MAINE REPORTS

113

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 18, 1915—AUGUST 30, 1915

WILLIAM P. THOMPSON
REPORTER

PORTLAND, MAINE
WILLIAM W. ROBERTS
1915

B2239

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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

Justices of the Superior Courts

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

ATTORNEY GENERAL

WILLIAM R. PATTANGALL

REPORTER OF DECISIONS

WILLIAM P. THOMPSON

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1915

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: SAVAGE, Chief Justice, SPEAR, CORNISH, BIRD, HALEY, PHILBROOK, Associate Justices.

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

STATE OF MAINE *vs.* ODILON BUTLER.

Kennebec. Opinion January 18, 1915.

Complaints Relative to Place Run by Respondent. Drinking House and Tippling Shop. Exceptions. Hearsay Evidence. Indictment.

1. The testimony of the two Deputy Sheriffs, that complaints by undisclosed persons had been made to them, that there had been liquor sold in the place of defendant, was not offered as preliminary to or as a part of any other testimony tending to show that the witnesses had any information regarding the character of defendant's business other than these complaints can be regarded only as hearsay evidence within the hearsay rule.
2. Hearsay, as a general rule, is not evidence. To this rule there are exceptions, under which to prevent an entire failure of justice, and when no better evidence can be supposed to exist, it is admitted.
3. But when, from the nature of the testimony offered, it is manifest that better evidence exists and is accessable, it is not admissible.

On exceptions by defendant. Exceptions sustained.

In this case, the defendant was arraigned upon an indictment found by the Superior Court for Kennebec County at the April term, 1914, for keeping a drinking house and tippling shop. He entered a plea of not guilty, was tried and convicted. In the course of the trial, the defendant objected to the testimony of two deputy sheriffs; the presiding Judge overruled his objections and admitted the evidence, and the defendant had exceptions to said ruling.

The case is stated in the opinion.

William H. Fisher, County Attorney, for the State.

Pattangall & Plumstead, for defendant.

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

SPEAR, J. This case involves an indictment against Odilon Butler in the usual form for keeping a drinking house and tippling shop. He was arraigned, entered a plea of not guilty, and was put upon trial. The bill of exceptions states the case:

"During the progress of the trial the County Attorney introduced the testimony of two deputy sheriffs; namely, Charles H. Farrington and John Roderick. Neither of them gave evidence or was requested to give evidence with regard to having any knowledge of his own that the respondent maintained a tippling shop or was guilty of any infraction of the prohibitory law under the indictment on which he was arraigned. But the following testimony was given by them, Deputy Sheriff Farrington was asked the following questions by the County Attorney:

Q. State to the jury whether or not prior to the twenty-first day of February last you had had complaints relative to the place run by Mr. Butler.

Counsel for the respondent objected to the question and the objection was overruled; whereupon he seasonably excepted to the admission of the question and answer. Deputy Sheriff Farrington answered the question in the affirmative. Deputy Sheriff Roderick was asked the following questions and gave the following answers while being examined in chief by the County Attorney: Q. Have you had any complaints relative to the place run by the respondent Butler? A. Yes, sir. Q. And if so, what was the nature of them? A. The complaint was that there has been liquor sold in the place. To the admission of these questions and answers counsel for the respondent objected, and the objections being overruled, seasonably excepted to the ruling of the Court. Neither of these witnesses testified or was asked to testify about any facts tending to verify the truth of the complaints which they stated had been made to them."

This evidence so far as appears was not offered as preliminary to or as a part of any other testimony tending to show that these witnesses had any information regarding the character of the defendant's business other than the complaints made by undisclosed persons. This testimony offered in chief by the State, consisting of the sole statement on the part of the witnesses, and not preliminary to, nor connected with, any other statement by them, can be regarded only as

hearsay evidence and must fall within the hearsay rule. They were but repeating that certain persons in the community had informed them that they believed the defendant was keeping a tippling shop. The witnesses apparently did nothing to verify this information and so far as appears the information, itself, might have been based upon hearsay.

It may be regarded as a fair presumption that the officers, who testified to the complaints made to them, well knew the name and place of residence of the complainants. Accordingly, the original sources, from which the complaints must have come, were presumably within the easy procurement of the officers. But it does not appear that they or the State, made any effort to obtain the presence of their informers as witnesses at the trial. These facts clearly bring the case within the hearsay rule, as stated in *Gould* v. *Smith*, 35 Maine, 513, as follows: "Hearsay, as a general rule, is not evidence. To this rule, however, there are exceptions, under which to prevent an entire failure of justice; and when no better evidence can be supposed to exist, it is admitted. But when, from the nature of the testimony offered, it is manifest that better evidence exists and is accessable, it is not admissible." This is the general rule adopted by every common law jurisdiction, and every text writer on evidence, so far as we have been able to discover. From the evidence of complaints the jury at most could only draw an inference as to the truth of the charge made in the indictment. But as was said in *Mason* v. *Tallman*, 34 Maine, 472: "An inference founded upon hearsay is not more admissible in evidence than a fact obtained in a like manner." It is unnecessary to go farther. There is no rule under which the testimony in question was admissible.

But it is claimed that, even though the testimony was inadmissible, it was not prejudicial to the rights of the defendant. We can conceive of a case, in which this contention might prove true, but in the case before us there is nothing stated in the exceptions, and there is no further report of the evidence, which warrants this conclusion.

Exceptions sustained.

JONAS EDWARDS & SON

vs.

JAMES H. PINKHAM.

Androscoggin. Opinion January 18, 1915.

Assignment. Assumpsit. Confession and Avoidance. Contract. Liability. Mortgage. Possession. Rules of Construction.

This case depends upon the construction of the following instrument, which is in effect a contract;

"Mr. James Pinkham, Winthrop, Me. Dear Sir: As assignee of Charles Davis we herewith advise you that during the time the six horses on which we have a claim are working on the Davis operation, we shall hold you responsible for the earnings of said horses for not less than thirty-five dollars each month from January 17, 1913 to April 17, 1913, (per team) and with the understanding we put you in absolute control of said teams as our agent.

J. L. PEARSON. JONAS EDWARDS.

The plaintiff contends that under this instrument, the defendant is personally liable for the use of the horses; the defendant, that he is liable only as assignee.

Held:

1. That as matter of law, it cannot be contended that the words "as assignee" at the beginning of the agreement exempts the defendant from personal liability.
2. The intention of the parties and the meaning of this instrument is to be discovered by the application of the well known rules of construction, which take into consideration the subject matter of the agreement, motive for procuring it, the probabilities as to conflicting contentions and all other circumstances which may throw light upon the transaction.
3. With regard to the subject matter of the contract, the situation of the parties, the purpose to be obtained and the motives for procuring it, the evidence clearly preponderates in favor of the contention of the plaintiffs regarding the construction of the written instrument.

On report. Judgment for the plaintiff for $180.53 and interest from date of writ.

This is an action of assumpsit on an account annexed to recover of defendant the sum of $315.00 for the use of three teams from January 17, 1913, to April 17, 1913, at $35.00 per month for each team. The plea was the general issue. At the conclusion of the evidence, the case was, by agreement of the parties, reported to the Law Court for determination, upon such evidence as is legally admissible.

The case is stated in the opinion.

Tascus Atwood, for plaintiffs.

Frank E. Morey, and H. E. Foster, for defendant.

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

SPEAR, J. This is an action of assumpsit on the following account annexed: "James H. Pinkham to Jonas Edwards & Son to use of three teams of horses, and harnesses with same, at $35.00 per month per team, from Jan'y 17, 1913 to April 17, 1913—$315.00."

The plea was the general issue. The defense goes to the liability and not to the amount claimed. The case turns upon the construction of the following instrument: "Mr. James Pinkham, Winthrop, Me. Dear Sir: As assignee of Charles Davis we herewith advise you that during the time the six horses on which we have a claim are working on the Davis operation we shall hold you responsible for the earnings of said horses for not less than thirty-five dollars each month from January 17, 1913 (per team) and with the understanding we put you in absolute control of said teams as our agent.

J. L. PEARSON. JONAS EDWARDS."

The contention of the plaintiff is that under this instrument the defendant is personally liable for the use of the horses; the contention of the defendant that he is liable only as assignee.

As a matter of law it cannot be contended that the words "as assignee" at the beginning of the agreement exempts the defendant from personal liability. *Hull* v. *Sturdivant et al.,* 59 Maine, 172; *Ross* v. *Brown,* 74 Maine, 352; *Mellen* v. *Moore,* 68 Maine, 390. Accordingly, this instrument is a contract, uncertain in meaning, from which is to be discovered the intention of the parties, by the application of the well known rules of construction, which take into consideration the subject matter of the agreement, the situation of the

parties, the purpose to be attained, the motive for procuring it, the probabilities as to conflicting contentions, and all other circumstances throwing light upon the transaction.

Bearing in mind these rules of interpretation the report shows the following facts: During the summer and fall of 1912 the plaintiffs sold to Charles H. Davis these teams for the respective sums of $650.00, $325.00, and $620.00 for which three promissory notes were given payable $50.00 each month on each note, the title of each team to remain in the seller until the respective notes were fully paid. Additional security was taken, but this fact is not material to the issue. Davis purchased these teams for the purpose of engaging in a lumber operation at a place called Mosquito in or about the Forks Plantation. Davis undertook the operation and proceeded until the 17th day of January, 1913, when, having failed in his project, he made a common law assignment to James H. Pinkham, the defendant. To this assignment the plaintiffs did not become parties. The avowed purpose of the assignment was to authorize and enable the defendant to complete the operation, which Davis had begun. To do this it was necessary that he should have control and use of the three teams which the plaintiffs had sold to Davis. But the evidence discloses that some kind of friction had arisen between Davis and Pinkham which disturbed Pinkham's prospects in getting control of the teams through Davis. Davis having failed to pay according to the tenor of his notes, Pinkham was aware that the plaintiffs had a legal right at any time to the control of the teams then in possession of Davis.

When Davis had failed in the success of his operation, it is manifest that Pinkham had interest enough of some kind in the affair to induce him to investigate the matter, and take a common law assignment of the operation, and of all the property, estates, rights and credits and choses in action belonging to Davis, together with debts, books of account and all other written instruments relating to the above property, with the view "to continue and carry on the business of the said Davis."

At this juncture, when Pinkham had both an interest and a desire to prosecute the business, and apprehension about getting control of the horses, he went to the plaintiffs for the express purpose of obtaining the use of these teams to carry on the operation, as expressed by himself in the following language: "I told Mr. Edwards that I

thought Mr. Davis and I were going to have a little trouble. Mr. Davis was discouraged and wanted to take his horses out and go to Manchester; and I was afraid I could not get the money out of the lumber if he took the horses out; and I told Mr. Day that I should get a paper to show Mr. Edwards so I could have possession." This testimony is in exact accord with the plaintiff's contention, as shown by the testimony of Jonas Edwards, as follows: "Q. And what was the occasion of your giving him the writing that was given him and has been identified here? A. He said he was having some trouble with Davis and wanted something to show that he had possession of the horses." This is the undisputed attitude of the defendant towards this transaction. On the other hand, the plaintiffs had these three teams in the woods in a hazardous occupation, holding an agreement that they should receive a payment of $50.00 each month on each team with the right in default of payment to take possession of the teams. Neither did the plaintiffs have any interest in the operation or in the assignment to Pinkham, except the indirect interest which might arise from the fact that Davis was a creditor of the bank in which Jonas Edwards was a director. This is the undisputed attitude of the plaintiffs towards this transaction. Up to this date, February 14, when the agreement was made, there was no controversy as to these facts. With regard to the subject matter of the contract, the situation of the parties, the purpose to be obtained, or the motive for procuring it, we think the evidence clearly preponderates in favor of the contention of the plaintiffs regarding the construction of the written instrument.

This conclusion is also confirmed by the probabilities and other circumstances in the case. It appears that the plaintiffs were entitled to a payment of $50.00 per month upon their notes whether the teams were employed by Davis, or by Pinkham as assignee. We are unable to discover any motive or any reason based upon business principles which would induce the plaintiffs to reduce a claim of $50.00 a month to one of $35.00 a month, if they were to look to the same source, for the payment of the smaller sum, with which they had a written contract, for the payment of the larger sum. If Pinkham had taken a writing for the purpose for which he says alone he desired it,—for the control only of the horses,—there would have been no occasion for any change in the amount of the payment and he would still have been obliged to pay from some source in order

to continue in control of the teams—$50.00 per month on each team, as specified in the notes. Now it looks reasonable, under these circumstances, that this change from $50.00 per month payable from the operation was reduced to $35.00 per month because it was to be paid by Pinkham, personally, and as a favor to him. There was certainly no visible reason why the plaintiffs should voluntarily make the reduction to their own disadvantage. There was some reason why this original contract was changed from $50.00 a month to $35.00 a month. What was it? Furthermore, it is unreasonable to suppose that the plaintiffs would allow their teams to continue all winter in a hazardous and admittedly depreciative service, in the employ of a defunct business, carried on by an assignee, as the only source to which they were to look for sufficient monthly payments to meet the use, depreciation, and possible injury to their teams.

Without some guarantee, this was the time when a prudent man, who had the right, would have taken his teams back rather than trust to such a source for monthly compensation. For it was now evident when the operation was over that the teams would come back, as Davis could not pay. If, then, the plaintiffs thought they were looking to a bankrupt business for their monthly pay, is it reasonable to suppose that they would not have demanded the $35.00 of the assignee, as it became due, rather than let the teams work all winter without pay, and take back what was left of them in the spring? Such conduct was perfectly consistent with the plaintiffs' contention, that they looked to Pinkham for $35.00 per month, whom they regarded perfectly responsible. And Pinkham gives no reason why he would have hesitated to make the agreement as the plaintiffs claimed it, but on the other hand gives ample reason why, at the time the agreement was made, he would not have hesitated to do it. When asked, when he read the contract and discovered "that this paper recited you were to pay $35.00 per month for the use of the teams," why he did not write back and say there was some mistake, he makes this significant answer in the nature of a confession and avoidance: "This is why, at that time when Mr. Edwards gave me that paper, I thought,—as Mr. Davis thought,— there would be plenty of money to pay the mortgage, when the operation was finished in the spring."

Jonas Edwards and Pearson say that it was expressly understood with Pinkham, in conversation with him in regard to the matter, that

he was personally to pay $35.00 per month for the use of these teams. He denies that he made any such conversation. These two witnesses, so far as the case shows, are each as reputable, and their testimony entitled to as much weight, as that of the defendant. If this be so, upon the testimony of these witnesses, unsupported by any outside influences, the plaintiffs must be regarded to have sustained the burden of proof. But when corroborated, as we have endeavored to show, by all the probabilities and every circumstance, they seem most clearly to have prevailed.

But the writing, itself, if construed without reference to any other evidence at all, is clearly in favor of the plaintiffs' contention as to the personal liability of the defendant. It clearly says: "We shall hold you responsible for the earnings of said horses for not less than $35.00 each month from January 17, 1913 (per month) and with this understanding we put you in absolute control of said teams as our agent." No language could be plainer; and the control of these teams is given practically upon the condition that the defendant understood that he was to pay $35.00 a month, as the language, "and with this understanding we put you in absolute control," etc., indicates. But it is said that this agreement is controlled in its clear expression "we shall hold you responsible" by the words "as assignee" at the beginning. It has already been shown that the words "as assignee" have no binding legal effect upon the contract. We think it as clearly appears that the words as here used were employed as they very naturally would be to express the relation which the defendant bore to Davis and to enable the defendant to show to Davis through the writing his right as assignee to demand the teams. The contract was written at the express instance of the defendant, for the express purpose of showing it to Davis, to enable him to get control of the teams. In other words, as here used, in connection with all the facts and circumstances before mentioned, the words should be regarded as merely *descriptio personae* as has been held in scores of cases found all through the books. As to the use of the words at the end of the contract "as our agent" we hardly think the claim of the defendant that he was acting as agent of the plaintiffs in the use of these horses, can be regarded with serious consideration. We are accordingly of the opinion that the plaintiffs have sustained the burden of proof.

The report shows that more or less testimony was taken out touching the disposal of the horses after the winter's work, and what prices were obtained for them; but we are unable to discover that these issues concern the case at bar, which involves only the interpretation of the contract before us.

Judgment for plaintiffs for $180.53 and interest from date of writ.

STATE OF MAINE *vs.* GEORGE SCHOPPE.

Sagadahoc. Opinion January 28, 1915.

Complaint. Demurrer. Dwelling. Intoxicating Liquors. R. S., Chap. 29, Sec. 52. Seizure. Store. Traffic. Warrant.

The officer, in this case, seized the intoxicating liquors without a warrant, under R. S., Chap. 29, Sec. 48, and within a reasonable time thereafter, made complaint and obtained a warrant for the same.

Held:

1. That in all cases where an officer may seize intoxicating liquors, or the vessels containing them, upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant.
2. The statute clearly authorized the seizure made in this case. The complaint was in the form prescribed by statute and conformed thereto with substantial accuracy.
3. The description of the place where the liquors were found is merely preliminary, and does not constitute a description of the offense alleged to have been committed.
4. By this statute, no new or additional authority is given to search; it is only to seize. It is to seize what the officer may be enabled to seize, without the unreasonable searches prohibited by the constitution.
5. Even if the seizure was illegal, that is no defense for the defendant's violation of the law. If the sheriff has violated any law, he is responsible for same, but that will not constitute any justification or excuse for the defendant.

6. Possession of spirituous and intoxicating liquors with intent to sell the same in violation of law, is an offense, and the defendant's possession with such intent was unlawful, wherever he kept his liquors.
7. If the liquors were kept in violation of law, they were none the less liable to forfeiture, because the possession of them were wrongfully or illegally obtained.

On report. Demurrer overruled. Judgment affirmed.

A process for search and seizure of intoxicating liquors, was issued by the Bath Municipal Court on the 3d day of July, 1913. The respondent was tried in said court and found guilty, and appealed to the Supreme Judicial Court for said County. In the Supreme Judicial Court, the respondent filed a general demurrer. Without ruling upon the demurrer the case was reported to the Law Court for determination. If the court is of the opinion that the complaint and warrant are defective, the entry is to be "Demurrer sustained; Complaint quashed;" If the complaint and warrant are held good, the entry is to be; "Demurrer overruled; Judgment of Bath Municipal Court affirmed."

The case is stated in the opinion.

Edward W. Bridgham, County Attorney, for State.

Frank L. Staples, for defendant.

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

HANSON, J. This process for seizure of intoxicating liquors taken without a warrant, was issued by the Judge of the Municipal Court of the city of Bath. The respondent filed a demurrer to the complaint and warrant. The case was then by agreement reported to this court for determination, with the stipulation that "if the court is of the opinion that the complaint and warrant are defective, the entry is to be: 'Demurrer sustained; complaint quashed'; if the complaint and warrant are held good, the entry is to be, 'Demurrer overruled; judgment of the Bath Municipal Court affirmed.' "

The complaint and warrant follow:

"To the Judge of the Bath Municipal Court in the County of Sagadahoc:

Chester C. Aderton of Bath in said County, and competent to be a witness in civil suits, on the third day of July in the year of our Lord one thousand nine hundred and thirteen, in behalf of said State, on

oath complains that he believes that on the third day of July in said year at West Bath, in said County, intoxicating liquors were unlawfully kept and deposited by George Schoppe of Bath in said County, in the dwelling house, or hotel and its appurtenances occupied by the said George Schoppe and situated on the south side of 'Bull Rock Bridge' Road and the east side of New Meadows River in said West Bath, said George Schoppe not being then and there authorized by law to sell liquors within said State and that said liquors then and there were intended for sale by the said George Schoppe in this State in violation of law, against the peace of said State, and contrary to the form of the statute in such case made and provided.

And the said Chester C. Aderton on oath further complains that he, the said Chester C. Aderton on the third day of July, A. D. 1913, being then and there an officer, to wit, a deputy sheriff of the County of Sagadahoc duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale, and the vessels containing them, by virtue of a warrant therefor, issued in conformity with the provisions of the law, did find upon the above described premises, one dress suit case containing ten bottles, each containing one pint of whiskey, intoxicating liquors as aforesaid, and the vessels containing the same, then and there kept, deposited and intended for unlawful sale as aforesaid within this State, by the said George Schoppe and did then and there, by virtue of his authority as a deputy sheriff aforesaid, seize the above described intoxicating liquors and the vessels containing the same, to be kept in some safe place for a reasonable time, and hath since kept, and doth still keep, the said liquors and vessels to procure a warrant to seize the same.

He therefore prays that due process be issued to seize said liquors and vessels, and them safely keep until final action and decision be had thereon, and that said George Schoppe be forthwith apprehended and held to answer to said complaint, and do and receive such sentence as may be awarded against him.

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Sagadahoc, ss. July 3, 1913.

The said Chester C. Aderton made oath that the above complaint by him signed, is true.

Before me, JOHN J. KEEGAN, Judge.

State of Maine

(*L. S.*)

Sagadahoc, ss.

To the Sheriff of our County of Sagadahoc, or either of the Towns or Cities within said County, or to any or either of them,

Greeting:

In the name of the State of Maine, you are commanded to seize the liquors and the vessels in which they are contained, named in the foregoing complaint, of said Chester C. Aderton, and now in his custody, as set forth in said complaint, which is expressly referred to as a part of this warrant, and safely keep the same until final action and decision be had thereon, and to apprehend the said George Schoppe forthwith, if he may be found in your precinct, and bring him before the Municipal Court for the City of Bath in said County, to answer to said complaint, and to do and receive such sentence as may be awarded against him.

Witness, John J. Keegan, Esq., our said Judge at Bath, aforesaid, this third day of July, in the year of our Lord one thousand nine hundred and thirteen.

JOHN J. KEEGAN,
Said Judge."

In support of the demurrer the respondent attacks the sufficiency of the complaint, and the warrant as well, because the complaint is made part of the warrant, and invokes R. S., Chap. 29, Sec. 52:—"No warrant shall be issued to search a dwelling house occupied as such, unless it, or some part of it, is used as an inn or shop, or for purposes of traffic, or unless the magistrate before whom the complaint is made, is satisfied by evidence presented to him, and so alleges in said warrant, that intoxicating liquor is kept in such house or its appurtenances intended for sale in this State, in violation of law," and says that if this were a "search and seizure process" instead of what is often "perhaps not with strict accuracy," called a "seizure" process, the demurrer would be sustained, "because there is no allegation that the dwelling or part of it is used for the purposes of traffic," and we cannot regard the words "shop or dwelling" "and occupied as a

store and dwelling" (here dwelling-house or hotel) as, or equivalent to, an allegation that the dwelling house "or some part of it, is used as an inn or shop," The State's counsel contends that the last sentence of Chap. 29, Sec. 48, authorizes the present process, that its requirements have been complied with, and that the complaint and warrant issued thereunder are sufficient in law. That section provides: "Intoxicating liquors kept and deposited in the State, intended for unlawful sale in the State, and the vessels in which they are contained, are contraband and forfeited to the county in which they are kept at the time when they are seized under this chapter. And in all cases where an officer may seize intoxicating liquors or the vessels containing them, upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant."

The attorney for the respondent contends, "that the last sentence of that section must mean, that when an officer may seize liquors upon a *legal* warrant he may seize them without a warrant."

2. That the complaint should be as precise in this case as in that for a search warrant.

3. That the allegations of the seizure, complaint and warrant should determine whether the liquors could legally have been taken with a warrant.

These objections relate to the form of the complaint, and while they would have force if directed to the form of the complaint necessary in a search and seizure process, their significance is lost when the distinction is recognized between that process and the process to seize under Sec. 48 of Chap. 29, R. S., as this court has heretofore held. In *State* v. *Nadeau*, 97 Maine, 275, the court holds: "The search and seizure process is in a class by itself. The constitution of the State has so placed it. The Bill of Rights, Sec. 5, provides that the people shall be secure in their persons, houses, papers and possessions from all unreasonable search and seizure; and that no search warrant shall issue without a special designation of the place to be searched and the thing to be seized."

The statute clearly authorized the seizure made in this case. The complaint was in the form prescribed by statute, and conformed thereto with substantial accuracy. The description of the place where the liquors were found is merely preliminary, and does not constitute a description of the offense alleged to have been com-

mitted, viz: "the keeping of intoxicating liquors . . . intended for sale in this State in violation of law." The warrant is not questioned except as it may stand or fall with the complaint.

The complaint appears to contain a statement of all the facts leading to the seizure of the liquor, and we must so conclude from the record. The officer making complaint had performed that duty within a reasonable time, and on receiving the warrant performed the other services required by law. We think the complaint sets forth all the necessary facts to constitute the offense charged. *State* v. *McCann*, 59 Maine, 385, and therefore fulfills the requirements of the statute. *State* v. *Holland*, 104 Maine, 391. The section under consideration has been passed upon many times. In *State* v. *McCann*, supra, the circumstances of the seizure were practically identical with the case at bar, and the court said, "by this statute, no new or additional authority is given to search. It is only to seize. It is to seize what the officer may be enabled to seize, without the unreasonable searches prohibited by the constitution. The act to this extent is constitutional. *Jones* v. *Root*, 6 Gray, 435; *Mason* v. *Lothrop*, 7 Gray, 355." *Weston* v. *Carr*, 71 Maine, 357; *State* v. *Guthrie*, 90 Maine, 448. "The evidence does not show any unlawful search, nor indeed any search. It simply proves a seizure, which we are not to presume illegal, without evidence." Idem. *State* v. *Bradley*, 96 Maine, 124.

Following close upon the foregoing, the court again passed upon the question. In *State* v. *McCann*, 61 Maine, 116, where search and seizure were made by the sheriff without a warrant, and the point was urged by the defendant, the court, by Appleton, C. J., said: "It is objected that the seizure was illegal, the officer having proceeded to search without any warrant. Suppose it was so, that is no defense for the defendant's violation of law. If the sheriff has violated any law, he is responsible for such violation, but that will not constitute any justification or excuse for the defendant."

The last contention of the defendant's counsel, as to the uncertainty created by the description of the place where the liquor was found, has been passed upon by this court in *State* v. *Plunkett*, 64 Maine, 538. It was there held that "possession of spirituous and intoxicating liquors with intent to sell in violation of law, is an offense. The defendant's possession with such intent was unlawful, wherever he kept his liquors." If the liquors were kept in violation of law, they

were none the less liable to forfeiture, because the possession of them was wrongfully or illegally obtained. *State* v. *McCann*, 61 Maine, 116. The defendant is none the less guilty, however the government may obtain possession of his person. If a complaint is made against one for larceny, and a search warrant is granted, and the stolen goods found, the thief is not to be discharged when his guilt is fully established, because the officer in serving the warrant may have exceeded his authority, or the complainant may not have had sufficient reasons for the belief upon which his complaint was based. In the case at bar, the offense was committed wherever the liquors were kept and deposited, if kept by and deposited with the defendant for unlawful sale within the State. The offense is committed whether they were in his store or his dwelling. The guilt of the respondent is not converted into innocence, though the belief of the complainant as to some of the allegations in the complaint were not well founded, or the officer, in its service, exceeded his authority.

There is no hardship involved in cases of this kind when an officer does in fact exceed his authority, for provisions for redress are ample, and an officer who seizes property without a warrant is held to a strict compliance with all the requirements of law authorizing such proceedings. *State* v. *McCann*, 61 Maine, 116; *State* v. *Plunkett*, 64 Maine, 528; *Adams* v. *Allen*, 99 Maine, 249.

Counsel on both sides cite with confidence *State* v. *LeClair*, 86 Maine, 527. There the seizure was made without a warrant, and objection was made to the form of complaint. The court held that "The forms set forth in Sec. 63, Chap. 27, R. S., are declared to be sufficient in law for all cases, "to which they purport to be adapted." The form there provided for a "complaint in case of seizure" was prepared before the Act of 1870, Chap. 125, Sec. 2, (R. S., Chap. 27, Sec. 29) now Chap. 29, Sec. 48, R. S., and does not "purport to be adapted" to the seizure without a warrant there authorized. This change in the statute obviously requires such change in the form of the process as will bring it into conformity with the facts, and are unobjectionable in form. *State* v. *McCann*, 59 Maine, 383; *State* v. *Nowlan*, 64 Maine, 531; *State* v. *Dunphy*, 79 Maine, 104.

In accordance with the stipulation filed the entry must be,

Demurrer overruled.
Judgment affirmed.

BELONIE BOUCHARD

vs.

DIRIGO MUTUAL FIRE INSURANCE COMPANY.

Somerset. Opinion February 3, 1915.

Engine. Exceptions. Explosive Material. Forfeiture of Policy. Gasoline. Increase of Risk. Insurance. "Kept and Used." Nonsuit. "Prohibited Articles." "Stored and Kept." Threshing Grain.

1. That although gasoline was conceded to be included in the prohibited list, it was not "kept or used" by the plaintiff under the facts of this case within the inhibition of the contract. These words imply something more than possession for a temporary purpose.
2. Nor was the increase of risk clause violated, which provides that the policy shall be void if without the written consent of the insured "the situation or circumstances affecting the risk shall, by or with the advice, agency or consent of the insured be so altered as to cause an increase of such risks." These words imply something of duration, and a casual change of a temporary character, such as in the case at bar, does not render the policy void as a matter of law.
3. That both clauses should be construed in the light of the entire contract, the situation and character of the property insured and the natural and necessary uses to which it must be put by the owner, and the application of this rule of construction confirms the inference already drawn from the language of the clauses themselves.
4. That the policy is not avoided when the use made of the prohibited articles or the general use and operation of the property is necessarily incident to the business of the insured, and therefore presumed to be recognized and impliedly permitted by the insurer.
5. That in view of the correspondence between the parties and the fact that the defendant denied all liability, the jury might well have found that it had waived the requirement as to proof of loss.

On exceptions by plaintiff. Exceptions sustained.

This is an action on a fire insurance policy, issued August 22, 1911, on plaintiff's farm buildings and personal property, which were

destroyed by fire on the 28th day of November, 1912. Plea, the general issue, together with brief statement of special matters in defense. At the conclusion of plaintiff's testimony, the presiding Justice ordered a nonsuit, and the plaintiff excepted to said order.

The case is stated in the opinion.

Fred F. Lawrence, for plaintiff.

S. W. Gould, for defendant.

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

CORNISH, J. Action on a fire insurance policy for loss of plaintiff's farm buildings and personal property. The presiding Justice ordered a nonsuit. The main issue is whether the fact that the fire was caused by the operation of a gasoline engine by the plaintiff for threshing grain, in the barn floor, avoided the policy either because it violated the "prohibited articles" clause or the clause against increase of risk.

1. *Prohibited Articles.*

The standard policy contains this provision among others: "This policy shall be void . . . . if camphene, benzine, naphtha or other chemical oils or burning fluids shall be kept or used by the insured, on the premises insured," with certain exceptions not material here. It is conceded that gasoline is within the prohibited list and the crucial question is whether under the facts of this case it was "kept or used" within the inhibition of the contract. The record shows that the plaintiff had lived on this farm in Skowhegan since the spring of 1908, and had been insured by the defendant during that time, the policy in suit being a renewal of a former policy in the same company; that each year he had employed men to thresh his grain by the use of a gasoline engine in precisely the same manner as on the day of the fire; that these men travelled from farm to farm doing the work and that practically all of the grain in that community is threshed in the same way, the engine being placed within or without the barn according to the location of the grain; that in 1912 the plaintiff, with one Herbert, had purchased the engine and had set it up in his barn for the purpose of threshing his grain, and in about an hour after the operation began, the fire occurred,

in precisely what manner or from what immediate cause it does not appear. Under these circumstances did the plaintiff "keep or use" gasoline within the meaning of the policy? We think not.

In the first place, the words themselves usually import something more than temporary possession or possession for a temporary purpose. "To keep" implies something more than merely to have. It carries with it the idea of continuance and duration. Such is its common acceptation, as "to keep a secret," "to keep the peace," "to keep a promise," "to keep a certain line of goods," "to keep store," or to "keep house." Such is its definition by lexicographers. "To keep" is "to have and retain in one's control or possession," Standard Dic.; "To continue to hold," "To conduct or carry on," "To have habitually in stock for sale," Webster New Int. Dic.

The verb "To use" in this connection and in collocation with "keep" naturally suggests the same idea of employment on more than a single occasion. It implies the customary or habitual rather than the accidental or the temporary. These definitions have the sanction of authority. In *Thompson* v. *Equity Fire Ins. Co.*, L. R., App. Cas. 1910, 592, a building was insured and the words were "keep or store," instead of "keep or use" as here, and the court held that a small quantity of gasoline in a stove being used for cooking purposes, which caused the fire, no other gasoline being in the building, was not an infringement of the condition. The court say:

"What is the meaning of the words 'stored or kept,' in collocation and in the connection in which they are found? They are common English words with no very precise or exact signification. They have a somewhat kindred meaning and cover very much the same ground. The expression as used in the statutory condition seems to point to the presence of a quantity not inconsiderable, or at any rate not trifling in amount, and to import a notion of warehousing or depositing for safe custody or keeping in stock for trading purposes. It is difficult if not impossible to give an accurate definition of the meaning, but if one takes a concrete case it is not very difficult to say whether a particular thing is 'stored or kept' within the meaning of the condition. No one probably would say that a person who had a reasonable quantity of tea in his house for domestic use was 'storing or keeping' tea there, or to take the instance of benzine, which is one of the prescribed articles, no one would say that a person who had a small bottle of benzine for removing grease spots or cleansing purposes

of that sort was 'storing or keeping' benzine. The learned counsel for the respondents contend that the presence of gasoline on the premises was enough to bring the statutory condition into operation and he referred to the accident which did happen as an example of the danger against which precautions are required. But it is obvious that the danger guarded against is not ignition caused by the article itself, but the risk of spreading or increasing the conflagration when once started and in progress by the presence of highly inflammable or explosive material. The fact that the fire in the present case was caused by the gasoline is irrelevant. And the fatal objection to the defendant's contention is that it gives no effect whatever to the words 'stored or kept' and the meaning which the defendants seek to attribute to it might possibly or even probably prevail if the words in question had been omitted altogether, and the condition had excluded liability for loss or damage occurring while . . . gasoline . . . is . . . in the building insured. Some meaning must be given to the words 'stored or kept.'"

While the words in the case at bar are "kept or used" instead of "kept or stored" as in the English case, and therefore the idea of storage is embraced in the one instead of use in the other, yet both have the word "keep," and so far as the reasoning in the cited case refers to that word it carries weight in our present discussion. "The word 'kept' as used in the policy, (of the same form as in the case at bar) implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time," says the Massachusetts Court in *First Cong. Church* v. *Ins. Co.*, 158 Mass., 475. A similar definition, excluding the idea of mere temporary presence, is given in *Cleete* v. *Ins. Co.*, 144 Wis., 638; *Smith* v. *Ins. Co.*, 107 Mich., 270, 30 L. R. A., 368, and see note 13 A. & E. Ann. Cas., 542.

The definition of "use" was discussed by the court in *Means* v. *Ins. Co.*, 92 Pa., 15, as follows: "We are not disposed to give to the word 'use' in this policy the narrow construction claimed for it. It must have a reasonable interpretation,—such as was contemplated by the parties at the time the contract was entered into. . . . . What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency. The strict rule claimed by the defendants would prevent the assured from painting his house or cleaning his furniture, as it would be difficult to do either

without using some of the prohibited articles." The court followed the same definition of "use" in *Lebanon County* v. *Ins. Co.*, 237 Pa. St., 360.

