of 1909, to recover damages for the death of her husband, William D. Gates, while in defendants' employ. Reported to Law Court. Judgment for defendant. *H. M. Cook and G. H. Morse,* for plaintiff. *O. F. Fellows,* for defendant.

STATE OF MAINE *vs.* HENRY STICKNEY.

Kennebec County. Decided June 3, 1914. Complaint and warrant against the respondent for having in his possession intoxicating liquors with intent to unlawfully sell same in this State, based upon section 47 of chapter 29, R. S. Verdict, guilty. Exceptions by respondent. Exceptions overruled. *W. H. Fisher,* County Attorney, for State. *Benedict F. Maher,* for defendant.

GEORGE B. WARNER *vs.* NARRAGANSETT MUTUAL FIRE INS. CO.

GEORGE B. WARNER *vs.* DIRIGO MUTUAL FIRE INS. CO.

Kennebec County. Decided June 3, 1914. Actions on two fire insurance policies to recover the insurance therein written. The policy issued by the Narragansett Company covered the plaintiff's stock of merchandise and store fixtures and furnishings contained in a building occupied by him as a dwelling house and store, and that of the Dirigo Company covered his household goods, furniture, wearing apparel, etc. Verdict in each case for the plaintiff. Motions by defendants in each case for new trial. Motion in each case overruled. *Ralph W. Crockett,* for plaintiff. *Newell & Skelton,* for defendant.

WATERBORO BOX & MILLING COMPANY

vs.

BOSTON AND MAINE RAILROAD COMPANY.

York County. Decided June 3, 1914. This action is to recover damages for the loss by fire of plaintiff's box mill and lumber in and about the outside of said mill. The fire is alleged to have been communicated to the mill and lumber by sparks from the locomotive engine of the defendant. Case tried at May Term, 1913, and verdict rendered for the plaintiff. Motion by defendant for new trial. Motion overruled. *Cleaves, Waterhouse & Emery,* for plaintiff. *George C. Yeaton,* for defendant.

INDEX

ABATEMENT.

See PLEADING.

A plea in abatement alleging another action pending should be overruled, where it did not set out or enroll the record or declaration of the pending action; the practice of referring to the records of the Court in which the prior action is alleged to be pending not being followed.

Ward v. *Jackson*, 240.

ACTION.

See ATTACHMENT. COMPLAINT FOR FLOWAGE. NEGLIGENCE.

An action against a town may be begun by writ of summons and attachment and not necessarily by writ of summons only.

Ripley v. *Harmony*, 91

Upon the death of a party defendant in a complaint for flowage, under Revised Statutes, Chapter 94, Section 35, the administrator of the deceased party may be cited in, and in such case must answer or be defaulted and suffer judgment against him.

Geyer v. *Cook*, 341.

An action of assumpsit to recover the price of goods sold cannot be maintained without proof of delivery and acceptance of the goods.

Watson v. *Cameron*, 343

The case shows no evidence of delivery, or receipt, and for that reason this action is not maintained for the price of goods bargained

Watson v. *Cameron*, 343.

The destruction by fire of goods bargained, but not delivered, is a total failure of consideration of a check given in part payment before the fire, but not presented for payment until afterwards.

Watson v. *Cameron*, 343.

When one covenants under seal with another to pay a sum or to do an act, the other cannot maintain assumpsit upon the agreement.

Drew v. *Western Union Tel. Co.*, 346.

On covenants under seal, the action for breach must be debt or covenant broken.

Drew v. *Western Union Tel. Co.*, 346.

An action on the case will lie for damages for neglect of an obligation arising from contract, as well as of one imposed by Statute.

Crosby v. *Plummer*, 355.

While one suing on the case for damages for neglect of an obligation arising from contract must prove negligence, when a wrong or omission is proved from which damages result, proof of the wrong implies a neglect requiring an explanation from defendant.

Crosby v. *Plummer*, 355.

ADMISSIONS OF AGENT.

The rule governing the admission of declarations of an agent as evidence against his principal is founded upon the idea of the legal identity of the agent and the principal, which presupposes authority from the principal to the agent to make the declaration.

Warner v. *M. C. R. R.*, 149.

Admissions by an agent are binding upon the principal only when the agent is expressly given the authority to make the particular declaration, or it is within the scope of the authority given him, or when the declarations accompany and explain an action by the agent which is within the scope of his authority.

Warner v. *M. C. R. R.*, 149.

A report written by a station agent to the general manager of a railroad company is not admissible as an admission of the cause of a fire, without proof that the company adopted the statements as its own.

Warner v. *M. C. R. R.*, 149.

A station agent has no authority by virtue of his position to bind the railroad company by an admission as to its liability for damages caused by fire.

Warner v. *M. C. R. R.*, 149.

AMENDMENT.

See EXCEPTIONS.

Writ of summons and attachment, which should be one of original summons only, is amendable under Revised Statutes, chapter 83, section 10 and not abatable when amended.

Ripley v. *Harmony*, 91.

The allowance of amendments by a trial court, when legally allowable, is a matter of discretion.

Clark, Applt. from decree of Judge of Probate, 399.

If an amendment is allowed or disallowed as a matter of law, exceptions lie.

Clark, Applt., 399.

Unless the bill of exceptions shows that the amendment was allowed, or disallowed, as a matter of law, it is to be presumed that the ruling was made as a matter of discretion, and the exceptions do not lie.

Clark, Applt., 399.

In Equity proceedings, the Court has ample power to allow proper amendments at any time, but it has also as ample power to refuse them at any time. This discretionary power is not open to exceptions.

Lakin v. *Chartered Co.*, 556.

APPEAL.

See WILLS.

A probate appeal is not a common law procedure. It is a matter of statutory prescription and gives no latitude for construction, as the language is plain and unambiguous.

Sykes v. *M. C. R. R.*, 182.

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Sykes v. *M. C. R. R.*, 182.

ARBITRATION AND AWARD.

Before an award is made, any submission to referees, not by rule of court, may be revoked by any party to the submission, but not if the submission is by rule of Court.

Clark v. *Clark*, 417.

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Clark v. *Clark*, 417.

ASSIGNMENT.

Under Revised Statutes, Chapter 84, section 146, authorizing an assignee under a written assignment to sue in his own name, a partner claiming a verbal assignment from his partner of a firm account must sue in the firm name, or as surviving partner after his partner's death.

Seruta v. *Surace*, 508.

Such an assignment would carry with it the undoubted right to bring suit in the name of the assignee, but not in his own, as the Statute limits the right of an assignee to bring suit in his own name to the method prescribed in Revised Statutes, Chapter 84, Section 146.

Seruta v. *Surace*, 508.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Creditors become parties to an assignment for their benefit when they assent to the assignment, and their assent need not be expressed in any particular way, but may be implied.

Clark v. *Holmes*, 75.

An agreement by creditors to accept an offer of settlement, made by an assignee for the benefit of creditors, upon the condition that they become parties to the assignment, implies an assent by them to the condition.
Clark v. *Holmes*, 75.

ATTACHMENT.

See ACTION. AMENDMENT.

The real estate of a town, not exempted by statute, and not used by the town in the performance of its municipal functions, may be attached in a suit against it.
Ripley v. *Harmony*, 91.

BANKS AND BANKING.

A stockholder in a Trust Company who retained his stock after enactment of Public Laws of 1905, Chapter 19 amending Revised Statutes, Chapter 48, section 86, imposing a double liability on stockholders in such corporation, by providing a method of enforcing the liability, must be deemed to have accepted the effect of the amendment.
Johnson et al. v. *Libby*, 204.

The Legislature has the power to modify and change a remedy, provided no substantial right is thereby imposed; consequently, a shareholder in a trust company cannot complain because the Legislature changed the remedy by which the double liability, previously imposed, might be enforced.
Johnson et al. v. *Libby*, 204.

The double liability assumed by a purchaser of the stock of a Trust Company is contractual in its nature and does not abate at his death, but survives and his estate is liable therefor.
Johnson et al. v. *Libby*, 204.

In the proceedings for the liquidation of the affairs of a Trust Company and the payment of its debts, the court may make an assessment against the shareholders upon their double liability without personal service upon them, the proceeding being against the corporation, which is presumed to represent them.
Johnson et al. v. *Libby*, 204.

An executor, or administrator, of the estate of a deceased stockholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representation of the deceased.
Johnson et al. v. *Libby*, 204.

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A bond given by the keeper of a pool room, under Rev. St., Chap. 31, section 5, when he receives his license, remains in force only so long as he continues to keep the room under his license.
Rumford v. *Boston Grocery Co.*, 116.
He ceases so to keep it, if he actually rents it to another, reserving no interest in it.
Rumford v. *Boston Grocery Co.*, 116.

BOUNDARIES.

See DEEDS.

Where the line of a road is referred to as a boundary in a deed, it is a question of intention of the parties whether the reference be to the road as laid out, or to the road as traveled, in case the actually traveled part thereof lies wholly or partly outside the limits as laid out; such intention is to be gathered from the language read in the light of existing conditions and a doubtful expression may be aided by other clauses in a deed.
Rounds v. *Hamm*, 256.

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Where the owner of land agreed with a broker to pay withdrawal fee if he withdrew the land from the brokers hands before a purchaser was procured, held, that a sale of the land by mortgagees for breach of condition was not such a withdrawal.
Strout Farm Agency v. *McTeer*, 169.

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The defendant's original liability having been admitted, the burden was on him to prove the payments therefor which he claimed to have made.
Fertilizer Co. v. *Danforth*, 212.

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See EXCEPTIONS.

In an action by an express company against a railway company for loss of express matter in a car destroyed by fire while on a side track over a holiday, the question of carrier's negligence should be submitted to the jury.
Hoyt Tarabox Exp. Co. v. *Atlantic Shore Ry.*, 108.

In an action by an express company against a railway company for destruction of express matter in a car while on a side track over a holiday, an instruction equivalent to direction of a nonsuit was properly refused.
Hoyt Tarbox Ex. Co. v. *Atlantic Shore Ry.*, 108.

A carrier of goods is bound to exercise reasonable care and diligence in transportation to transport within reasonable time, so as to prevent loss or damage from delay.
Johnson v. *N. Y., N. H. & H. R. R.*, 264.

What is reasonable diligence in transporting goods must depend on the circumstances of the particular case; the carrier having the right to discriminate in favor of perishable goods, when the exigencies require it.
Johnson v. *N. Y., N. H. & H. R. R.*, 264.

In the absence of a special contract, or special circumstances to take the case out of the general rule, a carrier is not bound to use extraordinary means to forward even perishable freight, as the shipper must be presumed to have contemplated carriage by regular trains on their usual schedule.
Johnson v. *N. Y., N. H. & H. R. R.*, 264.

In an action against a carrier of goods for damages for delay, the carrier has the burden of explaining the delay when it is shown that the shipment took twice the usual time.
Johnson v. *R. R.*, 264.

A common carrier engaged in interstate commerce cannot grant special favors to anybody.

Johnson v. *R. R.*, 264.

For a common carrier engaged in interstate commerce to agree with a particular shipper to expedite the shipment at regular rates, even when no rate has been established for special expedition, is a discrimination violative of Act of Congress, February 19, 1903.

Johnson v. *R. R.*, 264.

Where an interstate carrier established a rate for special switching service, which was for particular services rendered individual shippers, or consignees, an agreement with the shippers of produce that perishable shipments should be expedited by quicker switching service was not a discrimination.

Johnson v. *R. R.*, 264.

Where a carrier undertook to expedite perishable shipments of produce, the agreement for expedition became incorporated in the general contracts for carriage of goods of that class.

Johnson v. *R. R.*, 264.

COMPLAINT FOR FLOWAGE.

A complaint for flowage survives the death of any party thereto and does not abate.

Geyer v. *Cook*, 341.

COMPROMISE AND SETTLEMENT.

See EXCEPTIONS.

Where there was a controversy between the purchaser of an automobile and the seller as to whether certain defects were covered by seller's guaranty, held, that the purchaser had accepted a proposition by the seller to repair certain parts in settlement of the controversy.

Horigan v. *Chalmers Motor Co.*, 111.

CONDITIONAL SALE.

See CONTRACT.

A contract of sale, which stipulates that the title shall remain in the seller until the price is paid, must, to be valid under Revised Statutes, Chapter 113, Section 5, be signed by the buyer.

Pendleton vs. *Poland*, 563.

CONSTITUTION.

In address proceedings to remove any officer from office, under Article 9, Section 5 of the Constitution, it is a constitutional trial by a co-ordinate department, the Legislature acting as a constitutional tribunal and limited in authority only by the language of Article 9, Section 5.

Moulton v. *Scully*, 428.

The causes stated must be legal causes and such as specially relate to and affect the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public.

Moulton v. *Scully*, 428.

CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATION.

Unless an act is clearly and beyond all rational doubt in conflict with the constitution. it will not be so declared; all reasonable doubts will be resolved in favor of its constitutionality.

Laughlin v. *Portland*, 486.

Under the Constitution, Art. 4, part 3, sec. 1, the powers of the Legislature are absolute, except as limited by the constitution.

Laughlin v. *Portland*, 480.

CONSTRUCTION OF STATUTES.

See ELECTIONS. MUNICIPAL BOARD.

In construing a statute, while the context is to be considered and, under certain conditions may be entitled to great weight, it is not by any means controlling.

Tremblay v. *Murphy*, 38.

As an aid in ascertaining the Legislative intent, the court may look at the object in view, the remedy to be afforded and the mischief to be remedied.

Tremblay v. *Murphy*, 38.

In construing a statute, the intention of the Legislature must govern and the language of the statute itself is the vehicle best calculated to express that intention, and such intention cannot be ascertained by adding to or detracting from the meaning conveyed by the plain language used.

Tremblay v. *Murphy*, 38.

CONTRACTS.

When a party makes a contract to do work for a price certain, he cannot come into court and successfully defend his non-performance by saying that the contract price is inadequate. Having agreed to do the work in a certain manner and for a certain price, he is bound to do it according to his contract.

Kenney v. *Pitt*, 26.

Except in cases of rescission for fraud and for failure of the opposite party to perform, a contract cannot in general be rescinded without consent of both parties.

Listman Mill Co. v. *Dufresne*, 104.

When renunciation of an executory contract is accepted, the accepting party may sue at once to recover the value of what he has done toward performance.

Listman Mill Co. v. *Dufresne*, 104.

But if he does not accept, he can sue only when the time for performance has arrived and recover damages as of that time.

Listman Mill Co. v. *Dufresne*, 104.

Words in a contract of sale, descriptive of the subject matter of the contract, constitute the contract itself, but do not prevent annexation to the contract of warranties implied by law, such as that merchantability in case of goods purchased from the manufacturer by description, without opportunity of inspection, or when there is a defect not discoverable by inspection.

Philbrook v. *Kendall,* 198.

When a seller contracts to supply an article to be applied to a particular purpose, so that the buyer necessarily trusts his judgment, the law implies an agreement on his part that the article sold will be reasonably fit for the purposes.

Philbrook v. *Kendall,* 198.

When a known and described article is ordered, although the purpose of the buyer be stated, there is no warranty that it will answer the particular purpose, though there is one of merchantable quality.

Philbrook v. *Kendall,* 198.

A contract of sale of personal property, which stipulates that the title thereto shall remain in the seller until the price is paid, must, to be valid under Revised Statutes, Chapter 113, Section 5, be signed by the buyer.

Pendleton v. *Poland,* 563.

CORPORATIONS.

See EQUITY. JUDGMENT.

Unless the corporation itself, or its officers, refuse or are unwilling to seek relief to which it is entitled, a stockholder cannot maintain an action on behalf and for the benefit of the corporation.

Clarke, In Equity, v. *Marks,* 218.

A bill by a stockholder on behalf of a corporation may, when attacked by general demurrer, be amended to show that the corporation and its officers refused to act,

Clarke v. *Marks,* 218.

A corporation represents the stockholders and when it failed to introduce a defense in an action upon a corporate note, a judgment against it is binding against the stockholders, and an enforcement of the judgment cannot be enjoined by them.

Clarke v. *Marks,* 218.

Plaintiff, a stockholder in a corporation, sued to enjoin the collection of a note issued by a former officer who had sold plaintiff his stock in the company representing that there was no indebtedness, on the ground that the note was fraudulently issued without consideration and that defendant was not a bona fide holder; held, that the seller of the stock was not a necessary party.

Clarke v. *Marks,* 218.

In a suit by a stockholder of a corporation to enjoin the collection of a note issued by the Treasurer, without consideration, the bill will, on appeal. by dismissed, when it was bad as a stockholder's bill and was also bad as a bill to enjoin the holder of a note from enforcing it on the ground of estoppel.

Clarke v. *Marks,* 218.

Under Revised Statutes, Chapter 47, section 20, a stockholder of a corporation may make copies of only such of the corporate records as concerns his interest.

Withington v *Bradley,* 384.

Under Revised Statutes, chapter 47, section 20, a stockholder is entitled to copy a list of the stockholders from the corporation records; such list concerning his interests.

Withington v *Bradley,* 384.

The motive or purpose of a stockholder does not affect his right to make a list of the stockholders from the corporate records, as the only conditions imposed by the Statute are that the applicant shall be a party interested and that he shall take copies of only such parts of the records as concerns his interests.

Withington v *Bradley,* 384.

Under Revised Statutes, Chapter 47, Sections 88-89, providing that no dividend declared from capital stock or in violation of law, no withdrawal, cancellation, surrender or transfer to the corporation of its stock shall be voted against a lawful and bona fide judgment against it, based upon any claim, contract, and giving an action thereon. Creditor holding such a judgment may proceed against the stockholder without taking out an execution.

Damon v. *Webber,* 473.

The recovery of a judgment against a corporation establishes conclusively the plaintiff's right to satisfy it out of any assets of the corporation.

Damon v. *Webber,* 473.

COURTS.

See DIVORCE.

The Courts derive their jurisdiction largely from the Statutes.
Walker v. *Walker*, 404.

COVENANTS.

See DEEDS. ACTION.

Where the deeds to a paracel of land which was divided into lots and sold contained restrictive covenants, fixing a building line, the covenants are for the benefit of the land and run with it, and hence, one owner may recover against another who violates them.
Leader v. *LaFlamme*, 242.

When one covenants under seal with another to pay a sum or to do an act, the other cannot maintain assumpsit upon the agreement.
Drew v. *Western Union Tel. Co.*, 346.

On covenants under seal, the action for breach must be debt or covenant broken.
Drew v. *Western Union Tel. Co.*, 346.

CRIMINAL LAW.

See SEARCH AND SEIZURE.

The Supreme Judicial Court sitting as a law court is a court of limited jurisdiction, and on exceptions in a criminal case cannot go outside the record, but can only overrule or sustain the exceptions, so that it cannot consider as a part of the record a fact omitted in the copy of the original complaint sent up by the Police Court.
State v. *Dondis*, 17.

DAMAGES.

See EVIDENCE.

In an action for personal injuries, the plaintiff recovers her damages up to the date of the trial, and such future damages as the evidence shows with reasonable certainty, and interest cannot be allowed from the date of the writ.

Jones v. *Co-Operative Ass'n.*, 163.

Verdict for $3,487.15 for personal injuries making plaintiff practically an invalid, causing neuritis and accelerating a hardening of the spinal cord are not excessive.

Jones v. *Co-Operative Ass'n.*, 163.

When the evidence is conflicting and the question of liability and damages is one that is peculiarly within the province of the jury, and the evidence does not convince the court that the jury were clearly wrong, a motion for a new trial will be overruled.