A careful definition of "kept or used" is found in the recent case of *Springfield F. & M. Ins. Co.* v. *Wade*, 95 Tex., 598, 58 L. R. A., 714, where the words of prohibition were "kept, used or allowed," and they were held not to cover a case where a gallon of gasoline was brought on to the premises for temporary use, although such act in fact caused the destruction of the property. "It is not enough," say the court, "That hazardous articles are upon the premises; they must be there for the purpose of being stored or kept, . . . As the word 'kept' means that the prohibited article must not only be upon the premises, but must be there for keeping or storing, and not merely upon a temporary occasion for a different purpose, it follows that there must be some degree of permanency in its continuance there. The word implies all this. The word 'used' is employed in immediate connection with 'kept,' in order, we think, to extend the provision so as to exclude the idea that the article must be stored or deposited on the premises. But the purpose in the use of each word is to provide against the same danger, viz., that which would arise from the habitual, constant or continued exposure of the property, through the presence or use of the article. One word forbids the permanent or habitual keeping of the dangerous thing, and the other a like use of it, without the actual depositing or storing of it." See also *Hynds* v. *Ins. Co.*, 11 N. Y., 554; *Farmers Ins. Co.* v. *Simmons*, 30 Pa., 299, *Mears* v. *Ins. Co.*, 92 Pa. 15; *Szynkno* v. *Ins. Co.*, 114 Ill., App. 401, and *Adair* v. *Ins. Co.*, 107 Ga., 297, 45 L. R. A., 204, the last involving the temporary use of a machine for threshing grain on the premises where the insured property was located.

2. *Increase of risk.*

The language is that the policy shall be void if without the written consent of the insurer "the situation, or circumstances affecting the risk, shall, by or with the advice, agency or consent of the insured be so altered as to cause an increase of such risks." What constitutes an alteration of the situation or circumstances affecting the risk as to cause an increase of risk? Here we must distinguish between occasional negligent acts of the insured which may not only tend to increase the hazard for the time being but perhaps even cause the fire, and an

alteration of the situation or circumstances. In a certain sense all negligent acts of the insured have a tendency to increase the risk and yet the policy is not thereby avoided, because one's own carelessness is one of the very things insured against, otherwise insurance would afford little protection and the policy holder would be insuring himself. The insured who works in his barn or upon the hay mow, or in his woodshed, with a lighted pipe or cigar evidently increases the risk; so does the housewife who builds too brisk a fire, leaves the stove filled with wood and the draughts wide open, or deposits hot ashes in a wooden receptacle. But acts like these, while they may temporarily increase the hazard, do not so alter the situation or circumstances affecting the risk as to avoid the policy. They may constitute negligence on the part of the owner, but neither the situation of the property itself nor the circumstances surrounding it can with reason be said to be altered. "These words imply something of duration and a casual change of a temporary character would not ordinarily render the policy void under this provision." *First Cong. Church* v. *Ins. Co.*, 158 Mass., 475. See also *Lord* v. *Ins Co.*, 2 Gray, 221; *Coml'th* v. *Ins. Co.*, 112 Mass., 136; *King Brick Co.* v. *Ins. Co.*, 164 Mass., 291.

One object in requiring the written consent of the company in case of increase of risk doubtless is to enable the company to charge an additional premium therefor, during the continuance of the increase, and this presupposes a period of substantial duration. "An increase of risk which is substantial and which is continued for a considerable portion of time is a direct and certain injury to the insurer and changes the basis on which the insurance rests." *Kyle* v. *Ins. Co.*, 149 Mass., 116-123. Here, then, as in the prohibited articles clause, the words themselves ordinarily import something more than a mere temporary exposure to additional hazard, and it is the opinion of the court that it could not be said as a matter of law that the act of the plaintiff constituted a breach of this condition.

Let us take another and broader view. Both the prohibited articles clause and the increase of risk clause must be construed in the light of the entire contract, the situation and character of the property insured and the natural and necessary use to which it must be put, and the application of this universal rule of construction confirms the inferences already drawn from the precise language of the clauses themselves.

The buildings insured were not city property but farm buildings, consisting of a dwelling house, store-house and frame barn, together with various farming machinery, implements, vehicles, etc. It could not have been in the mind of either the plaintiff or the defendant that the barn in which the fire started was to be locked and lie idle. Both the parties knew that the plaintiff was to continue to use his buildings in the ordinary course of husbandry, as the ordinary farmer uses them in the pursuit of his legitimate occupation. The policy was not intended nor should it be permitted to prevent such use. The threshing of grain is as much a necessary incident of farm work as is harvesting and storing in the barn. Formerly threshing was done by horse power, but that method has become well nigh if not wholly obsolete, and the uncontradicted evidence shows that practically all the grain in the plaintiff's community is now threshed with the aid of a gasoline engine. This is common knowledge. The defendant, which makes a specialty of farm risks, must have known it. Its local agent through whom the first policy was issued was himself a farmer and lived within three or four miles from the plaintiff's premises, and must have been familiar with the general situation and custom, and the local agent who issued the policy in suit, a renewal of the first, also resides in Skowhegan. Knowledge of conditions, existing at the time the contract is made, is always taken into consideration in construing the rights of the parties thereunder, as in the case of vacancy. *Guptill* v. *Ins. Co.*, 109 Maine, 323.

The plaintiff was making the same use of his barn and was carrying on his ordinary occupation in the same manner as when the policy was issued, and the same as all other farmers were customarily doing. It was a reasonable and necessary use. It was impracticable if not impossible to secure the threshing of his grain by any other process, and under such circumstances, which must have been known to the insurer when the policy was issued, we cannot hold that the plaintiff was thereby violating the conditions of his policy. If such an act constituted a forfeiture then he had been uninsured since the engine was used on the first occasion after the policy was issued, because a breach occurred then if at all, and we have recently held that a policy once forfeited cannot be revived except by waiver or mutual agreement. *Dolliver* v. *Ins. Co.*, 111 Maine, 275.

And not only, under such a construction, would this policy have been long since forfeited, but it is safe to assume that practically all

the farmers in that section would find their policies in the same condition. If a fair and reasonable interpretation of the policy requires it, of course the injustice of the result must not be interposed to prevent it. Parties must be bound by the contracts they make. But a result so disastrous and universal raises a strong presumption that it was not within the contemplation of the parties and the contract should not be so construed except by compulsion of the language.

This rule that the policy is not avoided where the use made of the prohibited articles, or the general use and operation of the property, was necessarily incident to the business of the insured, and therefore presumed to be recognized and impliedly permitted by the insurer, is well settled and of wide and general application.

Thus in manufacturing establishments the keeping or using of an article necessarily incident to the manufacturing process or to the carrying on of the business will not avoid a policy, even though its keeping or using be expressly prohibited: as the use of gasoline in a silver plating factory, *Silver Plate Co.* v. *Ins. Co.*, 170 Pa. St., 151; Keeping a small quantity of benzine for use in a furniture repair shop, *Faust* v. *Ins. Co.*, 91 Wis., 158; Keeping benzine for finishing purposes in a furniture factory, *Davis* v. *Pioneer Furniture Co.*, 102 Wis., 394; Keeping benzine in a wagon factory for the purpose of mixing paints, *Archer* v. *Ins. Co.*, 43 Mo., 434; Keeping camphene in a printing establishment for use in cleaning type, *Harper* v. *Ins. Co.*, 22 N. Y., 441; petroleum in a flour mill for lubricating purposes, *Corlin* v. *Ins. Co.*, 57 Md., 515. In all of these instances, and in many more gathered in the note to 13 A. & E. Ann. Cas. 540, the use of the prohibited article was not merely once a year for a short time, as here, but continuous; nevertheless, as it was necessary to the conduct of the business its use for such a purpose was held to be within the implied permission of the insurer. The same reasoning and the same rule apply with equal force to agricultural pursuits and the ordinary and necessary use of farm buildings in connection therewith.

Based on the same principle is a class of cases growing out of the use of prohibited articles in making repairs. It is not to be presumed that when an owner effects insurance on his building he precludes himself from the right not only to use it in the customary manner but also to make the usual and ordinary repairs in a reasonable and proper manner, in the absence of anything in the policy expressly prohibiting the same. It has been frequently held that such repairs, thus

properly made, do not avoid the policy even where the fire hazard is obviously increased. In *Dobson* v. *Sotheby*, 1 Moody & M. 90, 31 Rev. Rep. 718, the policy was issued at a low rate payable on buildings in which no fire was kept and no hazardous goods deposited. The building required tarring, a fire was lighted in the inside, a tar barrel brought into the building for the purpose of performing the necessary operations. The tar took fire through the negligence of the workmen and the premises burned. Lord Tenterden said: "The common repairs of a building necessarily require the introduction of fire upon the premises and one of the great objects of insuring is security against the negligence of servants and workmen. I cannot therefore be of opinion that the policy was in this case forfeited." The same rule has been applied where paint was being removed from the outside of a wooden building by means of a naphtha or gasoline torch, and these decisions well illustrate what we conceive to be the true legal principle.

In *First Cong. Church* v. *Ins. Co.*, 158 Mass., 475, the plaintiff contended that the use of the torch and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the prohibitive provision of the policy there was an implied exception of what is done in making ordinary repairs. Acting upon this, the trial Judge submitted this single question to the jury: "Was the method used the method ordinarily pursued to remove the paint on the outside of a building preparatory to scraping it off to repaint it?" Affirmative answer being returned the presiding Judge ordered a verdict for the plaintiff. The Law Court set aside the verdict on the ground that the question submitted did not sufficiently present all the matters of fact in issue, including the material of which the outside of the building was composed, its character and condition, the season of the year, etc., but was too general in its form. The court held that "such provisions in the policy were not intended to prevent the making of necessary repairs and the use of such means as are reasonably required therefor," and that if the use of naphtha, at the time and in the manner in which it was used, was reasonable and proper in the repair of the building, having reference to the danger of fire as well as other considerations, then the policy was not thereby forfeited. In *Garebrant* v. *Ins. Co.*, 75 N. J. L., 577, a torch was used for the same purpose, and the court held that the policy was not thereby avoided as it

permitted mechanics to be employed for a period of fifteen days in making repairs, that time had not expired when the fire occurred, the necessity of repairs existed and the method was reasonable and proper. In *Lebanon Co.* v. *Ins. Co.*, 237 Pa. St., 360, (1912), where the working of mechanics was prohibited in general terms, it was held not to cover a case of ordinary repairs necessary for the proper care and preservation of the property and that, although a torch was used, the presiding Judge did not err in refusing to direct a verdict for the defendant either on the ground of keeping or using prohibited articles or of increase of risk, and that the case was properly submitted to the jury.

Our conclusion on this branch of the case therefore is, that the plaintiff was neither keeping nor using gasoline within the inhibition of this policy, nor did his acts constitute a breach of the increase of risk clause as a matter of law. The most that the defendant can successfully claim is that the question of increase of risk is a question of fact and should be submitted to the jury under proper instructions. The nonsuit was therefore improperly ordered.

3. *Failure to furnish proof of loss.*

The defendant also set up in its brief statement of defense the plaintiff's failure to furnish a proof of loss, but this point is not urged in argument. It is proper however to say that in view of the correspondence between the parties and of the fact that the defendant denied all liability, the jury might well have found that it had waived this requirement. Such waiver is a question of fact, *Robinson* v. *Ins. Co.*, 90 Maine, 385, and the court cannot say that under the evidence in this case the plaintiff is precluded from recovery on that ground.

Exceptions sustained.

STATE OF MAINE *vs.* AMBROSE SIMPSON.

Hancock. Opinion February 3, 1915.

Exceptions. Indictment. Intoxicating Liquors. Judicial Discretion. Motion for New Trial Before the Presiding Justice. Public Laws, 1909, Chap. 184. Public Laws, 1913, Chap. 18. R. S., Chap. 29, Sec. 42. R. S., Chap. 135, Sec. 27.

1. That when the evidence in support of an indictment is so slight that a verdict based upon it could not be allowed to stand it is the duty of the presiding Justice to direct a verdict in the respondent's favor.
2. That, therefore, the respondent had the legal right to except to the refusal of the presiding Justice to direct a verdict for the respondent, and to carry the question to the Law Court.
3. That the respondent, however, waived his exception to this ruling by subsequently filing a motion for a new trial addressed to the presiding Justice, because the same question was presented to the presiding Justice on the motion as would have been presented to the Law Court on the first exception, and having failed on the motion the respondent cannot be allowed to revive his exception and seek another tribunal.
4. That exceptions do not lie to the refusal of a single Justice to set aside a verdict on motion as against the law and the evidence.

On exceptions by defendant. Exceptions overruled. Judgment on the verdict.

This is an indictment against the defendant, as a common seller of intoxicating liquors, under R. S., Chap. 29, Sec. 42. At the conclusion of State's evidence, defendant requested the presiding Justice to direct a verdict in his favor, which request the Justice refused, and the defendant excepted thereto. The jury rendered a verdict of guilty. The defendant then filed a motion before the presiding Justice to set the verdict aside as against the law and the evidence, which motion the presiding Justice overruled, and defendant excepted to this ruling.

The case is stated in the opinion.

Herbert L. Graham, County Attorney, for State.

D. E. Hurley, for defendant.

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

CORNISH, J. The respondent was indicted as a common seller of intoxicating liquors under R. S., Chap. 29, Sec. 42. After the State had introduced all its evidence the respondent requested the presiding Justice to direct a verdict in his favor on the ground of insufficient evidence. The presiding Justice refused to direct a verdict and exceptions were taken by the respondent to this ruling. The respondent introduced no evidence, the case was submitted to the jury, and a verdict of guilty was rendered. The respondent then filed a motion before the presiding Justice to set aside the verdict as against the law and the evidence. The presiding Justice overruled this motion and the respondent alleged exceptions to this ruling.

As a matter of practice and independent of the merits, both exceptions must be overruled. The respondent had the legal right to except to the refusal of the presiding Justice to direct a verdict in his favor. When the evidence in support of an indictment is so slight that a verdict based upon it could not be allowed to stand, it is the duty of the presiding Justice to direct a verdict in the respondent's favor. *State* v. *Cady*, 82 Maine, 426. Had the respondent stood upon his legal rights in prosecuting that exception he could have brought the case to the Law Court, and obtained its decision and opinion as to the sufficiency of the evidence. But subsequently the respondent abandoned that remedy and that course of procedure, and sought the decision and opinion of the presiding Justice upon precisely the same question. He filed a motion asking the presiding Justice to set aside the verdict. The only ground on which the verdict could be set aside was that the evidence was insufficient to support it; which was the precise point raised in the first request. If the evidence was sufficient the direction of a verdict had been properly refused. If the evidence was insufficient the verdict should have been ordered. It follows therefore that exactly the same question was presented to the determination of the presiding Justice by the motion, which would have been presented to the Law Court, on the first exception, and having failed on the motion the respondent cannot now be allowed to revive his exceptions and seek another tribunal. The decision of the presiding Justice on such a motion is final. It is a matter within his discretion, and exceptions do not lie to his ruling. *Moulton* v. *Jose*, 25 Maine, 76. If made in a civil case, no appeal

lies from the decision of the presiding Justice to the Law Court, and a defeated party cannot be heard on a motion both before the single Justice and the Law Court. He must exercise his option and take one course or the other. He cannot take both. And having exercised his choice he is bound by the result. In criminal cases such a motion can only be heard at nisi prius, in the absence of Statute, *State* v. *Gilman*, 70 Maine, 329; *State* v. *Locklin*, 81 Maine, 251. The statutes do not cover an offense of the character of that at bar, but provide for procedure in cases of felony which is by motion to the court at nisi prius and appeal therefrom to the Law Court. R. S., Chap. 135, Sec. 27; Public Laws 1909, Chap. 184; Public Laws 1913, Chap. 18.

To permit the respondent therefore in this case to prosecute his exceptions to the refusal to direct a verdict, when he has sought the same remedy but through another tribunal by his motion to set aside the verdict, would be in effect to allow him not merely to exercise his option, but to give him the benefit of a second tribunal when he had failed in the first. This court has frequently held both in criminal and civil cases that the prosecution of a motion for new trial before the presiding Justice is a waiver of all rights of exception, *State* v. *Call*, 14 Maine, 421; *Cole* v. *Bruce*, 32 Maine, 512; *Dinsmore* v. *Weston*, 33 Maine, 256; *Ellis* v. *Warren*, 35 Maine, 125; and the practice is now well settled. See *Sylvester* v. *Mayo*, 1 Cush., 308. The first exception therefore cannot be entertained, nor can the second, because, as we have already said, exceptions do not lie to the refusal of a presiding Justice to grant a new trial, it being a matter addressed to his judicial discretion.

We might add however, that a careful study of the evidence fails to convince us that the verdict was unsubstantiated by proof. The intoxicating nature of the beverage sold, *Heintz* v. *La Page*, 100 Maine, 542, the number of sales, the character of the men making the purchase, and the circumstances attending the same were all such as might well lead to a conviction. The respondent therefore has lost nothing through technicality.

Exceptions overruled.
Judgment on the verdict.

REUBEN A. FALOON *vs.* J. FRED O'CONNELL

BERTIE FALOON *vs.* J. FRED O'CONNELL

Penobscot. Opinion February 10, 1915.

Arrest. Dwelling House. Intoxicating Liquors. Jurisdiction. Justification. R. S., Chap. 29, Sec. 52. Search and Seizure. Warrant.

1. In a warrant to search a dwelling house for intoxicating liquors, the allegation, either that the house was used as an inn or shop, or for purposes of traffic, or that the magistrate was satisfied by evidence presented to him, and so states in the warrant, that intoxicating liquor is kept in such house or its appurtenances, intended for sale in this State in violation of law, is material, and the want of such an allegation is fatal.
2. A magistrate or court has no jurisdiction to issue a warrant to search a dwelling house for intoxicating liquors, except upon complaint that it, or some part of it, is used as an inn or shop or for purposes of traffic, or when the magistrate or court is satisfied by evidence, and so states in the warrant, that intoxicating liquor is kept in the house, intended for unlawful sale in this State; and these jurisdictional facts must appear on the face of the warrant.
3. An officer is not protected by a warrant issued by a magistrate or inferior court, unless it shows on its face that the magistrate or court had jurisdiction to issue it.
4. It is not a violation of law for one to interfere with and impede the execution of a warrant for the search of intoxicating liquor, when the warrant shows on its face that it is void for want of jurisdiction of the magistrate or court that issued it.

On exceptions by defendant. Exceptions overruled.

Two actions against the defendant, as Sheriff of Penobscot County, for alleged false imprisonment of the plaintiffs, by his deputies upon a search and seizure process, issued from the Bangor Municipal Court under the statute prohibiting the sale of intoxicating liquors. In each case, a verdict was directed for the plaintiff, and the defendant excepted.

The case is stated in the opinion.

E. P. Murray, for plaintiffs.

B. W. Blanchard, and D. F. Snow, for defendant.

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

SAVAGE, C. J. The plaintiffs in these two actions are husband and wife. They have brought their actions respectively against the defendant, as sheriff of Penobscot County, for alleged false imprisonment by his deputies, in the execution of a search and seizure process under the statute prohibiting the sale of intoxicating liquors. The defendant sought to justify under a warrant for search and seizure of intoxicating liquors issued from the Bangor Municipal Court. In each case, a verdict was directed for the plaintiff, and the defendant excepted.

The cases can be considered together. In the end both depend on the same question of law. The facts are these. Upon a complaint alleging that "intoxicating liquors were, and still are kept and deposited by Reuben Faloon of Howland in said county, in the dwelling house," occupied by said Reuben Faloon, the location being particularly described, a warrant to search the dwelling house was issued from the Bangor Municipal Court. Search was made accordingly, and the plaintiff Reuben Faloon was arrested on the warrant by the defendant's deputies. And this is the imprisonment complained of by Reuben.

The testimony, which we must assume to be true on a directed verdict, shows that the wife, Bertie Faloon, prevented the officers from seizing a bottle of whiskey by taking it, breaking the bottle, and thus pouring the whiskey onto the ground. For thus obstructing, impeding and preventing the officers in the service of the process, she was arrested at once, and without warrant. And this is the imprisonment complained of by Bertie Faloon. If the search was lawful, she had no right to interfere. If it was not lawful, she was not guilty of obstruction. *Vinton* v. *Weaver,* 41 Maine, 430. So that in this case, as in the other, the question reverts to whether the officers were justified by the warrant in making the search.

It is provided by statute, R. S., Chap. 29, Sec. 52, that no warrant shall be issued to search a dwelling house occupied as such, unless it, or some part of it, is used as an inn or shop, or for purposes of traffic,

or unless the magistrate before whom the complaint is made, is satisfied by evidence presented to him, and so alleges in said warrant, that intoxicating liquor is kept in such house or its appurtenances, intended for sale in this State in violation of law." In the warrant in question there is no allegation that the dwelling house, or a part of it, was used as an inn or shop, or for purposes of traffic, nor did the magistrate state in the warrant that he was satisfied by evidence that intoxicating liquor was kept in the dwelling house intended for unlawful sale. In a warrant to search a dwelling house, the allegation either that the house was used as an inn or shop, or for purposes of traffic, or that the magistrate was satisfied by evidence, and so forth, is material, and the want of it fatal. *Small* v. *Orne*, 79 Maine, 78; *State* v. *Whalen*, 85 Maine, 469; *State* v. *Comolli*, 101 Maine, 47; *State* v. *Soucie*, 109 Maine, 251.

It is well settled, for reasons founded on public policy, that the law protects its officers in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. *Small* v. *Orne*, 79 Maine, 78; *Rush* v. *Buckley*, 100 Maine, 322; *Kalloch* v. *Newbert*, 105 Maine, 23. He may justify, though in fact the warrant may have been issued without authority, *Emery* v. *Hapgood*, 7 Gray, 55; or if there be irregularities making the process voidable, *State* v. *McNally*, 34 Maine, 210; *Tellefson* v. *Fee*, 168 Mass., 188. If the warrant was fair on its face, and the court had jurisdiction to issue it, the officer can justify. *Gray* v. *Kimball*, 42 Maine, 299; *Brown* v. *Mosher*, 83 Maine, 111; *Winchester* v. *Everett*, 80 Maine, 535.

But while the officer is not bound to look beyond his warrant, he is bound to look at it. The safety of the citizen and his protection against unwarrantable deprivation of personal liberty require that an officer should assume at least so much responsibility. This doctrine also is founded upon public policy, and is a sound one, although it may seem to work a hardship in some individual cases.

An officer is not protected by a warrant issued by a magistrate or inferior court unless it shows on its face that the magistrate or court had jurisdiction to issue it. Jurisdiction cannot be presumed. *Gurney* v. *Tufts*, 37 Maine, 130; *Vinton* v. *Weaver*, 41 Maine, 430; *Wills* v. *Whittier*, 45 Maine, 544; *Guptill* v. *Richardson*, 62 Maine, 257; *Jacques* v. *Park*, 96 Maine, 268; *Adams* v. *Allen*, 99 Maine, 249.

And the same rule applies, of course, when the want of jurisdiction appears affirmatively on the face of the process. *Waterville* v. *Barton,* 64 Maine, 321.

The Bangor Municipal Court has jurisdiction to issue warrants for the search and seizure of intoxicating liquors, but its jurisdiction is limited by statute. R. S., Chap. 29, Sec. 52. It has not jurisdiction to issue warrants to search dwelling houses indiscriminately. It has jurisdiction to issue a warrant to search a dwelling house only when it, or some part of it, is complained of as being used as an inn or shop or for purposes of traffic, or when the court is satisfied by evidence, and so states in the warrant, that intoxicating liquor is kept in the house intended for unlawful sale. These are jurisdictional facts, and a statement of one or the other of these contingencies must appear on the face of the warrant.

The warrant in question here contained no statement of any of these jurisdictional facts. Thus the want of jurisdiction appeared on the face of the warrant, and the officer was bound to take notice thereof at his peril. It follows that the warrant affords no justification to the defendant. The direction of a verdict for the plaintiff was right.

The certificate in each case must be,

Exceptions overruled.

KEELING-EASTER COMPANY

vs.

R. B. DUNNING & COMPANY.

Penobscot. Opinion February 10, 1915.

Carrier. Contract. Delivery. Evidence. Exceptions. Sale. Self-Serving Letters.

1. In the trial of a suit brought to recover the price of oyster shells sold in accordance with the terms of a written contract, in which the vendor agreed that they should be packed in "burlap sacks," a letter written previously to the making of the contract, by the vendor to the vendee, in which it was stated that "we expect to use new burlap bags," is inadmissible to add to, or vary, the terms of the written contract.
2. Letters and telegrams, written by one party to the other in the usual course of business, respecting the subject matter of the controversy, and not specifically to manufacture evidence, which by the character of their contents are naturally calculated to elicit replies and denials, are admissible in evidence, though they were self-serving, and were not answered.
3. Exceptions will not be sustained for the admission of a harmless answer to an irrelevant question; nor when a witness volunteers an inadmissible statement, which is ordered to be stricken from the record.
4. When oyster shells were contracted to be delivered on board of vessel at Norfolk, and it is claimed that those delivered there were inferior and defective and not in accordance with the contract, evidence of their condition on arrival by vessel at Bangor and afterwards is admissible as having some tendency to show their condition when put on board.
5. In an action to recover the price of goods sold and delivered when the purchaser seeks to recoup in damages by showing that the goods delivered were inferior in quality and value to those contracted for, the measure of damages which may be recouped is the difference between the value of the goods contracted for and the value of those actually delivered.
6. In the trial of an action for the recovery of the price of goods sold and delivered, when the purchaser seeks to recoup by showing that some of the goods delivered were defective and worthless, it is not error to instruct the jury that they might allow in recoupment such proportionate part of the expense of freight paid by the purchaser, and of the cost of handling on delivery as the amount of defective goods bore to the whole shipment.

On exceptions and motion for new trial by the plaintiff. Exceptions sustained.

An action of assumpsit to recover the sum of $2560 for crushed oyster shells for poultry sold and delivered by defendant to plaintiff. Plea, general issue, with brief statement.

The plaintiff, in the course of the trial, excepted to the admission and exclusion of certain testimony. The jury returned a verdict for the plaintiff for $1009.33, and the plaintiff filed a general motion for a new trial.

The case is stated in the opinion.

Fellows & Fellows, for plaintiff.

George E. Thompson, for defendant.

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

SAVAGE, C. J. Assumpsit to recover the price of 512 tons of crushed oyster shells for poultry, sold and delivered by the plaintiff corporation to the defendant corporation at $5 a ton. The defense was that a portion of the shells delivered were inferior in quality, and not in accordance with the contract of sale, for which defects the defendant seeks to recoup in damages. The verdict was for the plaintiff for $1009.33. The case is before this court upon the plaintiff's exceptions and motion for a new trial.

The contract of sale was in writing, and signed by the parties or their agents, and was in these words: "Sold to R. B. Dunning and Company for account of Keeling-Easter Co. three hundred and fifty tons of crushed oyster shells for poultry, packed in 100 lbs. burlap sacks, with buyer's name stencilled on bags, at $5 per ton for the poultry size and if should require any of the chick size to have option on this size at $4 per ton, all less 1% discount F. O. B. Norfolk, Va.; also to have privilege of taking as much as 100 tons more if the size of the schooner to be chartered should require more cargo, shells all to be delivered F. O. B. schooner during August, buyers to give factory about two weeks notice of vessel calling for cargo."

The defendant chartered a schooner, and the plaintiff seasonably delivered the shells on board. This constituted a delivery to the defendant. *State* v. *Peters*, 91 Maine, 31. The shells were brought to Bangor, unloaded and received by the defendant. On discharging the cargo, it was found, as the defendant claims, that some of the

bags containing the shells were old, rotten and unsuitable, and were torn open, and that the contents were scattered in the hold of the vessel; that a large proportion of the shells were not standard shells crushed poultry size; that a good deal of the shipment was chick shell, for which there was no demand in Bangor, and that some of it was sweepings of the floor with hardly any shell in it. The defendant sold and shipped to customers about one-half of the entire lot. The defendant claimed to be allowed in recoupment not only the damage sustained by it by reason that the shells delivered were less valuable than the shells contracted for, but also for the expense of freight from Norfolk paid by it, and of handling in Bangor, and so forth.

With this statement of facts and contentions, the exceptions may be intelligently considered.

1. The defendant contended that the contract required that the shells should be shipped in new burlap bags, and that a part of the damage was due to the fact that the bags used, or some of them, were old, second hand and unsuitable. The contract itself said merely, "burlap sacks." But for the purpose of showing what was meant by this expression, the defendant was allowed, against the plaintiff's objection, to introduce the plaintiff's letter to defendant, dated July 3, 1913, in which it said "we expect to use new burlap bags." The objection was that the letter antedated the contract, and that it varied and added to the written contract afterwards made. In fact, there is no evidence in the case showing when the contract was made. It is undated. The court's ruling, however, was predicated on the assumption that the letter, as stated by objecting counsel, was written before the contract was made. And we so consider it. We think the letter was inadmissible. The words "burlap sacks" in the contract are a common trade name. The expression is clear and unambiguous. There can be no uncertainty as to its meaning. It was implied, of course, that the sacks should be suitable for the purpose for which they were to be used. Any suitable burlap sacks, new or old, would answer the terms of the contract. The letter imports that the sacks or bags were to be new ones. It adds a new condition as to quality not expressed in the contract. If the letter was written before the contract was made, it falls within the common rule that when parties put their contracts in writing they are conclusively presumed to have incorporated in the writing their final agreement as to all of its terms. All prior negotiations, or so much

of them as the parties see fit, are merged in the written contract. No citation of authorities is necessary to support the doctrine that parol evidence is inadmissible to vary, add to, take from, or modify the terms of a written contract. This exception must be sustained.

2. After the shells were received, the defendant telegraphed the plaintiff, "Shell is not what we bought, will not accept it;" and later the same day, "Schooner arrived. Shell not up to grade we bought. Cannot use any but grade bought. What shall we do with it? Find a good many second hand rotten bags in shipment. Answer." And on a later day the defendant wrote a letter to the plaintiff specifying more particularly the defects in the shell, that much of it was "extremely fine ground shell, that is not much coarser than sand;" that "quite a lot of it went out in our shipments to customers before we knew there was of this in the cargo;" that the balance on hand "is not as coarse as it ought to be and it runs finer than what you said your standard shell is. In working up our storehouseman's figures we show up 3984 bags of the medium shell. We do not want the fine stuff. Neither do we want the medium we reported about. . . . We are getting returns now every day from our customers who are kicking on receiving fine shell which is not according to their order with us or the order given by us for the cargo of shell." These telegrams and this letter were admitted in evidence, subject to the plaintiff's objection.

To what extent and under what conditions, self-serving, unanswered letters and telegrams sent by one of the parties to the other, touching the controversy between them, are admissible in favor of the party sending, has been the subject of much discussion by the courts, and the decisions are not harmonious. But we think that the general trend of decision is to the effect that letters written in the general course of business, and not specifically to manufacture evidence, which by the character of their contents are naturally calculated to elicit replies and denials, are admissible, although they are self-serving and were not answered. 2 Wigmore on Ev., 1263. We have recently so held in *Ross* v. *Reynolds*, 112 Maine, 223.

Had the complaints made in these letters been made orally in conversation, but not answered, we think no one would question their admissibility. Nor would there be any question if the letters had been answered. The real ground of admissibility in a case like this is not that the writings themselves afford any proof that the state-

ments contained in them are true, but that silence, when statements are made which are calculated to draw forth a reply, may itself be an admission,—may raise some inference that the statements are true. It may have more weight, or less. That question is for the jury. If it can have any weight in that direction, the writings are admissible. As Mr. Wigmore says, "each case must stand on its own facts," and, tested by the rule we have stated, we think the telegrams and letter were properly admitted.

3. The defendant's manager was asked if they asked for sample of crushed oyster shells? and, against objection, was permitted to answer that they did. Exception was taken. The answer was harmless. Later, the witness stated in an answer which was not responsive to the question asked, that only a small part of the shell was up "to the sample." The presiding Justice properly ordered the answer stricken out, for the reason, we assume, that the sale was not by sample. Exception was taken to this answer also, but because of the direction by the presiding Justice, the plaintiff can take nothing by this exception.

4. Several exceptions were taken to the admission of testimony showing the condition of the shell when it reached Bangor, and afterwards, the contention of the plaintiff being that the only relevant inquiry was as to its condition when delivered "on board" the vessel chartered by the defendant, at Norfolk. It is true that the plaintiff was not responsible for what happened to the shell after it was delivered "on board," as required by the contract. It was delivered "on board," when it was put into the care and control of the carrier. For what happened afterwards the carrier was responsible. It was not the duty of the plaintiff to stow it. If the shell was in suitable sacks, and if they were torn in the process of storing in the hold of the vessel, so that the shell was scattered or lost, the plaintiff was not at fault.

But the condition of the shell as to fineness when it reached Bangor had a tendency to show its condition when it was put "on board." And the torn and rotten condition of the bags when received was admissible on the question whether they were suitable or not in the first place. And it may be added that the defendant was properly permitted to show, not only the condition of the shell when it reached Bangor, but what it appeared by inspection to be within a reasonable time afterwards. Complaint is made that the defendant was per-

mitted to show the condition of the shell at the time of the trial, seven months after the shipment. Such evidence was clearly admissible, especially in view of the undisputed testimony that shell will not deteriorate within one year. These exceptions must be overruled.

5. The plaintiff asked that the jury be instructed as to recoupment, that the measure of damages is the difference between the price agreed to be paid and the market price of the like goods at the time and place of delivery." The request was refused, and rightly. The rule requested is the rule of damages for non-delivery of goods sold. *Berry* v. *Dwinal*, 44 Maine, 255; *Bush* v. *Holmes*, 53 Maine, 417; *South Gardiner Lumber Co.* v. *Bradstreet*, 97 Maine, 165. This is a case of partial or imperfect performance. The rule of damages, when goods sold are delivered and received, but are inferior in quality to those contracted for, is the same as in case of a breach of contract of warranty, that is, the difference between the value of the goods contracted for and the value of those actually delivered. This rule exactly compensates the purchaser for his loss on the goods. *Moulton* v. *Scruton*, 39 Maine, 287; *Thoms* v. *Dingley*, 70 Maine, 100; *Merrimack Mfg. Co.* v. *Quintard*, 107 Mass., 127; 35 Cyc., 647. The agreed price is not a measure of the damages, in either direction. If the shell were actually worth more than the agreed price, the purchaser was entitled to have the benefit of his good bargain, irrespective of the effect of the seller's breach of contract. Suppose the shells contracted for were actually worth $6 a ton, and those delivered were actually worth only $3 a ton. The purchaser's actual damage by the breach would be the difference between $3 and $6, and not merely the difference between $3 and $5, the agreed price. On the other hand, if the shells contracted for were worth less than the contract price, the seller was entitled to the benefit of his good bargain. And if inferior shells were delivered, the purchaser's loss would be, not the agreed price, but less. It would be the difference between the value of the shells which ought to have been delivered, and those which were delivered. The requested instruction was properly refused. In this connection, it may be observed that the instructions actually given do not conform to the rule which we have stated, in that they made the contract price the measure of damages, both for the shells which were worthless, and for those which had some commercial value, though not as contracted for. That some of the

shells were of this latter description, we think the evidence, which is made a part of the bill of exceptions, would justify the jury in finding. But no exception was taken to this instruction.

6. The presiding Justice instructed the jury that they might add to the damages for defective shells, ascertained in accordance with the rule which he gave them, based on contract price, such proportionate part of the expense of freight from Norfolk to Bangor, and the cost of handling at Bangor, as the amount of defective shells bore to the whole shipment. Exception was taken to the instruction "relative to the recovery of freight and cost of handling."

Whether at all, and if so, to what extent special or consequential damages may be recovered in a suit for breach of contract is a question which is often before the courts. In the leading case of *Hadley* v. *Baxendale*, 9 Exch., 353, the rule was stated to be that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract, should be either such as may fairly and reasonably be considered as arising naturally, that is, 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."