Boyd v. *Bangor Railway & Electric Co.*, 332.

Evidence in an action for an injury to a passenger, held not to show that a verdict for plaintiff for $2071 was against the weight of evidence.

Boyd v. *Bangor Railway & Electric Co.*, 332.

DEEDS.

See COVENANTS. BOUNDARIES.

Where the deeds to a parcel of land which was divided into lots and sold contained restrictive covenants, fixing a building line, the covenants are for the benefit of the land and run with it, and hence one owner may recover against another who violates them.

Leader v. *LaFlamme*, 242.

When the line of a road is referred to as a boundary in a deed, it is a question of intention of the parties whether the reference be to the road as laid out, or the road as traveled, in case the actually traveled part thereof lies wholly or partly outside the limits as laid out; such intention is to be gathered from the language read in the light of existing conditions, and a doubtful expression may be aided by other clauses in the deed.

Rounds v. *Ham*, 256.

When the calls in a deed are applied to the surface of the ground, a doubt as to which of two objects or places is meant may be resolved by the aid of parol evidence, as to intention; the question being one of faact and not construction.

Rounds v. *Ham*, 256.

Where the description of a deed in part was along the northwesterly side of a road leading across a beach, such road was not the one located, the boundaries of which were uncertain or lost, but the one used which was visible and certain.

Rounds v. *Ham*, 256.

In a deed giving a particular description by metes and bounds, a recital that the tracts were a part of the land conveyed by a certain grantor could add nothing to the particular description which preceded it.

Rounds v. *Ham*, 256.

DEMURRER.

See NEGLIGENCE. PLEADING. SEARCH AND SEIZURE.

On demurrer, held the proximate cause of the injury as alleged in the declaration was the negligent act of the defendant, and not the plaintiff's act in turning the pole.

Rollins v. *Central Maine Power Co.*, 72.

That as the account annexed contained three items, two of which are conceded to be properly stated, a general demurrer will not lie. The defendant should have demurred specially to the first item, instead of generally to the whole account and declaration.

Peabody v. *Conley, et al.*, 174.

A motion for a nonsuit is in the nature of a demurrer to the evidence and raises every question of law arising in the course of the trial, regardless of particular exceptions.

Sykes v. *M. C. R. R.*, 182.

That upon demurrer, "a certain store and its appurtenances, situated on the southwesterly side of Main Street in said Bucksport, commonly known as the Homer Store, and occupied by said Thomas Sheehan," is sufficient description

State v. *Sheehan*, 503.

It does not avail defendant in support of his general demurrer to the complaint and search warrant, on appeal from a magistrate, that the magistrate did not, as required by Revised Statutes, Chapter 133, Section 18, send to the appellaate court a copy of the whole process, and of all writings before him; the demurrer going only to the complaint and warrant.

State v. *Sheehan*, 503.

The objection that the copies sent up from the Municipal Court on appeal in search and seizure process, under the prohibitory liquor Statute, were certified by the recorder and not by the Judge, cannot be raised on demurrer to the complaint.

State v. *Pio*, 506.

DIVORCE.

See COURTS. JURISDICTION.

The courts derive their jurisdiction largely from the Statutes.

Walker v. *Walker*, 404.

It matters not whether the guilty party transgressed within or without the limits of the State, as the Statute makes no exception or restriction.

Walker v. *Walker*, 404.

ELECTIONS.

See CONSTRUCTION OF STATUTES.

Persons claiming to have been elected to the common council of a municipality cannot, by proceeding under Revised Statutes, Chapter 6, Section 70, providing that any person claiming to, be elected to any county or municipal office, may proceed as in equity against the holder of such office, deprive the city council of jurisdiction to pass upon such election.

Tremblay v. *Murphy*, 38.

The municipal board, acting under the city charter, is constituted a court for the time being, and sitting as a judge upon the election of its own members, its functions are clearly judicial.

Tremblay v. *Murphy*, 38.

Municipal boards, when sitting in such cases, should give to all parties interested reasonable notice and an opportunity to be heard.

Tremblay v. *Murphy*, 38.

When municipal councilmen held certificates of election from the proper returning board, they were prima facie members of the council and were entitled to act upon all matters regularly presented, though their elections were afterwards declared void.

Tremblay v. *Murphy*, 38.

EQUITY.

See REFEREES. INJUNCTION. FRAUDULENT CONVEYANCES. MUTUAL MISTAKE. PLEADING.

The allegations of the bill and of the answer put in issue the title to the vessels.

Jonah v. *Clark*, 142.

That, in general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiffs' property, or to interfere with his rights and had changed the condition of the real estate, he is compelled to undo, so far as possible, what he had wrongfully done affecting the plaintiffs and pay the damages.

Coombs v. *Lenox Realty Co.*, 178.

Where, by an innocent mistake, erections have been placed a little upon the plaintiffs' land, and the damages caused to the defendant by the removal would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order them removed, but will leave the plaintiff to his remedy at law.

Coombs v. *Lenox Realty Co.*, 178.

The doctrine applied by the court in equity, in cases of this kind, call for a consideration of all the facts and circumstances which help to show what is just and right between the parties.

Coombs v. *Lenox Realty Co.*, 178.

Findings of a single Justice in equity will not be reversed, unless clearly wrong.

Haggett v. *Jones*, 348.

The burden is on the appellant to show that the findings of fact, by a single Justice in equity, are incorrect.

Haggett v. *Jones*, 348.

Upon the equitable maxim that he who seeks equity must do equity, one who seeks relief from accident, mistake or fraud must see that the party against whom relief is sought is remitted to the position he occupied before the transaction in which the mistake occurred.

Tarbox v. *Tarbox*, 374.

A constructive trust is raised by a court of equity whenever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation.

Tarbox v. *Tarbox*, 374.

Jurisdiction in equity in cases of mistake is expressly conferred by Statute, which does not in terms limit it to mistakes of fact, and it may be presumed that the Legislature used the word as generally understood in equity proceedings.

Tarbox v. *Tarbox*, 374.

The phrase "mutual mistake" as used in equity, means a mistake common to all the parties to a written instrument, and usually relates to a mistake concerning the contents or legal effect of the instrument.

Tarbox v. *Tarbox*, 374.

Constructive trusts include all those instances when a trust is raised in equity to work out justice in the most efficient manner, when there is no intention of the parties to create such relation, and in most cases contrary to the intention of the one holding the legal title, and without any express or implied declaration of trust.

Tarbox v. *Tarbox*, 374.

The decision of a single Justice on questions of fact in an equity suit will not be reversed on appeal, unless the Court is clearly convinced of its incorrectness, the burden being on the appealing parties to prove the error.

Sposedo v. *Merriman*, 531.

Findings of a single Justice that assignment of a bond for title was not an unconditional transfer of plaintiff's right in the property, but was intended as an equitable mortgage and that defendant B., prior to obtaining an interest in the land and bond, had notice of plaintiff's right, held not so contrary to the evidence as to justify reversal on an appeal.

Sposedo v. *Merriman*, 531.

EVIDENCE.

See PAUPERS. DAMAGES.

Under Revised Statutes, chapter 27, section 45, conclusions of overseers with respect to the necessity of relief of paupers will be respected, and it will be presumed that they acted with integrity, until the contrary is shown by decisive proof.

Bishop v. *Hermon*, 58.

When a deceased person, a stranger to the transaction, made entries in a book which are relevant to the case, the entries are admissible in evidence only when made in the regular course of business, which means in the way of business, and hence, entries by a private person in a diary concerning the weather, kept only as a matter of custom and not as a matter of business or duty, are not admissible after his death.

Arnold v. *Hussey*, 224.

In an action for injuries caused by a fall on ice in front of defendant's building, the erroneous admission of entries in a private weather record, kept by one now deceased, tending to show that temperature was such that ice could not have formed on the day in question, is prejudicial.

Arnold v. *Hussey*, 224.

The court will not disturb a verdict on the ground of excessive damages, unless it very clearly appears to be excessive upon any view of the facts, which the jury were authorized to adopt.

Boyd v. *Bangor Railway & Electric Co.*, 332.

Evidence in an action for an injury to a passenger, held not to show that a verdict for plaintiff for $2071 was against the weight of the evidence.

Boyd v. *Bangor Railway & Electric Co.*, 332.

When the evidence is conflicting and the question of liability and damages is one peculiarly within the province of the jury, and the evidence does not convince the court that the jury were clearly wrong, a motion for a new trial will be overruled.

Boyd v. *Bangor Railway & Electric Co.*, 332.

A receipted bill of parcels made out by a vendor, not a party or witness to the action, is not admissible as a declaration against interest, unless it is shown that such vendor is dead.

Kaliamotes v. *Wardwell*, 401.

A bill of parcels is not competent as a declaration of a vendor, not a party to the suit, to prove the ownership of goods shipped, where the act of setting apart and shipping the goods preceded the making of the bill of parcels by at least two days and its mailing by four days.

Kaliamotes v. *Wardwell*, 401.

When the title to personal property is in question between third parties, mere declarations of the alleged vendor, unaccompanied by any acts, are not admissible in evidence.

Kaliamotes v. *Wardwell*, 401.

EXCEPTIONS.

See MANDAMUS. TENANCY AT WILL. CARRIERS. AMENDMENT.

Exceptions lie in matters of law, to the denial of a writ of peremptory mandamus.

Lawrence v. *Richards*, 95.

On exceptions to the direction of a verdict, the only question is whether any other inference than the one implied by the direction could reasonably have been drawn by the jury; if not the verdict must stand.

Horigan v. *Chalmers Motor Co.*, 111.

The decision of a presiding Justice on questions of fact submitted to him is conclusive, and exceptions do not lie to his findings, unless the only inference to be drawn from the evidence is a contrary one.

McLeod v. *Amero*, 216.

Upon exceptions to an order of nonsuit or of verdict for defendant, the duty of the court is simply to determine whether, upon evidence, under the rules of law, the jury could properly have found for the plaintiff.

Johnson v. *N. Y., N. H. & H. R. R.*, 262

The allowance of amendments by a trial court, when legally allowable, is a matter of discretion, and exceptions do not lie to the exercise of the discretion.

Clarke, Applt., 399.

If an amendment is allowed, or disallowed, as a matter of law, exceptions lie.

Clarke, Applt., 399.

Unless the bill of exceptions shows that the amendment was allowed, or disallowed, as a matter of law, it is to be presumed that the ruling was made as a matter of discretion, and the exceptions do not lie.

Clarke, Applt., 399.

EXECUTORS AND ADMINISTRATORS.

See CONTRACTS.

In an action by a daughter against her stepfather for services rendered in caring for the stepfather and his wife, the daughter's mother, it was incumbent upon plaintiff to prove that the services were rendered in pursuance of a mutual understanding that she was to receive payment and that the daughter expected payment.

Leighton v. *Nash,* 525.

EXTORTION.

See INDICTMENT.

An indictment for extortion under Revised Statutes, Chapter 119, section 23, which alleged that accused verbally did feloniously and maliciously threaten to accuse H of the crime of selling intoxicating liquor in violation of law with intent to extort money from him is sufficient to inform accused of the offense charged, and not defective for not alleging the language of the alleged threat.

State v. *Blackington,* 229.

FRAUDULENT CONVEYANCES.

See EQUITY.

A grantee is not protected in taking a conveyance from an insolvent grantor, when he has not paid an adequate consideration therefor, though he may have acted in good faith.

Haggett v. *Jones,* 348.

In equity, when the property is of greater value than the consideration, the conveyances may be impeached to a partial extent as being voluntary, and if not fraudulent in fact, be sustained to the extent of the consideration.
Haggett v. *Jones,* 348.

At law, a conveyance is wholly good or wholly bad; there is no middle ground.
Haggett v. *Jones,* 348.

GIFTS.

See REPORT OF ACTION. WILLS.

The law requires gifts inter-vivos to be completed by actual delivery to the donee or to some person for him, unless the property which is the subject of the gift is at the time in the possession of the donee.
Gray v. *Gray,* 21.

If the property which is the subject of the gift is in the possession of donee, the evidence to establish the gift must be clear and satisfactory that the donor had relinquished all control of and claim to the property which is the subject of the gift.
Gray v. *Gray,* 21.

The delivery may be proved by circumstances, but the circumstances proved must clearly and satisfactorily show delivery.
Gray v. *Gray,* 21.

When the gift is claimed between husband and wife, the possession by the alleged donee is presumed to be the possession of the donor.
Gray v. *Gray,* 21.

A gift in trust for ten years for investment and accumulation, at the expiration of that time to be paid to the testator's two children and their heirs is vested, and passes to the heirs of a child dying during the trust period.
Bryant v. *Plummer,* 511.

Where there is a gift of a legacy, or a share of a residue to be paid at or when the legatee shall attain twenty-one years, or any specified age, or at the death of a particular person, or when the legatee shall have served out his apprenticeship. the gift vests in the legatee at the death of the testator, the time only applies to the payment.
Bryant v. *Plummer,* 511.

HIGHWAY.

See NEGLIGENCE.

The driver of an auomobile in public highways constantly traveled by pedestrians and teams and occupied by children of all ages must, in the exercise of due diligence, have such control over his car as to enable him to stop it, if necessary, to avoid a collision with any of the persons whose presence he can foresee, the duty of due care being measured by the hazard to be avoided.

Savoy v. *McLeod*, 234.

HUSBAND AND WIFE.

Defendant's husband, in conducting certain lumbering operations in partnership with C, held not to have acted as defendant's agent and, hence, she was not liable on a dissolution agreement between C and her husband.

Carle v. *Ladd*, 422.

INDICTMENT.

See EXTORTION.

An indictment for extortion under Revised Statutes, Chapter 119, section 23, which alleged that accused verbally did feloniously and maliciously threaten to accuse H of the crime of selling intoxicating liquor in violation of law, with intent thereby to extort money from him, is sufficient to inform accused of the offense charged and not defective for not alleging the language of the alleged threat.

State v. *Blackington*, 229.

An indictment charging that accused made threats to charge another with a crime, with intent to extort money from him, was not defective for not more specifically describing the money which accused attempted to extort from such person.

State v. *Blackington*, 229.

INJUNCTION.

See EQUITY.

That, in general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiffs' property, or to interfere with his rights, and had changed the condition of the real estate, he is compelled to undo, so far as possible, what he had wrongfully done affecting the plaintiffs and pay the damages.

Coombs v. *Lenox Realty Co.*, 178.

Where, by an innocent mistake, erections have been placed a little upon the plaintiffs' land, and the damages caused to the defendant by the removal would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order them removed, but will leave the plaintiff to his remedy at law.

Coombs v. *Lenox Realty Co.*, 178.

The doctrine applied by the court in equity, in cases of this kind, call for a consideration of all the facts and circumstances which help to show what is just and right between the parties.

Coombs v. *Lenox Realty Co.*, 178.

INSURANCE.

See WAIVER.

When a policy was issued to the holder of a bond for a deed and the holder of the legal title, who subsequent to the fire conveyed his interest to the insurer's agent, the failure of the legal owner to sign proofs of the loss did not defeat the rights of the holder of the bond, though the policy required the proofs to be signed by the insured.

Alezunas v. *Granite Fire Ins. Co.*, 171.

In an action on a fire insurance policy, the failure of a nominal party to the writ, who no longer had any interest in the property, to sign the proof of loss, did not defeat a recovery by the real party in interest.

Alezunas v. *Fire Ins. Co.*, 171.

Where proofs of loss, stating that the property was used as a dwelling were received by the insurer, without protest, and insured was not asked to

furnish any additional information, the objection that the proofs did not state by whom the insured building was used, as required by the policy, was waived.

Alezunas v. *Fire Ins. Co.*, 171.

Where an insurer, with full knowledge of all the facts, accepted proofs of loss signed by only one of the insured parties, it waived the technical requirement of the policy that both parties should sign.

Alezunas v. *Fire Ins. Co.*, 171.

Contracts of insurance are contracts of indemnity upon terms and conditions specified in the policy embodying the agreement of the parties, and if it appears that the insurance has violated or failed to perform conditions of contract, and such violation or want of performance has not been approved by the insurer, the assured cannot recover.

Dolliver v. *Granite State Fire Ins. Co.*, 275.

Under Revised Statutes, Chapter 1, section 6, Par. 1, relative to the construction of words and phrases, where a fire policy provided that it should become void in case of vacancy, or a breach of the condition, it was not merely a suspension, and subsequent occupancy did not revive the policy.

Dolliver v. *Fire Ins. Co.*, 275.

An insurer may waive a breach of a provision for forfeiture in case of vacancy without its assent.

Dolliver v. *Fire Ins. Co.*, 275.

Revised Statutes, Chapter 49, section 104, taken from Act of April, 1891, merely prohibits rebates and discriminations without interfering with the practice of making an application for a policy a part thereof by reference only.

Frye v. *Equitable Life Ass. Society*, 287.

Failure of insured to return the policy as required in case of default in payment of premiums held to destroy his rights in the absence of a waiver or estoppel.

Frye v. *Equitable Life Ass. Society*, 287.

The act of a life insurance agent in informing a holder of a life policy that he was entitled to as many twentieths as he had paid premiums, without any other policy, is a waiver of the stipulation in the policy for its return to insurer as a condition precedent to insured's exercise of his rights under the policy.

Frye v. *Equitable Life Ass. Society*, 287.

Where an accident policy insuring against sickness provided that the insured, in order to recover benefits, must have been necessarily and continuously confined within the house, proof that he was wholly and continuously disabled, suffering from walking typhoid fever during a specified period, for which indemnity was claimed, was insufficient.
Bruzas v. *Peerless Casualty Co.*, 308.

Where a health insurance company accepted an overdue premium for July, 1912, and also accepted other overdue premiums for subsequent months, plaintiff's default in failing to pay the July premium in advance was waived.
Bruzas v. *Peerless Casualty Co.*, 308.

Where a sick benefit policy required that insured must have been regularly visited by a qualified physician once every seven days, there could be no recovery for a period during which no physician was employed.
Bruzas v. *Peerless Casualty Co.*, 308.

The constitution and laws of a fraternal beneficiary association, so far as applicable to its beneficiary contracts, form a part of the contract itself.
Grand Lodge of United Workmen v. *Edwards*, 359.

A new designation of a beneficiary must be made in the form prescribed and must be signed by "the member" and must be forwarded with the beneficiary certificate to the Grand Recorder.
Grand Lodge v. *Edwards*, 359.

The letter from insured to his son, and the statements therein contained, do not constitute a designation of the son as the beneficiary of the fund, made in the manner provided therefor in the laws of the order.
Grand Lodge v. *Edwards*, 359.

JUDGMENT.

See PARTITION. PETITION. CORPORATIONS.

When the parties agree that the value of the buildings and improvements on the land shall be ascertained, by persons named on the record for that purpose, their estimate is equal in its effect to a verdict.
Pond v. *Hussey*, 297

A final judgment rendered by a court having jurisdiction and proceeding regularly is conclusive between the parties, in the absence of fraud, and is

a bar to any subsequent litigation, not only to the matters actually tried, but also, as to all which might have been tried.

Wilson, Atty. Gen. Welch, Rel. v. *LaCroix*, 324.

A judgment rendered in one form of procedure is conclusive upon all the parties thereto and is a bar to any subsequent proceedings in the other form.

Wilson, Atty. Gen., Welch, Rel. v. *LaCroix*, 324.

The recovery of a judgment against a corporation establishes conclusively the plaintiff's right to satisfy it out of any assets of the corporation.