The principle that in case of breach of contract such consequential damages may be recovered as may fairly be presumed to have been in the contemplation of the parties at the time of making the contract, has been affirmed in this State. *Miller* v. *Mariner's Church*, 7 Greenl., 51; *True* v. *Telegraph Co.*, 60 Maine, 9; *Grindle* v. *Express Co.*, 67 Maine, 317; *Thoms* v. *Dingley*, 70 Maine, 100. So in Massachusetts. See *Merrimack Mfg. Co.* v. *Quintard*, 107 Mass., 127. So elsewhere, 13 Cyc., 3361.

Applying the rule to the facts in this case, it seems clear that the expense of freight on vessel and of handling in Bangor were necessarily within the contemplation of the parties when the contract was made. The contract itself required a delivery on a carrying vessel. It was contemplated that the shell was to be transported somewhere, and that involved the payment of freight. Likewise, there would necessarily be the expense of handling at the end of the voyage. See *U. S.* v. *Behan*, 110 U. S., 338. The instruction complained of was correct.

There are other minor exceptions, but not of sufficient importance to require discussion. We have examined them all. We find no error excepted to, except with respect to the admission of the letter mentioned in the first exception. For that error, the certificate must be,

Exceptions sustained.

STATE OF MAINE *vs.* PASQUALE CAVALLUZZI.

Penobscot. Opinion February 12, 1915.

Arrest of Judgment. Exceptions. Indictment. Prostitution. Sex. Woman. Words of Statute.

1. While it is better practice to employ the words of the statute in drawing indictments for statutory offenses, it is not essential, if equivalent words are used and all the elements of the crime are set forth.
2. An indictment under Sec. 3, Chap. 97 of the Public Laws of 1913 is sufficient if the sex of the party wronged can be recognized from the name and the pronoun her, although the word woman is not employed.
3. In such indictment the use of the word prostitution, as used in the statute, is sufficient without words of limitation or description.

On exceptions by defendant. Exceptions overruled.

This is an indictment under Chap. 97, Sec. 3, of the Public Laws of 1913, against the defendant for unlawfully, feloniously and knowingly receiving, accepting and appropriating, without consideration, certain moneys from the proceeds of the earnings of one Flossie Cavalluzzi in her occupation of prostitution. The jury returned a verdict of guilty, and the defendant filed a motion in arrest of judgment, which was overruled and the defendant had exceptions.

The case is stated in the opinion.

Donald F. Snow, County Attorney, for the State.

Terence B. Towle, and Charles J. Hutchings, for defendant.

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

BIRD, J. The defendant was indicted for violation of the provisions of Sec. 3, Chap. 97, of the Public Laws of 1913. The section is as follows: "Any person who shall knowingly accept . . . . any money or other valuable thing, without consideration, from the proceeds of the earnings of any woman engaged in prostitution, shall be guilty of felony. . . . ."

The indictment alleges that defendant did . . . . knowingly accept . . . . , without consideration, certain moneys, . . . said money and moneys being then and there from the proceeds of the earnings of one Flossie Cavalluzzi, who was then and there engaged in prostitution, said moneys being then and there from the proceeds of the earnings of said Flossie Cavalluzzi, in her said occupation of prostitution, against," etc.

Upon conviction, the defendant filed a motion in arrest of judgment which was overruled and defendant had exceptions.

In support of the exceptions, it is urged that the indictment does not allege that Flossie Cavalluzzi was a woman engaged in prostitution and that the term prostitution should be further limited and explained by apt words.

1. It is contended that as the word woman is used in the statute, its absence from the indictment is fatal. But while it is unquestionably much better practice to employ the words of the statute, it is not essential if equivalent words are used and all the elements of the crime are set forth. *State* v. *Hussey*, 60 Maine, 410; *State* v. *Lynch*, 88 Maine, 195; *State* v. *Doran*, 99 Maine, 329, 331; *Com.* v. *Fogerty*, 8 Gray, 489, 491. The definition of the crime of rape both at common law and by statute includes the word woman or female but neither at common law nor under the statute was the word woman or female indispensable. Generally it was omitted and the word her supplied its place. See *Stone* v. *Blake*, 39 Maine, 323; Archb. Cr. Pl. (5th Am. Ed.) 570 (x480); *Com.* v. *Sugland*, 4 Gray, 7, 9; *Com.* v. *Thompson*, 116 Mass., 346; Bish. D. & F. (1885), Sec. 905, n. 3. There are many cases which hold such indictment sufficient when the Court may recognize the sex of the party wronged by the name and pronoun, or by the pronoun alone. See *Hill* v. *State*, 3 Heisk, 317, 319; *State* v. *Farmer*, 4 Ired., 224, 225; *Taylor* v. *Com.*, 20 Grat., 825, 828; *Battle* v. *State*, 4 Tex. App., 595, 596; see also *State* v. *Hussey*, 7 Ia., 409, 410;

Com. v. *Burnet*, 2 Va., Cas. 235. So in the case at bar, we are clearly of the opinion that, from the name Flossie, which, albeit it may be a substitute for the Christian name Florence given alike to men and women, is never applied to a man but is a strictly feminine appelative, and from the pronoun her, it is clearly charged that Flossie Cavalluzzi is a woman, and one engaged in prostitution.

2. While it is probable that the word prostitution has no legal meaning at common law, and while, in its general sense it is the letting of one's self to sale or devoting to infamous purposes what is in one's power (*State* v. *Stoyell*, 54 Maine, 24, 27), it indicates other than a specific form of sexual immorality, only when it is coupled with the thing devoted to base ends, as prostitution of one's office, of one's faculties, of the press, etc. The specific form of sexual immorality has become its primary meaning with lexicographers. So, also, in present legal phraseology. Black's Law Dist. See also *Com.* v. *Cook*, 12 Met., 93, 97-98; *State* v. *Brow*, 64 N. H., 577. Examination of the other sections of Chap. 97 of the Public Laws of 1913 and of R. S., Chap. 125, Secs. 9 and 10, all in pari materia, leave no doubt as to the meaning given the word in the section of statute in question. The conclusion is irresistible that the use in the indictment of the word employed in the statute is sufficient.

"Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. . . . . The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." *U. S.* v. *Wiltberger*, (Marshall, C. J.) 5 Wheaton, 76, 95, 96. See *U. S.* v. *Bitty*, 208 U. S., 393, 401, 403. See also *State* v. *Bierce*, 27 Conn., 319, 320; *Paraiso* v. *U. S.*, 28 Supreme Court Reporter, 127.

Exceptions overruled.

FRED G. NEWTON *vs.* FRED H. HAWKS.

Oxford. Opinion February 12, 1915.

Assault and Battery. Character. Damages. Exceptions. Punitive Damages.

1. In an action to recover damages for assault and battery, when plaintiff claims punitive damages or damages for injured feelings, the conduct of plaintiff or provocation by him, may be inquired into to mitigate the damages and evidence of whatever is really and clearly part and parcel of the matter is admissible.
2. Time is not of the essence of the principle, but fairly established direct connection, as cause and effect.

On exceptions by defendant. Exceptions sustained.

Action to recover damages for assault and battery, upon plaintiff by the defendant, at Dixfield, August 7, 1911. The case was entered at the October term, 1913, of Supreme Judicial Court for Cumberland County and afterwards transferred to the County of Oxford. Plea, the general issue. The jury returned a verdict for plaintiff for $255.00. The defendant filed and had allowed exceptions to the admission and exclusion of evidence.

The case is stated in the opinion.

George A. Hutchins, for plaintiff.

Bisbee & Parker, for defendant.

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

BIRD, J. This is an action brought by plaintiff to recover damages for an assault and battery which occurred on the seventh day of August, 1911. There was no evidence in justification of the acts of defendant but the bill of exceptions sets forth that at the beginning of the trial plaintiff's attorney, in answer to inquiry, stated that he claimed damages for wounded pride, humiliation, etc., and punitive damages. The defendant offered evidence tending to show conduct on the part of plaintiff on Saturday, August 5, 1911, which would

naturally arouse the indignation and outrage the feelings of plaintiff. The evidence offered was excluded. Evidence of conversation or statements of plaintiff was also offered by defendant but was excluded as not occurring on the day of the alleged assault.

It is the opinion of the court that the ruling in both instances was erroneous. *Prentiss* v. *Shaw*, 56 Maine, 427; *Palmer* v. *M. C. R. R. Co.*, 92 Maine, 399. "Mere evidence of general bad character,—or unpopularity, or of acts or declarations of ancient date, or not clearly and really part and parcel of the matter in question, must be excluded. But time is not of the essence of the principle, but fairly established direct connection, as cause or effect." *Prentiss* v. *Shaw*, 56 Maine, 427, 441-442. If the plaintiff claims punitive damages, or damages for his injured feelings, the spirit and conduct of the defendant may be inquired into, to enhance or aggravate, and as well, the plaintiff's own conduct and the provocation by him if any, to mitigate the damages. *Palmer* v. *Maine Central R. R. Co.*, supra, at page 412.

Exceptions sustained.

MOUNT VERNON TELEPHONE COMPANY, In Equity,

vs.

FRANKLIN FARMERS' CO-OPERATIVE TELEPHONE COMPANY, et als.

Kennebec. Opinion February 12, 1915.

Equity. Injunction. Nuisance. Permit. Public Roads. Private Lands. R. S., Chap. 55, Sec. 17.

The defendant, Franklin Farmers' Telephone Company, maintains a telephone line in the town of Vienna, without a written permit having been granted them by the municipal officers of the town to construct its lines upon and along the highways and public roads of the town, as required by R. S., Chap. 55, Sec. 17.

Held:

1. That in this statute the word "upon" includes crossing a way by the wires; therefore, the erection and maintenance of the defendant's wires across highways and public ways were contrary to law.
2. Where wires and poles erected and maintained in accordance with the statutes are declared by R. S., Chap. 55, Sec. 17, to be deemed legal structures, it cannot be held by inference that those not so erected and maintained are nuisances, since the statute is in derogation of the common law and therefore, must be construed strictly. It cannot be enlarged by implication.
3. Under the testimony as to the height of the wires, the manner in which they are strung and their failure to obstruct or interfere with the proper use of the highways and public roads by the traveling public, it cannot be said that they are nuisances as matter of law.

On report. Bill dismissed as to all defendants. Defendants not to recover costs.

Bill in equity. The plaintiff asks the court to enjoin the operations of the defendants. The defendants have no written permit by the municipal officers of the town to that company to construct its lines upon and along the highways and public roads of the town, as required by statute. Answers were duly filed. The case was reported to the Law Court for decision upon the bill, answer and agreed statement of facts.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for complainants.

W. R. Pattangall, for defendants.

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

PHILBROOK, J. This is a proceeding in equity. Among the defendants named in the bill is the Kennebec Farm and City Telephone Company, but by agreement of parties the bill has been dismissed without costs as to that company, thus leaving as defendants the Franklin Farmers' Co-Operative Company and certain individuals all of whom are residents of Vienna in the County of Kennebec.

The plaintiff company, admittedly, has conducted and is conducting a telephone business in the towns of Vienna and Mount Vernon, and in other towns in said Kennebec County, and has the right to erect poles and wires, and construct its lines, under written permits from the Selectmen of Vienna, upon, along, over and across the various highways and public roads in said town of Vienna.

The plaintiff avers that neither the defendant company nor the individual defendants, have any lawful authority to erect telephone lines or to set poles, or string wires upon, along, over, under, or across any of the highways and public roads in said town of Vienna, but that notwithstanding such lack of authority the defendants have set poles, strung wires and constructed telephone lines upon, along, over and across the highways and public roads of the said town of Vienna, and intend to further extend said telephone lines upon, along, over and across the highways and public roads of said town of Vienna. The plaintiff avers that the poles and wires thus erected by the defendants are upon private lands, and follow the highways of Vienna for the most part, but say that at certain points these wires are strung from poles on private land on one side of the highway, to poles on private land on the other side, and are thus strung "across" the highways. It is also averred that the wires of the defendants cross those of the plaintiff at certain places and thereby seriously damage and interfere with them.

The defendants do not deny the erection of poles and wires as alleged by the plaintiff but say they are acting within their legal rights, since they are on private land, and further say that they are

not inhibited by law from stretching wires "across" a public highway from pole to pole standing on such private lands on opposite sides of the highway.

The plaintiff asks this court by injunction to prevent the defendants from conducting a telephone business over any lines where any part of them "are constructed upon, along, over, under or across any of the highways and public roads of said town of Vienna;" also to prevent the defendants "from erecting any posts, or poles, or stringing any wires, or constructing telephone lines upon, along, over, under or across any of the highways and public roads of said town of Vienna."

The case comes to us on report for decision upon the bill, answer, and the following agreed statement of facts:

"It is admitted that A. W. Hall, Frank French, Ernest French, Samuel Gordon, Corry Dunn, R. E. Swift, William Richards, L. L. Riggs, Abbie Hall and Frank Roberts have partially erected and propose to complete and maintain a private telephone line in the town of Vienna connecting their several homes each with the other, the poles being set on private land and the wires running from pole to pole over private land except that at certain points said wires connecting poles cross the highways at points from twenty to twenty-three feet above the surface thereof. The above named defendants are also connected by contract with the said Franklin Farmers' Co-Operative Telephone Company and thence with the outside world.

It is agreed that if the erection and maintenance of said wires by the above named defendants in the manner above described is illegal or constitutes a nuisance, this bill shall be sustained against these defendants, nominal damages shall be assessed by the court and an injunction issued against them as prayed for, otherwise the bill to be dismissed as to said above defendants.

It is admitted that the Franklin Farmers' Co-Operative Telephone Company has erected and now maintains and proposes to maintain a telephone line in the town of Vienna, the poles being set on private land and the wires running from pole to pole over private land except that at certain points said wires connecting said poles cross the highways at points from eighteen to twenty-two feet above the surface thereof, and it is agreed that if the erection and maintenance of said wires in the manner above described is illegal and constitutes a nuisance this bill shall be sustained against said Franklin Farmers'

Co-Operative Telephone Company, nominal damages to be assessed by the court and an injunction issued against them as prayed for, otherwise this bill to be dismissed as to said company.

If the court find the wires as erected and maintained and proposed to be erected and maintained constitute a nuisance, it is agreed that the plaintiff has suffered special damage because of said wires, but if the court find that said wires do not constitute a nuisance the plaintiff makes no claim of special damage."

As a fundamental proposition on which to base this proceeding the plaintiff calls our attention to R. S., Chap. 55, Sec. 17, which forbids not only corporations engaged in the telephone business, but also individuals engaged in such business, from constructing lines "upon and along" highways and public roads without permission in writing from mayor and aldermen, in case of cities, from selectmen, in case of towns, or from county commissioners, in case of plantations and unorganized townships, specifying the kinds of poles to be used, where and how they are to be located and set, and the height of the wire above the ground. The defendants reply as already suggested that their wires are "across" the highways and public roads, and that the words "upon and along" are not synonymous with or equivalent to the word "across." With reference to the meaning of these terms in this particular statute it is significant to note that we borrowed the same from the statutes of Massachusetts in the year eighteen hundred eighty-five. Only a year before that time the Supreme Court of that State in *Banks* v. *Highland Street Railway*, 136 Mass., 485, said "In this statute, the word 'upon' includes crossing a way by the wires." We must assume that our legislature was familiar with this interpretative ruling and adopted it when the statute in question was passed. We also adopt it and declare that in the statute, under consideration the word "upon" includes crossing a way by the wires. This disposes of one contention of the defendants, for we have no hesitation in saying that the erection and maintenance of the defendants' wires across the highways and public ways, in the manner admitted, were contrary to law.

Conceding this illegal erection and maintenance of defendant's wires, can the plaintiff prevail in this cause. In other words has this court jurisdiction in equity upon motion of this plaintiff to enjoin such maintenance or to forbid future action of the same kind.

The plaintiff claims that these wires constitute a nuisance and assigns this claim as the chief ground of equity jurisdiction in its behalf as evidenced by the agreed statement. Wires thus erected and maintained are not declared by statute to be nuisances. Wires and poles erected and maintained in accordance with statute provisions are declared by R. S., Chap. 55, Sec. 17, to be deemed legal structures, and the plaintiff urges that we should hold by inference that those not erected and maintained in accordance with statute provisions are nuisances. But the statute is in derogation of the common law and must be construed strictly; it cannot be enlarged by implication. *Houlton* v. *Titcomb*, 102 Maine, 272. The plaintiff relies upon the last named case in support of its contention as to nuisance but in doing so overlooks the fact that the statute in that case had expressly declared buildings, erected contrary to an ordinance then under consideration, to be nuisances. The application made by the plaintiff to this case, where the wires have not been declared, by law to be nuisances, obviously fails. The case of *Lang* v. *Merwin*, 99 Maine, 487, cited by plaintiff, is also inapplicable for the same reason. In that case injunction was sought to restrain the use of a gambling machine, a thing declared by statute to be a nuisance. In support of its claim that wires erected and maintained, as in this case, are nuisances, the plaintiff also cites *Banks* v. *Highland Street Ry. Co.*, supra, claiming that case to hold "that a wire across a street, being erected contra to the provision of a statute similar to ours, was a nuisance;" but a more careful examination shows that an employee was carrying the wire, looped across the street, and the court said "the wire, at least while looped across the street, so that it might be hit by passing carriages, was a nuisance, which any person lawfully travelling on the way, and incommoded by it, might remove." A state of affairs so materially different from the case at bar cannot be said to throw light on this discussion.

The wires of the Franklin Company, one of the defendants, appear to have been in use for eight years, at a height of from eighteen to twenty-two feet from the surface of the ground, and nothing has been introduced in the record to show that they have in any way interferred with or obstructed public travel. The wires erected, and proposed to be erected, by the individual defendants, are from twenty to twenty-three feet from the ground. We cannot say as matter of law that these wires of either the Franklin Company or the individual

defendants constitute a nuisance, nor has the plaintiff satisfied us that they have been declared so by any statute, city ordinance or town by-law.

Failing to find that these wires constitute a nuisance, as erected and maintained, we must dismiss the bill in accordance with the stipulation of the parties in the agreed statement. Since the erection and maintenance of the wires across highways and public ways are in violation of law we think the defendants should not recover costs.

Bill dismissed as to all defendants.

GREAT NORTHERN MANUFACTURING COMPANY

vs.

GEORGE BROWN.

Knox. Opinion February 12, 1915.

Circulars. Contract. Delivery. Fraud. Misrepresentation. Sale.

1. There is no controversy that defendant executed the contract upon which the suit is brought, and by the ordinary rules of law is presumed to know its contents, whether read or not.
2. But if it is shown that the contract, itself, was procured by fraud, the general rule does not apply. If it did, no written instrument could be avoided. It is universally held that the most sacred instrument may be avoided for fraud.
3. The means which may be employed to accomplish a fraud are as varied as the ingenuity of the human mind, and upon the question as to whether a fraud was intended and the means employed calculated to accomplish it, it is no exaggeration to say, that it would be a rare discovery to find a device better designed to establish fraudulent intent than the scheme conceived and operated in this case.

On exceptions by plaintiff. Exceptions overruled.

This is an action on a special contract for goods sold and delivered. The defendant plead the general issue and filed, in addition thereto, a

brief statement alleging misrepresentation and fraud in procuring the contract. At the conclusion of the evidence, the presiding Justice directed a verdict for the plaintiff for $15.00 and the plaintiff excepted.

The case is stated in the opinion.

A. S. Littlefield, for plaintiff.

Alan L. Bird, for defendant.

SITTING: SPEAR, KING, BIRD, HANSON, JJ.

SPEAR, J. This is an action upon a special contract alleging "that the defendant at Port Clyde, to wit at Rockland, on the 24th day of October, A. D. 1911, entered into a written contract by him signed, wherein the plaintiff agreed to sell and the defendant to buy 12 Harmony Disc Talking Machines with horns complete, the plaintiff to furnish free therewith 100 needles and 27 double disc 10 inch harmony records to be free therewith.

"And the parties to said contract did agree that said machines should be delivered by the plaintiff and received by the defendant on board the cars at Bridgeport, Connecticut; and the defendant did agree to pay for the same the sum of $17.55 for each of said machines within thirty days from the time said machines were so shipped."

The machines were delivered according to the agreement and transported to Port Clyde and tendered by the carrier to the defendant. But the defendant refused to accept the machines on the ground that the contract of sale to him was procured by fraud. In answer to the plaintiff's action he pleaded the general issue and a brief statement setting up misrepresentation and fraud in procuring the contract. The account annexed was for twelve machines at $17.55 each, amounting to $210.60, and needles amounting to $7.00, making a total of $217.60 and interest amounting to $22.50.

At the conclusion of the testimony, the court directed a verdict for the plaintiff for $15.00, being the amount of freight from Connecticut to Port Clyde and return, which was a ruling in favor of the defendant upon the question of rescission. The plaintiff excepted to the instruction, but inasmuch as the instruction was in favor of the plaintiff to the amount of the verdict, the conclusion of the presiding justice,—that in order to effectuate the rescission the defendant was required to pay the freight—being erroneous, the instruction was harmless error except to the defendant who does not complain.

There is no controversy that the defendant executed the contract upon which the suit was brought. The defense is rescission based upon misrepresentation and fraud; the issue, are they proved?

We do not overlook the fact that the defendant signed a written contract and, by the ordinary rules of law, is presumed to know its contents, whether read or not. But if shown that the contract, itself, was procured by fraud, the general rule does not apply. If it did, no written instrument could be avoided. But it is universally held that the most sacred instrument may be avoided for fraud. Accordingly, the question to determine, is not whether the contract was signed and entitled to the ordinary force of such an instrument, but whether it is entitled to any force as the contract of the defendant. "Fraud has been defined to be any cunning, deception or artifice used to circumvent, cheat or deceive another. Words and Phrases, Vol. 3, 2943."

The means which may be employed to accomplish a fraud are as varied as the ingenuity of the human mind. But whatever the method, we inquire first, in proof, Was a fraud intended? Second, were the means employed calculated to accomplish it? Third, was the intended victim entrapped? It is not exaggeration to say, that it would be a rare discovery to find a device better designed to establish fraudulent intent, and fraudulent methods, than the scheme conceived and operated in this case. The plan was to thoroughly prepare the mind of the victim to expect the reverse of what he was to receive; to fix his attention upon a gift and divert it from a sale; to gain his confidence and allay suspicion; to misrepresent and avoid detection; to get his signature without inspection. When the way was prepared for the sacrifice, a priest appeared at the temple, and the omens augured success.

While the circulars which the defendant received were not in his possession at the time of the trial, other circulars, identical with the ones which he had received, were offered in evidence and properly admitted. The first step, in the accomplishment of the scheme, is shown by a letter headed Harmony Talking Machine Co., 600 to 630 South Dearborn St., Chicago, 2-1-12. While not addressed to the defendant, it was precisely like the one he received, and is partly as follows: "Dear Sir: We simply want to send you one sample machine and a good selection of a few of our best Harmony velvet tone records—we'll send this sample outfit at our own expense—

there'll be no charge whatever. We want you to examine the instrument—listen to our sweet toned records, and then let us know how many of these machines you can give away for us in your locality. Yes, we want the machines given away absolutely free—don't want you to charge one red cent for the instrument—it wont cost you anything and we don't want you to charge for it. This is simply an advertising idea to sell Harmony Velvet Toned Records." Now it will be observed that the language of this letter is calculated to impress upon the mind of the prospective donee the sole idea that he is to receive these machines free of any charge. For instance, in the sentence, "Don't want you to charge one red cent for the instrument," the phrase "one red cent" attracts the eye, and negatives the idea of pay. They then go on to state the reason why they are able to give these machines away—that it is simply an advertising scheme to sell the Harmony Velvet Tone Records; that with every machine they are placed in a position to sell from 75 to 100 records upon which they are able to make large profits, "so that it can be easily seen why we are glad to give them away free." Then as a further inducement they say that many stores make everybody buy $30.00 or $35.00 worth of merchandise before giving them a machine, which is calculated to draw trade from the other merchants. They then wind up with the injunction, "Please do not delay sending for the free sample outfit. We want to begin giving the machines away as soon as possible. Yours very truly, Harmony Talking Machine Co."

Comment is unnecessary. The meaning of this letter is clear to a layman.

The first circular evidently was not answered. From the phraseology of the second circular it would seem that a failure to answer the first was regarded but an opportunity on the part of the plaintiff to make more enticing the lure of the scheme. This circular begins: "Dear Sir: You did not answer our last letter—why? Either the letter didn't get to you— or you didn't understand us clearly or you certainly would have written us. We want to know whether you will give away a certain number of our talking machines to your customers—give them away free? The machine, itself, don't cost you or your customers anything—what we want to do is to sell records to the people that you give these machines to. Our machine is built in such a way that no record but the Harmony can be played on this instrument. Our proposition to you is this: let us send you

twenty-five or fifty machines—put these in your window and we'll furnish you a couple of window sign card that read: "THESE TALKING MACHINES WILL BE GIVEN AWAY FREE WITH TWENTY-FIVE DOLLARS IN TRADE." The capital letters appear in the circular, thus making conspicuous the theory of gift. Constantly keeping in view the bait, the next paragraph goes on to say, "Then give away one instrument to each family on that plan." Then a reference is made to the profits to be gained by the sale of the records. Further along the fact that the machine is free is again brought to the attention of the prospective recipient: "And we also know that a person that gets a machine free always buys a great many more records than people do, that had to pay $20.00 or $25.00 for the instrument." The next paragraph emphasizes the idea of a gift by stating: "The machine you give away is a regular $25.00 instrument," etc. Then the very last thing to which attention is called is as follows: "Remember this sample outfit is free also—it is sent at our expense—no express charges or in fact any charge at all—Simply mail the post card for this outfit." This is signed precisely as the other circular.

From these communications it is too obvious for question that the foreground, the background and the detail of the picture contained in these circulars, all end in the perspective of free machines, to whoever would consent to take them for distribution to customers.

The defendant answered this circular, in response to which, according to the representation, he should have received "a free sample outfit." But the free sample outfit was but an optical illusion. It was not in harmony with the original design. It would not accomplish the end which the inventors of the scheme had in view. It would not secure a contract for the purchase of these machines at $17.55 each. Accordingly, to carry out the plan and secure the contract it became necessary to send an agent ostensibly representing another company, called the "Great Northern Manufacturing Co." The real mission of the new company in the mechanism of the plan is not obvious unless to prevent the admission of the circulars on the ground that the contract was not made with the company sending out the circulars. But this point is not made in argument before the Law Court, nor could it be, inasmuch as the agent purporting to represent the Great Northern Manufacturing Co. had no mission except to represent the Harmony Talking Machine Co.

Having prepared the mind of the defendant for free machines, the agent appeared before him with the post card, in hand, sent to the defendant and, by him, signed and returned for the order. In accord with the circulars intended to deceive were the representations made by the agent. At the outset when the defendant's wife objected to taking the machines, he said: "These machines are not going to cost Mr. Brown anything." Then later when the defendant signed the contract the agent said: "You will have to sign these papers, or paper, to show you are going to receive these machines." He did not say "buy these machines." The language was in direct harmony with the scheme. The word "receive" carried out the idea of gift, with which the defendant's mind had been filled. The defendant's wife also testified that the agent said to the defendant: "They are not going to cost Mr. Brown anything." His daughter testified that her mother refused to have a machine in the house; that her father replied he thought she would be all right when she understood about them, and that the agent then explained that they were going to cost Mr. Brown nothing. Again she states that the agent said that there would be a profit on the needles and the records were to sell; the machines were to be free. Not a word of this testimony was contradicted. It, therefore, appears that this agent several times, and whenever he said anything at all about the disposal of the machines, reiterated precisely what was in both the circulars, either that the machines would cost Mr. Brown nothing or that they would be free. Upon the strength of these circulars and the representations of the agent, the defendant signed the contract which he says he supposed, as the agent told him, was simply a writing indicating his consent to receive the machines to be disposed of in accordance with the representations made in both the circulars and by the agent, when, as a matter of fact, he signed a contract for the purchase of twelve of these machines ar $17.55 each. And the climax of the fraudulent intent of the whole transaction is found in the last paragraph of the contract signed by the defendant, namely: "It is fully understood between the parties hereto that this instrument covers and includes all contracts and agreements between the parties hereunder."—a confession and attempted avoidance of a barefaced fraud. In confirmation of the interpretation given to the circulars sent to the defendant, it is not without interest to note that the word "free," "without charge," "don't cost anything," or the exact equivalent, is used fifteen

times in the first circular and fifteen times in the second circular. The correspondence of the numbers in each circular may be a coincidence but the repeated use of the phraseology was undoubtedly employed with crafty design.

Exceptions overruled.

MARY E. JORDAN *vs.* COLIN MCKENZIE.

Hancock. Opinion February 12, 1915.

Debt. Discharge. Insolvency. Judgment. Provable in Insolvency. Scheduled. Waiver.

This is an action of debt on judgment in which the plaintiff sued to recover on a judgment rendered in favor of Sylvanus Jordan, the original plaintiff, at the October term, 1893, of the Supreme Judicial Court for the County of Hancock. The writ was dated January 11, 1893, and entered at the April term of court and continued to the October term, of the same year, when the insolvency of the defendant was suggested, and at the April term, 1894, and before the defendant received his discharge in insolvency, the defendant was defaulted and judgment rendered in favor of Sylvanus Jordan, upon which execution was issued May 1, 1894.

The present action is founded upon this execution in favor of Mary E. Jordan, under the will of her late husband, Sylvanus Jordan.

Held: That the taking of judgment by the plaintiff was a waiver of his claim against the estate; that the account sued was merged in the judgment and assumed a new form of indebtedness; and having been acquired after the commission of insolvency was issued was not provable against the estate, but became the personal debt of the insolvent.

On report. Judgment for plaintiff.

This is an action of debt on a judgment rendered in favor of Sylvanus Jordan at the October term, 1893. At the April term, 1894, the defendant was defaulted and judgment rendered, upon which execution was issued May 1, 1894. The present action is founded upon the execution in favor of Mary E. Jordan, under the will of her

late husband, Sylvanus Jordan. The original action was brought before defendant filed his voluntary petition in insolvency, and judgment was obtained before defendant obtained his discharge. The case was reported upon an agreed statement of facts, to the Law Court, for determination.

The case is stated in the opinion.

George E. Googins, for plaintiff.

E. J. Walsh, for defendant.

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

SPEAR, J. On agreed statement of facts. This is an action of debt on judgment in which the plaintiff sues to recover on a judgment rendered in favor of Sylvanus Jordan, the original plaintiff, at the October term, 1893, of the Supreme Judicial Court for the County of Hancock. The writ was dated January 11, 1893, and entered at the April term of court and continued to the October term of the same year, when the insolvency of the defendant was suggested, and at the April term, 1894, the defendant was defaulted and judgment rendered in favor of Sylvanus Jordan, upon which execution was issued May 1, 1894.

The present action is founded upon this execution in favor of Mary E. Jordan under the will of her late husband, Sylvanus Jordan. The action in the original suit was brought before the defendant filed his voluntary petition in insolvency. The claim, upon which the suit was founded, was provable against the estate of the defendant when he was declared insolvent. The claim, notwithstanding suit was pending, was scheduled, allowed, and became entitled to a proportional part of any dividend which might be declared, and, so far as appears, so stands to-day. But after the defendant was declared an insolvent upon his petition, and before he received his discharge, the original plaintiff obtained judgment upon the identical claim filed against the defendant's estate. Under this state of facts the only question is, Did the defendant's discharge in insolvency bar the plaintiff's right of action? The solution of this question depends upon whether we follow the rule laid down by our own court in *Emery et al., appellants*, 89 Maine, 544, or the doctrine announced in *Boynton* v. *Ball*, 121 U. S., 457. The trend of the later decisions in Massachusetts is in harmony with the decision of our court. *Hunt-*

ington v. *Saunders*, 166 Mass., 92. *Emery et al., appellants*, affords an exact precedent in every detail of the facts for the case at bar. The suit was brought before the defendant went into insolvency and judgment obtained before he received his discharge; and the claim was scheduled and allowed against the estate. But the court held, that the taking of judgment by the plaintiff, was a waiver of his claim against the estate; that the account sued was merged in the judgment and assumed a new form of indebtedness; and having been acquired after the commission of insolvency was issued, was not provable against the estate, but became the personal debt of the insolvent.

The plaintiff, accordingly, had before her for her legal guidance the unchallenged opinion of this court, not only unchallenged but expressly overruling *Boynton* v. *Ball*, in its application to proceedings under our insolvent law.

Litigants have a right to transact business with reference to the law enunciated by the court. Most valuable property rights may be predicated upon the law, as thus declared. These rights should not be impaired nor sacrificed by a reversal or modification of the law except upon cogent and necessary reasons. Stability of the law should be the one great outstanding feature of jurisprudence upon which the profession as well as the people should have a right to rely. We are unable to discover any such paramount reason as would warrant us in overruling this long standing decision of our own court touching the disposal of the case before us.

Judgment for the plaintiff.

GEORGE F. HILL *vs.* JOHN A. WILES.

Penobscot. Opinion February 16, 1915.

Attachment. Mortgage. Notice. R. S., Chap. 83, Sec. 46. Sale. Tender. Trespass de bonis asportatis. Waiver.

R. S., Chap. 83, Sec. 46, provides that an officer who has attached mortgaged chattels may give written notice thereof to a claimant under the mortgage, and that if the claimant does not within ten days thereafter deliver to the officer a true account of the amount due on his claim, he thereby waives the right to hold the property thereon.

Held, under this statute,

1. That the officer may give the "written notice" after, as well as before, a sale of the chattels on execution.
2. That a delivery by the claimant of a "true account" to the attaching creditor's attorney is not a delivery to the officer, and is not sufficient.

On exceptions by plaintiff. Exceptions overruled.

This is an action of trespass de bonis asportatis for a bike trotting sulky, claimed by the plaintiff as assignee of a mortgage covering said sulky, and attached and sold by said defendant as deputy sheriff, in a suit of *Dover and Foxcroft Light and Heat Co.* v. *A. A. Huntington*, the assignor of said mortgage, to the plaintiff. Plea, the general issue, with brief statement.

The case is stated in the opinion.

A. L. Blanchard, for plaintiff.

C. W. Hayes, for defendant.

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

SAVAGE, C. J. Trespass de bonis asportatis for a bike trotting sulky. A verdict was directed for the defendant, and the plaintiff excepted.

The material facts are not in dispute. The sulky was mortgaged November 10, 1911. The mortgage was assigned to the plaintiff August 15, 1913. Both the mortgage and the assignment were duly

recorded. The defendant, a deputy sheriff, attached the sulky June 5, 1913, as the property of the mortgagor, seized it on the execution August 20, and sold it August 26, 1913. The defendant did not have actual notice of plaintiff's mortgage interest, nor, as it would seem, did the plaintiff have knowledge of the attachment, seizure or sale, until after the sale. On September 6, following, the defendant gave the plaintiff written notice of the attachment and seizure, but not of the sale. The plaintiff claims that thereupon he notified the creditor's attorney, by letter, of his mortgage, and the amount due thereon. The attorney denies having received the letter. The burden on this issue is on the plaintiff, and he fails. The presumption of delivery, arising from the known regularity of the mail service, is rebutted. But if it were conceded that the letter was received by the attorney, the plaintiff is in no better situation. The statute, R. S., Chap. 83, Sec. 46, provides that the officer may give the claimant written notice of his attachment, and that if the claimant "does not within ten days thereafter, deliver to the officer a true account of the amount due on his claim, he thereby waives the right to hold the property thereon." The statute requires a delivery of the "true account" to the officer. Delivery to the creditor's attorney is not delivery to the officer. *Phillips* v. *Fields*, 83 Maine, 348. No "true account" was given to the officer within ten days after September 6, 1913, nor, in fact, until January 26, 1914. It follows, so the defendant contends, that the plaintiff has waived his right to hold the property. *Colson* v. *Wilson*, 58 Maine, 416.

On the other hand, in reply to this, the plaintiff says the statute does not apply. He says that even if, on September 6, the defendant gave written notice to the plaintiff that he had attached the property, it was too late, because it was after the sale, that therefore the notice was ineffective, and that for that reason the plaintiff was not bound to deliver a true account within ten days. In other words, the plaintiff contends that the "written notice" by the officer, provided for by the statute, must be given before the sale, and cannot be given with effect afterwards. His ground is that after the sale there is no attachment to give notice of,—that it has ceased to exist.

We think that such a construction of the statute as is contended for would be too narrow. The legislature has not said that the notice must be given before a sale, and not after. If it is to be so held, it must be by construction, and not by expression. The court, in

Nichols v. *Perry,* 58 Maine, 29, said that "this statute is to be fairly and liberally construed in furtherance of its object. It was designed to prevent the assertion, by a suit involving cost and expense, of an outstanding title, the existence of which was unknown to the officer making the attachment, . . . and to give the officer, or attaching creditor, an opportunity to pay the mortgage, if he chose, or to release the attachment without being subjected to cost for an inadvertent and harmless interference with the rights of the mortgagee." And such is the unquestionable purpose of the preceding section, Sec. 45, which provides that the claimant must give the officer at least forty-eight hours written notice of the claim and the amount, before suit, and that the officer may discharge the claim by paying or tendering the amount. Both these sections were originally enacted at the same time, in the same statute, Laws of 1859, Chap. 114, and were intended, we think, to accomplish the same general purpose, to enable the attaching creditor or officer to discharge a claim, by payment of the amount due, and retain the benefit of the attachment.

Now it was held in *Holmes* v. *Balcom,* 84 Maine, 226, that under Sec. 45, the claimant may give the written notice of the claim and the amount after, as well as before, the sale. The claimant may give that notice any time before his claim is barred by the statute of limitations. And then the officer may discharge the claim by paying the amount. And if the officer may have the right to pay and discharge after sale, under Sec. 45, there is, at least, no incongruity in affording him that privilege under Sec. 46. And such, we think, was the legislative intention. The two sections go along, pari passu. Under Sec. 45, the officer will have, necessarily, the right to pay at some time, since suit cannot be brought against him until he has forty-eight hours' notice, and an opportunity to pay. But under Sec. 46, he is not compelled to wait the delays of the claimant, but by giving notice he can force him to disclose his claim within ten days.

In either case the creditor gets what belongs to him, and all that belongs to him, his debt and interest. We can find no discriminating reasons, therefore, why the construction given in *Holmes* v. *Balcom* to Sec. 45 should not be applied to Sec. 46. Under either section the officer is enabled to protect himself, and to protect a sale already made. We so conclude.

Exceptions overruled.

FRANKLIN MOTOR CAR COMPANY *vs.* DANIEL S. HAMILTON.

York. Opinion February 16, 1915.

Attachment. Mortgage. Notice. Possession. Redemption. Replevin. R. S., Chap. 83, Sec. 44. Sale. Title. Vendee.

In an action by the vendor in a conditional sale made in Massachusetts against an officer who attached the property thus sold as the property of the conditional vendee, it is,

Held:

1. That the conditional sale contract was a Massachusetts contract, to be construed and applied in accordance with the laws of Massachusetts.
2. That in the absence of the proof of any statute, the rights of the parties under the conditional sale must be considered as governed by the common law of Massachusetts.
3. That the common law of another State is presumed to be like our common law, but not like our statute.
4. That the statute of another State is not presumed to be like our statute.
5. That the statute of another State must be proved as a matter of fact.
6. That at common law there is no right of redemption by a conditional vendee.
7. That when no right of redemption is shown, the statute, R. S., Chap. 83, Sec. 45, requiring forty-eight hours' notice by the vendor before bringing suit against an attaching officer, does not apply.

On exceptions by defendant. Exceptions overruled.

This is an action of replevin, brought by the Franklin Motor Car Co., a Massachusetts corporation, against Daniel S. Hamilton, for an automobile. The contract for the sale of said automobile was made, executed and delivered in Massachusetts. Plea, general issue with brief statement. At the conclusion of the evidence, the presiding Justice directed the jury to return a verdict for the plaintiff, which they accordingly did and assessed damages at one dollar. The defendant filed and had allowed exceptions to said direction.

The case is stated in the opinion.

Leroy Haley, for plaintiff.

Cleaves, Waterhouse & Emery, Louis B. Lausier, and Clinton C. Palmer, for defendant.

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

SAVAGE, C. J. The plaintiff bargained an automobile to one Welch. Welch was to pay in instalments. The title was to remain in the plaintiff until the instalments were fully paid, and the plaintiff was to have the right to take immediate possession on default of payment of any instalment. The contract was in writing. It was made and to be performed in Massachusetts. A default in payment was made and two days afterwards this action of replevin was brought against the defendant, a deputy sheriff who had previously attached the automobile as the property of Welch, the conditional vendee. The plaintiff gave the defendant, before suit, no notice of his claim and the true amount thereof. The presiding Justice directed a verdict for the plaintiff, to which direction exceptions were taken.

Such a contract is a conditional sale. The title does not pass till performance of the condition, and in case of default or non-performance, the vendor may repossess himself of the goods, not only as against the vendee, but also as against his creditors claiming to hold them under attachments. *Peabody* v. *Maguire*, 79 Maine, 572. But in this State, by statute, R. S., Chap. 113, Sec. 5, under such a contract of conditional sale, made here, the conditional vendee has a right of redemption, as in case of chattel mortgages. As to redemption, it is considered as a mortgage. And when there is a right of redemption, the statute gives an attaching creditor the right to discharge the claim by payment. R. S., Chap. 83, Sec. 44. But the claimant, that is, the mortgagor or conditional vendor, cannot maintain an action against an attaching officer for the property, unless he has given at least forty-eight hours' notice of his claim and the true amount thereof. R. S., Chap. 83, Sec. 45. This provision is to give the officer or creditor, within the time limited, an opportunity to discharge the claim by payment. Such is the law as to Maine contracts.

But the contract in question is admittedly a Massachusetts contract, made in Massachusetts, and to be construed in accordance with the laws of that State. Nevertheless, the defendant contends that the requirement of our statute for forty-eight hours' notice before suit applies, just as if it were a Maine contract. He relies upon *Gross* v. *Jordan*, 83 Maine, 380. In that case this court held that where by the statutes of another State it is provided that the vendee in a conditional sale of personal property shall have the right of

redemption, that provision becomes a part of a conditional sale contract made in that State; and that when the property is redeemable in that State, it is redeemable here. And under such circumstances, the court held further that the statute requiring forty-eight hours' notice to the officer before suit was applicable.

But the difficulty with the defendant's contention is this. In the case of *Gross* v. *Jordan,* the court appears to have had the foreign statute before it as a part of the case. The statute was quoted, and it gave a right of redemption. In this case we do not have the statute of Massachusetts, if there is any now, before us. None was offered at the trial. It is well settled that the law of another State is to be proved as a matter of fact. *McKenzie* v. *Wardwell,* 61 Maine, 136. There is a presumption that the common law of another State is similar to our own. *Tllexan* v *Wilson,* 43 Maine, 186; *Insurance Co.* v. *Plummer,* 70 Maine, 540. There is no presumption that the common law or the statute of another State is like our statute. *Carpenter* v. *G. T. Ry.,* 72 Maine, 388; *Jowett* v. *Wallace,* 112 Maine, 389. One who relies upon a foreign statute must prove it.

In their brief, counsel for defendant quote from an 1882 statute of Massachusetts, but that does not make it a part of the case. It was not offered in evidence. It is not in the record. And it is patent that the court have no authority to go outside the record and consider facts not in it. And this includes foreign statutes. We cannot consider this statute, even if we could presume that it had remained unamended since 1882, which we cannot.

The plaintiff offered the testimony of a Massachusetts lawyer, found by the presiding Justice to be qualified as an expert, and showed by him that the Massachusetts law does not require such a contract of conditional sale to be recorded, as the statute of this State does. R. S., Chap. 113, Sec. 5. But no inquiry was made as to the right of redemption.

It follows that the right of redemption under this contract must, in this case, depend upon the common law of Massachusetts, which is presumed to be like our own. At common law there was no right of redemption by a conditional vendee. The vendee, like a mortgagor of chattels, was remediless at law, unless he performed the condition of his contract. Such a mortgagor could not redeem after breach. *Flanders* v. *Barstow,* 18 Maine, 357; 2 Hilliard on Mortgages, 4th Ed. 559. It is the statute only which gives such a mortgagor the right of

redemption. So it is the statute only which gives a conditional vendee the right to redeem. The situations are entirely analogous. In each case, in the absence of a statute to the contrary, the parties must stand upon the terms of their contract.

The result is that no right of redemption being shown by Massachusetts law, none can be presumed here. And there being no right of redemption shown, as there was in *Gross* v. *Jordan*, supra, our statute requiring forty-eight hours' notice before suit does not apply.

The direction of a verdict for the plaintiff was right.

Exceptions overruled.

FRED S. SHERBURNE *vs.* INHABITANTS OF SANFORD.

York. Opinion February 16, 1915.

Assessment of Damages. Complaint. Raising Grade of Road. R. S., Chap. 68. Road Commissioners.

In a proceeding under R. S., Chap. 23, Sec. 68, for the assessment of damages for the raising or lowering of a way or street by a road commissioner, or person authorized,

Held:

1. That the replacing of matter that has been scraped off, or that has been washed off by the action of the elements, or that has been worn down by travel, is not a raising of the street, within the meaning of the statute.
2. That the measure of damages is the diminution in market value of the property injured by the raising.
3. That the rule of damages does not include damages for physical injuries that have occurred, or that may hereafter occur, to the property itself in consequence of the raising, whether by surface water or otherwise; nor for injuries which may result from insufficient catch basins, or for not keeping them properly cleaned and free; nor for the consequences of some fault in the location, size, plan of construction or general design of the sewers; nor for injuries which may result merely from surface water flowing down a street, and overflowing onto the land.

4. That it is conclusively presumed that in the assessment of land damages for land taken for a way, the likelihood that surface water from the road may be turned onto the adjacent lands was considered, and that damages therefor were awarded.
5. That the town is liable, with respect to surface water, only for such depreciation in value of the adjacent lands as may be caused by an increased likelihood, by reason of the raising, that surface water will flow thereon from the street doing injury.
6. That when a land owner has obliterated a natural channel into which the surface water would have run, by putting into it a closed pipe, he cannot complain if the surface water finds its way over his land in other courses.
7. That, in the case at bar, the increased liability, on account of any raising of the street, that surface water will flow upon and across the complainant's land is inappreciable.

On motion for new trial by defendant. Motion for new trial sustained.

This is an appeal from the action of the municipal officers of the town of Sanford, in the County of York, on application of the plaintiff for the assessment of damages, under Secs. 67 and 68 of Chap. 23 of the R. S. The plaintiff recovered judgment before the jury at the January term, 1914, for $1082.64. The defendant filed a motion for a new trial.

The case is stated in the opinion.

Elvington P. Spinney, and Lucius B. Swett, for plaintiff.

George W. Hanson, John V. Tucker, and Mathews & Stevens, for defendant.

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

SAVAGE, C. J. This is a complaint for assessment of damages brought under R. S., Chap. 23, Sec. 68, which provides that "when a way or street is raised or lowered by a road commissioner or person authorized, to the injury of an owner of adjoining land, he may, within a year, apply in writing to the municipal officers and they shall view such way or street and assess the damages, if any have been occasioned thereby, to be paid by the town, and any person aggrieved by said assessment may have them determined on complaint to the supreme judicial court." The complainant claims that the road in front of and adjoining his premises on High Street in Sanford was raised by the road commissioner in June, 1912, and that he was injured

thereby. Within the year limited he made written application to the municipal officers for an assessment of damages. They acted, but refused to assess damages on the ground that the town was not liable. Thereupon this complaint was brought. Upon trial the complainant recovered a verdict of $1082.64. The town brings the case up on a motion for a new trial.

The particular ground on which the complainant claims to recover, as stated in his complaint, is that the town raised the grade of the street and changed the ditches and water courses thereon "whereby all the water accumulated on said High Street has been turned from its original course and has flowed and still flows upon and over said land of said Sherburne and into the cellar of the dwelling house and the basement of the mill situated thereon," doing damage.

It is necessary in the first place to state, as briefly as may be, the physical situation. High Street runs in an east and west direction. Northerly of High Street it is more or less hilly, and there is generally an upward slope northward from High Street. Several streets, at right angles with High Street, open into it on the northerly side. They are, from west to east, Spruce, Brook Streets, Island Avenue and North Avenue. High Street at its westerly end opens into River Street, which descends from Zion's Hill. Between two elevations or hills on the north side is a valley in which flows Birch Log Brook. The valley, which is between Brook Street and Island Avenue, is opposite the plaintiff's land, and the brook flows down under High Street and thence down across plaintiff's land to a pond. The complainant's house is situated on the southerly, and lower, side of High Street. The house itself is on land higher than the road, but westerly from the house the land slopes down to the pond. Besides his dwelling house and out-buildings, the complainant owns a mill, situated a little southwesterly of the house, on lower ground, near the pond.

Prior to 1901, Birch Log Brook flowed under High Street in a culvert. The brook was about eight feet lower than the surface of the road. From the road to the pond it flowed in its natural channel. In the year 1901 the town took out the old culvert, and put in its place a 30 inch tile pipe. The complainant at that time connected a thirty inch pipe with the town pipe and continued it, then and later, in diminishing sizes, across his own land to the pond. So that thereafter the water of the brook which came through the pipe under the street was conveyed to the pond in the complainant's pipe, instead of

flowing along its natural channel. Further than this, the complainant the same year filled in over the pipe on the south side of the street, untill the earth fill came up to about the level of the street or a little higher. And at the westerly end of the fill he built a retaining wall. Upon this new made ground under which runs the brook in the pipe he made a lawn and a flower garden. The plaintiff's driveway to his stable lies between the lawn and his dwelling house, and is on a descending grade from the street to the stable. And from the stable there is a road down to the mill. From the brook, High Street rises to the east and to the west. The lowest point in the street is opposite the complainant's driveway or lawn. An iron "grate" or screen has been placed across Birch Log Brook, a hundred or more feet northerly from the street, evidently for the purpose of preventing refuse matter from being carried into the pipe below. It does not appear who placed the screen there. The sidewalk on the northerly side of the street is several inches higher than the one on the southerly side. There is a slight gutter on each side of the street, the one on the northerly side being for the most part a little higher than the southerly one. A sewer has been laid in High Street, and catch basins, connecting with the sewer, have been placed at several points on each side of the street.

Originally there were one or more little elevations in High Street, so that surface water coming down that street from River Street was turned off onto the lower land towards the pond, south, before it reached Spruce Street, which is between River and Brook Streets. But the town reduced the elevations so that High Street was on a continuous down grade from River Street to the brook. Some of the area on the higher land north of High Street was not within the water shed of the brook, and surface water outside the water shed naturally drained into River Street, High Street, and the other streets named. And the complainant testified that the surface water flowing down River Street, or at least a part of it, was turned into High Street. The contour of High Street is such that water flowing down has a tendency to flow over onto the south side, and there is the bulk of the current. The whole situation was such in 1912 that after showers of rain all the surface water from the higher lands north of the street flowed either into the brook, and through the pipe under the street into the pond, or into River, Spruce, Brook Streets, Island Avenue and North Avenue, and from there into High Street, and then so

much of it as was not caught by the catch basins flowed down High Street to the lowest point opposite complainant's driveway or lawn, and there overflowed or was discharged onto the plaintiff's land in its downward course to the pond.

In June, 1912, the road commissioner of Sanford made certain repairs or improvements on High Street between Spruce Street and Island Avenue in front of the complainant's premises. Gravel was hauled on, and the street was rounded up in the center. The defendant town contends that the street was not raised by this work, that before the gravel was hauled the mud was scraped off, and that the gravel no more than supplied the place of the mud, and the earth previously in the road which had been washed away in storms and freshets. It contends that after the work in 1912 the street was left no higher than it had been at the time the road had been repaired the last time previously. On the other hand the complainant says that the work in 1912 actually raised the road six or eight inches. And he says in particular that before the work in 1912 the sidewalk by his house was two or three inches higher than the surface of the road, and that afterwards the surface of the road was from four to six inches higher than the sidewalk.

Under the statute the complainant can recover damages only for the injury to his property by reason of the raising of the road. If it was not raised, he cannot recover. If it was raised only so far as to replace matter that had been scraped off, or had washed off by the action of the elements, or had been worn down by travel, it was not a raising of the street within the meaning of the statute, and the complainant cannot recover. But we think the jury were warranted by the evidence in finding that there was a substantial raising of the street in front of the complainant's land. And we may as well say here as anywhere that if before the work in 1912, the street was lower than the sidewalk and higher than the sidewalk after, that change under some conditions might afford ground for a recovery of damages. When the street was lower than the sidewalk, it served as a canal, and had a tendency to carry the water along in the street. But when the street is higher than the sidewalk, there is a greater likelihood that water will overflow the sidewalk and onto adjoining land. And that likelihood might, under some circumstances, diminish the value of the land. How this reasoning may affect this case will be considered later.

The only injurious effect of raising the street complained of is that surface water is thereby turned from the street onto complainant's land below. The plaintiff testified that only once before 1912, and that seventeen years ago, had water from the street flowed onto his premises in damaging quantities. Then to show the effect of the raising of the road in 1912 upon the value of his property he was permitted to show, by himself and other witnesses, the consequences of two or more rainstorms that occurred after the work was done, when the surface water flowed in large quantities down the streets into High Street, and down High to the point opposite his driveway or lawn, and over the sidewalk onto plaintiff's land. He showed that it overflowed the lawn and flower bed several inches deep and spoiled them, and flowed down the driveway to the stable, and by the stable into and through his mill, doing great damage. And in connection with this description, the plaintiff claimed that the catch basins were insufficient in number, size and location, and that they were clogged by debris, so as not to take in water to their capacity, to be carried away in the sewer.

The defendant contended rather unsuccessfully that the water on the occasions described came from an overflow of the brook. But the defendant contended, and we think quite successfully, notwithstanding the complainant's denial, that on two or more occasions prior to the work in 1912, surface water after rainstorms had flowed down High Street and onto the complainant's land in large quantities. These are the material facts, and contentions in matters of fact.

We must now recur to the statute. It gives a remedy in damages when an adjoining land owner is injured by the raising of a way. The measure of damages is the diminution in market value of the property injured by reason of the raising. *Chase* v. *Portland*, 86 Maine, 367. It does not include damages for physical injuries that have occurred or that may hereafter occur to the property itself in consequence of the raising, whether by surface water or otherwise. It does not include injuries which may result from insufficient catch basins, or from not keeping them cleaned and free. It does not include injuries resulting merely from surface water flowing down the street, and overflowing on to the land. A town is not liable in any form of proceeding for the consequences of some fault in the location, size, plan of construction or general design of its sewers. *Keeley* v. *Portland*, 100 Maine, 260. It is liable for failure to keep its sewers in

repair, *Keeley* v. *Portland,* supra, but not in a proceeding like this. Whether they are liable for failure to keep catch basins clear and free may be doubted. See *Dyer* v. *South Portland,* 111 Maine, 119. It is certain that that question cannot be considered in a proceeding for assessment of damages for raising a way. It is well settled that when land is taken for a way and damages are assessed, the damages are presumed to include not only the value of the land taken, but the diminished value of the remainder of the tract caused by the taking. And the likelihood that surface water from the road may be turned onto the adjacent lands is one of the elements to be considered in assessing land damages. *Peaks* v. *County Commissioners,* 112 Maine, 318. And after the assessment, it is to be conclusively presumed that it was taken into consideration. There is no further remedy. So in this case, we must presume that the likelihood that surface water would flow down High Street and onto the plaintiff's land at the lowest point was considered in the original assessment. The complainant can have no further damages for that.

But there is one situation, the consequences of which are not presumed to have been considered in the original assessment. And that is this. After a road has been built and a grade practically established, and when it may be presumed that the adjoining owners have adjusted their property, their fences, buildings, walks and so forth, to that grade, if a town raises or lowers the road to the injury of the adjoining owner, it must pay the damages. And that is the claim in this case.

The town is not liable now for the effect of the condition prior to the work in 1912. It is not liable for any depreciation of the value of the complainant's property because of a likelihood then that surface water would flow from the street onto his land. It is liable only for such depreciation in value as has been caused by an increased likelihood, by reason of the raising, that surface water will flow from the street onto the complainant's land, doing injury. Is there any such increased likelihood? and if so, to what extent? These are the questions now to be answered.

In the first place, it is clear that the raising of the road did not increase the likelihood that water coming down from an overflow of the brook, or surface water flowing down on the northerly side of the street would pass onto the complainant's premises. The raised road would serve as a dam, temporarily at least. It would not expedite the flow of the water.

Again, the complainant seeks damages because of the greater likelihood that water will flow down to his mill, and injure it. But there can be no greater likelihood of that now than before the street was raised. Water will flow down hill. When it reaches the bottom of a hill in a street, it must flow onto the adjoining lower land. It cannot go elsewhere. Nature provided a channel into which the surface water from High Street would have gone. It would have emptied into the brook. But the complainant has put the brook into a closed pipe, and obliterated the channel. He cannot complain that the surface water finds its way over his land in other courses.

We do not mean to say that the complainant could not lawfully make the fill and cover the channel of the brook so far as this case is concerned. And the liability of the town for damages must be considered with reference to any improved condition into which he had put his property. What we do say is that there is not, and cannot be, any greater likelihood now that surface water will flow over onto his land at the low point in the road than there was before 1912. All conditions except a slight raising of the road remain the same. There is the same contour of the ground, the same streets, the same sewer, the same catch basins, the same brook, the same liability to rainfall, the same necessity for surface water flowing down High Street to pass off on the lower side onto the land of the complainant. The raising of the road, which is the complainant's only legal ground of relief under the statute, has not changed any of these conditions.

It may be true, as already suggested, that if the street before the raising was lower than the sidewalk and higher afterwards, there is a greater likelihood that water will overflow the sidewalk before it reaches the low point, opposite the driveway and lawn. But, inevitably, it must pass on to the driveway or lawn, which are the low points on the complainant's residential grounds, on its way to the pond, the same as it must have done before 1912. The depreciation in value of the complainant's property on account of the change must be so small as to be inappreciable.

Whatever may be the injurious effect upon the value of the plaintiff's premises, because of the liability that surface water will flow down High Street and thence down across his land to the pond, we think it cannot be said that that liability has been increased by raising the way. The verdict of the jury for the complainant was clearly wrong.

Motion for a new trial sustained.

JOHN D. VERMEULE *vs.* JOSEPH HOVER.

York. Opinion February 18, 1915.

Assignment. Conveyances. Corporation. Directors. Equity. Foreclosure. Mortgages. Quitclaim Deed. Real Action. R. S., Chap. 84, Sec. 17. Title.

1. The general rule in *European and North American Railway* v. *Poor*, 59 Maine, 277, that directors cannot legitimately acquire an interest adverse to the corporation of which they are directors, and that if they purchase any claim against the company it is in trust for the company, while recognized in principle is too broad a rule in its application to the case at bar.
2. A director in a corporation is not debarred by reason of his office from entering into a contract with the corporation but the contract is subject to the principle that when he appears on both sides of it, it will be closely scrutinized in equity and set aside unless made in that entire good faith which the law demands of this species of fiduciary.
3. Subject to the same principle directors are not debarred from purchasing the property of the corporation at judicial or other public sales, nor at private sale, if the same is paid for out of personal funds of the purchasing director.
4. The president of a corporation who executes a warranty deed of lands of the corporation acknowledging it to be his own free act and deed, as well as that of the corporation, does not render himself personally liable in an action for breach of covenant.
5. A demand for accounting under the provisions of R. S., Chap. 92, Sec. 15, should call for an accounting of an entirety, not a portion of the debt due on the mortgage.
6. A deed by a mortgagee out of possession, unaccompanied by a transfer or assignment of the mortgage indebtedness, conveys no title.

On report. Judgment for the plaintiff.

This is a real action to recover two pieces of real estate situate in York County. The defendant, in the court below, was permitted to plead in equity, under the provisions of R. S., Chap. 84, Sec. 17, in addition to the general issue. To said pleadings, the plaintiff filed his reply. At the conclusion of the evidence, the cause was reported to the Law Court for the determination of the rights of the parties, upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

Charles E. Littlefield, and George C. Yeaton, for plaintiff.

Leroy Haley, for defendant.

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

PHILBROOK, J. This is a real action wherein the plaintiff demands of the defendant two pieces of real estate in York County. On motion allowed by the presiding Justice in the court below, the defendant was permitted to plead in equity under the provisions of R. S., Chap. 84, Sec. 17.

The plaintiff claims record title to the real estate under the following conveyances. As to one piece he says that Cornelius C. Vermeule, then the owner, gave a mortgage deed thereof to Armenious H. Bowden on April 3, 1890, that this mortgage was assigned to the plaintiff October 9, 1900, and by him foreclosed by due process of law. As to the other piece he says that Cornelius C. Vermeule, then the owner, gave a mortgage deed thereof to John Parsons and Phoebe A. Parsons on August 10, 1892, that this mortgage was assigned to the plaintiff August 11, 1899, and by him foreclosed by due process of law. The defendant, while admitting the existence of this record title, claims that the same should not be allowed to prevail.

In 1892 a corporation was organized by the name of the York Cliffs Improvement Company. The plaintiff was president and one of the directors of the company. On November 2, 1892, by quitclaim deed the said Cornelius C. Vermeule, also a member of the corporation, conveyed to it several parcels of land, among them being the two lots in controversy. In that conveyance no reference was made to the Bowden and Parsons mortgages, which were still valid incumbrances, but knowledge of their existence by the parties then interested is shown by the fact that, on the same second day of November, the directors of the corporation, at a meeting held in New York City, spread upon their records the fact that part of the "other valuable considerations" paid for the lands granted the corporation by Cornelius C. Vermeule was the payment to the grantor of "a mortgage for two thousand four hundred dollars given by C. C. Vermeule to A. H. Bowden," and also payment of "a mortgage for three thousand three hundred dollars given by C. C. Vermeule to John Parsons."

As time went on the corporation became heavily indebted to the plaintiff, John D. Vermeule, to Cornelius C. Vermeule, and to Joseph N. Kinney, all three of whom were members of the corporation. On November 24, 1897, an agreement in writing was made between these three creditors and the corporation, in which the creditors agreed to accept in exchange for such indebtedness "all lands owned by said company" and then followed a description of the lands. The agreement also contained the following provision; "And in case no other provision is made and agreed upon by the parties hereto, for paying off said debts of the York Cliffs Improvement Company on or before June 1st, 1898, then it is hereby agreed that on that day these aforesaid lands will be conveyed by a good and marketable title to John D. Vermeule, Cornelius C. Vermeule and Joseph N. Kinney by the said York Cliffs Improvement Company in proportion to their respective claims in the aforesaid indebtedness of the York Cliffs Improvement Company." The agreement, from which these quotations are made, was quite long and contained other provisions but we have referred to those which are inportant at this point in our discussion. Apparently the debts of the corporation were not otherwise paid for on August 27, 1898, deeds were executed by the Improvement Company granting its lands, in common and undivided, nine-twentieths to the plaintiff, John D. Vermeule, seven-twentieths to the defendant Joseph Hover, and four-twentieths to Charles D. Kinney. Mr Joseph N. Kinney, creditor as aforesaid, directed the deed of his share in the lands to be given to his son, Charles D. Kinney, as he, the father, was expecting to go abroad for an extended visit. The share of Cornelius C. Vermeule was deeded to the defendant. This was done by direction of Cornelius, who stated in his testimony that the defendant was acting as attorney for his (Cornelius') wife, who had advanced the money from her separate estate. Cornelius also stated that Mr. Hover "holds the title as attorney for my wife." At that time Cornelius receipted for the indebtedness of the corporation to him. It was not claimed that Mr. Hover, at the time the deed was given to him, was a creditor of the corporation, a member of the corporation, an officer of the corporation, or had any claim against it, or that anything was paid to it by him as consideration for the conveyance. As a result of petition for partition in 1899 the lands in controversy were among those set off to the defendant. Hence the defendant's claim of title.

It should be noted that at the close of the testimony there is a stipulation that when the plaintiff verifies the description, in case he found his declaration covered more than he is entitled to recover under the foreclosed mortgages, he may amend his declaration accordingly.

As already observed, the defendant says that the record title of the plaintiff, in view of the conditions just recited, should not be allowed to prevail. He admits that the Bowden and Parsons mortgages, through foreclosure of which plaintiff obtained title, would be valid liens, if in the hands of innocent third parties, for value, but contends that in view of the situation of the several parties relative to the corporation and to the agreement above referred to, those mortgages should not be considered valid liens in favor of this plaintiff. He contends, since the plaintiff, the defendant, and Kinney received their lands from the corporation, all having knowledge as he says, that the corporation had assumed or promised payment of the debts secured by those mortgages, that it was the intention of the grantees that each should take his respective share free from any encumbrance so far as any party to the agreement was concerned.

The agreement on which defendant relies according to its terms, relates to debts due from the corporation to the other three parties, "amounting to $97,660, more or less" and which, the defendant claims, are to be extinguished by the transfer of the lands of the corporation to its three creditors, "in proportion to their respective claims in the aforesaid indebtedness of the York Cliffs Improvement Company," but it does not clearly appear that the "aforesaid indebtedness" included the debts secured by the Parsons and Bowden mortgages although the corporation had promised to pay them, as urged by defendant. These mortgage debts at the date of the agreement, November 24, 1898, were still due the original mortgagees, since the assignment of the Parsons mortgage was dated August 11, 1899, and that of the Bowden mortgage was October 9, 1900. Clearly then this agreement could not wipe out the Parsons and Bowden debts secured by these mortgages.

This brings us to a specific contention of fact made by the defendant, namely, that the money used by the plaintiff in procuring the assignment of at least one of the mortgages, was advanced to the plaintiff by the corporation, and was the money of the corporation, but from an examination of all the testimony we do not think this

contention can prevail. On the other hand we are persuaded that the corporation was financially unable to redeem the mortgages and that the plaintiff paid for their assignment out of his own funds. Accordingly it will be seen that the wiping out of claims against the corporation referred to in the agreement by the transfer of its lands to these creditors, was a transaction in no way affecting the mortgage debts as they then existed, or the payment of them, and their assignment to the plaintiff was a separate and distinct transaction.

But the defendant contends, since the plaintiff was president and director of the corporation that he could not lawfully acquire these claims against the corporation, and if he did so he really acquired them for the benefit of the corporation, and that their acquisition under these circumstances was an extinguishment of them and of the mortgages given to secure them. The defendant does not allege in his pleadings, and consequently does not attempt to prove, any fraudulent act of the plaintiff in acquiring these mortgages. This lead us to the question, may an officer of a corporation, in the absence of fraud, lawfully acquire and enforce a claim against such corporation. In *European and North American Railway Company* v. *Poor*, 59 Maine, 277, the court said "The general rule is, that directors cannot legitimately acquire an interest adverse to the corporation, and that if they purchase any claim against the company it is in trust for the company." The case from which this quotation is made involved the right of a director to share with a building contractor in the profits realized from the construction of a railroad for a company in which the sharer was such director. That right was challenged by the corporation in its own behalf and for its own benefit. We agree with the rule as actually applied to that case but think the statement of it, as shown by the above quotation, was too broad. We hold strictly to well established doctrines concerning the fiduciary relationship existing toward a corporation on the part of those who become its officers, but it is one of those well established doctrines that a director is not debarred, by reason of his office, from entering into a contract with the corporation, but the contract is subject to the principle that when he appears on both sides of it, it will be closely scrutinized in equity, and set aside unless made in that entire good faith which the law demands of this species of fiduciary. 3 *Thompson's Corporations*, Sec. 4059; *Smith* v. *Skeary*, 47 Conn., 47; *German-American Seminary* v. *Kiefer*, 43 Mich., 105; *Pneumatic Gas Co.* v. *Berry*, 113 U. S., 322; *Leavenworth* v. *Chicago, etc., R. Co.*, 134 U. S., 688.

We regard it also as a well established doctrine that the principle which upholds contracts between a corporation and its directors or officers, when fairly made, allows them, under like conditions to purchase property from the corporation. 3 *Thompson's Corporations*, Sec. 4070, and cases there cited.

Another step leads us to the doctrine, equally well established, that the principle which allows directors to deal with their corporation and which makes contracts between them and it good in law, though subject to be avoided in equity upon any appearance of unfairness, has an analogy in the principle that directors are not disabled, by the fiduciary relation which they occupy toward the company, from purchasing its property at judicial or other public sales. "Such purchases are not wholly void, but they operate to pass the legal title to the purchasing director, so that he will hold it as against a purchaser at execution sale under a subsequent judgment against the corporation, in a proceeding at law, such as a writ of entry to obtain possession." 3 *Thompson's Corporations*, Sec. 4071. *Salt Marsh* v. *Spaulding*, 147 Mass., 224; s. c., 17 N. E. Rep. 316. The last cited case contains the following language peculiarly applicable to the case at bar. "The demandants further contend that, as the directors are trustees for the stockholders, even if the mortgage was valid, a purchase, by one of the directors, of the property belonging to the corporation (the cestui que trust) is prima facie a purchase for the trust. If this proposition is correct, we cannot see that it would aid the demandants in maintaining this action. The title clearly passed to the purchaser even if a director; and if the foreclosure sale could be avoided or the purchaser declared to hold the property subject to a trust, this could only be done by the corporation or by its stockholders." In this last cited case we also note the following language: "A director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and when the transaction is open, and otherwise free from blame; nor is his subsequent purchase of its property, at a fair public sale by a trustee under a deed of trust, executed to secure a payment of the debt, invalid." Citing *Holt* v. *Bennett*, 146 Mass., 437; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S., 587.

We pause to emphasize the fact that the party here contending against the plaintiff is not the corporation, nor an officer, or stockholder, in behalf of the corporation. The assignment of the two mortgages in question, under the testimony paid for by the plaintiff's

own funds, the lack of averment or proof of fraud, the open and legal manner of recording the assignment, and the open and legal manner of foreclosure, satisfy us that the defense cannot prevail upon this branch of the case.

But he further contends, since the plaintiff was president of the corporation when it gave the warranty deed to the defendant, and acknowledged it to be his own free act and deed as well as the free act and deed of the corporation, that the plaintiff was bound by the covenants of deed. The defendant does not call our attention to any decision in support of this position. On the contrary it was held in *Whitford* v. *Laidler*, 94 N. Y., 145, s. c., 46 Am. Rep. 131, that in the absence of a personal promise or covenant, one signing a contract, who therein represents himself to be the agent of a disclosed and known principal, and who assumes to contract for such principal only, is not held personally liable upon the covenants contained in such contract. That the sealing and delivery of a written instrument by M. as president and in behalf of the corporation did not render M. liable in an action for breach of covenant is held in *Hopkins* v. *Mehaffy*, 11 S. & R. 126, cited in *Abbey* v. *Chase*, 6 Cush., 54.

The defendant further contends that the plaintiff was an equitable part owner, with the defendant of the demanded premises, and hence equitably a joint mortgagor in the mortgages running to Bowden and to Parsons for the purchase price of the lands in controversy; that payment of the mortgage by one joint mortgagor would operate as a discharge of the mortgage. The defendant overlooks the fact that he was unknown to these transactions until long after the purchase price mortgages were given, and long after the agreement, herein before referred to was given, that the deed under which he claims is from the Improvement Company which made him and the plaintiff owners jointly and in common with Kinney, of the disputed premises, under a legal title, so that he and the plaintiff never stood in the relation of equitable joint owners or equitable joint mortgagors, whatever might be claimed as to the plaintiff and Cornelius C. Vermeule, whose share in the premises seem to have been deeded to the defendant Hover.