Damon v. *Webber*, 473.

The Statute of Limitations begins to run against a judgment from the date of its rendition, or of its entry provided it is then final and suable, and is not stayed or superseded for any cause.

Damon v. *Webber*, 473.

The rule is well settled that if a judgment is conclusive between the parties in the state in which it is rendered, it is equally conclusive in every other state of the Union

Damon v. *Webber*, 473.

LANDLORD AND TENANT.

A person who went upon leased premises to deliver wood purchased by a tenant was there by implied invitation, and was neither a trespasser nor a licensee.

Patten v. *Bartlett*, 409.

Owner of land, who constructed a cesspool thereon, before the tenant's occupancy commenced, promised to repair it, and did repair it, after the horse of an implied invitee fell therein, is liable and not the tenant.

Patten v. *Bartlett*, 409.

It is well settled that to come under an implied invitation as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the owner, or occupant, is engaged, or which he permits to be carried on there.

Patten v. *Bartlett*, 409.

LAW COURT.

See CRIMINAL LAW.

The Law Court has no power to permit an amendment of the record sent up by bill of exceptions. If the record was faulty, the proper place to correct it was in the court below.

State v. *Dondis*, 17.

LEASE.

See STATUTE OF FRAUDS.

The transfer of the premises by the assignment of the lease was a completed transaction and the assumption of the rent by the defendant was a material part of the consideration.

Knight v. *Blumenberg*, 191.

LEGACIES.

See WILLS.

A specific legacy is a bequest of a specified part of a testators estate which is so distinguished.

Spinney v. *Eaton, et als.*, 1.

A general or demonstrative legacy is not adeemed by the sale or change of the fund

Spinney v. *Eaton, et als.*, 1.

A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, as distinguished from all others.

Spinney v. *Eaton, et als.*, 1.

The court in determining the character of legacies as specific, general or demonstrative, must not only consider the precise language of the bequests, but must seek to ascertain the intention of testator as ascertained from an examination of the entire will.

Spinney v. *Eaton, et als.*, 1.

LICENSEE.

See LANDLORD AND TENANT.

A licensee is a person who is neither a passenger, servant or trespasser, and does not stand in any contractural relation with the owner of the premises, and who is permitted to go thereon for his own interest, convenience or gratification.

Patten v. *Bartlett*, 409.

LICENSES.

See BOND.

Under Rev. St., Chap. 31, Sections 4-5, a bond by a person licensed to keep a pool room will cease when the licensee rents the room to another, reserving no interest therein.

Rumford v. *Boston Grocery Co.*, 116.

Only the defendant company could keep the room under that license

Rumford v. *Boston Grocery Co.*, 116.

MANDAMUS.

See EXCEPTIONS.

Though under proper circumstances mandamus may issue to compel an inferior tribunal to exercise its discretion, it can never issue to control such discretion.

Lawrence v. *Richards, et als.*, 95.

Under Revised Statutes, Chapter 104, sections 17-18, providing that in applications for mandamus, exceptions shall not be certified to the Chief Justice until after the peremptory writ is issued, it was not the Legislative intent to allow review only in case the writ is issued, and if the writ is denied, the petitioner is entitled to have his exceptions certified.

Lawrence v. *Richards*, 95.

MASTER AND SERVANT.

See NEGLIGENCE.

The master and servant do not stand upon equal footing. It is the duty of the servant to obey his superior and he is not bound at his peril to set his judgment above that of the master.

Randall v. *Abbott Co.*, 7.

He has a right, within reasonable limits, to rely upon the master's knowledge, skill and ability.

Randall v. *Abbott Co.*, 7.

In obeying the order of the master, he would not be guilty of contributory negligence, unless the execution of the order involved a danger so apparent, or obvious, that a person of average prudence and intelligence would have refused to obey it.

Randall v. *Abbott Co.*, 7.

An employe may rely on the employer's assurance of safety of the place in which to work, unless the danger is so apparent that a person of average prudence would have refused to obey the employer's order to continue in the work.

Randall v. *Abbott Co.*, 7.

A master is not required to inform his servant of those risks incident to the employment which the servant already, or which a person of the servant's experience and capacity, by ordinary care, might have known.

Dame v. *Skillin*, 156.

Servants operating unguarded machinery assume those risks and dangers that are obvious and readily discernible to a person of average intelligence.

Dame v. *Skillin*, 156.

The extent of the employer's obligation to give instruction is to be determined with reference to the plaintiff's duty to exercise her senses and faculties, in order to discover and comprehend the dangers incident to her work.

Dame v. *Skillin*, 156.

In order to make a payment in full by money, or check, in this way, there must be proof of a new contract upon which the check or money is offered and used, and the burden is upon the defendants to prove the new contract which they set up.

Price v. *McEachern*, 572.

Where a master claimed that his servant, who accepted a check for part of his wages, was precluded from collecting the balance, because there had been a settlement, master has the burden of showing. not only that the payment was offered as a discharge of the entire obligation, but that it was so accepted; a compromise and settlement arising only out of a new and distinct contract.

Price v. *McEachern,* 573.

The party to whom the offer is made can accept or reject the offer upon his own volition, but cannot change its terms.

Price v. *McEachern,* 573.

MORTGAGES.

See EQUITY.

When an assignment of a mortgage was under seal. the seal imported a consideration.

Maxwell v. *Hewey,* 62.

That an assignment of a mortgage was without consideration was not a defense to a writ of entry by the assignee to foreclose, since the mortgagee could make the assignment as a gift, if he so desired.

Maxwell v. *Hewey,* 62.

Where, in a suit to redeem, it appeared, after the time to redeem had expired, that defendant had failed to render a true account, though the bill did not so allege, the plaintiff should be permitted to amend to obtain the necessary relief.

Miller v. *Ward,* 134.

A mortgagee in possession should make necessary repairs and improvements to protect the property from waste, and if he neglects so to do, upon redemption of the mortgage, he may be charged with waste and for rents and profits that, with the exercise of reasonable care and attention, he would have received from the mortgaged premises.

Miller v. *Ward,* 134.

The mortgagee has no authority to make the estate better at the expense of the mortgagor, but is bound to use reasonable means to preserve the estate from loss and injury.

Miller v. *Ward,* 134.

When a mortgage was given to secure a building loan and the mortgagee took possession after the mortgagor had failed to complete the building, the mortgagee was entitled to a lien for a further outlay necessary to complete the building.

Miller v. *Ward*, 134.

A mortgagee, having agreed to pay insurance on the building as a part of the consideration of a second mortgage, and having, without authority, cancelled the policy and taken out a new one in his own name is not entitled to charge the premium on the new policy to the mortgagor.

Miller v. *Ward*, 134.

Though as between mortgagor and mortgagee, the title passes to the mortgagee, the mortgage is regarded as security for the debt, and until the title has become indefeasible by expiration of the time for redemption the mortgagor is the owner of the property and may maintain a real action against all parties, except the mortgagee and those claiming under him.

Hawes v. *Nason*, 193.

The decision of a single Justice upon matters of fact in an equity hearing should not be reversed, unless it appears that such decision is erroneous.

Carll v. *Kerr*, 365.

When a mortgage. providing that the right of redemption should be forever foreclosed in one year after the commencement of foreclosure proceedings, was foreclosed by publication under the Statute declaring that the year of redemption shall begin at the date of the first publication, a mistake of the owner of the equity of redemption as to the date of the first publication will not entitle him to equitable relief under a bill seeking to redeem after the expiration of the year.

Carll v. *Kerr*, 365.

The time in which a mortgage may be redeemed is clearly fixed by Statute and the Court cannot enlarge it.

Carll v. *Kerr*, 365.

In an action for breach of a mortgage securing a bond, whereby defendant agreed to furnish plaintiff a home and support for life, if the plaintiff understood what he was doing and was at the time mentally responsible, so that he appreciated what the effect and nature of the acts he had performed were, then he would forfeit all right to the support specified in the bond.

Gray v. *Gray*, 419.

When the bill to redeem from an alleged equitable mortgage, consisting of an assignment of a bond for a deed alleged that the bond was transferred by way of security for money to be finished not to exceed $500, to pay debts of complainant, a variance between the allegations and proof as to the particular debts too which the money was to be applied was immaterial.

Sposedo v. *Merriman,* 530.

In a suit to redeem a mortgagee in possession, under an equitable mortgage, is not entitled to allowance for permanent improvements, consisting of new structures not necessary for the preservation of the property, and without the mortgagor's consent.

Sposedo v. *Merriman,* 530.

MUNICIPAL CORPORATIONS.

General acts are held not to repeal the provisions of charters granted to Municipal Corporations, though conflicting with the general provisions, unless the words of the General Statute are so strong and imperative as to render it manifest that the intention of the Legislature cannot be otherwise satisfied.

Bass v. *Bangor,* 390.

It must be presumed, in the absence of clear expressions to the contrary, that the Legislature passed the general law with reference only to those to whom the general tax law before then was applicable, and not for the purpose of affecting corporations that had in their charters a specific provision for taxation.

Bass v. *Bangor,* 390.

A general statute repealing all acts, or parts of acts, contrary to its provisions, will not be held to repeal a clause in any municipal corporation upon the same subject matter.

Bass v. *Bangor,* 390.

The general law on a subject matter, which has been provided for in certain localities by special laws, will not, although it contains a general repealer of acts inconsistent with it, annul or alter the special provisions in those localities.

Bass v. *Bangor,* 390.

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.

Bass v. *Bangor,* 390.

MUTUAL MISTAKE.

See EQUITY.

The phrase "mutual mistake" as used in equity, means a mistake common to all the parties to a written instrument, and usually relates to a mistake concerning the contents or legal effect of the instrument.

Tarbox v. *Tarbox*, 374.