This view also disposes of the claims made by the defendant that the plaintiff was jointly indebted with the defendant to the extent of the mortgage and that acquiring title of a joint obligation was payment of the debt.

We are unable to see how the contention of the defendant as to demand for accounting can effect the issue in this case for at best his only demand was for "a true account of the sum due on said mortgages that belong to the said Hover to pay," which is not a demand in accordance with the provisions of R. S., Sec. 15, Chap. 92, which provides for demand for "a true account of the sum due on the mortgage," an entirety and not a portion.

It does not seem necessary to discuss the questions of estoppel or laches raised upon the one side and the other, for these in the light of all the facts, do not appear to affect the main question sufficiently to change the result. Having regard to the stipulation for verification of description the entry must be,

Judgment for plaintiff.

JOHN D. VERMEULE *vs.* CAROLYN C. VERMEULE.

York. Opinion February 18, 1915.

Assignment. Foreclosure. Mortgage. Quitclaim Deed. Real Action.

A deed by a mortgagee not in possession, unaccompanied by a transfer or assignment of the mortgage indebtedness, conveys no title.

On report. Judgment for plaintiff.

This is a real action for certain real estate and is based upon the same allegations, evidence and arguments as the case of John D. Vermeule against Joseph Hover, to which reference is made. The defendant, on motion, was permitted in the court below to plead in equity. By agreement, this case was referred to the Law Court for the determination of the rights of the parties, upon so much of the evidence introduced by either party in the case of *John D. Vermeule* v. *Joseph Hover*, so far as is legally admissible.

The case is stated in the opinion.

Charles E. Littlefield, and George C. Yeaton, for plaintiff.

LeRoy Haley, for defendant.

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

PHILBROOK, J. This is a real action presented to this court in conjunction with the case of *John D. Vermeule* v. *Joseph Hover*, ante, and with the exception of one element is based upon the same allegations, evidence and arguments, so that reference is hereby made to that case for a statement of claims made by parties and our conclusions. In this case the defendant claims an additional element and urges that on the first day of August, 1898, Armenious H. Bowden, then the owner and holder of the mortgage given by C. C. Vermeule to said Bowden, by his quitclaim deed of that date, conveyed to her all his right, title and interest in and to the premises covered by the mortgage. But Bowden was not then in possession of the premises and it is now well settled in this State that a deed by a mortgagee out of possession, unaccompanied by a transfer or assignment of the mortgage indebtedness, conveys no title. *Smith* v. *Booth Brothers*, 112 Maine, 297, and cases there cited. It is not claimed that Bowden transferred or assigned the mortgage debt to Mrs. Vermeule.

This quitclaim deed of Bowden to the defendant, therefore, conveyed no title and does not strengthen defendant's claims. Subject to stipulation for verification of description, referred to in *Vermeule* v. *Hover*, the record of which case was to be made part of this case, so far as it might be relevant or material, the entry must be,

Judgment for plaintiff.

LEROY R. FOLSOM, Receiver,

vs.

CLYDE H. SMITH, et als.

Somerset. Opinion February 18, 1915.

Corporation. Creditors. Directors. Foreclosure. Fraud. Fraudulent Misappropriation of Assets. Insolvency. Mortgage. Preference. Receiver. Stock.

1. A receiver of a corporation, appointed under Public Laws of 1905, Chap. 85, as amended by Public Laws of 1907, Chap. 137, succeeds only to the rights of the corporation, and is subject to all the equities that could have been invoked successfully against the corporation. He may sue at law or in equity, whenever the corporation itself might have sued, but not where the interests of the corporation are not involved. He does not succeed to the rights of creditors.
2. A corporation may lawfully keep its bank account in any name it chooses, and may adopt and use such name in the signatures upon its checks.
3. When the directors of a corporation have applied money belonging to it to the payment of its overdraft in a bank, for which it was primarily responsible, a receiver, under the statute, cannot maintain an action therefor against the directors, on the ground that they were guarantors or sureties for the overdraft, and that the transaction amounted to a preference of themselves, and was fraudulent as to other creditors. The corporation itself was not wronged.
4. When the directors of an insolvent corporation sold its assets, partly for cash, and partly for capital stock in another corporation, and caused the stock to be issued, not to the corporation itself, but to themselves individually, they thereby diverted the stock from the corporation to themselves, and became responsible to the corporation for the value of the stock at the time of its conversion. And the receiver of the corporation may maintain an action to recover the value.
5. All the directors of a corporation by whose authority or acquiescence its assets have been diverted from the uses of the corporation are liable to the corporation, or its receiver, for the consequences of that breach of trust.
6. Every director of a corporation is bound to know, and is presumed to know, its financial condition.
7. When a case involving the assessment of damages is reported to the Law Court, and the evidence affords insufficient date for such assessment, the Law Court will, if justice requires, remand the case for assessment of damages, at nisi prius.

On report. Defendants defaulted. Remanded for hearing in damages at nisi prius, on account of stock converted.

This is an action of tort brought by LeRoy R. Folsom, as receiver of the Smith Publishing Company, a Maine Corporation, against Clyde H. Smith, Selden F. Greene, R. C. Brown, J. F. Hill and Edward F. Danforth and Helen Wing Wentworth, both executors of the last will and testament of John P. Clark, deceased, directors in said corporation, for misappropriation of the assets of said corporation. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court upon so much of the foregoing evidence as is legally admissible; the Law Court to render such judgment as law and justice require.

The case is stated in the opinion.

Fred F. Lawrence, for plaintiff.

Merrill & Merrill, for defendant Smith.

George W. Gower, for defendant Greene.

R. V. Brown, for defendant Brown.

Walton & Walton, for defendant Hill.

Butler & Butler, for estate of J. P. Clark.

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

SAVAGE, C. J. The plaintiff is the receiver of the Smith Publishing Company, a corporation at one time doing business at Skowhegan. The defendants, Smith, Greene, Hill and Brown, with one Clark, now deceased, were its directors. Clark's executors are made defendant parties. We shall speak of Clark as one of the defendants.

This suit is brought to recover for the fraudulent misappropriation of the assets of the corporation by the defendants for their own benefit, whereby its creditors were deprived of the means of enforcing their claims against the corporation. The case comes up on report.

The salient facts are these. Prior to 1911, the defendants, Smith, Greene, Hill and Clark, were stockholders in, and creditors of, the J. F. Smith Publishing Company. In 1911, they took a mortgage of the property of that corporation, which later during the year they foreclosed. The property of the corporation seems to have been chiefly some printing machinery and paraphernalia, and the subscription lists and good will of a small publication then published by it and issued to subscribers, together with such rights as were inci-

dent to the management and operation of the publishing business and a mail-order business connected therewith. After the foreclosure, the four defendants named appear to have carried on the business for a time as individuals. But on December 13, 1911, they organized a new corporation, called the Smith Publishing Company, with $60,000 capital stock, and conveyed to it the property and property rights which they had received from the J. F. Smith Company. Thereafter the Smith Publishing Company carried on the business. In the new corporation Hill was president, Smith was treasurer, and Smith, Greene, Hill and Clark were the directors, and so continued to the end. Each of the four received $15,000 of the capital stock. Afterwards Hill sold defendant Brown one-sixth of his capital stock. Brown was elected a director, and remained such.

The business did not prosper. And in October, 1912, in accordance with a vote of the directors, the good will, subscription lists, publication rights, advertizing contracts and electrotypes of the corporation were sold to the Pulitzer Company, a New York corporation. The purchase price was $7,500 in cash, and $10,000 in the preferred stock of the Pulitzer Company. The cash was received by Smith, the treasurer. The Pulitzer Company stock was issued, not to the Smith Publishing Company, but to Smith, Greene and Clark individually, and is so held by them to this time, except ten shares which Smith later transferred to Brown. Hill and Brown had before that time ceased to contribute to the growing necessities of the corporation. Previously they had contributed less than the others. And apparently for this reason, by a general understanding, the Pulitzer stock was divided among Smith, Greene and Clark.

In order to understand what was done with the $7,500 cash, it is necessary to go back a little. While the business was being carried on by Smith, Greene, Hill and Clark as individuals, and perhaps earlier, a deposit account was opened with the Skowhegan Trust Company, in the name of "C. H. Smith, special." At the time of the formation of the Smith Publishing Company, this account was overdrawn to the amount of $10,415.13. The Smith Publishing Company from that time on used the same account in the same name. They deposited to the credit of the "C. H. Smith, special" account and checked against it, the deposits in the whole being much more than the amount of the overdraft at the beginning. But they checked out more than they deposited, and the overdraft gradually grew until

in October 1912 it was about $23,000. When Smith, the treasurer, received the $7,500 cash from the Pulitzer Company, in October, 1912, he deposited it to the credit of the "C. H. Smith, special" account, thereby reducing the overdraft by so much. At the time of the sale, the Smith Publishing Company was unable to pay its debts in the regular course of business, and was, in the eye of the law, insolvent. *Morey* v. *Milliken*, 86 Maine, 564.

In his declaration, the plaintiff sets forth two grounds for recovery, one as to the $7,500 received from the Pulitzer Company, and the other as to the Pulitzer stock. With respect to the Pulitzer cash, he alleges that, having been paid to Smith, the treasurer, with the knowledge and approval of the other defendants, it became their duty to use it for the payment of their company's debts, and not to prefer themselves, or any of themselves in so doing; but that in disregard of their duty, they applied the money wholly to the payment of the overdraft at the Skowhegan Trust Company, on account of Smith, that the Publishing Company was not in any sense the debtor of the Trust Company, and that the payment was made with the sole intent to relieve Smith from his personal obligation to pay the overdraft, and to relieve the other directors from such duty as might exist on their part to contribute thereto, so as to effect an unlawful preference in favor of the defendants. He alleges also that the action of the defendants was a fraud upon the other creditors.

With respect to the Pulitzer stock he alleges that the defendants knowingly, wilfully and fraudulently caused the certificates of stock to be issued to them as individuals, that they received and have retained them as their individual property, which action was fraudulent as to the creditors of the company.

It will be noticed that action is brought against the defendants, not to recover the money and the stock as the property of the company, but to recover damages which the creditors have suffered by reason of their tortious conduct in misappropriating the money and the stock. It is not alleged that the corporation was defrauded, but that its creditors were. The suit is brought apparently for the benefit of creditors, and not for the benefit of the corporation.

The statute under which the plaintiff was appointed receiver, Public Laws of 1905, Chap. 85, as amended by Public Laws, 1907, Chap. 137, provides that "such receiver shall have power to institute or defend suits at law or in equity, in his own name as receiver, to

demand, collect and receive all property and assets of said corporation, to sell, transfer or otherwise convert the same into cash, and carry on the business of said corporation, as ordered by the court, if it appears for the best interest of all concerned." No special authority is expressly given a receiver to preserve and enforce the rights of creditors, as separate and distinct from the rights of the corporation.

We are aware that there are authorities which hold that a receiver represents the interests of both debtor and creditors, and is a trustee for all parties. See Beach on Receivers, Sec. 264. But the current of authority favors the proposition that a statutory receiver succeeds only to the rights of the defendant in the receivership suit, and is subject to all the equities that could have been successfully invoked against the latter, unless the statute otherwise provides. Beach on Receivers, Sec. 298. The case of *Gilbert* v. *Finch*, 173 N. Y., 455, chiefly relied upon by the plaintiff as authority for the doctrine that a receiver may maintain an action at law against recreant directors for the benefit of creditors is not inconsistent with this conclusion. In that case corporate funds were wrongfully diverted by the directors, and the corporation was wronged. We have here to deal with a statutory receivership. The general scope of the receiver's powers are marked out, and, we think, limited, by the statute. Taking the statute as a whole, we think it was the legislative intent that a receiver should succeed to the rights of the corporation, and not specifically to the rights of creditors, except as the enforcement of the corporate rights may enure to the benefit of creditors. Under this statute, a receiver may sue at law or in equity, whenever the corporation itself might have sued, but not where the interests of the corporation itself are not involved. It may be added that this case does not come within the purview of R. S., Chap. 47, Sec. 89, relating to actions by receivers against stockholders. For these reasons, the declaration is demurrable. It is likewise amendable.

When cases come to the Law Court on report, technical imperfections in pleading are regarded as waived. *Elm City Club* v. *Howes*, 92 Maine, 211; *Rush* v. *Buckley*, 100 Maine, 322; *Hurd* v. *Chase*, 100 Maine, 561; *Proctor* v. *M. C. R. R. Co.*, 101 Maine, 459. And we will proceed to consider the case as if the alleged wrongful acts had been declared to have been to the damage of the corporation.

The plaintiff contends in the first place that the overdraft in the Skowhegan Trust Company was the debt of Clyde H. Smith, and not

that of the corporation, and that application of the Pulitzer Company money in reduction of the overdraft was the diversion of corporate funds to the payment of the private debt of Smith, for which the corporation itself had a right of action against the defendants. If the plaintiff is right as to his premise, his conclusion undoubtedly follows. He bases his contention upon the fact that the overdraft was caused by the payment of checks signed "Clyde H. Smith, special," and upon the principle of law that the primary liability of parties on commercial paper must be determined from the face of the paper itself. He argues that it is not competent to show that a "Clyde H. Smith, special" check was the check of the corporation itself. But the principle relied upon is not applicable in this case. This is not a case between parties to commercial paper. It is not a case calling for the determination of the question whether Clyde H. Smith would or would not have been liable to the holder of such a check. The checks were paid, and the case shows that they were paid on the primary responsibility and credit of the corporation. The corporation might lawfully keep its bank account in whatever name it chose. It might adopt and use such name in the signatures upon its checks. Three of the defendants were directors in the Trust Company, and the conclusion from the evidence is irresistible that when the Trust Company paid the "Clyde H. Smith special" checks, it paid them as the checks of the corporation, and the corporation became indebted to it therefor. So that so much of the overdraft, at least, as accumulated after the Smith Publishing Company was organized was the debt of that corporation. Whether Smith was also liable as guarantor, as is claimed, is immaterial to this discussion.

When therefore these defendants caused the $7500 received from the Pulitzer Company to be deposited to the credit of the "C. H. Smith, special" account in the Trust Company, they thereby reduced the overdraft and paid by so much the indebtedness of the corporation. The money was not diverted from corporate uses. The corporation could not complain of this payment. It could not recover back the money. The receiver, as representing the corporation, has no greater rights. The corporation, even if insolvent, at common law, could lawfully prefer one creditor to another. *Symonds* v. *Lewis*, 94 Maine, 501. So far as the corporation itself was concerned, it was not unlawful for the directors to pay this particular debt, even if thereby they saved themselves as guarantors. Whether

the defendants or any of them were guarantors, and if so, whether the indirect benefit they received by the payment made it an unlawful preference as to creditors, we have no occasion in this case to decide. If creditors were unlawfully affected by this act of the defendants they must seek their remedy in some other proceeding. Their rights in this respect cannot be enforced by the receiver. It follows that the plaintiff cannot recover in this action as for the diversion of the $7500, nor for the alleged unlawful preference.

But the case as to the Pulitzer stock stands on different grounds. We shall not base our decision respecting the stock upon the ground claimed by the plaintiff that the directors exceeded their authority in taking the stock instead of money, when the stock had only a speculative value. It was not taken as an investment, but as a part of a trade. It may have been the best trade possible under the circumstances. We shall not discuss the responsibility of the directors for making the trade. But when the trade was accomplished, the stock received as a consideration of the sale belonged to the Smith Publishing Company and should have been issued in its name and turned over to it as assets. Instead, it was issued to, and received and retained by, three of the directors who are defendants, except as director Smith afterwards transferred ten shares to director Brown. It is claimed that the defendants Smith, Clark and Greene believed that the Pulitzer stock was of considerable value, and that their purpose was to retain the stock until it could be sold with advantage, and with the proceeds to pay the corporate debts, and then, as Brown and Hill had practically "dropped out," to divide the surplus among themselves. And this arrangement seems to have been acquiesced in by Brown and Hill.

But whatever may have been the belief of the defendants as to their ability thus to liquidate the debts of the corporation, it, in fact, was insolvent. And they, as directors, were bound to know it. The duty of a director to the corporation requires him to know its financial standing, and he is presumed to know it. He cannot set up his ignorance to defend himself from the consequences of his own dereliction of duty. *Clay* v. *Towle*, 78 Maine, 86. This stock was a part of the assets of the corporation. The assets of an insolvent corporation are a trust fund. In handling and managing the assets, the directors owe the duties and have the responsibility of trustees. Their duty was to put this stock into the treasury of the corporation.

They disregarded their duty. They diverted it from the corporation to themselves. They accomplished a conversion of it. By taking the stock in their own names, the directors who received it became responsible for it to the corporation at its value at the time, the same as trustees and agents are for similar conduct. *White* v. *Sherman*, 168 Ill., 589; 61 Am. St. Rep. 132; Stanley's Appeal, 8 Pa. St. 431; 49 Am. Dec. 530; 1 Perry on Trusts, Sec. 463.

And all the directors by whose authority or acquiescence this diversion was made are liable to the corporation in this action for the consequences of the breach of trust, as well as those who received the stock. Perry on Trusts, Sec. 419. It is claimed that defendants Hill and Brown are not liable in any event. Hill received none of the stock, and Brown none at the time of the sale. But both were directors and Hill was president of the corporation. They paid little attention to its affairs. They trusted to the judgment of the others, and particularly, of Smith. They neglected their duties. They did not personally participate in the sale, but when they learned the details, they acquiesced, and took no steps to protect the rights of the corporation. Under the rule of liability stated above, we think they are liable to the receiver equally with the others.

One question remains,—the amount of damages. The defendants are liable for the value of the Pulitzer stock at the time it was taken. The plaintiff claims that upon the evidence we should find that the stock was worth its par value. Two of the defendants testify in effect that they regarded it as worth par. But it seems clear to us that in fact it was not worth par. How much it was worth is a question which is not answered by the evidence. It was apparently a speculative stock. It does not appear to have been on the market, and probably had no market value, strictly so called. Yet we cannot assume that it was valueless. Its actual value must have depended on many conditions, hardly any of which appear in this case. The value of a share of capital stock in a corporation depends largely upon the value of its actual assets, its liabilities, the state of its business, its good will, its reasonable expectations and the amount of capital stock issued. Upon the evidence before us, to determine the value of this stock at the time of sale would be mere guess-work. There are no sufficient data for anything but surmises. To attempt a determination would be likely to result in rank injustice to one side or the other.

We think the circumstances are such that the case should be sent back for an assessment of damages on account of the Pulitzer stock. Justice requires it.

The certificate will be,

Defendants defaulted.
Remanded for hearing in damages at nisi prius, on account of stock converted.

LORENZO D. GETCHELL *vs.* HARRY A. KIRKBY.

Somerset. Opinion February 20, 1915.

Assumpsit. Contract. Deed. Fraud. Misrepresentation. Notice of Rescission. Possession. Rescission. Restoration. Sale.

1. The right to rescission is limited to cases where the seller can be put substantially in the position he occupied before the contract. If one would rescind, he must restore.
2. Notice that possession will be delivered within the next ten days is not sufficient; it should be done within a reasonable time.
3. If a party would rescind a contract on the ground of fraud, the rule is that he must restore, that it should be done within a reasonable time.
4. What is a reasonable time is a mixed question of law and fact. When the facts are ascertained, it becomes a question of law.
5. A contract obtained through fraudulent representations may be rescinded, or affirmed, at the election of the party defrauded, and this principle applies to contracts under seal, as well as to other classes of contracts. Deeds procured by covin or fraud, as between the parties, are as dead as forged deeds.
6. The law does not allow a partial rescission whereby the party claiming the right to rescind can retain the beneficial part of a contract and refuse performance on his part.
7. The vendee may avail himself of a partial failure of consideration to reduce damages and is not obliged to resort to a separate action for deceit, or upon a warranty.

8. That the power to cancel an executed contract ought never to be exercised, except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved and unless the complainant has been deceived and injured by them.

On motion and exceptions by the plaintiff. Exceptions not considered. Motion sustained. Verdict set aside. New trial granted.

This is an action of assumpsit, to recover for interest and the first instalment on a note for $2700, given by defendant to plaintiff as part consideration for plaintiff's farm, sold and conveyed to defendant, and payable in instalments. The defense was fraud and false representations by plaintiff in the sale of said farm. Plea, general issue. The jury returned a verdict for the defendant, and plaintiff filed a general motion for a new trial and had exceptions to certain rulings of the presiding Justice.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

Butler & Butler, for defendant.

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

HANSON, J. This is an action of assumpsit for interest and the first instalment on a note for $2700 payable $100 per annum, with interest payable annually. The verdict was for the defendant, and the case is here on motion and exceptions by the plaintiff.

The plaintiff sold a farm to the defendant on May 1, 1913, receiving therefor $400 in cash and the above note, and also an agreement to secure him on a part of the crops to insure the first two payments. Before the sale was made, the plaintiff told the defendant that the farm had yielded 38 tons of hay the previous year, and that the income from all sources was $1,000, and offered to show his books to the defendant.

The plea was the general issue, under which the defendant resisted payment upon the ground that the contract had been rescinded. Rescission was based upon two grounds: 1. That the plaintiff had represented that the farm had produced 38 tons of hay in 1912, and (2) that he had received $1,000 for his products the same year, and defendant claims that these statements on which he relied were untrue, and that he was deceived thereby.

The plaintiff produced the note and rested his case. The defense assumed the burden of showing the fraud alleged. There was substantial agreement as to the language used by the plaintiff in the sale of the farm. The only questions involved were the truth of the statements as to the amount of hay cut in the previous year, and the gross income from the farm as stated by the plaintiff. The plaintiff's positive testimony was supported by a neighbor who assisted in cutting the hay, while the defendant's evidence was circumstantial, and largely involved testimony from neighboring farmers as to the general hay crop for 1913, as compared with that of 1912, the trend of which was that in the locality the hay crop fell off from one-third to one-half from that of 1912. The case thus presented to the jury a condition from which a verdict must be reached largely, if not wholly, from inference.

The plaintiff introduced the following notice:

"Skowhegan, Maine, April 11, 1914.

To LORENZO D. GETCHELL,
Skowhegan, Maine.

You are hereby notified that I hereby revoke the trade whereby I purchased of you your homestead farm in Skowhegan and Fairfield on the Back Road, so called, leading from Skowhegan Village to Waterville and conveyed to me by your deed dated December 7, 1912, and tender to you herewith deed of said farm with the personal property which you conveyed to me and will deliver up possession of the same as soon as I can move therefrom, *which will be within the next ten days.*

I hereby demand from you the return to me of the sum of Four hundred dollars ($400.00) which I have paid you on account of the purchase price of said farm, together with the notes given by me to you for the balance of said purchase price with the mortgage securing said notes, properly discharged.

I rescind said trade and demand of you the return of said money, notes and mortgage because of the false and fraudulent representations which you made to me concerning the quantity of hay which you cut on said farm and the amount of money which you made on said farm the previous year and the deceit which you practiced in making the sale of said farm to me.

HARRY A. KIRKBY."

The right to rescission is limited to cases where the seller can be put substantially in the position he occupied before the contract. If one would rescind he must restore. *Pratt* v. *Philbrook*, 33 Maine, 17; *Randall* v. *Webber*, 64 Maine, 191; *Milliken* v. *Skillings*, 89 Maine, 180. Notice that possession will be delivered within the next ten days is not sufficient. If a party would rescind a contract on the ground of fraud, the rule is that he must restore; that it should be done within a reasonable time. What is a reasonable time is a mixed question of law and fact. When the facts are ascertained it becomes a question of law. *Wingate* v. *King*, 23 Maine, 35; *Herrin* v. *Libbey*, 36 Maine, 350; *Cutler* v. *Gilbreth*, 53 Maine, 176; *Hotchkiss* v. *Coal and Iron Co.*, 108 Maine, 34.

A contract obtained through false and fraudulent representations may be rescinded or affirmed at the election of the party defrauded, and this principle applies to contracts under seal, as well as to other classes of contracts. Deeds procured by covin or fraud as between the parties, are as dead as forged deeds. *Jackson* v. *Somerville*, Pa. Sup. Ct., 1850, 13 Law Reporter, 422; *Herrin* v. *Libbey*, 36 Maine, 353. The vendee in such case may abandon the possession without notice. *Taylor* v. *Porter*, 25 Am. Dec. 155; but rescission does not follow unless the vendee does abandon possession to the vendor. *Duncan* v. *Jeter*, 39 Am. Dec. 342; *Meeklin* v. *Blake*, 99 Am. Dec. 68. The law does not allow a partial rescission whereby the party claiming the right to rescind can retain the beneficial part of a contract and refuse performance on his part. *Morrow* v. *Moore*, 98 Maine, 373. But the vendee may avail himself of a partial failure of consideration to reduce damages, as in this case, and is not obliged to resort to a separate action for deceit or upon a warranty. *Dorr* v. *Fisher*, 1 Cush., 271, and cases cited. Here the defendant did not rely wholly upon want of consideration. His main defense was fraud, and to render that defense available, it was indispensable that he should surrender the property, if he wished to make rescission. He must put the defendant in as good position as he was before; otherwise the rescission is not complete. The purchaser cannot derive any benefit from the purchase and yet rescind the contract. It must be nullified in toto or not at all. *Harrington* v. *Stratton*, 22 Pick., 510, and cases cited; *Dorr* v. *Fisher*, supra; *Pearson* v. *Carney*, 64 Maine, 191.

The rule stated in *Union R. R. Co.* v. *Dull*, 124 U. S., 174, applies with equal force in cases of this character. There the court held, "that the power to cancel an executed contract ought never to be exercised except in a clear case, and never for an alleged fraud unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them." The evidence in this case does not support a finding of fraud, or establish facts from which fraud may be inferred,—*Kimball* v. *Dresser*, 98 Maine, 517; and it is evident from the record that the jury considered but one question, that of the alleged rescission. As has been seen, such rescission was not complete. It is unnecessary to consider the exceptions.

Motion sustained.
Verdict set aside.
New trial granted.

CHARLES H. BARTLETT, Trustee,

vs.

HAROLD M. PICKERING, CATHERINE EDITH PICKERING and GEORGE ARTHUR PICKERING.

Penobscot. Opinion February 20, 1915.

Beneficiaries. Construction. Dividends. Funds. How far Timber may be cut upon Trust Lands. Income. Principal. Remainder-man. Trust Estate. Trustee. Waste. Will.

A testator made a devise in trust of "wild lands," which were kept and held merely for the produce of salable timber. He gave no directions as to how they were to be operated. The income was to go to certain beneficiaries for life, remainder in fee to another. On a bill by the trustee for instructions,

Held:

1. That the income derived from the cutting of trees or the sale of stumpage rights belongs to the life beneficiaries, and not to the remainder-man.
2. That the trustee is to operate the timber-land without strip or waste of the rights of the remainder-man. He must operate according to the precepts of good forestry, and not so as to reduce the quantity of available timber below what it was at the commencement of the trust.
3. That when the trustee cuts trees, or permits such cutting, so much, and no more, of the proceeds of such cutting, in addition to the previous cuttings, as is equivalent to the growth since the commencement of the trust, of available, marketable timber, taking the tract as a whole, is income to be paid to the life beneficiaries.
4. That the interest on income already received and deposited pending this proceeding will follow the principal deposit.
5. That of the income already received and interest thereon, the life beneficiaries are entitled only to so much as would have been received had the operations been conducted in accordance with the preceding paragraph 2. The remainder is to be allowed to accumulate and be paid to the remainder-man upon the termination of the trust.
6. That the income from the wild lands now in the hands of the trustee belongs to the life beneficiaries and the remainder-man in the proportion of 4,496,000 to 4,262,855, respectively.

7. That the expenses for wild land taxes, scaling, commissions, and all other expenses connected with the wild land management, may be paid from any income in the hands of the trustee, whether derived from the proceeds of stumpage, or from any other trust property, and whether the wild lands are being operated for the time being, or not.
8. That the trustee has large discretionary powers respecting the details of the management of the trust estate, and that it is not within the province of the court to direct him how to exercise these powers.

On report. A decree will be entered by a single Justice in accordance with this opinion. And reasonable solicitor's fees and expenses may be allowed to counsel, to be paid out of the funds now in his hands.

This is a bill in equity for the construction of the will of the late George William Pickering, brought by Charles H. Bartlett, of Bangor, in said County of Penobscot, as trustee under the will of George William Pickering, against certain of the beneficiaries. Answers to said bill were filed by all of the defendants, and a hearing had before a single Justice. At the conclusion of the evidence, the cause was reported to the Law Court for determination. Upon so much of the evidence as is legally admissible, the Law Court will render such judgment as law and equity require.

The case is stated in the opinion.

Charles H. Bartlett, pro se.

Sisk Brothers, and John Wilson, for Harold M. and Catherine Edith Pickering.

Matthew Laughlin, guardian ad litem of George Arthur Pickering.

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

SAVAGE, C. J. Bill by the trustee under the will of George W. Pickering, for instructions. The defendants, Harold M. Pickering and Catherine E. Pickering, husband and wife, are entitled to receive, during life, the income of the trust estate, in the proportions of three-fourths and one-fourth, respectively. Upon the death of either, the share of the income bequeathed to that one is to go to the children of Harold in equal shares, and upon the death of the survivor, the entire trust estate is to go to Harold's children, "or to their heirs at law." The third defendant, George A. Pickering, a minor about nine years

of age, is now the only child of Harold. The questions we are asked to consider relate virtually to the respective rights of the life tenants and the remainder-man in the trust estate.

The testator in his lifetime owned five-eighteenths in common and undivided of the west half of Seboeis Plantation in Piscataquis County, and this property is a part of the trust estate. It is wild, uncultivated land, covered with a forest growth of pine, fir, cedar and hard woods. The tract has been cut over, and the present growth is second growth. Since the death of the testator in 1910, the plaintiff trustee has joined the other owners in "permitting" the land for the cutting of timber, and has received his proportional part of the stumpage. The cuttings for four years amounted to 8,758,855 feet. And after payment of taxes and expenses, the trustee now has on deposit $4,941.34 stumpage money, to which is to be added savings bank dividends on the deposit, $96.19, making the whole deposit $5,037.53. The income from the remainder of the trust estate is approximately $2,000 annually. It seems to be undisputed that the timber cutting operations from which the foregoing stumpage was derived took from the land a very much larger amount of timber in feet, than the growth of standing trees during the period amounted to. In other words, the operations have lessened the total amount of timber standing on the territory. An expert witness testified that the annual growth has been 1,124,000 feet. This does not include soft wood, white birch, poplar and ash below six inches in diameter, nor maple, yellow birch and beech below ten inches in diameter.

The plaintiff asks for answers to the following questions, viz.:

1. Do the funds in the hands of the plaintiff trustee (apart from dividends received thereon) represent principal wholly?

2. If so, should the dividends or income derived from such funds be distributed to the beneficiaries, according to the terms of the will, or should such income be allowed to accumulate and be added to the principal until the termination of the trust?

3. If some part of the receipts from stumpage as aforesaid may represent income to be paid to said beneficiaries, what method or rule shall the plaintiff trustee adopt to ascertain the same?

4. Shall the plaintiff trustee pay the taxes, expenses of scaling operations, commissions and other expenses connected with the management of his interest in said wild land from the proceeds of the

stumpage received therefrom, if any, or from the trust income received from other property? Shall he use the savings bank dividends aforesaid for such purposes as far as they will go?

5. If said land should not be operated on for a period, so that no stumpage were available, from what funds of the trust shall the plaintiff trustee pay the necessary expenses?

6. The plaintiff trustee prays that the court will give him such other instructions in the premises as may be desirable.

Considerable testimony appears in the record respecting the annual percentage of growth of the different kinds of trees growing on this land, the wisdom or unwisdom of operating at all in certain species of timber trees until they have reached a larger growth, the marketable conditions of some of the varieties of wood, the total stumpage of trees of different kinds on the tract, and such like matters. We think that a consideration of problems suggested by this testimony lies, for the most part, outside the province of the court in this proceeding. What is, or is not, good forestry, we have no occasion now to consider. In answering the plaintiff's questions, we can in general only lay down such rules of law as are within the scope of the questions, and as may be useful to him in the performance of his duties both to life tenants and remainder-man. The law and the unlimited terms of the trust confer upon him large discretionary powers in determining the details of the management of the trust estate. Very much must necessarily be left to his sound judgment and wise discretion, to be applied as various conditions and contingencies may arise. It is not within the province of the court to direct a trustee how to exercise a discretionary power committed to him. He must use his own discretion. And when he does so, keeping within legal limitations, he is protected.

1. The first question, which is in effect, whether the stumpage funds now in hand belong wholly to the remainder-man and must all be held in trust for him, must be answered in the negative.

It is undoubtedly true that the general rule is that trees cut and sold are treated as principal and not as income, and that a life tenant is guilty of waste in cutting trees. But we think this rule is not applicable to trees on "wild land" so called in this State, which is kept and held merely for the produce of salable timber. These lands are held for income-producing purposes, and the only income derivable from them ordinarily comes from the cutting and sale of

marketable timber trees. The bequest of the income of the trust estate in this case, consisting, as it did, in considerable part of timber-lands, contemplated, we think, that the income should be obtained from the cutting of trees, or the sale of stumpage rights. See *Drown* v. *Smith*, 52 Maine, 141; *McNichol* v. *Eaton*, 77 Maine, 246; *Honywood* v. *Honywood*, L. R., 18 Eq. Cas., 306. A similar rule has been applied to the rights of life tenants in analogous cases of iron, coal, oil and gas mines, opened in the lifetime of the testator, even when the exercise of the right might in time exhaust the mine, and practically destroy the estate of the remainder-man. *Gaines* v. *Green Pond Iron Min. Co.*, 33 N. J., Eq. 603; *Sayers* v. *Hoskinson*, 110 Pa. St., 44; *Koen* v. *Bartlett*, 41 W. Va., 559.

But a mine of iron or coal is in one important respect unlike a growth of living forest trees. A mine necessarily tends to exhaustion by the very fact of operation. It is not necessarily so in case of a living forest. It may be operated perpetually, without diminution in quantity of the available timber remaining. That is to say, it may be so operated that the annual growth will make up for the timber taken off by operation.

Now we have before us a devise of a trust estate in timber-lands, under which the income only goes to one set of parties, for life, and the remainder, or corpus of the trust estate, to another, upon the termination of the life interest. The will itself gives no further indication of the intention of the testator as to how the timber-land part of the trust should be operated. It is contended that the testator in his lifetime, in conjunction with the other owners, was in the habit of cutting more than the annual growth would replace. But we do not think this fact, if it be a fact, can effect the construction of the will. Having made the devise as he did without qualification or directions, we think it must be presumed that he intended that the estate should be managed so as to conserve all interests,—to secure on the one hand the natural increment of the trust estate as income for the life beneficiaries, and, on the other hand, to protect and preserve the entire remainder for the remainder-man.

The conclusion is that the trustee, so far as his interest goes, is to operate the timber-land without strip or waste of the rights of the remainder-man. He may operate at such times and in such places as his good judgment may dictate. He need not operate annually. But when he does operate, so much, and no more, of the proceeds of

such cutting, in addition to previous cuttings, as is equivalent to the growth, since the beginning of the trust, of available, marketable timber, taking the tract as a whole, is income. He must not operate so as to reduce the quantity of available timber below what it was at the beginning. He is to operate according to the precepts of good forestry, as to times and places of cutting, and size of trees to be cut, with a view to the preservation of the rights of all the parties. It would be impracticable and unwise to attempt at this time to specify the limitations of his powers in greater detail. The trust has devolved upon the trustee, and he has assumed the responsibility of the exercise of sound judgment and faithful discretion in these matters. If the trustee finds himself embarrassed in the application of these principles by the fact that there are other owners who may wish to operate otherwise, he may, under the will, sell his interest in these lands and re-invest, or, under the law, he may petition for partition.