Where parties are ignorant of facts on which their rights depend, or erroneously assume that they know these facts. and deal with their property accordingly not upon the principle of compromising doubts, a court of equity will relieve against such transactions.

Tarbox v. *Tarbox*, 374.

A mutual mistake which will afford ground of relief from a contract by reforming it, means a mistake common to both parties, where each alike labors under a misconception as to the terms of the written contract.

Tarbox v. *Tarbox*, 374.

NAVIGABLE WATERS.

If a bridge erected in a floatable stream by a town was a nuisanse, defendant could do whatever was reasonably necessary to remove so much of it as prevented him from using the stream for driving his logs; it not being necessary for him to resort to the Courts to abate the nuisance.

Inh. of Marion v. *Tuell*, 566.

A bridge built by a town over a navigable or floatable stream, so as to unreasonably interfere with navigation or floating. is a common nuisance.

Inh. of Marion v. *Tuell*, 566.

In a broad sense, a common nuisance is an unlawful condition, and a municipality has no more right to establish such condition than an individual.

Inh. of Marion v. *Tuell*, 566.

NEGLIGENCE.

See HIGHWAYS. ACTION.

A declaration, in an action for personal injuries by a street car conductor, which alleged that while he was exercising due care in swinging the

trolley pole around, it struck and broke the globe of an electric lamp which had been negligently placed there by the defendant light company, thereby causing the injury, does not show on its face that the act of the conductor. and not the negligence of the company, was the proximate cause of the injury.

Rollins v. *Central Maine Power Co.*, 72.

In an action for the death of a person struck by a railroad train, evidence that to the knowledge of the person with whom decedent was riding, the company at certain times employed a flagman at the crossing, offered as bearing upon the question of the driver's negligence, was immaterial, no attempt being made to bring this information home to the decedent since the driver's negligence was not imputable to her.

Sykes v. *M. C. R. R.*, 182.

In an action for death caused by a railroad crossing collision, evidence held insufficient to show that the engineer was negligent after discovering that the person with whom the decedent was riding was attempting to cross in front of the train.

Sykes v. *M. C. R. R.*, 182.

The negligence of the driver of a carriage in which the plaintiff's testator was riding at the time of the railroad crossing collision could not be imputed to the testator.

Sykes v. *M. C. R. R.*, 182.

Under R. S. Chap. 51, Sect. 71, providing that the officers of a town may request gates to be erected at a crossing, that on refusal they may apply to the railroad commissioners, and that when they decide that such a request is reasonable, or that a flagman or automatic signals are necessary, they may order a flagman to be stationed at such crossing, and the railroad shall comply with such order, it is not negligence as a matter of law for a railroad to omit the use of a flagman at a crossing, unless requested to employ one.

Sykes v. *M. C. R. R.*, 182.

Those in charge of trains have a right to expect an unobstructed right of way at a crossing; and when an approaching train could be seen 675 feet from the crossing, they were not required to anticipate that a traveler would attempt to cross in front of the train, but had a right to assume that he would observe the law in looking and listening and would not attempt to cross.

Sykes v. *M. C. R. R.*, 182.

Where defendant drove his car directly into plaintiff's team, although the road was wide enough for him to have avoided it, proceeding on the theory that the team would turn out in response to his signal, defendant is guilty of negligence which is the proximate cause of the injury, the team being driven slowly and in full view.

Savoy v. *McLeod,* 234.

When the highway was wide enough for an automobile to have passed a team without the team turning out at all, the driver of the team was not guilty of negligence in failing to turn out so as to give the machine a clear right of way.

Savoy v. *McLeod,* 234.

The defense of contributory negligence of plaintiff must be based upon the plaintiff's obligation, or duty, under the contract, or its incidents, and must be shown to be a proximate cause of the breach by the defendant.

Crosby v. *Plummer,* 355

Failure on the part of the plaintiff, after a breach to use due care to prevent, or diminish consequences which are avoidable in whole or in part, is a matter of defense distinct from contributory negligence.

Crosby v. *Plummer,* 355

NEW TRIAL.

See REPLEVIN.

When the evidence is conflicting and the question of liability and damages is peculiarly within the province of the jury, a motion for a new trial will be overruled.

Cobb v. *Cogswell,* 336.

A new trial will not be granted on the ground that defendant had discovered a letter, when, before the trial, defendant's counsel were served with notice to produce the letter and papers in the case and they produced one letter which referred to correspondence of which the newly discovered letter was a part.

Cobb v. *Cogswell,* 336.

When an issue was submitted to the jury under proper instructions, a new trial will not be granted on the ground that the verdict was against the weight of the evidence, unless the verdict was clearly wrong.

Cobb v. *Cogswell,* 336.

OFFICER.

See CONSTITUTION. JURISDICTION.

The causes for removing an officer must be causes attaching to the qualification of the officer, or his performance of his duties, showing that he is not a fit or proper person to hold the office.

Moulton v. *Scully*, 428.

A sheriff is presumed to know the Statutes relating to the illegal sale of intoxicating liquors and his duties relating to its enforcement.

Moulton v. *Scully*, 428.

PARTITION.

See MORTGAGE. JUDGMENT.

Under Revised Statutes, Chapter 90, Sections 1, 2, 28, providing for partition and declaring that a lien on the share of a part owner remains in force on the part assigned to him, a judgment creditor receiving a sheriff's deed under execution sale of real estate held by his debtor in common may not maintain partition until after the expiration of the time within which the debtor may redeem.

Hawes v. *Nason*, 193.

When the parties agree that the value of the buildings and improvements on the land shall be ascertained by persons named on the record for that purpose, their estimate is equal in its effect to a verdict.

Pond v. *Hussey*, 297,

After verdict, the demandant may elect to abandon the premises to the tenant at the value estimated and have judgment against him for the sum estimated and costs.

Pond v. *Hussey*, 297,

When the demandant does not so elect to abandon the premises, no writ of possession shall issue on the judgment, nor a new action be sustained for the land, unless within one year from rendition thereof he pays into the clerk's office, or to such person as the Court appoints, for the use of the tenant, the sum assessed for the buildings and improvements, with interest thereon.

Pond v. *Hussey*, 297,

The demandant cannot be permitted to disregard the proceedings had on the real action and bring another action against the same defendants to again try out his claim in that property.

Pond v. *Hussey*, 297,

These petitions for partition constitute a new action within the meaning of the Statute. brought by this petitioner for the same premises involved in the real action.

Pond v. *Hussey*, 297.

JURISDICTION.

See COURTS. CONSTITUTION.

Under Revised Statutes, Chapter 62, Section 2, the Court has jurisdiction, if libellant resided in this State when the cause of divorce occurred, irrespective of whether the acts constituting the grounds of divorce were committed within the State.

Walker v. *Walker*, 404.

The Courts derive their jurisdiction largely from the Statutes.

Walker v. *Walker*, 404.

Jurisdiction is conferred upon the Legislature in address proceedings by Article IX, Section 5, of the Constitution of Maine.

Moulton v. *Scully*, 428.

Under Article 9, Section 5 of the Constitution of Maine, in address proceedings by the Legislature, three things are required to be done; (1) state the causes of removal and enter them upon the journal; (2) service notice on the person in office, and (3) admit him to a hearing.

Moulton v. *Scully*, 428.

The jurisdiction of the Court must be decided upon the allegations found in the original bill.

Lakin v. *Chartered Company*, 556.

A Court of Equity will not assume jurisdiction merely because the property, being beyond the territorial jurisdiction, a Court at law cannot entertain an action in respect of it.

Lakin v. *Chartered Co.*, 556.

PARTNERSHIP.

Partnership assets applicable to debts of the same class should be equally distributed among creditors of the same class.

Fogg v. *Tyler,* 546.

When petitioner, without his fault, failed to present his claim as a partnership creditor to commissioners appointed by the Probate Court to hear claims against the estate of an insane partner, the partnership receiver will be directed to pay petitioner the amount of his claim before further dividing the assets among creditors of the same class of the petitioner.

Fogg v. *Tyler,* 546.

The individual estate of an insane partner, under guardianship, which was paid out by the guardian under decrees of the Probate Court, upon liquidating the firm business, is not to be considered a separate fund from the partnership funds in the hands of the receiver, both constituting the fund for the payment of firm debts.

Fogg v. *Tyler,* 546.

PAUPERS.

See EVIDENCE.

To render towns liable for expenses incurred for the relief of paupers under Revised Statutes, chapter 27, section 45, there must not only be an express, formal and particular notice, but also a distinct request as explicit as the notice.

Bishop v. *Hermon,* 58.

When provision has been made upon such notice and request, the liability of the town ceases and in order to render it liable for further expense, a new notice and request are necessary.

Bishop v. *Hermon,* 58.

Revised Statutes, Chapter 27, section 3, relating to a pauper settlement does not apply to the settlement of minor children abandoned by their father in 1902, while having a pauper settlement, and the children's settlement was unaffected by his loss of settlement five years later.

Bangor v. *Veazie,* 371.

The abandonment by a father, having a pauper settlement in a town, of his minor children, affects their emancipation, and under Revised Statutes, Chapter 27, section 1, par. 2, they take his settlement which continues until they gain a new one after attaining full age. Paragraphs 4, 6, 7, 8, relating to the acquisition of settlement, are inapplicable.

Bangor v. *Veazie*, 371.

A decree of divorce, with custody of children, obtained by a wife from her husband, who had a pauper settlement in a town at the time he abandoned his children, does not affect the settlement of either the wife or the children.

Bangor v. *Veazie*, 371.

PETITION.

See JUDGMENT.

Prior to 1880, the only legal process in this State by which the right of one unlawfully holding a public office could be inquired into was by quo warranto. If successful, this was followed by mandamus. By the former process, the usurper was ejected; and by the latter, the legal incumbent was substituted.

Wilson, Attorney General, Welch, Rel. v. *LaCroix*, 324.

By chapter 198, of Public Laws of 1880, which, with its subsequent amendments, has become R. S. Chap. 6, sections 70 to 74, the Legislature created an additional remedy not known to the Common Law and one more effective. This act accomplished by one and the same process the objects contemplated by both quo warranto and mandamus.

Wilson, Attorney General, Welch, Rel. v. *LaCroix*, 324.

PLEADING.

See DEMURRER. ABATEMENT. COURTS. OFFICER. CONSTITUTION. EQUITY.

When an account annexed to a writ contained three items, two of which are conceded to be properly stated, a general demurrer will not lie. The defendant should have demurred specially to the first item, instead of generally to the whole account and declaration.

Peabody v. *Conley, et al.*, 174.

Even on a special demurrer, the first item must be held to have been sufficiently stated. The plaintiffs set forth with unusual minuteness the various services that entered into the preparation and trial of the case in the lower court and the argument before the law court carrying out a lump sum for the whole. This was sufficient.

Peabody v. *Conley, et al.*, 174.

That the slightest variance between the total amount claimed as set forth in the declaration and in the account is not the subject of demurrer. The amount stated in the account controls. and a mis-recital of that amount in the declaration, whether through a mathematical or a typographical error does not vitiate the writ.

Peabody v. *Conley. et al.*, 174.

A plea in abatement, alleging another action pending, should be overruled when it did not set out, or enroll, the record or declaration of the pending action; the practice of referring to the records of court in which the prior action is alleged to be pending not being followed.

Ward v. *Jackson*, 240.

As a rule statutory offences may be set out in the language of the Statute or its equivalent.

Moulton v. *Scully*, 428.

An exception to the rule that Statutory offences may be alleged in the language of the Statute exists when such language is so general that it embraces cases within its letter, but not within its spirit.

Moulton v. *Scully*, 428.

The particularity required in an indictment need not be observed in a resolution of address, under the Constitution. Article 9. Section 5, providing that every office holder may be removed by the Governor on address of both branches of the Legislature and requiring the causes of removal to be stated and entered on the Legislative Journal and a copy on the office holder.

Moulton v. *Scully*, 428.

Variance in its legal sense means a substantial departure in the evidence adduced from the issue as made by the pleadings. It is a disagreement between the allegations and proof in some matter, which in point of law is essential to the claim relied on for relief, and in order to constitute a fatal defect, must reside in a matter which is indispensable to a recovery.

Sposedo v. *Merriman*, 531.

An amendment to a bill in equity, which contains allegations of material fact, if not verified, is not well pleaded.

Lakin v. *Chartered Co.*, 556.

RAILROADS.

Under Statute making it an offense to wilfully and maliciously release the brakes upon, or move, any railroad car on the track of a railroad, an indictment charging that defendant wilfully and maliciously set in motion a railroad car, to wit, a hand car, is sufficient.

State v. *Tardiff*, 552

The broadest possible definition should be given to the words "railroad car", and it should include any and every vehicle constructed and calculated for operation over railroad tracks, since any vehicle capable of being so operated, whether moved and running wild, or in the hands of an irresponsible person, may be the efficient cause of a serious railway accident.

State v. *Tardiff*, 552

REAL ACTION.

Where it was found in a real action that demandant, who claimed an estate in a cemetery lot, had only an easement to bury so long as it was used as a cemetery, the action was not maintainable without amendment.

Perry v. *Spear*, 262.

RECORDER OF MUNICIPAL COURT.

See CRIMINAL LAW. SEARCH AND SEIZURE.

A recorder of a municipal court is at most a magistrate of inferior and limited jurisdiction and even within limits his jurisdiction is only exceptional and occasional.

State v. *Dondis*, 17.

There is no presumption of jurisdiction of a recorder of a municipal court arising from the fact that he assumed to exercise jurisdiction.

State v. *Dondis*, 17.

Whether he has jurisdiction or not is a question of fact depending upon proof.

State v. *Dondis*, 17.

REFERENCE.

See EQUITY.

In a suit by an administrator against intestate's former partners to set aside bills of sale, and for an accounting, a referee's report, which failed to decide as to the ownership of certain property, or to determine the amount due on an accounting, is void and not to be accepted.

Jonah v. *Clark*, 142.

The award must follow the agreement of submission and must determine the questions submitted.

Jonah v. *Clark*, 142.

RELEASE.

On an issue as to whether plaintiff understood a release executed by him to be in satisfaction of his claim for damages for injuries, or a receipt for money on account for lost time, letters written by plaintiff to defendant, so far as they contain self serving declarations, were inadmissible.

Borden v. *Sandy River R. R.*, 272.

When only one reasonable conclusion can be reached by careful and discriminating minds, it is the privilege of the Court to direct a verdict accordingly.

Borden v. *S. R. R. R.*, 272.

Failure of insured to return the policy as required in case of default in payment of premiums held to destroy his rights in the absence of a waiver or estoppel.

Frye v. *Equitable Life Ass. Society*, 287.

REPORT OF ACTION.

See GIFTS.

When an action is reported to Law Court upon a stipulation to determine whether a verdict for defendant could be sustained, the Court must consider the case as if such verdict had been rendered.

Gray v. *Gray*, 21.

REVIEW.

The Revised Statutes, Chapter 91, Section 8, requires that writs of review be served as other writs.

McDonough v. *Blossom*, 66.

A writ of review, on which no attachment nor service has been made, cannot be entered in court, with or without leave.

McDonough v. *Blossom*, 66.

Neither Revised Statutes, chapter 84, section 1, nor the Public Laws of 1911, chapter 149, confers jurisdiction upon a Justice of the Court to order notice in term time or vacation, on a writ on which there has been neither attachment nor service.

McDonough v. *Blossom*, 66.

SALES.

See CONTRACTS.

Words in a contract of sale descriptive of the subject matter of the contract constitute the contract itself, but do not prevent annexation to the contract of warranties implied by law.

Philbrick v. *Kendall*, 198.

When it did not appear that the buyer relied on the seller's judgment, but ordered a particular brand of fertilizer, an instruction that is susceptible of a construction that there was an implied warranty that it was fit for the purpose ordered is improper.

Philbrick v. *Kendall*, 198

SEARCH AND SEIZURE.

See DEMURRER.

A complaint in search and seizure instituted under the prohibitory liquor law addressed to the recorder of a police court not avering the date when the alleged offense was committed was fatally defective.

State v. *Dondis*, 17.

A complaint alleging that the intoxicants were seized in an automobile numbered 9193, standing in the highway in said E., leading from E. to W., and at a point in the way leading to the powder house of M. Company, sufficiently described the place where the liquor was found and seized, so as to authorize the seizure under Revised Statutes, Chapter 29, section 48.

State v. *Pio*, 506.

SEWERS.

See TOWNS.

Surface water is not entitled to passage through a sewer, within the meaning of R. S. Chap. 21, Sect. 18.

Dyer v. *South Portland*, 119.

SHERIFFS AND CONSTABLES.

Public Laws of 1907, chapter 138, did not amend Revised Statutes, chapter 29, section 69 so as to increase the per diem compensation of deputy sheriffs engaged in the enforcement of the statutes prohibiting the illegal manufacture and sale of intoxicating liquors. The per diem mentioned in said section 69 is to be regarded as a fee and remain fixed at two dollars.

Norris, Petr. v. *McKenney, et als.*, 33.

STATUTE OF FRAUDS.

An agreement by an assignee of a lease to pay the rent to the lessees by paying it direct to the lessor as a matter of convenience is not within the Statute of Frauds, as a contract for the sale of an interest in land.

Knight v. *Blumenberg*, 191.

STATUTE OF LIMITATIONS.

See JUDGMENT.

The Statute of Limitations begins to run against a judgment from the date of its rendition, or of its entry, provided it is then suable, and it not stayed or superseded for any cause.

Damon v. *Webber*, 473.

SURFACE WATER.

See SEWERS. TOWNS.

A town is not liable under Rev. St. Chap. 21, sect. 18, for damages caused by surface water, which is prevented from entering a sewer by the clogged and obstructed condition of catch-basins, and which, in consequence flows upon adjoining land and does damage.

Dyer v. *South Portland*, 119.

TAXES.

An action for a tax will not be defeated by any mere irregularities in the election of assessors or collectors, or in assessment itself, but only by such irregularaities as go to the jurisdiction of assessors or deprive the defendant of some substantial right.

Rockland v. *Farnsworth*, 315.

To sustain an action for taxes, it is enough that the collector was collector defacto.

Rockland v. *Farnsworth*, 315.

A separate written direction to bring suit for each year's tax due, instead of one direction covering taxes for several years, is not necessary.

Rockland v. *Farnsworth*, 315.

TENANCY AT WILL.

See EXCEPTIONS.

A tenancy at will may be determined by either party by thirty days' notice in writing for the purpose, or by mutual consent.

McLeod v. *Amero*, 216.

TOWNS.

See SEWERS.

A town is not liable under R. S. Chap. 21, Sect. 18 for damage caused by surface water which is prevented from entering a sewer by the clogged and obstructed condition of catch basins, and which, in consequence, flows upon adjoining land and does damage.

Dyer v. *South Portland*, 119.

The statutory provision in this State for liability must be regarded as exclusive of all others.

Dyer v. *South Portland*, 119.

TROVER.

An action of trover cannot be maintained without proof that the defendant either did some positive wrongful act, with the intention to appropriate the property to himself, or to deprive the rightful owner of it.

Whiting v. *Whiting*, 13.

A mere detention of another's chattels, which rightfully came into plaintiff's possession, is not an actionable "conversion" unless the detention be based upon a negation of the owner's right, or accompanied by an intent to convert the property to the holder's own use.

Whiting v. *Whiting*, 13.

The refusal to deliver the property upon demand must be absolute, amounting to a denial of the plaintiff's title to the possession and not a mere apology for not delivering the goods at present.

Whiting v. *Whiting*, 13.