2. We understand that the second question relates to the disposition of the savings bank dividends on the deposit of stumpage funds. These dividends will follow the principal deposit proportionally. The life beneficiaries are entitled only to so much of the deposit and dividends as would have been received had the operation been conducted in accordance with the principles laid down in the answer to the first question. The remainder of deposit and dividends should be allowed to accumulate and be paid to the remainder-man upon the termination of the trust.

3. When the operations are conducted in accordance with the principles laid down in the answer to the first question, the net income will all belong to the life beneficiaries. It is therefore necessary to advise only as to the distribution of the funds now on hand. The cuttings from which these funds were derived, during the four years since the trust was created, amounted to 8,758,855 feet as already stated. The counsel for the remainder-man offered evidence that the report and estimates of the expert witness that the annual growth had been 1,124,000 feet annually, or 4,496,000 feet for the four years, were somewhat too favorable to the life beneficiaries. But at the argument, counsel stated that he was willing to abide the report of that witness. We shall, therefore, assume it to be correct. We disregard the small growth, as the expert did. When it reaches a growth when it may be cut, having regard to good forestry, the life beneficiaries may have the benefit of it. Until then they are not

entitled to it. According to the estimate, the four years' operations have resulted in a strip or waste of the remainder-man's interest of five-eighteenths the difference between 8,758,855 feet and 4,496,000 feet, or, 4,262,855 feet. The stumpage funds now in the hands of the trustee belong, therefore, to the life beneficiaries and the remainder-man in the proportion of 4,496,000 to 4,262,855 respectively.

4. The trustee asks if he is to pay the wild land taxes, expenses of scaling, commissions and other expenses connected with the wild land management from the proceeds of stumpage, or from the income of the other trust property. We answer that it is immaterial. It is a matter of bookkeeping. The interest of the life beneficiaries in the income properly to be derived from the timber-lands is precisely the same as their interest in the other income. The trust estate is a unit, though made up of different items. Any income in the trustee's hands is available to pay any proper expenses of the trust.

5. The trustee asks further from what funds expenses shall be paid if the land shall not be operated on for a period. The answer to the previous question answers this one.

6. Lastly, the trustee asks for "such other instructions in the premises as may be desirable." This is too indefinite to require an answer.

A decree will be entered by a single Justice in accordance with this opinion. And reasonable solicitor's fees and expenses may then be allowed to counsel, to be paid by the trustee out of the funds now in his hands.

So ordered.

CENTRAL MAINE POWER COMPANY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion February 27, 1915.

Jurisdiction. Local Action. Motion to Dismiss. Place of Detention. Replevin. Waiver.

1. The action of replevin is a local action, made so by statute, and must be brought in the county where the goods are detained.
2. If a local action be brought in the wrong county, the error may be pleaded, or taken advantage of at the trial under the general issue, or if the error is shown on the face of the record, it may be reached by demurrer.
3. A motion to dismiss an action of replevin brought in the wrong county is not regarded as a dilatory motion, and may be filed at any time.

On exceptions by plaintiff. Exceptions overruled.

This is an action of replevin to recover a certain quantity of copper junk, alleged in plaintiff's writ to have been taken and detained by the defendant company at Fairfield, in the County of Somerset. The writ in said action was returned to and entered in the Superior Court at Augusta, in the County of Kennebec, on the first Tuesday of April, 1914. At the June term of said court, the defendant filed a motion to dismiss said action for want of jurisdiction. The judge of said Superior Court granted the motion, to which the plaintiff excepted.

The case is stated in the opinion.

H. D. Eaton, for plaintiff.

Andrews & Nelson, for defendant.

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

SAVAGE, C. J. Replevin for goods, which it was alleged were "taken and detained," and "held" at Fairfield, in the county of Somerset. The writ was made returnable to the Superior Court for Kennebec County, and was answered to at the return term. At

a later term, the defendant moved to dismiss the action, on the ground that the goods were detained in Somerset County and not in Kennebec County. The court granted the motion, and the case comes before us on the plaintiff's exceptions.

The plaintiff contends, first, that the action of replevin is properly a transitory action and may be brought in the county where either of the parties has its corporate residence, and secondly, that by Rule X of the Superior Court, pleas and motions in abatement or to the jurisdiction, must be filed within two days after the entry of the action, and that accordingly this motion was not seasonably filed. We think neither ground is tenable.

It was held in *Robinson* v. *Mead*, 7 Mass., 353, that an action of replevin is local in its nature. It was so held in *Ackerson* v. *Erie Ry. Co.*, 30 N. J. Law, 309, and in *McLeod* v. *C. & P. R. R. Co.*, 58 Vt., 727, and other cases.

But in this State there is a statute, R. S., Chap. 98, Sec. 9. "Actions of replevin of goods shall be brought in the county where they are detained." Under this statute replevin is a local action. The question is res adjudicata with us. *Pease* v. *Simpson*, 12 Maine, 261; *Cassidy* v. *Holbrook*, 81 Maine, 589. When a statute prescribes the county in which a particular kind of action shall be brought, the action is local. The statute makes it so. See *Blaisdell* v. *Walker*, 77 Maine, 459.

Some courts have held that the matter of the venue of local actions touches not the question of jurisdiction, but relates merely to a question of procedure, and that the defendant may or may not, as he chooses, take advantage of a wrong venue. It is his privilege, they say, and he must use his privilege within the limitations in time of pleas or motions in abatement. But that is not the rule in this State. Here the court has no jurisdiction of a local action brought in the wrong county. *Webb* v. *Goddard*, 46 Maine, 505. And if a local action be brought in the wrong county, the error may be pleaded, or taken advantage of at the trial, or if the error is shown on the face of the record, it may be reached by demurrer. *Hathorne* v. *Haines*, 1 Maine, 238; *Blake* v. *Freeman*, 13 Maine, 130; *Heath* v. *Whidden*, 29 Maine, 108; *Cassidy* v. *Holbrook*, supra.

On the other hand, transitory actions, which are personal actions brought for the recovery of money, whether they sound in contract or tort, in contemplation of law have no locality. Of such an action

the court has jurisdiction in any county. The matter of wrong venue is a question of procedure. The defendant may submit to jurisdiction in any county if he chooses. If he objects, he must do so by dilatory plea or motion seasonably filed. If he fails so to plead, he waives the objection. *Webb* v. *Goddard*, 46 Maine, 505.

In *Pease* v. *Simpson*, 12 Maine, 261, it was expressly held under a statute, in substance like the existing statute, that replevin is a local action. And it was also held that the action might be brought in the county where the original taking was, or in the county where the property was afterwards detained; in other words, it was held that the detention referred to in the statute as the ground of jurisdiction was not necessarily the last detention; it might be the first one, connected with the taking. But in the case at bar both the taking and the detention were alleged to be in Somerset County. We must conclude therefore that the court in Kennebec County has no jurisdiction of the suit.

Since the want of jurisdiction in this class of cases may be pleaded in bar or shown in bar under the general issue, evidently the motion to dismiss cannot be regarded as a dilatory plea or motion which must be filed within two days after the action is entered. Whenever the court discovers that it has no jurisdiction of a cause it is its duty to stop then. The discovery may come under a special plea in bar, or upon demurrer, or during trial. But the discovery once made judicially, the court can proceed no further. *Maine Bank* v. *Hervey*. 21 Maine, 38. It need not wait for a motion. It may act suo motu. *Powers* v. *Mitchell*, 75 Maine, 364. And we can see no reason, when the fatal error is discovered upon the face of the papers, why a motion to dismiss for want of jurisdiction is not a proper proceeding. See *Cassidy* v. *Cota*, 54 Maine, 380.

Further than this, since it is apparent that the plaintiff must go out of court when a trial is reached, he is not prejudiced, and cannot complain, because he has to go out earlier than he wished to. Exceptions cannot be sustained, unless the excepting party shows himself aggrieved. *Darling* v. *Dodge*, 36 Maine, 370; *Webster* v. *Calden*, 56 Maine, 204; *Allen* v. *Lawrence*, 64 Maine, 175; *Pullen* v. *Glidden*, 68 Maine, 559; *Smith* v. *Smith*, 93 Maine, 253.

Exceptions overruled.

SAMUEL R. PERCY

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Sagadahoc. Opinion February 27, 1915.

Appeal. Approval. Constitutional Law. Equity. Injunction. Jurisdiction. Public Convenience. R. S., Chap. 53, Sec. 9. Stockholder. Street.

1. The construction by a street railroad company of additional turnouts in a street is unlawful, unless the approval of the municipal officers is first obtained.
2. In a petition by a street railroad company to municipal officers to approve additional turnouts in a street, under R. S., Chap. 53, Sec. 9, it is not necessary to allege that public convenience or necessity requires them.
3. The approval by a board of mayor and aldermen of additional turnouts on the petition of a street railroad company is not rendered invalid by the fact that the mayor was interested as president of a corporation to be benefited thereby, when it appears that the mayor took no part in the proceedings except to present the petition.
4. By statute, all street railroad corporations, both those specially chartered and those organized under the general laws, have authority to do a freight business.
5. The right granted to a street railroad company to haul freight in cars imposes no additional servitude upon the land in the street on which its line is located, for which the owner of the land is constitutionally entitled to compensation, more than was awarded when the street was originally laid out.
6. A street railroad company has no right to use the public highway as a switching yard, and is not entitled to a turnout for that purpose, nor for the purpose of affording a standing place for its cars, nor for its mere business convenience.
7. An injunction may be granted to prevent a threatened wrong for which there is no adequate remedy at law, although the rights of the parties have not been settled by an action at law.
8. The plaintiff is entitled to an injunction restraining the defendant from using the proposed turnout as a switching or shifting place.

On appeal by the plaintiff. Decree below reversed. Bill sustained with costs. Decree in accordance with opinion.

This is a bill in equity, in which the plaintiff seeks to enjoin the defendant from constructing a turnout or spur track extending from the Maine Central Railroad's track along Washington Street, in Bath, in the county of Sagadahoc, to the plant of the Bath Box Company. The defendant filed an answer to the bill and the plaintiff filed a replication. At the conclusion of hearing in said cause, the Justice presiding ordered the bill dismissed without costs, from which order the plaintiff claimed and took an appeal.

The case is stated in the opinion.

E. C. Plummer, and George W. Heselton, with him, for plaintiff.

Newell & Woodside, and W. B. Skelton, for defendant.

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

SAVAGE, C. J. Bill for an injunction to restrain the defendant company from lengthening a turnout in its line in front of the plaintiff's residence on Washington Street, in Bath. An injunction was denied by the sitting Justice, and the case comes before us upon the plaintiff's appeal.

The plaintiff owns the fee in the street. There is already a turnout at the point in question of sufficient length to enable cars going in opposite directions to pass each other conveniently. The defendant proposes to extend the turnout to the length of 287 feet. The particular purpose of the defendant is to take freight cars, two at a time, from the Maine Central Railroad yard in Bath, over a connecting spur track to its own line, then push them with a motor car onto the proposed turnout, unshackle the motor car, then back it over the turnout switch, then proceed forward over the other line of the turnout beyond the forward switch, then back to the standing freight cars, then shackle on, and haul them to their destination. And the only destination now in contemplation is the plant of the Bath Box Company. In short, the design is to facilitate the transfer of freight in freight cars from the Maine Central Railroad to the Bath Box Company, in the manner stated. It is proposed to make the switch long enough to accommodate a motor car, two freight cars and a passenger car, and to enable the defendant to shift and switch cars by means of the lengthened turnout. This appears to be the sole reason for lengthening the turnout. To sum it up, the defendant proposes to make a switching yard of the street, to the extent indicated.

The plaintiff's residence is Washington Street at the corner of Union Street. Union Street debouches into Washington Street against the turnout. The entrance to the plaintiff's premises with teams is on the Union Street side. And he contends that the use of the proposed turnout will in an especial manner add to his inconvenience and risks of travel, as he may pass to and from Union Street onto Washington Street. He also contends that the construction and proposed use of the turnout will depreciate the value of his property. And for these reasons he claims the right to institute these proceedings in his own behalf.

The board of mayor and aldermen of Bath, the mayor not acting, have voted to approve the proposed turnout,

The plaintiff's points are these. 1, that the construction of the proposed turnout would be unlawful, unless the valid approval of the municipal officers of the city of Bath was first obtained. R. S., Chap. 53, Sec. 9; 2, that the approval obtained was invalid because the board of mayor and aldermen of Bath had no jurisdiction to approve the turnout, inasmuch as the defendant's petition therefor did not allege that public convenience and necessity required it, but merely, on the contrary, that the Bath Box Company desired to make track connection between the petitioner's track and the track, of the Maine Central Railroad Company, to transport steam railroad cars between the Box Company's property and the Maine Central Railroad; 3, that the approval of the board of mayor and aldermen was void because the mayor was a stockholder in and president of the Bath Box Company; 4, that the defendant has no authority to haul freight cars, and especially steam railroad freight cars, over its line, and hence that it has no right to a turnout to facilitate such uses of its road; and 5, that it has no right in any event to use the public highway for such switching purposes as it proposes.

I. The first contention is sound.

II. The next point is not tenable. The statute, R. S., Chap. 53, Sec. 9, provides that "when the location of any street railroad has been approved as provided by law, the municipal officers may approve such additional locations for turnouts and spurs to property used or to be used by said corporation in the operation of its road as shall be necessary therefor." And it is implied of course that without such approval, the corporation cannot lawfully construct the turnouts. But the statute does not require any formalities of petition. It does

not even require a formal petition at all. Jurisdiction of municipal officers is not limited to cases alleged to be of public necessity or convenience. The question of public necessity or convenience of the general location is settled by the approval of the railroad commissioners. R. S., Chap. 53, Sec. 7. The question of the public necessity or convenience of the location having been thus settled, the subsequent construction of turnouts is merely incident to the general power of construction.

III. The third point is equally untenable. Assuming that the ownership of stock in the Bath Box Company would disqualify the mayor from acting on the approval of a location for a turnout, in which his company was specially interested, it appears in this case that the mayor did not vote on the question of approval, and it does not appear that in any way he took part in the proceedings, except to present the petition. His disqualification did not prevent the other municipal officers from acting, nor did it invalidate their proceedings.

IV. As to the authority of the defendant to transport freight, and for that purpose to haul freight cars over its line. The defendant is a street railroad company. There is much authority to the effect that, in a popular, as well as a technical sense, a street railway is a railway for the transient transportation of passengers, and not of freight, and, therefore, that in the absence of statutory authority, a street railroad is not authorized to do a freight business. *Omaha & C. B. St. Co.* v. *Interstate Commerce Commission*, 230 U. S., 324; *South & N. A. R. Co.* v. *Highland Ave. & B. R. Co.*, 119 Ala., 105; *Hannah* v. *Met. St. R. Co.*, 81 Mo., App. 78; *Williams* v. *City Electric Railway*, 41 Fed., 556; *Louisville & P. R. Co.* v. *Louisville City R. Co.*, 2 Duv., 175; Elliott on Roads & Streets, 3rd. Ed. Sec. 927. We shall assume this proposition to be correct, and shall inquire whether the defendant has statute authority.

The defendant is the successor, in the city of Bath, to the rights and franchises of the Bath Street Railway Company. The latter company was chartered by the legislature. Priv. and Spec. Laws, 1889, Chap. 374. The charter provided that the corporation should have "authority to construct, maintain and use a street railway to be operated by electricity or animal power." In this connection no specific reference was made either to passengers or freight. But in another connection it was provided that "said corporation shall

have power from time to time to fix such rates of compensation for transporting persons or property, as it may think expedient;" and further that "said road shall have all the rights and be subject to all the liabilities of horse railroads in this state." It may be noticed that at the time this charter was granted, horse power, and not electric power, was in general use in this State for the moving of street cars. The street railroads were horse railroads, and in popular parlance were so called. The term "horse railroad" in the statute meant, and should be interpreted as meaning, "street railroad."

The grant of power to fix compensation for transporting "persons or property," affords a strong implication, we think, that under the charter the power of transporting both persons and property was intended to be granted. But we go further. Not only does the charter, as we have seen, declare that this corporation should have all the rights of street railroads in this State, but the general statutes, R. S., Chap. 53, Sec. 1, also provide that "all street railroad corporations shall, in addition to their chartered rights, have all the rights and powers conferred from time to time by general laws upon street railroad corporations." And the following section, section 2, which is a part of the general law relating to the organization of street railroad corporations, states the purpose for which such corporations may be organized to be "the constructing, maintaining and operating . . . a street railroad for public use, for street traffic for the conveyance of persons and property." There can be no doubt that a street railroad corporation organized under this general law has the power to do a freight business over its lines.

The question now arises, whether the language in section 1 is broad enough to cover, and was intended to cover, the exercise of powers granted in their very incorporation to corporations organized under the general law. In other words, is it the purpose of the statute to give to all street railroad corporations, both those specially chartered and those organized under the general laws, the same rights and powers, to place them all on the same basis, whatever the limit of chartered powers may have been? We think that is the purpose. The language has little significance otherwise. And we conclude that the defendant has statutory authority to do a freight business.

The doctrine that the grant of the power to construct and operate a street railroad along a highway imposes no additional servitude for which the abutting owner is entitled to additional compensation

is not denied by the plaintiff. This doctrine has been thoroughly elucidated in the modern cases of *Briggs* v. *Railroad*, 79 Maine, 363, and *Taylor* v. *Railway*, 91 Maine, 193, and the reasons for the doctrine need not be repeated here. But it is suggested in argument that the rule is, or ought to be, different, when a street railroad company is authorized to transport freight in freight cars, especially in the freight cars of a steam railroad company. We do not think so. The reasons given in the Briggs and Taylor cases why the changed methods of transportation of passengers do not result in an additional servitude apply with equal force to changed methods in transporting property. The right of public travel includes the right to transport property in drays and wagons. To transport it in cars is but another, and more modern, way of transporting it. And in the Taylor case the court said,—"It is no matter whether the vehicle carries passengers or freight or passes intelligence along its contrivance." So that we think the right to haul freight in cars, if the right exists, imposes no additional servitude upon the land in a street over which the railroad runs, and affords no reason for saying that the legislative grant of the right is unconstitutional, as impinging upon the constitutional provision which forbids the taking of private property for public uses without just compensation.

But the plaintiff contends that even if the defendant has the statutory power to transport freight in cars over its line that the statute does not contemplate that it may make a rail connection with a steam railroad company and transport the cars of that company along the public ways. And, as already stated, it is the admitted purpose of the defendant to transport steam railroad freight cars, two at a time, along its line and over the proposed turnout.

The statute places no limit upon the means to be used in the transportation of property. If it may be carried at all, from the nature of the case it must be carried in or upon cars. If it is to be carried in a car, we can see no logical or legal difference whether it is carried in one of the defendant's own cars, or in a car of another company which can run over its tracks. If it can transport one car, we can perceive no legal reason why it may not transport one or two cars hauled by a motor car. The argument of the plaintiff to the contrary is largely addressed to the question of policy. But with that we have nothing to do. When the legislature has made an unqualified and unlimited grant of power, the court cannot question the

good policy of the enactment. The grant under which this defendant has the right to transport property is unqualified and unlimited in its terms. If the exercise of the power is found to be detrimental to public interests, or contrary to good policy, the legislature has the authority to place such limitations upon it as it deems best. The court has no such power.

V. Lastly, the plaintiff contends that even if the defendant has the authority to transport property in steam railroad freight cars, it has no right to use the public highway as a switching yard, and that it is not entitled to a turnout for that purpose, nor for the purpose of affording a standing place for cars. We think the contention is sound. Streets are subject only to public uses. They are made to travel in. They are not made as places for public trade or business, except business necessarily incident to travel. They are made to enable the public, on foot, in carriages, or carts, or cars, with or without their wares and merchandises, to pass and repass. For these public uses the public has compensated the owner of the land, has constructed the road, and maintained it. To permit the transportation of passengers and freight along the way is not an additional use, but an extension of the use for which the way was laid out. But to permit the way to be used for the mere business convenience of persons or corporations would be a perversion of its proper use. It might be convenient for the defendant to use the street as a switching or shifting place for its motors and cars. It might be that its business would be facilitated thereby. But a public way was not constructed, and is not maintained, for that purpose.

The defendant cites *Tracy* v. *LeBlanc*, 89 Maine, 304, to the effect that the bill cannot be maintained, because there is a complete and adequate remedy at law. Not so in this case. Here it is a threatened, not a completed wrong, and one for which there is no remedy at law which would be adequate. This is a sufficient ground for equitable restraint by injunction. *Wilson* v. *Harrisburg*, 107 Maine, 207.

Having reference to the location of the plaintiff's premises, and the means of ingress to and egress from the premises from and to Washington Street, we think the plaintiff would sustain a special damage from the threatened use of the turnout, beyond the damage to the public in general, such as entitles him to relief in this proceeding.

Since the sole object of lengthening the turnout seems to be to enable the defendant to use it as a switching or shifting place, it should be restrained from that use. The specific relief sought by the bill is to enjoin the defendant from extending the turnout. The relief to which the plaintiff is entitled is a restraint from the proposed use of it, which we have described, after it shall be constructed. And this relief we think may be granted under the general prayer for relief. A decree may be made by a single Justice in accordance with this opinion.

Decree below reversed.
Bill sustained with costs.
Decree in accordance with the opinion.

HARRY G. YOUNG *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion February 27, 1915.

Agents. Carrier. Contract. Damages. Delay in Transportation. Limiting Liability. Misconduct. Negligence. Owner's Risk Freezing. Perishable Freight.

Action to recover damages for defendant's negligence as a common carrier whereby a carload of potatoes were frozen while being transported from a point in this State to a point in New Jersey.

Held:

1. While the law is firmly established that a common carrier, in the absence of any statute to the contrary, may by special contract limit its liability, yet it is equally well established that the carrier cannot by special and express contract exempt himself from liability for any negligence or misconduct of himself or his agents.
2. A common carrier is bound to exercise reasonable care and diligence in transportation, to transport in a reasonable time, without unnecessary delay, and to prevent, so far as is reasonable and practicable, any loss or damage which may be occasioned by delays in transit. What is reasonable care and diligence in this class of cases must depend upon the circumstances of the particular case.

3. A delay from Nov. 26 until Nov. 30, under the circumstances of this case, is not an exercise of reasonable care and diligence.
4. A common carrier cannot be exonerated from liability as such on account of unprecedented amount of business, or congested terminals, where it accepts shipment without notice of those conditions to the shipper.
5. A common carrier cannot avoid liability as such by reason of sudden severity of weather, on the ground that the weather, and not the delay, was the proximate cause of the damage, for the weather is not an independent, intervening cause, but a natural condition, the chance of the occurrence of which should have been foreseen.

On report. In accordance with stipulation, the entry must be, case to stand for trial.

This is an action on the case to recover damages for the loss of one carload of potatoes, by the alleged negligence of the defendant, which the plaintiff delivered to and the same were received by the defendant on the 26th day of November, 1910, at Hillside Station in Brunswick, to be carried by the defendant to Summit, in New Jersey, and there to be delivered by the defendants, through connecting railroads, to the order of the plaintiff.

The plea was the general issue. At the close of the plaintiff's testimony, this case was reported to the Law Court by agreement of parties. If the plaintiff is entitled to recover in this action, upon the evidence offered by him, the case to stand for trial; otherwise, the Law Court is to direct judgment for the defendant.

The case is stated in the opinion.

Clarence E. Sawyer, for plaintiff.

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

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

PHILBROOK, J. This case comes to us on report, the defendant having offered no testimony, with the stipulation that if the plaintiff is entitled to recover upon the evidence offered by him the case is to stand for trial; otherwise this court is to direct judgment for defendant.

In the latter part of November, 1910, the plaintiff desired to ship a carload of potatoes from Hillside, a station on defendant's road, to Summit in the State of New Jersey. He applied to defendant's

yard master at Brunswick for a refrigerator car, or a double lined car. The yard master replied to the applicant "I can't give you one, but I am going to give you a good car." The plaintiff said "I will get paper and line it," and he testified to the manner in which he fastened building paper to the floor and sides of the car, loaded the potatoes, and fastened the doors by means of wooden cleats. The freight agent's office of the defendant at Brunswick furnished the plaintiff with a red card, which was by him attached to the car. Proper blank spaces upon the card were filled by the plaintiff in his own handwriting, showing the initials and number on the car, the station of departure, the destination, the route, "Via Deering Jct.," and the date of loading, "Nov. 26, 1910." Upon the card when received by plaintiff there were printed in large type, the words, "Perishable freight;" in smaller type, "This car must not be delayed;" and in still smaller type, "Should car break down conductor must notify Superintendent by telegraph giving full particulars." The bill of lading, signed by the plaintiff as well as by defendant's agent, contained the words, "Owner's risk freezing," written across its face.

On Saturday, November 26, the car was shipped but as the defendant had no facilities for weighing at Deering Junction it was taken to Portland. According to a letter from the defendant's general freight agent the car arrived in Portland November 26, but was held there, and not delivered to the Boston and Maine railroad for forwarding until November 30. The delay according to the letter, "was on account of temporary disability caused by the extension and improvement of the terminal facilities here at Portland." The car reached its destination December 6, when it was discovered that the potatoes had been spoiled by freezing while en route.

By agreement of counsel a table of figures was introduced in testimony showing the minimum temperature at points along the route, from that of shipment to that of destination, and from the date of shipment to the date of arrival. This shows that severely cold weather prevailed during the last days on which the potatoes were being transported, while warmer weather prevailed on the earlier days. The plaintiff claims that if the transportation had been without delay the cold weather would have been avoided and the potatoes would not have been destroyed by freezing.

It is claimed by the defendant that by the terms of the contract between it and the plaintiff, evidenced by the bill of lading already

referred to, the plaintiff assumed all risk of damages resulting from the freezing of the potatoes. No principle of law is now more firmly established than that a common carrier, in the absence of any statute to the contrary, may by special contract limit its liability, at least against all risks but its own negligence or misconduct. *Hix* v. *The Eastern Steamship Company*, 107 Maine, 357. But a qualification of the carrier's right to restrict his common law responsibility, almost as generally recognized as the right itself, and supported by innumerable authorities, is that a carrier cannot by special and express contract exempt himself from liability for any negligence or misconduct of himself or his agents. 4 Ruling Case Law, Sec. 232, and cases there cited; *Sager* v. *Portsmouth, etc., R. R. Co.*, 31 Maine, 228; *Willis* v. *Grand Trunk Railway Company*, 62 Maine, 488; *Little* v. *Boston & Maine Railroad*, 66 Maine, 239.

The plaintiff therefore, while not denying his signature to the bill of lading whereon appear the words "Owner's risk freezing," says that no contract between himself and the defendant can exempt the defendant from liability for any negligence or misconduct of itself or its agents. Thus the issue between the parties is squarely presented as to whether the defendant was guilty of any negligence or misconduct which caused the damage complained of by the plaintiff.

It is not denied that the car was detained at Portland from November 26 to November 30. The excuse given by the defendant was the congested conditions of the terminal facilities consequent upon extensive improvements.

The duty of the defendant "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. 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." *Johnson* v. *New York, New Haven and Hartford R. R.*, 111 Maine, 263.

In a very comprehensive note to be found in Am. State Reports, Vol. 11, at page 361, we find the following; "As the law does not define what is an unreasonable delay in the shipment of goods, and as each case must be determined by the jury upon its own peculiar facts, it remains to illustrate the subject by the consideration of those cases in which the delay has been of such nature as, under the facts,

to be considered reasonable, and to excuse the carrier from liability, or to have been unreasonable, and to make him responsible in damages for the delay." Among the illustrations are to be found the following: "Where the carrier accepts perishable property, such as potatoes, to be shipped over its line at a season of year when, in the course of nature, severely cold weather is to be apprehended, though the weather may be warm when the freight is received, the carrier is bound to use great diligence in forwarding such property with haste and dispatch, and where, by a delay of two or three days, either in transporting or delivering it, it is damaged by freezing, he is liable for such damage;" citing as authorities, *McGraw* v. *B. & O. R. R. Co.*, 18 W. Va., 361; 41 Am. Rep., 696; *Wood* v. *Chicago, Milwaukee and St. Paul Railway Company*, 68 Iowa, 491; 56 Am. Rep., 861; *Hewitt* v. *Chicago, etc., R'y Co.*, 69 Iowa, 665. We may also cite an illustration from our own court in *Johnson* v. *N. Y., N. H. & Hartford R. R.*, supra, where a delay lengthening the time of transportation from twenty-four hours or less to fifty-three hours, resulting in injury to crates of strawberries, was considered an unreasonable delay.

Upon this branch of the case we conclude that a jury would be warranted in saying that there was unreasonable delay.

It has already been suggested that the defendant seeks complete exoneration from its liability by saying that there was a congested condition of its terminal facilities but we do not think this excuse will avail. A carrier cannot excuse delay in transporting freight on account of shortage of cars and unprecedented amount of business where it accepts shipment without notice of those facts to the shipper. *Daoust* v. *Chicago, R. I. & P. R. Co.*, 149 Iowa, 650; 128 N. W., 1106; *Unionville Produce Co.* v. *Chicago B. & Q. R. Co.*, 168 Mo. App., 168; 153 S. W., 63; *Missouri K. & T. Ry. Co.* v. *Stark Grain Co.*, 103 Tex., 542; 131 S. W., 410. "It is the duty of a common carrier to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. When an emergency arises and more business is suddenly and unexpectedly cast upon a carrier than he is able to accommodate, unless the carrier decline to receive the excess offered some shippers must be necessarily delayed; yet if the shipper do receive the goods without notice to the shippers of the circumstances likely to occasion delay, or fail to

obtain his assent, express or implied, to the delay, he will be bound to transport the goods within a reasonable time, notwithstanding such emergency" *Dawson* v. *Chicago & A. R. Co.*, 79 Mo., 296; *Joynes* v. *Pennsylvania Railroad Company*, 235 Pa. St., 232; 83 Atl., 1016; Ann. Cases 1913, D. 964.

Finally the defendant urges that the delay complained of by the plaintiff was not the proximate cause of the damage done to the potatoes and therefore says it is not liable for that reason. While the rule is well established that in the event of an unreasonable delay in the carriage of goods the carrier will be held liable for all losses or damages consequent thereon, yet the mere fact that a delay has occurred is not sufficient to charge a carrier unless it appears that such negligent act was in truth the proximate and not merely the remote cause of a loss. 4 Ruling Case Law; Sec. 213. But in *McGraw* v. *Baltimore and Ohio Railroad Company*, supra, a case strikingly similar to the one at bar, the court held, taking into account the nature of the property, its liability to be injured by freezing weather, the distance from the point of shipment to the place of destination, the favorable condition of the weather when the property was delivered to the carrier and its liability to change at that season of the year, that the carrier was liable for the damage to the property because the delay was the immediate and proximate cause of that damage.

The precise principle which we are now considering is well illustrated and discussed in *Marsh* v. *Great Northern Paper Company*, 101 Maine, 489. In that case the defendant negligently or through misfeasance unnecessarily delayed a lot of logs which it was under obligation to drive and as a result of that delay, the freezing of the logs into the ice of the river, and a December freshet, a portion of the logs were carried out to sea and lost; and another portion lost in the same manner in the freshet of the next spring. The court there said; "The defendant cannot avoid liability for its negligence by reason of the early freezing of the river, because this was not an independent, intervening cause, but a natural condition, the chance of the occurrence of which should have been foreseen. Our conclusion is that a jury would have been authorized in finding from the evidence, and in accordance with the rules of law that the negligence of the defendant . . . . was the direct and proximate cause of the injury sustained by the plaintiffs."

From the evidence introduced, and under the authorities cited, we are of the opinion that the plaintiff is entitled to recover.

In accordance with the stipulation the entry must be,

Case to stand for trial.

LESLIE H. LEAVITT *vs.* IRENE M. SEANEY, et al.

Penobscot. Opinion February 27, 1915.

Acreage. Agent. Boundary. Deceit. False. Misrepresentations. Representations. Sale of Farm. Title.

During the negotiations for the sale of the land between the parties, the defendant, M. A. Seaney, knew where the true boundary was and he knew that the fence, which the defendant pointed out to the plaintiff, was not the northerly boundary of his land, but included land not owned by him.

Held:

1. That if the defendant did falsely point out, as the boundaries of the land, he was endeavoring to sell the plaintiff the fence the plaintiff claims he did, the plaintiff had the right to believe that fence to be the true boundary.
2. Where a vendor of land undertakes to state or point out to a purchaser the boundaries of property he is selling, he is bound to state or point them out correctly.
3. If the defendant did point out the boundary as claimed by plaintiff, he did not point it out correctly, but knowingly pointed out to plaintiff a false boundary for the purpose of deceiving the plaintiff.
4. It appears from the testimony that M. A. Seaney was acting as the agent of his wife, I. M. Seaney, who owned the land, in the sale thereof to the plaintiff; therefore, she was liable for such acts of her agent as were done within the scope of his authority as agent.
5. The principal is liable to third persons in a civil suit for frauds, deceits, concealments, torts, negligence and other malfeasance, and omissions of duty in his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct, or even if he forbade them or disapproved of them.
6. In such case, the principal holds out his agent as competent and fit to be trusted; thereby, in effect, he warrants the fidelity and good conduct in all matters of his agency.

On motion by defendant for a new trial; motion overruled.

This is an action on the case for deceit in the sale of a farm by defendants to plaintiff, situate in Newburg, in the county of Penobscot. The defendants plead the general issue. The jury returned a verdict for the plaintiff of $250.00, and the defendants filed a general motion for a new trial.

The case is stated in the opinion.

F. W. Halliday, for plaintiff.

W. H. Mitchell, and George E. Thompson, for defendants.

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

HALEY, J. An action on the case; for deceit in the sale of a farm in the town of Newburg, in the county of Penobscot, purchased by the plaintiff of the defendants May 18, 1912, at which time the legal title to the farm was in the defendant, Irene M. Seaney, the wife of the defendant, M. A. Seaney. The case was tried to a jury at the April term of the court at Penobscot, the verdict was for the plaintiff, and the case is before this court upon a motion to set aside the verdict as against law and evidence.

It was the claim of the plaintiff that, at the time of the negotiations for the property, he was informed that the property was the homestead farm of Martin Miller, deceased, in his lifetime; that it contained fifty acres, more or less, and the deed that was given so states. The property that the plaintiff received by the deed contained only between twenty-five and twenty-six acres, a part of the Martin Miller homestead not being included in the deed. Before the purchase of the property the plaintiff went upon it with the defendant M. A. Seaney and Mr. Rice, at which time he claims, and testified, that the representations as to the former ownership of the land; the acreage and the other misrepresentations were made; that the defendant M. A. Seaney, after showing him parts of the farm from the highway that surrounded it upon two sides, put up the team in which they had driven to the farm, then went out back of the barn, and that Mr. Seaney stood up on a high knoll and said, "My land runs to the town line, pointing to the further fence," the witness at the time referring to the fence shown upon the plan. He further testified: "He spoke of the fence, we couldn't discern any fence in

particular, but that fence, it was plain to be seen where we stood," and he supposed the defendant was pointing to the fence as the boundary of the lot. The lot, as deeded to the plaintiff, was bounded upon the north by the town line upon which there was a fence, and it appeared in the case that upon the north side of the farm there was a gully, that the town line ran through that gully, that there was a fence along the line, but that it was concealed to a great extent by the bushes that grew on the low land and was not observable from the knoll where they stood when the defendant pointed out to the plaintiff the fence to which, as the plaintiff claims, he stated his land ran. Between the boundaries as given in the deed, and as the plaintiff claimed they were pointed out to him by the defendant, there was a tract of land containing about seventeen acres of grass and wood land.