In trover, where the wife claimed the converted bond as a gift inter vivos from her deceased husband, evidence held insufficient to show delivery.

Gray v. *Gray*, 21.

TRUSTEE PROCESS.

The National Home for Disabled Volunteer Soldiers, established under Act of Congress, March 21, 1866, chapter 21, sections 1-14, United States Stat-

utes, section 4825, is not subject to trustee process in an action brought in a state court; This institution cannot be regarded as having its place of business within the State of Maine, within the trustee statute process, since the state ceded to the United States jurisdiction over the lands on which the Home is situated.

Brooks Hardware Co., v. *Greer & Tr.* 78.

The principal that the sovereign cannot be sued is predicated upon the condition that it has not consented to be sued, which it may do.

Brooks Hardware Co., v. *Greer & Tr.* 78.

TRUSTS.

See WILLS. EQUITY.

When a will required investment of the trust estate in safe and productive property, the trustee, though requested by the cestui que trust and his wife, had no right to accept the non-productive farm which had belonged to testatrix, and retain it as a part of the trust property.

Jordan v. *Jordan*, 124.

It was the duty of the trustee to follow the directions in the will appointing him trustee, and administer the trust according to the terms upon which the property was devised to him in trust.

Jordan v. *Jordan*, 124.

By the terms of the will, the trustee was entitled to, and it was his duty to receive from the executor, the balance of the estate in money, and having taken in dischage of the executor's liability property instead of money, the farm must be regarded as an investment made by the trustee.

Jordan v. *Jordan*, 124.

The investment of the funds of the estate in the unproductive farm by the trustee not being such as he was directed by the will to invest the funds in, the trustee should be charged for the improper investment a reasonable income from the time he took the title to the death of Harry E. Jordan.

Jordan v. *Jordan*, 124.

A constructive trust is raised by a court of equity whenever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation.

Tarbox v. *Tarbox*, 374.

Constructive trusts include all those instances where a trust is raised in equity to work out justice in the most efficient manner, where there is no intention of the parties to create such relation, and in most cases contrary to the intention of the one holding the legal title, and without any express or implied declaration of trust.

Tarbox v. *Tarbox*, 374.

In the investment of trust funds, trustees are to conduct themselves faithfully and exercise sound discretion, not with a view to speculation, but to consider the probable income along with the safety of the capital.

Tarbox v. *Tarbox*, 374.

WAIVER.

See INSURANCE.

Where proofs of loss stating that the property was used as a dwelling were received by the insurer without protest, and insurer was not asked to furnish any additional information, the objection that the proofs did not state by whom the insured building was used, as required by the policy, was waived.

Alezunas v. *Fire Ins. Co.*, 171.

Where an insurer, with full knowledge of all the facts, accepted proofs of loss, signed by only one of the insured parties, it waived the technical requirement of the policy that both parties should sign.

Alezunas v. *Fire Ins. Co.*, 171.

An insurer may waive a breach of a provision for forfeiture in case of vacancy without its assent.

Dolliver v. *Granite Ins. Co.*, 275.

WARRANTY.

See CONTRACTS.

When an express warranty is made upon a sale, no other wararanty touching the quality will be implied.

Philbrick v. *Kendall*, 198.

WILLS.

See LEGACIES. TRUSTS. APPEAL.

Bequests in a will and codicil of testator owning 1830 shares of stock of a corporation of the par value of $100 each of a specific number of shares to his sisters, and revoking a bequest of a specified number of shares to another sister, because the stock had been transferred to her, are in the nature of general legacies.

Spinney v. *Eaton*, 1.

When the fund or security for the payment of a demonstrative legacy fails, resort may be had to the general assets of the estate.

Spinney v. *Eaton*, 1.

When a will required investment of the trust estate in safe and productive property, the trustee, though requested by the cestui que trust and his wife, had no right to accept the non-productive farm which had belonged to the testatrix and retain it as a part of the trust property.

Jordan v. *Jordan*, 124.

Being purely a matter of statute, there is no room for construction in case of probate appeals, and as Rev. Statute, Chap. 65, Section 29, specifically requires a bond to be filed within the time limited for an appeal, such bond must be filed before the appeal can become effective.

Carter, Applt., 186.

Even when an appeal is taken from a decree of the Judge of Probate by leave of the Supreme Judicial Court, under Rev. St., Chap. 65, Sec. 30, the appellant is bound to file the bond required by section 29 before his appeal will become effective.

Carter, Applt., 186.

An unsealed instrument, although purporting to be a bond, cannot be regarded as one within Rev. St. Chap. 65, Sec. 29, making the filing of a bond a condition precedent to the perfecting of an appeal from a decree of the Probate Judge.

Sykes v. *M. C. R. R.*, 182.

The addition of seals to an appeal bond, given to perfect an appeal, from a decree of the Judge of Probate, will make a new contract between the obligors and the sureties on the bond, and hence, to allow it would be equivalent to permit the filing of a new bond

Sykes v. *M. C. R. R.*, 182.

When a testator created a trust for the benefit of his brothers, sisters, nephews and nieces, surviving him, whose necessities might require a larger acount of money than he had devised or bequeathed them, only those relatives within the stated class to to whom the testator had made a gift are entitled to share in the trust.

Huston v. *Dodge*, 246.

A bequest of money to a wife for life, with a bequest of the income therefrom to her absolutely, did not give her more than a life estate in the principal.

Huston v. *Dodge*, 246.

In a suit for the construction of a will and the determination of the ultimate disposition of a remainder, those persons who might, under any contingency, be entitled to take, are necessary parties.

Huston v. *Dodge*, 246.

While ordinarily the question whether a bequest was absolute will not be determined in a suit by the trustees for instructions and a construction of the will, it may be determined when a trustee of testator was also executor of the beneficiary.

Huston v. *Dodge*, 246.

While Revised Statutes, Chapter 79, Section 6, Par. 8 gives the Supreme Court jurisdiction on petition by trustees to determine the construction of a will, the court will not construe the will, or instruct the trustees as to matters which are yet contingent and may never arise, or as to matters which concern only the heirs among themselves.

Huston v. *Dodge*, 246.

When it was stipulated in the report of a suit for the construction of a will that facts stated in the bill are true and the bill stated that plaintiff was trustee, defendants cannot attack the validity of his appointment.

Huston v. *Dodge*, 246.

Where a testator gives a sum of money to trustees for the use and benefit of his sister, and the sister died before him, the legacy lapsed, and the trustees took no title.

Huston v. *Dodge*, 246.

Where a testator bequeathed $5000 to a Church, with directions for the investment of the principal and the application of the interest, with the provision that, if the Church allowed the gift to be diverted to any other purpose it should revert to the testator's heirs, the gift in case of default goes to the testator's heirs and under no circumstances can become a part of the residuary estate.

Huston v. *Dodge*, 246.

A waiver by a husband, or wife, of a testamentary gift annuls only so much of the will as the husband or wife had a personal interest in, leaving the balance in force to be determined in view of the diminished property, and except as the waiver necessarily modifies the will, the courts will carry out testator's intention.

Adams v. *Legroo,* 302.

Generally, the extinction of the first interest created by a will accelerates the rights of the second taker and lets him into immdiate enjoyment of the estate.

Adams v. *Legroo,* 302.

A will and codicil must be read together as one instrument, so as to give effect to the intent of testator ascertained from the language used, read in the light of the circumstances under which he employed them, provided that in so doing no fixed rule of construction is violated.

Adams v. *Legroo,* 302.

Where a legatee, not related by blood to testatrix, died before testatrix, the legagy lapsed.

Adams v. *Legroo,* 302.

The interest of the remaindermen in the trust fund takes precedence of the interest of the residuary legatees in the will.

Adams v. *Legroo,* 302.

While a will is presumed to have been drawn in accordance with the law of the testator's domicil and will be interpreted accordingly, its validity in respect to the disposition of real property depends upon the lex rei setae.

Blaine v. *Dow,* 480.

The effect of a will as affecting realty is to be determined by the law of the place where the land is located.

Blaine v. *Dow,* 480.

When a word is used in one sense in one part of a will and there is nothing to indicate a different meaning when it is used in another part, it presumed that the same meaning was intended.

Blaine v. *Dow,* 480.

When a testatrix devised property to her sister for life, the remainder at her death to be equally divided among the sister's three named children and the survivor, the remainder was to the children individually and not as a class.

Blaine v. *Dow,* 480.

It is always presumed that a testator intended the vesting of estates, and hence, a remainder will be regarded as vested, unless the testator manifested an intention to make it contingent; this being particularly true when intestacy might result if the gifts were contingent.

Blaine v. *Dow*, 480.

A devise of property to testatrix's sister for life, remainder at her death to be divided equally among the sister's three named children and the survivor, imported no trust for devision, and the life tenant was entitled to the possession, management and control of the property.

Blaine v. *Dow*, 480.

The intention of a testator is to be ascertained from the whole will and from all that it discloses regarding the motive and extent of the estate, the size of his bounties, the relationship and environment of the beneficiaries, as well as from the precise language over which doubts have arisen.

Bryant v. *Plummer*, 511.

In construing wills, the intention of the testator must govern, if ascertainable, unless so expressed as to be thwarted by established rules of construction.

Bryant v. *Plummer*, 511.

The general rule is that a devise or bequest to children gives a vested interest, unless the contrary intention is shown by the will.

Bryant v. *Plummer*, 511.

When at the time of the making of a will empowering trustees to apply the income to a beneficiary and his wife and children and to make advances to him and his family, the beneficiary's family consisted of only a wife, the wife was included within the term "family."

Hichborn v. *Bradbury*, 519.

The discretionary power conferred on testementary trustees to apply the income of a trust fund for the support of a beneficiary and his wife and children, and to make advances to him and his family, as they shall deem for the best, vests in their successors, under Revised Statutes, Chapter 79, Section 6, Par. 8.

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