The defendant M. A. Seaney testified in regard to the conversation in reference to the boundaries, "I says, the fence is right up there, you can see it; if you get out of it you have got to get over it. It was just as plain as that railing."

During the negotiations for the land between the parties, the defendant M. A. Seaney knew where the true boundary was, and he knew that the fence which the plaintiff claimed he pointed out to him was not the northerly boundary of his land, but that it included land not owned by him and that he did not intend to convey and did not convey by the deed given to the plaintiff. If the defendant did falsely point out, as the boundaries of the land he was endeavoring to sell the plaintiff, the fence that the plaintiff claims he pointed to, the plaintiff had the right to believe that fence to be the true boundary, for when a vendor of land undertakes to state or point out to a purchaser the boundaries of property he is selling, he is bound to state or point them out correctly. If the defendant did point out the boundary as claimed by the plaintiff, he did not point it out correctly, but knowingly pointed out to the plaintiff a false boundary, and it must have been for the purpose of deceiving the plaintiff, as the plaintiff testifies he was deceived.

It was a question of fact for the jury whether the fence as claimed by the plaintiff was pointed out and represented as the boundary of the land or not. If it was, it was a material misrepresentation of an existing fact, and knowingly made to deceive the plaintiff. The jury saw and heard both the plaintiff and the defendant, and having

observed their appearance upon the stand and weighed their testimony, by their verdict have said that the plaintiff's version is true. Their judgment upon that disputed fact is binding upon this court, as the testimony is not so strong to the contrary as to show they were influenced by prejudice, bias, passion or by mistake, the evidence being of that character that they may well have, after having weighed it, concluded that the plaintiff's version was right.

The defendant contends that Mrs. Seaney cannot possibly be guilty in this action, since the plaintiff has not shown wherein she has had anything to do with the sale except to sign the deed, and to tell Mr. Rice over the telephone that her business affairs relating to the property were handled by her husband. In addition to her statement over the telephone as above, she stated upon the stand that her husband did her business, and her husband testified that in doing the business he acted as her agent. So the fact of the agency must be considered as established. As the husband was the agent of the wife in the sale of the property, she was liable for such acts of her agent as were done within the scope of his authority as agent. *Rhoda* v. *Annis*, 75 Maine, 17.

"The principal is also liable to third persons in a civil suit for frauds, deceits, concealments, torts, negligence and other malfeasances and omissions of duty in his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct; or even if he forbade them or disapproved of them." In every such case, the principal holds out his agent as competent and fit to be trusted; thereby, in effect, he warrants the fidelity and good conduct in all matters of his agency." Storey's Agency, Secs. 452, 453; *Stickney* v. *Munroe*, 44 Maine, 195.

Motion overruled.

HENRY M. JONES, et als., *vs.* CITY OF PORTLAND.

Cumberland. Opinion February 27, 1915.

Bill in Equity. Constitution of Maine, Art. I, Sec. 21. Constitution of United States, Fourteenth Amendment, Art. I. Injunction. Municipal Fuel Yard. R. S., Chap. 79, Par. VI, Cl. II, R. S., Chap. 4, Sec. 87.

The reasons urged in this case in support of the bill were fully considered by this court in *Laughlin* v. *City of Portland,* 111 Maine, 486, and upon the authority of that case, *held,* that the statute in question, and the acts of the city set forth in the bill, are valid and not in violation of the fourteenth amendment to the Constitution of the United States.

On report. Demurrer sustained. Bill dismissed with costs.

This is a bill in equity, praying for an injunction restraining and enjoining the city of Portland from establishing a permanent municipal fuel yard, and is brought by taxable inhabitants of said city, under R. S., Chap. 79, Par. VI, Cl. 11. The defendants demurred to said bill. Upon a hearing in the above entitled cause, the Justice hearing the same being of opinion that questions of law are involved of sufficient importance and doubt to justify the same, and the parties agreeing hereto, hereby reported this cause to the next term of the Law Court to be held at Portland, Maine: The bill of complaint and the demurrer thereto to make the report of said cause.

The case is stated in the opinion.

Eben Winthrop Freeman, for complainant.

Carroll S. Chaplin, for respondent.

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

HALEY, J. This is a bill in equity, praying for an injunction against the city of Portland, restraining and enjoining the city from establishing a permanent municipal fuel yard, brought by the plaintiffs, taxable inhabitants of said city, under the provisions of R. S.,

Chap. 79, Par. VI, Cl. 11, which authorizes this court to restrain and enjoin, upon petition or application of not less than ten taxable inhabitants of counties, cities, school districts, villages or other public corporations who, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation, or to exempt property therefrom, or to pay money from their treasury, or if any of their officers or agents attempt to pay out money for such purpose.

The bill sets forth Sec. 87, Chap. 4, R. S., which provides that any city or town may 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; that on February 4th, 1913, the City of Portland voted that it establish and maintain, within its limitation (limits), a permanent wood, coal and fuel yard for the purpose of selling, at cost, wood, coal and fuel to its inhabitants, and that the money necessary for such purpose be raised by taxation; that the common council of said city, at a legal meeting thereof, passed said vote; that the board of aldermen of said city, at a legal meeting thereof, passed said vote; and the mayor of said city, February 4th, 1913, approved said vote; that February 4th, 1913, the said city voted to appropriate the sum of one thousand dollars to be devoted to carrying out the purposes of said vote; that the common council of said city, and the board of aldermen of said city, at a legal meeting passed said vote to appropriate the monies aforesaid, and that said vote to make the appropriation aforesaid was duly approved by the mayor of said city, and that it is the intention of said city to do all and singular the several acts contemplated by said vote, for the purposes therein set forth.

The principles of law relied upon by the plaintiffs were considered by the court in *Laughlin* v. *City of Portland*, 111 Maine, 486, which was a bill in equity asking for the same relief that the plaintiffs ask for in this bill, and involved the same statutes and votes of the city. In *Laughlin* v. *City of Portland*, supra, the plaintiff urged that the proposed action of the city was in violation of the Constitution of Maine, Art. I, Sec. 21, which provides that "Private property shall not be taken for public uses without just compensation; nor unless the public exegencies require it." In this case the plaintiffs urge that the proposed action of the city is in violation of the provisions of section 1 of the fourteenth article of amendment to the Constitution of the United States; that the section of the statute authorizing

cities and towns to establish municipal fuel yards, and the votes of the city of Portland establishing a municipal fuel yard and appropriating money for the purpose of so doing, are repugnant to said section 1 of the fourteenth amendment to the Constitution of the United States. The reasons urged in this case, in support of the bill, were fully considered by the court in *Laughlin* v. *City of Portland*, supra, and upon the authority of that case we must hold that the statute in question, and the acts of the city set forth in the bill, are valid, and not in violation of the fourteenth amendment to the Constitution of the United States.

Demurrer sustained.
Bill dismissed with costs.

EDDIE PARADIS

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin. Opinion March 1, 1915.

Contract. Due Care. Exceptions. Fellow Servant. Negligence. Notice to Produce. Written Agreement between the Defendant and the Tarbox Express Company.

Action of tort brought by the plaintiff, a motorman in the employ of the defendant, to recover damages for injuries sustained by him on February 2, 1912, in a collision between the car he was driving and two freight cars partly loaded with wood which had been left standing unflagged and unattended on the main line of the defendant's road between Gardiner and Lewiston, at or near Thompson's Crossing, so called.

Held:

1. The case clearly shows that the plaintiff failed to prove that the agreement offered and excluded was the agreement in force between the companies at the time of the accident, and for that reason it was properly excluded.

2. The purpose of a notice to produce a document is to obtain the document itself that it may be introduced in evidence if admissible, or to lay the foundation for the introduction of secondary evidence of its contents, if not produced. But it does not have the effect to make an inadmissible document admissible.
3. The evidence shows unmistakably, that the motorman of the express car was the servant of the defendant, and therefore the fellow servant of the plaintiff; that he had full control of the operation of the express car; and that the freight cars were left standing on the main line through his negligence.
4. Where the plaintiff's injuries were caused by the negligence of his fellow servant, he cannot recover of the defendant damages therefor.
5. Furthermore, the evidence clearly shows that the plaintiff did not exercise that degree of attention and caution on his part which the law requires, otherwise he would have seasonably seen the obstruction on the track and avoided the collision.

On exceptions by plaintiff. Exceptions overruled.

This is an action of tort to recover for personal injuries received by plaintiff through the negligence of the defendant, February 2, 1912, in a collision on the main line of defendant's railway between Gardiner and Lewiston, between a passenger car on which the plaintiff was motorman, and two freight cars.

Plea, general issue. In the course of the trial, the plaintiff offered a written agreement between the defendant and the Tarbox Express Company, and the presiding Justice excluded the same, to which the plaintiff excepted. At the close of the evidence of the plaintiff, the presiding Justice directed a nonsuit, to which the plaintiff excepted.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Skelton, for defendant.

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

KING, J. Action of tort brought by the plaintiff, a motorman in the employ of the defendant, to recover damages for injuries sustained by him on February 2, 1912 in a collision between the car he was driving and two freight cars partly loaded with wood which had been left standing on the main line of the defendant's road between Gardiner and Lewiston at or near Thompson's Crossing, so called.

The case is before this court on exceptions: First, to the exclusion of a certain written agreement dated Nov. 1, 1907 between the defend-

ant and the Tarbox Express Company; and second, to the granting of a nonsuit. We think neither of the exceptions is sustainable.

1. At the time of the accident the Hoyt-Tarbox Express Company was operating an express business over the defendant's railway system under an arrangement between it and the defendant company. As a part of that business it transported wood from points along the line of the railway. On the morning of the accident an express car, in taking a car load of wood from the spur track at Thompson's Crossing, had left the two freight cars out on the main line unattended and unflagged. In his writ the plaintiff alleged "that the defendant carelessly and negligently left" the cars on the main line. At the trial, however, he sought to prove that the express company had control of the operation of the express car and that it was through its negligence that the freight cars were left standing on the main line. And the instrument excluded was offered for the purpose of showing the terms of the agreement between the defendant and the Express Company under which the latter was carrying on the express business at the time of the accident. The agreement offered, however, expressly provided that it should "be in force for one year from November first, 1907," but it contained an option for renewal to be taken advantage of by the Express Company by a thirty days notice in writing before the expiration of the agreement. In order, therefore, to show that the agreement was admissible it was incumbent upon the plaintiff to prove that it was the contract in force between the two companies at the time of the accident. But the case clearly shows that the plaintiff failed to prove that, and for that reason the agreement was not admissible.

Nor was the instrument excluded admissible merely because produced in compliance with the plaintiff's notice therefor. The purpose of a notice to produce a document is to obtain the document itself that it may be introduced in evidence if admissible, or to lay the foundation for the introduction of secondary evidence of its contents, if not produced. But it does not have the effect to make an inadmissible document admissible.

2. The nonsuit. It appears from the evidence that the substance of the arrangement between the defendant and the Express Company for the carrying on of the express business was, that the defendant was to haul the express matter over its road, and to furnish for that purpose at its expense the necessary cars, a motorman to operate each

car, power to propel the same, and the right of way over its road; the Express Company on its part was to superintend and manage the details of the express business, and to furnish at its expense all necessary labor for the proper collection and distribution of express matter, including an express messenger for each express car, and to collect the gross receipts of the business, which were to be divided between the two companies on an agreed percentage basis.

The motorman of the express car was employed by, paid by, and under the control of, the defendant. He was its servant. He had full control of the operation of the express car, the running of it, the placing of it, and the handling and placing of freight cars on which express was carried. The evidence shows, therefore, beyond doubt that the motorman of the express car and the plaintiff were servants of the same master, the defendant. It follows then, according to well settled principles, that if the plaintiff's injuries were caused by the negligence of the motorman of the express car in leaving the freight cars on the main line the plaintiff cannot recover of the defendant, because that negligence was the negligence of a fellow servant.

But if there had been evidence of negligence on the part of the defendant, the plaintiff failed to prove that he was in the exercise of due care. The place where the accident happened was in a hollow. Going east from that point the grade of the main line is ascending for a distance of about 2000 feet. The spur was on the north side of the main track with its dead end toward the east. Its rails were lower than the main line. There was a pile of wood on the north side of the spur, between it and the highway. The freight cars had been left on the main track just east of the switch. The plaintiff was driving his car down the grade from the east toward the switch. There were no trees or bushes or buildings to obstruct his view of the track, and the morning was clear. The brakes of his car were in order and the rails were not wet. He says that he did not see the freight cars until he was within 200 feet of them, too near to avoid a collision, and his excuse for not seeing them before is the existence of the pile of wood. The evidence is overwhelming, however, that he could have seen the cars from a point much farther up the track if he had been attentive. One of his witnesses testified that the freight cars were in plain sight for a distance of at least 1500 feet up the track. The plaintiff admits that he was driving his car at 24 miles an

hour, although he knew the rule of the road required that a car should not be driven over a switch at a greater speed than four miles an hour.

As was said by this court when this case was before it the first time, had "the plaintiff exercised that degree of attention, watchfulness, and caution which the law requires, he could not have escaped seasonably seeing, and therefore avoiding, the obstruction."

Exceptions overruled.

BENJAMIN F. WARNER *vs.* MAINE CENTRAL RAILROAD COMPANY & Tr.

GEORGE B. WARNER *vs.* SAME.

MARY JACQUES *vs.* SAME.

BERTHA WARNER *vs.* SAME.

MONA WARNER, Pro Ami, *vs.* SAME.

Androscoggin. Opinion March 1, 1915.

Damages. Engine. Fire. Insurance. Locomotive. R. S., Chap. 52, Sec. 73.

These actions were tried together. They were brought under the provisions of Sec. 73, Chap. 52, R. S., to recover damages for the loss of certain buildings, and personal property therein contained, by fire alleged to have been communicated by a locomotive of the defendant.

Verdicts were returned for the plaintiffs as follows: for Benjamin F. Warner $753.50, for George B. Warner $546.47, for Mary Jacques $65.74, for Bertha Warner $58.65, for Mona Warner $99.22. The cases are before the Law Court on defendant's motion for a new trial.

Held:

1. That there was testimony which, if believed, was sufficient to support a jury finding that the fire was caused by sparks from the defendant's railroad locomotive.
2. That it does not appear to the court that the damages awarded in either case are excessive.
3. That after full consideration of all the evidence the court is not led to the conclusion that the verdicts are so manifestly erroneous that they should be set aside.

On motions by defendant. Motions overruled.

These actions on the case were brought under R. S., Chap. 52, Sec. 73, to recover damages for the loss of certain buildings and personal property therein, by fire alleged to have been communicated to said buildings by a locomotive belonging to and in control of the defendant. Plea, general issue. The cases were tried together and verdicts were rendered in each case in favor of plaintiff. The defendants each filed a motion for a new trial.

The cases are stated in the opinion.

Ralph W. Crockett, for plaintiffs.

White & Carter, for defendants.

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

KING, J. These actions were tried together. They were brought under the provisions of Sec. 73, Chap. 52, R. S., to recover damages for the loss of certain buildings, and personal property therein contained, by fire alleged to have been communicated by a locomotive of the defendant.

The first action, that of Benjamin F. Warner, is for damages for the loss of the buildings burned; the second, that of George B. Warner, for damages for the loss of the contents of the buildings, consisting of a stock of merchandise, store fixtures, household furniture, etc.; and each of the other three actions is for damages for the loss of articles of personal property, owned by the respective plaintiffs, and contained in the buildings at the time of the fire. 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 favor of Benjamin F. Warner for $753.50. Likewise the jury deducted from the damages to the stock of merchandise, household furniture and fixtures the amount of the insurance thereon received and returned a verdict in favor of George B. Warner for $546.47. In the other three cases the verdicts were, for Mary Jacques $65.74, for Bertha Warner $58.65, for Mona Warner $99.22. The cases are now before this court on defendant's motions for a new trial, and the only question urged is that of liability.

The buildings burned were situated at Leeds Junction Station, so called, in the town of Wales, Maine. The highway at that point

extends substantially north and south, and the main tracks of the defendant's railroad cross the highway nearly at right angles to it—apparently in a course of east about 30° north. The passenger station is on the northerly side of the tracks and just west of the crossing. East of the crossing and near it the track of the Farmington branch diverges northerly from the main line. The Warner buildings were situated on the easterly side of the highway, northerly of and near to the railroad. They consisted of a dwelling-house, store and barn, all connected, and being situated in the order named going north from the railroad. The barn stood end to the highway with gable roof. It was claimed by the plaintiffs that the fire caught on the southerly side of the roof of the barn, the side pitching toward the railroad. The defendant's civil engineer, Swift, gave the distance from the center of the barn to the nearest point in the Farmington branch as "about 90 feet," and Mr. Warner gave the distance from a point on the ground, beneath where he claimed the fire caught on the roof, to the nearest point of the railroad as 91 feet. The crossing of the highway and railroad appears to be a little west of a line extending south from a point at the center of the barn, and about 140 feet from that point. And the passenger station appears to be in a southwest line from the same point at the barn.

The case shows that on Sunday afternoon, October 6th, 1912, a train of 25 cars loaded with pulp-wood, going from Portland to Livermore Falls (a station on the Farmington branch) arrived at Leeds Junction from the west at 3.45 o'clock. It stopped on the hill west of the station, Leeds Junction being "in a sag or hollow," the grade from the station going east on the Farmington branch being 47 feet to the mile. The engine was cut from the train and went down to the stand-pipe east of the crossing for water. Two more cars were picked up there from a side track, after some necessary shifting, and pushed back and joined to the other cars on the hill. The train was first booked out of Leeds Junction at 4.25. But after passing beyond the crossing some five or eight hundred feet it was flagged on account of a gravel train headed west on the same track. The pulp-wood train then backed back far enough to let the gravel train clear the block and at 4.40, according to the register, pulled out east over the Farmington track. The engineer testified that when he started his engine the second time it was located at about the lowest point in the yard, and that it labored hard, at its full capacity,

in pulling the train up the grade. Mr. Warner's testimony would indicate that the engine when it started the second time was near the crossing—or between the crossing and the station.

The fire was first discovered by Mona Warner, probably at about 5.45 P. M. She went out into the store first that afternoon after paper to write a letter, and saw no indications of fire then, "but after I came back and had written the letter I went out after envelopes and I heard a sort of roaring sound, and I ran out in the middle of the store, and then I went to the roll-way door. It came from the stable. I went over there and looked and saw the reflection of the flames, up through the pitch hole, in the top of the barn, . . . then I ran into the dining room and hollered 'fire.' " She then ran over to the station giving the alarm. The "roll-way door" through which she looked was between the store and barn, a little more than half way from the front to the back of the store. She did not remember whether that door "was open already or I pushed it open." Mr. Warner, at the alarm of fire, hastened from the dining room through the store into the barn, and looking up through the pitch hole saw a hole burned through the roof and the hay and straw on fire. Others who gathered there quickly observed the same conditions. The buildings were soon totally destroyed.

1. It is a contention of the defendant, in support of its motions that the fire originated inside of the barn—in the barn chamber or hay-loft. And that is an important and fundamental proposition involved in the case, because, if the fire did originate inside of the barn, then there is no claim that it was communicated there by the defendant's locomotive.

But after a careful study of the record the court is led to the conclusion that the evidence is sufficient to justify a finding by the jury that the fire did not originate inside of the barn, but caught on the outside of its roof, the side toward the railroad.

There is ample testimony showing that when the fire was first discovered it had burned a hole through in one place on the southerly roof of the barn. The witnesses who went into the barn immediately after the alarm was given testified to seeing that particular hole as they looked up through the "pitch hole." Mr. Warner, who was first there after Mona, described it as "four or five feet" in size; Mr. Hayes, as "four or five feet . . . across it;" Mr. Richards, as "two or three feet may be, a jagged hole, it wasn't square nor round;"

Mr. Philbrick, called by defendant, as "five or six feet." Mr. Warner testified on cross-examination that the inside of the roof of the barn was not on fire when he looked up through the pitch hole, except where this hole was burned through, but that the hay and straw in the loft was then on fire. And he and other witnesses testified that when the outside door was opened a strong draft of air went up through the pitch hole and the whole top of the barn was soon in flames. After Mr. Warner first saw the condition of the fire—the hole burned through the roof and the hay and straw in the loft on fire—he "run in through the store out into the street, and hollered 'fire' . . . and went towards Hayes' house and hollered 'fire.'" He then "came back through the store and cut the rope halter to get the horse out." There were three stalls on each side of the barn with a hay chute for each extending down from the hay-loft. The horse was in the middle stall on the north side. There was no fire whatever in the lower part of the barn at the time the horse was taken out, except that some particles of burning hay were then dropping down through the hay chutes and other "open places." It was while Mr. Warner was getting the horse out that Mr. Hayes and Mr. Lynch opened the outside barn door causing the draft up through the pitch hole.

If the fire originated in the hay-loft, and had burned there long enough, and had increased to an extent sufficient, to have burned the hole through the roof as described by the witnesses, then it is quite difficult to believe that it would not have been communicated to the lower part of the barn through the pitch hole, the hay chutes, and the other "open places." On the other hand, the fact that when the fire was discovered that hole of "four or five" feet in size had been burned through the south side of the roof, with the rest of the roof apparently not much, if any, involved, the hay and straw being then on fire, but no fire up to that time having been communicated below the hay-loft, is, we think, consistent with, and reasonably justifies, the conclusion that that hole was burned through the roof from the outside, and that the hay and straw caught fire from sparks and embers falling upon it as the fire worked down through the roof. No one had been in the upper part of the barn or hay-loft since the preceding Friday, and there was no evidence tending in any way to account for the origin of the fire up there.

2. It is also urged by the defendant that the direction of the wind was not such as to carry sparks and cinders from its locomotive over and upon the Warner buildings, and the defendant's witnesses for the most part testified that the direction of the wind was parallel with the track. On the other hand, Mr. Warner testified that the wind was south, blowing right up the highway; Mr. Hayes, that it was blowing diagonally from the track to the buildings; Mr. Richards, that it was a little west of south blowing diagonally from the track towards the buildings; Mr. Stetson, that it was from a general southerly direction, a little west of south. But the jury had other testimony which, if believed by them, established beyond doubt the fact that the direction and strength of the wind was such as to carry smoke and cinders from the passing locomotive over and upon the Warner buildings. Mr. Warner testified, in substance, that he saw from his window the train back down westerly from the Farmington track to the station, and that when it started again going east the engine was working so hard and making so much noise that he went onto his veranda towards the track and watched the engine pull by his house up the grade, and that it was throwing out smoke and cinders to a "large extent," and that he then heard the cinders falling on his buildings. "I could hear them strike on the roof." Mr. Hayes also testified that smoke and cinders came from the train over and upon his premises which were situated 65 to 70 feet directly north of the Warner barn.

3. The defendant further contends that the finding by the jury that the fire was communicated from its locomotive in question was not justified in view of the evidence it introduced showing that the locomotive was equipped with an approved spark arrester in good condition which, in the opinion of its witnesses, would have prevented the emission of sparks that could have set the fire.

The essential feature of a spark arrester appears to be a steel wire mesh netting placed in the forward end of the smoke arch of the engine so that nothing can get from the fire box to the open air through the smoke-stack without passing through this netting. Its purpose is to break up the large pieces of burning coal and cinders before they pass into the smoke-stack—in other words, to arrest the emission of live sparks and burning cinders of any considerable size, and thereby reduce the chance of fires being communicated by the

engine to adjoining property. But everyone who has observed, especially in the night time, a locomotive engine working hard has probably noticed live sparks and glowing cinders coming from its smoke-stack. The size of those sparks and cinders necessarily depends on the size of the mesh of the spark arrester with which the engine is equipped. Any spark or cinder that can be forced through the mesh of the netting may come out of the smoke-stack. There is nothing else to stop it. The netting used on the engine in question was exhibited in court, having been taken from the engine the morning after the fire for that purpose, and the jury saw the size of the mesh. And it was conceded at the trial that a locomotive engine has the inherent capacity under certain conditions of setting fires to adjoining property from sparks emitted from its smoke-stack. And there was evidence that fires had been communicated by defendant's engines to the railroad buildings and structures near the tracks at Leeds Junction, and, further, that in one instance an engine communicated fire to the roof of the Philbrick barn situated easterly of the Warner buildings on the same side of the tracks and apparently about the same distance therefrom. And Mr. Warner testified, as already noted, that the engine in question when pulling by his house just before the fire did emit sparks and cinders that came over and upon his buildings, and that he "could hear them strike on the roof." Without discussing further in detail the evidence bearing on this contention of the defendant it is sufficient to say that the court is not satisfied that the jury erred in finding that sparks and cinders did come from the engine capable of being carried to, and of setting fire to, the Warner barn.

4. Lastly, the defendant contends that the jury erred in finding that the fire was communicated from the engine to the roof of the barn, in view of the evidence that at least an hour elapsed after the train passed before the fire was discovered, during which time no fire was observed on the roof of the barn by anyone, although witnesses testified that they were in position where they could have seen a fire there. The argument of the learned counsel for the defendant is persuasive. We are much in doubt on this proposition. And yet, after full consideration of the evidence, we are not convinced that the communication of the fire from the engine to the roof of the barn may not be a reasonable inference from all the facts and circumstances, notwithstanding the evidence of the length of time that

elapsed after the engine passed before the fire was discovered by Mona from the inside of the barn. If a spark lighted on the roof it might have smouldered there for some time before being fanned into much flame, and after that it would necessarily take some time before such a hole as was described could be burned through the roof. Who can determine the limit of that time? The testimony of the witnesses that they did not see a fire on the roof, though in a position to have seen it, does not conclusively show that the fire was not there.

5. We do not understand that the defendant really urges as a ground for its motions that the damages are excessive. It is sufficient to say, however, that it does not appear to the court that the damages awarded in either case are manifestly excessive.

It is therefore the opinion of the court after full consideration of all the evidence, that it does not clearly appear that the verdicts are so manifestly erroneous that they should be set aside.

Motions overruled.

D. H. DARLING *vs.* FRED T. BRADSTREET.

Kennebec. Opinion March 1, 1915.

Breach. Contract. Damages. Dividends. Exceptions. Sale. Stock. R. S., Chap. 70, Sec. 51.

1. Whether a contract was entered into by the plaintiff and defendant, the terms thereof, if made, whether the plaintiff performed the services called for by the contract or not, were questions of fact for the jury and were submitted to them, with proper instructions as to the force and effect of the testimony, the acts and conduct of the parties, the degree of credit to be given to witnesses, and the explanations of their acts and conduct.

2. The jury having decided that the contract was made and performed, as claimed by the plaintiff, and there being sufficient evidence, if believed by them, to authorize that finding, the court will not substitute its judgment for theirs, and the finding by the jury is binding upon the parties.

3. The plaintiff was asked upon cross-examination this question, "After you came down here and got ready to establish your home, were you informed that Mr. Bradstreet had provided a house that you could occupy rent free?" The question was objected to, excluded and exceptions taken to its exclusion. The court overruled the exception, on the ground that the furnishing of a house, if furnished, was no part of any contract entered into between the plaintiff and defendant and had no tendency to prove or disprove the contention of either plaintiff or defendant.

On motion and exceptions by defendant. Exceptions overruled; If plaintiff within thirty days after the certificate is filed remits all of the verdict in excess of $20,772.99, motion overruled; otherwise, motion sustained, new trial granted.

This is an action on the case to recover damages for breach of a contract, whereby the defendant agreed to sell to the plaintiff one-sixth of the capital stock of the Bradstreet Lumber Company for the sum of five thousand dollars, to be paid for from the profits of the business of the company when they could be divided. The contract also covered the employment of the plaintiff by the company. Plea, the general issue, with brief statement. The defendant, during the trial of the case, excepted to the exclusion of certain evidence. The jury rendered a verdict for the plaintiff of $25,129.24, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

George W. Heselton, for plaintiff.

Butler & Butler, for defendant.

SITTING: SAVAGE, C. J., KING, HALEY, HANSON, PHILBROOK, JJ.

HALEY, J. This is an action of assumpsit to recover damages for the breach of an alleged contract for the sale of one-sixth of the capital stock of the Bradstreet Lumber Company, was tried to a jury at the March term, 1914, in Kennebec County, the plaintiff recovered a verdict for $25,129.24, and the case is before this court upon motion and exceptions.

It is the claim of the plaintiff, the son-in-law of the defendant, that while working in New York, in March, 1905, he entered into negotiations with the defendant for the purchase of one-sixth interest in the capital stock of the Bradstreet Lumber Company, and, as a result, the contract relied upon in the case was made.

Nine letters passed between the parties in reference to the sale of the stock and employment of the plaintiff, and the contract claimed by the plaintiff is only stated in one of the letters, which is the letter of the defendant to the plaintiff, dated March 9, 1905, and which reads as follows:

"OFFICE OF F. T. BRADSTREET,

"Wholesale Dealer in Pine, Spruce and Cedar Logs.

Gardiner, Maine, March 9th, '05

My dear Harry:—

I have read your letters and Laura's.

I will sell you ½ of my 1-3 interest in the Bradstreet Lumber Co. for $5,000. This interest shall carry the treasureship at a salary of $1200 per year. The $5000 to be paid out of the profits when they can be divided. We are not dividing at present as no one is suffering for them and we want to get a working capital. At the present Mrs. J. S. and I are furnishing it, or at least the collateral on which we borrow it. So you and the girl for two or three years would have to live on your salary and her allowance. The $5000 when paid to be Baby Anne's and to be invested for her benefit. The profits last year show $20,000, and I look for as good a year this. We can't expect to do this every year but ought to do from 10 to $12,000. This will make you your own man and as interested in the welfare of the Co. as any of us. You can live in Richmond summers and anywhere your income will allow winters. Although it would be desirable for you to spend part of your time in the woods familiarizing yourself with the value of our lands as well as others that we might wish to buy, or the stumpage from them.

Tell Laura if she wants Port or anything else to go to Kirk's Corner of B'dway and 27th and buy it and buy Rachael some "black and white."

Y'rs truly,

DAD."

There was no acceptance in writing of the offer contained in the above letter, although there was more or less correspondence between the parties and the plaintiff's wife and the defendant after it's receipt by the plaintiff. On March 13th the plaintiff wrote the defendant and inquired when he would want him to begin his employment, "and also who determines whether profits are to be divided, and when divided to what they are credited? As I understand the matter the shares you offer me could not become mine unless and until the profits were divided. Am I right? . . . . If you are sure you can use me and I am sure of it, when would you want me?" And the defendant's reply to that part of the inquiry was, "You should begin very soon as I want two of our towns looked over this spring with a view of logging them next winter. The time of dividing the profits will probably be determined by vote of the Co. I don't think, however, that they will be divided until we get about $60,000 for a working capital. Last years profits are now in logs and lumber carried over and not in cash. We have borrowed 40 M on the winter's operation. We want about 60 M to carry on the business & be all easy. There is no doubt you and Laura would have to live on your salary for two or three years."

June 1, 1905, the plaintiff came to Maine and entered upon his duties as treasurer of the Bradstreet Lumber Company, to which office he was elected on that date, and held the position until the corporation meeting April 18, 1910, when he was not re-elected. From August 18, 1910 to November 1, 1913, he continued as bookkeeper of the company and performed all the duties of treasurer, except that of signing the company's checks and notes.

EXCEPTIONS.

The plaintiff was asked, upon cross examination: "Q.—After you came down here and got ready to establish your home, were you informed that Mr. Bradstreet had provided a house that you could occupy, rent free?" The question was objected to, excluded and exception taken to its exclusion. There is no pretense that the furnishing of the house, if furnished, was a part of any contract entered into between the plaintiff and the defendant. That, if furnished, it was a mere gratuity upon the part of the defendant there can be no question; and it had no tendency to prove or disprove the contention of either the plaintiff or the defendant. The only issue submitted to the jury was: Was there a contract between the

parties as shown by the letter of March 9th and referred to in the letter of March 13th, and the furnishing of house rent free would have no tendency to prove or disprove the making of such a contract, and the exception must be overruled.

The bill of exceptions also contains an extract from the Judge's charge, to which exceptions were taken. It covers more than four pages of the printed record, and contains several propositions of law and fact, many of which were admitted at the trial or conceded by both sides to be the correct rule, and the only one that is urged is to an instruction allowing the jury upon that branch of the case to fix the value of the mill. The exception is not in proper form, does not comply with the statute, Sec. 51, R. S., Chap. 70, and, as held in *McKown* v. *Powers*, 86 Maine, 295, such a bill of exceptions is a direct violation of the practice of this court and has been condemned by a long line of decisions. But, as the only question urged in the bill of exceptions is discussed upon the motion for a new trial, the defendant has the same benefit that he would have had, if it had been in conformity with the statute.

MOTION.

The plaintiff claims that he accepted the offer made in the letter of March 9th, and that, relying upon that and the other letters of the defendant as to the terms of the employment, he moved to Maine and entered upon the performance of the duties required by the terms of the contract to entitle him to a one-sixth interest in the stock, and the profits earned by the stock, that during his employment the dividends earned by the stock more than paid the agreed price of the stock, and that the defendant has never delivered or accounted to him for the stock or its value; that the defendant understood that the offer had been accepted, and allowed the plaintiff to so understand, until the winter of 1905 or 1906, when the plaintiff, by reason of something that occurred, went to the home of the defendant in the evening, accompanied by his wife, with the letters introduced in the case, at which time the defendant denied that he had made any contract with the plaintiff, as follows: "Q.—What did he say to you about it? A—He denied there was any agreement, asked me to leave the letters which I had regarding it, and said, 'If you don't leave the letters you may never speak to me of this thing again, and if you try to force this matter, your position in the company will be very unpleasant.' "

The defendant met the plaintiff's wife after the above interview, and she testified: "Q—I only want to ask you one question. Do you recall of speaking with your father a day or two after you and your husband called at the house? A—I do. Q—What was the conversation? A—I asked my father to do right by that contract. Q—What did he say? A—He said, 'I have changed my mind.' "

The defendant, upon the other hand, contends that there never was any valid contract between the parties; that their minds did not meet; that it was not his understanding, or the plaintiff's understanding, that the contract as outlined in the letter was the contract under which the defendant was working. The defendant does not attempt to state his understanding of the terms of the plaintiff's employment, or why he did not think he was working according to the offer contained in the letter of March 9th; nor does he deny, except by stating that he does not remember, the significant language that his daughter testified to as above.

Whether a contract was entered into by the plaintiff and the defendant, the terms thereof, if made, whether the plaintiff performed the services called for by the contract or not, were questions of fact for the jury, and were submitted with proper instructions as to the force and effect of the testimony, the acts and conduct of the parties, the degree of credit to be given to witnesses, and the explanations of their acts and conduct, and the jury having decided that the contract was made and performed, as claimed by the plaintiff, and there being sufficient evidence, if believed by them, to authorize that finding, we should not substitute our judgment for theirs, and their finding must be binding upon the parties.

The defendant insists that there was error in the assessment of damages. The rule of damages was agreed to by counsel and stated by the court to the jury, that, if the plaintiff recovered, "the amount which he is entitled to recover, by the agreement or consent of both counsel, is $22,796.34. That includes one-sixth of the total profits of this concern up to the summer of 1914, and then the figures given me by the defendant's counsel, interest for the plaintiff on the first four dividends, $2432.50; the interest for the plaintiff on the fifth dividend, $256; the interest for the plaintiff on the sixth dividend, $89.42, and the interest for the plaintiff on the seventh dividend, $137.78. These are the figures given me by the defendant, as conceded." And the court also authorized the adding of $430.13,

interest upon the coupons received by the defendant. "This is in addition to what the defendant conceded to make the total, $23,226.47 to which the plaintiff would be entitled to recover, according to the auditor's report, and in regard to which, as I understand it, there is no dispute except as to the interest on the coupons of $430.13." The jury was also instructed that to the above amount should be added one-sixth of the value of the mill; all other assets of the company were included in the dividends that make up the $23,226.47.

It is conceded by counsel for both parties that, to arrive at the verdict which the jury did, they must have figured the value of the mill at $40,000 and added to the plaintiff's damage one-sixth of said sum, and, as properly instructed by the court, deducted from the total the $5000 purchase price of the stock. And the defendant earnestly urges that there was no testimony that authorized the jury to place that valuation upon the mill. The mill was built by the defendant in 1903, and sold by him to the Bradstreet Lumber Company. The only evidence of value was the testimony of W. F. Henderson, a large stockholder and the treasurer, as follows: "Q—Can you tell from the records of the company, how much the cost of the mill was? A—I could tell from the book of construction. I can't in the ledger. Q—Can't you tell something from the record that you made there? The Court: Isn't that the easiest way in the ledger? Mr. Heselton: He has got before him a vote of the company. A—This is a vote that was taken at different times to purchase F. T.'s interest down there. He owned the whole of it, but this wouldn't be the exact construction account. This says $39,000 here. It cost $45,000. The Court: You know. Q—If you know what it cost, state it? A—It cost $45,000."

The mill was shut down in December, 1913, the manufactured stock all sold, and no testimony of its market value, how much it had depreciated, and its market value at any time does not appear. The company earned large profits, but that was because the three owners of the stock had valuable tracts for stumpage, and furnished the lumber to operate the mill. Without those contracts the mill probably would not have earned the money that it did earn, and we do not think there was testimony which justified the jury in fixing the value of the mill at $40,000. It is a well known fact that mills, situated as this one was, will not bring in the market one-half their cost. It had been operated for ten years, had ceased to be

operated, and no lumber permits went with it, and when sold by the defendant, ten years before, was offered for $39,000, when he and the other stockholders could and did furnish it lumber from the lots cut under their permits. We do not think it possible that, at the time of suit, it could have been sold for $25,000, and, if valued at that sum, surely the plaintiff will not be wronged. The one-sixth difference between the valuation of $40,000 and $25,000 is $2500, which should be deducted from the amount found by the jury. By the rule of damages agreed upon at the trial, the plaintiff was credited upon the purchase price of the stock the dividends earned by the stock and interest upon those dividends. And the court further authorized the jury to add interest upon the coupons of the bonds holden by the company. As the defendant was charged interest upon the dividends which were to pay and did pay the purchase price of the stock, it is but fair that the purchase price should bear interest during the time the defendant was charged for interest on the dividends, from September 30, 1907, to December 20, 1913, $1856.25, making a total of $4356.25, which should be deducted from the verdict as returned. Accordingly the certificate will be,

Exceptions overruled; if the plaintiff, within thirty days after the certificate is filed, remits all of the verdict in excess of $20,772,99, motion overruled; otherwise, motion sustained, new trial granted.

STATE OF MAINE

BY

INFORMATION OF SCOTT WILSON, Attorney General,

vs.

YORK LIGHT & HEAT COMPANY.

York. Opinion March 3, 1915.

Demurrer. Franchise. Heat and Power. Information. Private and Special Laws of Maine, 1891, Chap. 213. Quo Warranto.

This is an information in the nature of quo warranto. The defendant demurred, and the case is before us upon exceptions to the order overruling the demurrer. The complainant attacks the corporation and asks for a surrender of its chartered rights upon a general statement of misuser of its franchise, without specifying acts constituting misuser, or stating any definite time when such misuser occurred, or whether single acts or continuous misuser of its franchises constituted the ground of complaint.

Held:

1. To allege the breach of a condition in general terms is to assert a conclusion of law, and the plainest principles of good pleading require that the act or acts or the instances of failure to act should be specified in order that the court may see whether or not when taken in connection with the charter they amount to a breach and cause of forfeiture. The reasonableness of this rule is apparent when it is considered that when one is injured by a breach of duty, he must know better than any one else in what the act or neglect consists.
2. It is settled law that certainty of allegation is indispensable, that the complainant must make his complaint sufficiently full and explicit to show that he has a case to establish, and thus bring himself within the common law rule of pleading, that all the essential facts must be averred positively. These general rules apply to the form of the allegations as well as to their sufficiency.
3. In this State quo warranto is a civil action, so determined and classified by the Legislature, and so considered by the court, and consistently with the rule universally adopted in common law pleading, we hold that the complaint must aver the acts or omissions constituting the misuser complained of concisely and clearly.

4. The pleadings in such an action are governed in general by the rules applicable in ordinary civil actions. By such rules the complainant is required to set forth the facts on which he relies, positively and with certainty, in order that the court may be able to determine whether a wrong has been done to the public.
5. Information in the nature of quo warranto is, however, the appropriate remedy against a corporation for abuse of power, misuse of privilege, malfeasance or non-feasance.
6. In this case demurrer was properly interposed, and this conclusion is supported by well nigh universal judicial agreement that any defect in the structure of the information may be taken advantage of by demurrer.
7. The relief to be granted does not depend upon the prayer for relief, but upon the complaint and the evidence, and from the nature of the complaint, a resort to extraordinary remedy, it is surely but fair to require the complainant to reveal what he knows, to state his full case, so that the court may have sufficient information to authorize and justify the later steps necessary in quo warranto,—in short, the State above all other suitors can afford to inform the court frankly, fully and in detail what is believed to be an injury or menace to the public. Such course will surely safeguard the interest of a complainant, and accomplish another end of equal importance in safeguarding the interests of the individuals adverse to the complainant.

On exceptions by defendant. Exceptions sustained.

This is an information in the nature of quo warranto. The defendant demurred to the information, and the plaintiff joined the demurrer. The presiding Justice overruled the demurrer and the defendant filed and had allowed exceptions to the overruling of said demurrer.

The case is stated in the opinion.

Howard Davies, and E. H. Wilson, for plaintiff.

Bradley & Linnell, for defendant.

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

HANSON, J. This is an information in the nature of quo warranto. The defendant demurred, and the case is before us upon exceptions to the order overruling the demurrer.

By Chapter 213 of the Private and Special Laws of Maine for the year one thousand eight hundred and ninety-one, the York Light and Heat Company was authorized to supply heat and power by the manufacture of gas and electricity in the Cities of Biddeford and Saco, and town of Old Orchard.

By Chapter 4 of Private and Special Laws of Maine, for the year one thousand nine hundred and three, the defendant Company was authorized to purchase, own and enjoy the franchises, property, shares of stock, rights, easements, privileges and immunities of Old Orchard Electric Light Company. And the information sets out "that the said York Light & Heat Company has long since, to wit: On the first day of May, in the year of our Lord one thousand nine hundred and thirteen, forfeited so much of its said franchise under its Charter and Acts Amendatory Thereto, aforesaid, as pertains to the purposes of supplying light, heat and power by the manufacture of gas and electricity in the town of Old Orchard, and to dispose of electric light and power to individuals and corporations therein, together with all the rights, privileges, powers, immunities, liberties and franchises, aforesaid, thereunto appertaining by law.

First: Because he says, that by the acceptance of the aforesaid Charter and Acts Amendatory Thereto, and of the franchises therein created, the said York Light & Heat Company became charged with the duty of disposing of the electric light and power to individuals and corporations therein, faithfully and impartially, and at reasonable and equal rates, and of thereby serving the public.

Second: Because the York Light & Heat Company since the first day of May, one thousand nine hundred and thirteen has wilfully, intentionally and unlawfully refused to faithfully and impartially perform its aforesaid duties, but has abused its power and misused its privilege, in that, it has charged excessive and exorbitant rates, and has discriminated between its patrons, at said Old Orchard.

Third: Because the aforesaid franchise became the property of the State of Maine on the first day of May, one thousand nine hundred and thirteen, when so forfeited, as aforesaid, but the said York Light & Heat Company so illegally and wrongfully withheld the same from the State since the said first day of May, as aforesaid down to the present day, has claimed and is still claiming to hold the said franchise as its own, and is illegally and unlawfully preventing the occupation of the streets in said Old Orchard, or any other corporation that might otherwise be legally authorized to occupy the same to the great detriment of the public and in violation of the trusts of its Charter, and in wilful perversion of the objects, duties and public obligations thereof. And the said Attorney General further gives the court to understand and be informed that the fore-

going illegal acts and doings by the said York Light & Heat Company, done and performed, and the forfeiture of all charter rights as aforesaid for said town, has during all the time since the said first day of May, one thousand nine hundred and thirteen, now last past, usurped and doth usurp from said State, the liberties, privileges and franchises following, to wit: Powers, privileges and immunities incident by law to a corporation aggregate to furnish electric lights for lighting streets in the town of Old Orchard, and to dispose of electric light and power to individuals and corporations therein, all which liberties, privileges and franchises, the said company during said time hath usurped and doth usurp from the said State to its great damage and injury.

Wherefore, the said Attorney General prays the advice of the court in this behalf in the premises, that due process of law may be awarded against the said York Light & Heat Company, in this behalf to answer to this court by what warrant it claims to use and exercise the powers, privileges and franchises aforesaid."

The demurrer follows:

And now comes the said defendant and says that said information is insufficient in law, and for the following reasons, to wit:—

1. Because neither quo warranto nor information in the nature of quo warranto is the appropriate remedy upon the facts alleged in said information.

2. Because it does not appear from said information that the plaintiff therein has exhausted all other proper remedies.

3. Because the facts alleged in said information are not alleged with certainty.

4. Because the matters alleged in said information are insufficient in law to enable the plaintiff therein to maintain his action.

The causes of complaint are:

1. That the defendant has charged excessive and exorbitant rates.

2. That it has discriminated between its patrons at Old Orchard.

3. That it has withheld the franchise illegally and wrongfully since May 1, 1913.

The complainant attacks the corporation and asks for a surrender of its chartered rights upon a general statement of misuser of its franchise, without specifying acts constituting misuser, or stating

any definite time when such misuser occurred, or whether single acts or continuous misuser of its franchises constituted the ground of complaint. It does not appear how much was charged for service, or the excess above the amount claimed to be just and fair, or required by the terms of the Charter. Neither the time, manner or character of the discrimination complained of, nor the name of any person, or persons, affected in any manner by the alleged charges and discriminations are set out in the complaint.

The objections raised by the demurrer necessary to be considered here relate to pleading, and are for the first time raised in this State, but are by no means new to other jurisdictions.

The evolution of quo warranto from its original purpose as the King's writ for the King's personal use and profit to its more general but no less important use in its present form by the people collectively and individually developed a difference in procedure and practice in the matter of certainty in the allegations of the complaint. In a few jurisdictions under statute provision the allegation by the Attorney General of intrusion or usurpation may be of the most general character, and statutes provide that no issue of fact need be tendered. Pleading and Practice, Vol. 17, 457, *State* v. *Pennsylvania Canal Co.*, 23 Ohio St., 121, *People* v. *DeMill*, 15 Mich., 164. *State* v. *McDiarmid*, 27 Ark., 179.

The rule invoked by the complainant under the authority of the above citations "that it is only necessary to set forth in general terms the rights and privileges alleged to be usurped, and the wrongful act or omission complained of may likewise be stated generally by alleging the ultimate fact," cannot be taken as authority in the case at bar. The cases cited were limited and regulated by statute in the first instance, and in the last and most important particular, the rule insisted on by the relator and upon which he relies, is stated in these words: "If the complaint, besides making general allegations, *which, standing alone, would be sufficient,* specifies the particular facts claimed to show usurpation or other illegality, and these do not amount to a cause of action, the entire pleading is bad." Then follow two citations from New York and California Reports, under Sec. 1448, 32 Cyc.

In this connection it may be profitable to note the conclusion of the court in *People* v. *The Kingston and Middleton Turnpike Road Co.*, in 23 Wendell, 193, that "in a proceeding by information in nature of

a quo warranto, facts, necessary to be alleged to show a neglect of duty, must be set out with all the exactness of pleading required in an action for a penalty." See also: *Harris* v. *Mississippi Valley & S. I. R. Co.*, 51 Miss., 602. *Atty. Gen.* v. *Petersburg R. R. Co.*, 28 N. C., 456. *State* v. *Greene*, 88 At., 515 (Vt.). *State ex rel. Union Electric Light & P. Co.* v. *Grimm*, 270 Mo., 483. *The People* v. *San Francisco Stock Exchange* (*Calif.*), 33 Pac., 785.

It may be useful also to repeat the text relating to this subject in 2 Spelling, Sec. 1850, which would seem to remove all doubt as to what is the proper pleading in all such cases. That author says: "An information to have a Charter of a corporation declared forfeited must set forth a substantial cause of forfeiture. Under the earlier practice, and before quo warranto was placed on a footing with civil remedies, the prosecutor might in a proceeding to forfeit corporate franchises either disclose in his information the specific ground of forfeiture relied upon, or he might in general terms charge the respondent with exercising certain franchises without authority, and call upon it to show by what warrant such powers were claimed. The plea might then deny the facts charged in general terms, or set forth the authority relied upon, as the case might be, and the replication might then allege the acts upon which the prosecution relied as working a forfeiture. These again might be denied, or a demurrer might be filed following substantially the same course as in ordinary common law pleadings. But under the system now generally prevailing, the complainant must conform to the usual requirements of good pleading with respect to the certainty of the allegations." Then follows the note to same: *Attorney General* v. *Petersburg, etc., R. R. Co.*, 6 Ired., (N. C.) L., 456; *State ex rel. Walker* v. *Equitable Loan & Investment Co.*, (Mo. Sup.) 41 S. W., 916; *Commonwealth* v. *Sturtevant*, (Pa. Sup.) 37 A., 916; 182 Pa. St., 323; *State* v. *Southern, etc., R. R. Co.*, 24 Tex., 80.

For cases where informations asking a forfeiture for non-feasance were held to be defective for uncertainty, see *People* v. *Bristol, etc., Tp. Co.*, 23 Wend. 222; *Atty. Gen.* v. *Petersburg, etc., R. R. Co.*, 6 Ired., 456; *State* v. *Southern, etc., R. Co.*, 24 Tex., 80; *Dullam* v. *Wilson*, 53 Mich., 392.

An information in the nature of quo warranto was brought to forfeit the Charter of the Manhattan Company in the City of New York for non-performance of a condition therein that it should "furnish and

continue a supply of pure and wholesome water sufficient for the use of all such citizens dwelling in said city as shall agree to take it on the terms to be demanded by the said company, alleged in general terms that the defendants have not furnished or continued to supply water sufficient (or a supply or any other quantity of pure and wholesome water) for the use of all citizens dwelling in said city of New York as were willing and desirous to agree for and take the same as aforesaid."

It was held that the Attorney General in alleging a breach of conditions was bound to name such citizens as were willing to agree, etc., and that the naming of one individual would have been sufficient; also that he should have averred a request on the part of those citizens who wished a supply of water, or an offer to pay for it, or that the defendants had notice of such willingness or desire. *People* v. *Prest., etc., of Manhattan Co.*, 9 Wend., 352.

"By analogy to the general rules of pleading established by the various codes, and on the authority of several cases previously cited, where the object of the proceeding is to oust the defendant from the franchise of being a corporation on account of the non-performance of conditions, the facts constituting the breach should be set forth with reasonable certainty. It is plain that to allege the breach of a condition in general terms is to assert a conclusion of law, and the plainest principles of good pleading require that the act or acts or the instances of failure to act should be specified in order that the court may see whether or not when taken in connection with the Charter they amount to a breach and cause of forfeiture. The reasonableness of this rule is apparent when it is considered that when one is injured by a breach of duty, he must know better than any one else in what the act or neglect consists." Idem, 1851. See *People* v. *Milk Exchange*, 133 N. Y., 565.

It is evident that the great weight of authority supports the contention of the defendant, that certainty of allegation is indispensable, that the complainant must make his complaint sufficiently full and explicit to show that he has a case to establish, and thus bring himself within the common law rule of pleading, that all the essential facts must be averred positively. These general rules apply to the form of the allegations as well as to their sufficiency.

In this State quo warranto is a civil action, so determined and classified by the legislature, and so considered by the court, and

consistently with the rule universally adopted in common law pleading, we hold that the complaint must aver the acts or omissions constituting the misuser complained of concisely and clearly.

It is well settled that a proceeding by information in the nature of quo warranto is a civil and not a criminal proceeding. Words and Phrases, 5893, 32 Cyc., 1446, and cases cited.

The pleadings in such an action are governed in general by the rules applicable in ordinary civil actions. Ibid. Clark on Corporations, 244. Spelling, Vol. 2, Sec. 1846.

By such rules the complainant is required to set forth the facts on which he relies, positively and with certainty, in order that the court may be able to determine whether a wrong has been done to the public. This can only be achieved when all the facts known to the complainant are made known to the court, and cannot be fairly arrived at, when, as in this instance, the complaint is based upon conclusions of law only. While the facts from which the conclusions are drawn may be known to the complainant, they are not in the possession of the court, and this consideration leads to the reflection that to sanction the pleading involved, and compel a defendant to answer when he knows not what to traverse, or disclaim, would be to give the complaint an arbitrary range rivalling its earlier license.

Information in the nature of quo warranto is, however, the appropriate remedy against a corporation for abuse of power, misuse of privilege, malfeasance, or non-feasance. Spelling, Sec. 1804, and cases cited. See *Ulmer* v. *Lime Rock R. R.*, 98 Maine, 579.

The same authority recognizes the difficulties attending the determination of whether the facts and circumstances of a given case amount to usurpation, perversion, or non-user, and rules are laid down to aid generally in the solution of questions arising. Idem, Sec. 1812.

In the treatment of the subject under discussion and the requirements of good pleading in respect to indictments and the information in the nature of quo warranto, authority is found for the application of the strict rule that "the same certainty and technical precision are required in both, and the principal if not the only, difference between them is, that an indictment is presented by the grand jury, on its oath, while the information in the nature of quo warranto, the court is informed of the facts by the State's attorney." *Donnelly* v.

People, 52 Am. Dec., 460; 11 Ill., 552. But we have no occasion to adopt such strict rule, or apply it in its essential force to the record before us.

In this case demurrer was properly interposed, and this conclusion is supported by well nigh universal judicial agreement that any defect in the structure of the information may be taken advantage of by demurrer. *Territory* v. *Lockwood*, 3 Wallace, 236. *State* v. *Kennedy*, 69 Conn., 220, Spelling, Vol. 2, Sec. 1846. Note to *People* v. *Rens. and Sar. R. R. Co.*, 30 Am. Dec., 51, and cases cited. *The People* v. *Richardson*, 4 Cowen, 97, 119. Note. 32 Cyc., 1449, Note 82.

The information declares that the public are interested, but from this bare statement it cannot follow that the public suffers injury from the act of the defendant. The complaint should be specific and contain sufficiently definite information in the first instance to enable the court to say that a case has been stated which ought to be further considered and a remedy applied. We cannot determine fairly from the information whether there is other remedy than the one sought. It does not inform the court of the proper facts from which to determine whether or not there has been a misuse, an overcharge, or unreasonable discrimination in which the public are interested. The information states a conclusion of law only, and being challenged properly by demurrer, we are constrained to hold that the objections raised by sections 3 and 4 of the demurrer are well within the rule, and supported by the weight of authority.

Whether the alleged misuser is such as works substantial injury to the public, or one of a private right, an injury to one or more individuals in which the public or whole community are not interested, or whether there is another remedy, are questions not passed upon in the present stage of the case.

The relief to be granted does not depend upon the prayer for relief, but upon the complaint and the evidence, and from the nature of the complaint, a resort to extraordinary remedy, it is surely but fair to require the complainant to reveal what he knows, to state his full case, so that the court may have sufficient information to authorize and justify the later steps necessary in quo warranto,—in short, the State above all other suitors can afford to inform the court frankly, fully, and in detail what is believed to be an injury or menace to the public. Such course will surely safeguard the interest of

a complainant, and accomplish another end of equal importance in safeguarding the interests of the individuals adverse to the complainant.

The following citation from a recent well-considered case shows the trend of judicial thought upon the subject:

"Courts will proceed with extreme caution in the forfeiture of corporate franchises. There must be a plain abuse of its powers, some grave misconduct, some act at least by which it has offended the law of its creation, or something material which tends to produce injury to the public, and not merely that which affects only private interests, for which other adequate remedies are provided." *State of Indiana* v. *Portland Gas & Oil Co.*, 153 Ind., 483; 53 L. R. A., 413.

In holding that the complaint is insufficient and necessarily sustaining the exceptions, we do not thereby dismiss the information.

The plaintiff may amend the complaint as in ordinary civil cases. If the complainant desires to amend, it may do so within 30 days from the filing of the certificate of decision, the further pleadings to be filed and testimony taken upon such notice to the parties as the sitting Justice may prescribe. If the amendment is not so filed, the information will be dismissed.

The entry will be,

Exceptions sustained.

SAM STERNS *vs.* HENRY HUDSON et als.

Penobscot. Opinion March 3, 1915.

Breach of Warranty. Burden. Damages. Exceptions. "Extra expenses" on Account of Sickness of Horse.

An action to recover damages for breach of warranty of a horse. Verdict was for plaintiff for $300. Defendant had exceptions to the admission of evidence of extra expenses incurred by the plaintiff on account of a disease which the horse had contracted before the alleged warranty.

Held:

1. The evidence offered tending to show loss and damage flowing directly from a breach of warranty is clearly admissible and testimony as to the extra expense incurred by plaintiff in caring for the horse, for medicine, for medical attendance and like expenses, is admissible, and that courts universally so hold.
2. The evidence upon the principal issue was conflicting, which issue was determined under proper instructions in favor of the plaintiff. The burden then changed and it became the duty of the defendant to make it clearly appear that the jury erred.

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

This is an action to recover damages for breach of warranty of a horse. Plea, the general issue. The defendants had exceptions to the admission of certain evidence. The jury returned a verdict for the plaintiff for three hundred dollars ($300.00), and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Terence B. Towle, for plaintiff.

Hudson & Hudson, for defendants.

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

HANSON, J. This is an action to recover damages for breach of warranty of a horse. The jury returned a verdict for the plaintiff in

the sum of $300 and the case is before the court on general motion and exceptions to the ruling of the presiding Justice admitting against objection evidence of expenses incurred by the plaintiff on account of a disease which the horse had contracted before the alleged warranty.

As to the motion. The evidence was conflicting upon the principal issue, which was determined under proper instruction in favor of the plaintiff. The burden then changed and it becomes the duty of the defendant to make it clearly appear that the jury erred. We have examined the record with great care in connection with the briefs of counsel, and we are unable to say that the verdict is clearly wrong.

The exceptions. The evidence introduced under objection related to "extra expenses, caused by the sickness of the horse" and under the ruling admitting the same, many questions were asked eliciting in detail the plaintiff's expenses due to such sickness, the amount of which as found in the special verdict was $50. The defendants have not referred to the exceptions in their brief, but being part of the record we deem the subject of sufficient importance to pass upon the questions raised. The action is for damages claimed to be due to a breach of warranty.

We think that evidence offered tending to show loss and damage flowing directly from a breach of warranty is clearly admissible, and testimony as to the expense incurred by the plaintiff in caring for the horse, for medicine, for medical attendance, and like expenses, is admissible, and that courts universally so hold.

Sedgwick on Damages, 9 Ed., Vol. 2, Sec. 772.

Peak v. *Frost,* 162 Mass., 298.

Heenan v. *Redman,* 101 Ill., Appeal, 603.

Cummins v. *Ennis,* 56 Atlantic Reporter, 377.

The entry will be,

Motion and exceptions overruled.

SARAH C. GOWER,

Appellant from Decree of Judge of Probate of Androscoggin County.

Androscoggin. Opinion March 3, 1915.

Appeal. Exceptions. Guardian. Mental Incapacity. Petition. Unsound Mind.

This was a petition to the Probate Court of Androscoggin County, asking for the appointment of W. H. Judkins as guardian of the appellant. Upon due notice and hearing thereon, it was decreed "that W. H. Judkins be appointed guardian of said Sarah C. Gower, and that letters of guardianship issue to him."

From this decree an appeal was taken to the Supreme Court of Probate. Hearing was had on the appeal and the decree was affirmed by the presiding Judge.

The case is before the Law Court on exceptions to the ruling, and respondent's counsel also filed a motion for a new trial.

Held:

1. The presiding Justice found that the appellant was incompetent to manage her estate and protect her rights. This was a finding of fact, and not an inference of law, and having ample evidence to support it, such finding is conclusive.
2. The findings of the Judge presiding in the Supreme Court of Probate in matters of fact are conclusive, if there is any evidence to support them. And when the law invests him with the power to exercise his discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions.
3. There is no statute or rule authorizing a motion for a new trial in cases of appeal from a decree of a Judge of Probate, or of a single Justice in matters heard by him without a jury.

On motion and exceptions by respondent. Exceptions overruled. Motion overruled.

This is a petition to the Probate Court of Androscoggin County, asking for the appointment of W. H. Judkins as guardian of Sarah C. Gower. Upon notice and hearing thereon, said Judkins was appointed guardian of said Sarah C. Gower. From this decree, an appeal was taken to the Supreme Court of Probate. In the Supreme Court of

Probate, a hearing was had on the appeal and it was ordered that the decree of the Judge of Probate, appointing W. H. Judkins, guardian, be affirmed. To this decree affirming the decree of the Judge of Probate, respondent excepted, and a motion for a new trial was filed.

The case is stated in the opinion.

Ralph W. Crockett, for petitioner.

McGillicuddy & Morey, for defendant.

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

HANSON, J. This was a petition to the Probate Court of Androscoggin County asking for the appointment of W. H. Judkins as guardian of the appellant. Upon due notice and hearing thereon it was decreed "that W. H. Judkins be appointed guardian of said Sarah C. Gower, and that letters of guardianship issue to him."

From this decree an appeal was taken to the Supreme Court of Probate. Hearing was had on the appeal and the following decree entered by the presiding Judge:

"This appeal is from the appointment of a guardian of the appellant, as a person of unsound mind, who by reason of infirmity and mental incapacity is incompetent to manage her estate and protect her rights.

The appellant is seventy years old, feeble in body, and undoubtedly of unsound mind in some respects. She has an estate of several thousand dollars. I do not think there is any danger that she will waste any of it upon herself. But the condition of her mind is such, owing to her delusions and hallucinations, that I think she is incompetent to protect her estate, and properly manage it.

It is therefore ordered that the decree of the Judge of Probate, appointing Wilbur H. Judkins, Guardian, be affirmed, and that the proceedings be remanded to the probate court."

The case is before the Law Court on exceptions to the ruling, and respondent counsel have filed a motion for a new trial on the ground that the decree is, 1st, against the evidence; 2nd, against law.

The exceptions must be overruled. A perusal of the record discloses that full hearing was had, and ample opportunity afforded for presentation of evidence. The petitioner was upon the stand and much time was devoted to the inquiry as to her mental condition and ability to manage her own estate.

The presiding Judge found that the appellant was incompetent to manage her estate and protect her rights. This was a finding of fact, and not an inference of law, and having ample evidence to support it, such finding is conclusive. *Costello* v. *Tighe*, 103 Maine, 324.

The question here involved is treated fully in *Palmer's Appeal*, 110 Maine, 441. Among other things the opinion holds:

"The findings of the Justice presiding in the Supreme Court of Probate in matters of fact are conclusive, if there is any evidence to support them. And when the law invests him with the power to exercise his discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority his doings may be challenged by exceptions."

Our conclusion necessarily disposes of the motion. It was not urged by counsel, and its purpose in the proceeding is not apparent. We know of no statute or rule authorizing a motion for a new trial in cases of appeal from a decree of a Judge of Probate, or of a single Justice in matters heard by him without a Jury.

The entry will be,

Exceptions overruled.
Motion overruled.

HENRY DENNIS *vs.* WATERFORD PACKING COMPANY.

Cumberland. Opinion March 3, 1915.

Bill of Exceptions. Broker. Commissions. Exceptions. Fancy Corn. Samples. Self-serving Evidence.

1. The court is not bound to consider exceptions, unless the bill of exceptions itself states the grounds of exceptions in a summary manner; nor unless it states the evidence, concerning the admission or exclusion of which complaint is made, and enough of the contentions or issues in the case to show that it was relevant or irrelevant, material or immaterial, competent or incompetent, as the case may be; nor, unless it contains the requested instructions, to the refusal of which exception is taken, and sufficient matter to show that the requested instructions were appropriate.
2. Neither the reference in a bill of exceptions to the body of the evidence, nor the incorporation of the evidence as a part of the bill of exceptions can take the place of a succinct and summary statement of the specific grounds of exception in the body of the bill itself.
3. Letters and telegrams sent in the general course of business by one party to a suit to the other, which by the character of their contents are naturally calculated to elicit replies and denials are admissible in evidence, although they are self-serving, and are not answered.
4. A broker has earned his commissions for the sale of goods, when he has produced a customer who is ready and willing to buy on the seller's terms, and is able to pay.
5. In a suit by a broker to recover commissions, it appears so clearly that the defendant offered for sale "fancy" packed corn; that the plaintiff produced a customer ready and willing to buy "fancy" packed corn, and able to pay for it; that the corn offered was not "fancy" and that for that reason the customer refused to take it, that a verdict for the defendant is set aside.

On exceptions and motion by plaintiff. Exceptions sustained. Motion for new trial sustained.

This is an action on the case tried in the Superior Court for Cumberland County at the November term, 1913, to recover commissions for procuring a customer, who was ready, willing and able to purchase certain canned corn offered for sale by the defendant to the

plaintiff, a broker. The defendant plead the general issue and filed a brief statement. The plaintiff had various exceptions to the admission and exclusion of evidence, and to the charge of the presiding Judge. The defendant moved that the plaintiff's bill of exceptions be dismissed on the ground that they are not sufficiently definite, specific and summary. This is considered in the opinion. The jury returned a verdict for the defendant, and plaintiff filed a general motion for a new trial.

The case is stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Eben Winthrop Freeman, for defendant.

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

SAVAGE, C. J. Action by a broker to recover commissions. The verdict was for the defendant, and the case comes before this court on the plaintiff's exceptions and motion for a new trial.

The defendant moves that the exceptions be dismissed on the ground that they are not sufficiently definite, specific and summary. The bill of exceptions states that,

"During the trial, the plaintiff seasonably objected to the admission of certain testimony, and when the same was admitted noted his exceptions.

During the trial the plaintiff offered certain testimony which the presiding Justice excluded, and the defendant (plaintiff?) duly excepted.

At the close of the evidence the plaintiff duly requested the presiding Justice to give certain instructions to the jury, which the presiding Justice refused to give, and the defendant (plaintiff?) duly excepted."

There is in the bill no other or particular statement of what the evidence was which was thus admitted or excluded. Nor is there anything in the bill to show that the evidence admitted was irrelevant, immaterial or incompetent; nor that the evidence excluded was relevant, material and competent; nor is there anything to show that the requested instructions were appropriate. There is nothing to show that the rulings and refusals to rule were erroneous or prejudicial. This statement brings this bill of exceptions precisely within

the teeth of *McKown* v. *Powers*, 86 Maine, 291. It does not present separately each issue of law in that clear, distinct, summary manner required by the statute. R. S., Chap. 79, Sec. 55. *Salter* v. *Greenwood*, 112 Maine, 548.

It is needless to cite the long line of cases in this State which hold that the excepting party must on the face of the bill show that he has been aggrieved, and this rule requires that the bill should state the evidence concerning the admission or exclusion of which complaint is made, and enough of the contentions or issues in the case to show that it was relevant or irrelevant, material or immaterial, competent or incompetent, as the case may be. In the case of *McKown* v. *Powers*, which was but a restatement of the existing rule, the court declared in substance that it would not feel bound to consider exceptions so irregularly presented, and that it would not do so, unless in exceptional cases. This warning was repeated in *Wilson* v. *Simmons*, 89 Maine, 242, in which the court used this language: "An imperative rule has been established and repeatedly reaffirmed in order to secure greater regularity and certainty in the administration of justice, and no material relaxation of the rule will be countenanced, unless for special and peculiar reasons in furtherance of justice." The doctrine of *McKown* v. *Powers* has been many times reaffirmed since that case was decided, the latest instance being in the very recent case of *Salter* v. *Greenwood*, 112 Maine, 548.

It is true in this case, as it was in *McKown* v. *Powers*, that the record of the evidence is made a part of the bill of exceptions, but that does not help the matter. It is not a "summary" bill, as contemplated by statute. It is not an infrequent practice in framing a bill of exceptions to refer to the evidence and make it a part of the bill. This is not improper. The evidence may help to illuminate the exceptions. But neither the statute, nor approved practice, contemplates that a reference in the bill to the body of the evidence, or the incorporation of the evidence as a part of the bill, is to take the place of succinct and summary statement of the specific grounds of exception in the body of the bill itself. In view of the statute and the rule, we do not think it is the duty of the court to hunt through a mass of undigested, and sometimes indigestible, testimony, to find the points of exception, and determine their value.

The motion of the defendant might well be granted, if that would end the case. But as an examination of the record under the motion

for a new trial has led us to the conclusion that the case must be sent back for a new trial, we deem it to be for the interest of both parties to consider now one or two questions concerning which exceptions were taken. And this necessitates a brief statement at this point of the issue between the parties.

The defendant corporation is a packer of corn. The plaintiff is a broker of corn packing products. On October 12, 1912, the defendant wrote to the plaintiff as follows:—"Having finished packing corn we are now in the market with about Ten Thousand Cases Fancy, which we offer at $1.00 net per dozen cases, F. O. B. Harrison, Maine, with the customary label allowance." Thereupon the plaintiff offered the corn to Austin-Nichols Co. of New York, upon the terms named in the letter. October 14, Austin-Nichols Company accepted the offer subject to approval of case of "fancy" representing average quality. The plaintiff notified the defendant of the acceptance, and requested it to send sample case to Austin-Nichols Company for their approval. A sample case was accordingly sent. October 19, Austin-Nichols Company wired the plaintiff, "Sample case Waterford corn received. Not fancy quality. Cannot use." The telegram was offered in evidence, and excluded on the ground that it was merely hearsay evidence, as to the quality of the corn. The plaintiff testified that upon receipt of the telegram he wrote a letter to the defendant in which he communicated the information received in the telegram, or, as we understand it, the substance of the telegram. Then he offered to show the contents of that letter. The evidence of the contents of the letter was excluded on the ground that they were self-serving statements.

We have recently held that letters and telegrams sent in the general course of business, by one party to a suit to the other, and not specifically to manufacture evidence, which by the character of their contents are naturally calculated to elicit replies and denials, are admissible in evidence, although they are self-serving, and are not answered. *Ross* v. *Reynolds*, 112 Maine, 223; *Keeling-Easter Co.* v. *Dunning Co.*, 113 Maine, 34. The ground of admissibility is not that the writings themselves afford proof that the statements in them are true, but that silence when such statements are made may itself be an admission. We think the evidence offered and excluded falls within this rule, and that it should have been admitted. These observa-

tions will apply also to other instances of exclusion of oral statements made by the plaintiff to the representative officers of the defendant. The exceptions must be sustained.

The motion can be disposed of briefly. If the plaintiff produced a customer ready and willing to buy on the defendant's terms, and able to pay, he earned his commissions. That the plaintiff produced a customer ready and able to buy "fancy" corn and that it was "fancy" corn which the defendant in its letter to the plaintiff proposed to sell, the testimony leaves no real doubt. It is undisputed. Neither can there be any real doubt that the customer refused to accept the corn on the claimed ground that it was not "fancy" corn.

This leaves only two questions for consideration, 1, was the customer willing to buy the corn if it was "fancy corn?" and 2, was it fancy corn? We find nothing in the testimony which tends to show that the customer was not willing to buy, if the corn proved to be as represented, "fancy" corn. Even after it wired the plaintiff that the sample sent was not "fancy quality," it sent its agent and buyer from New York to Waterford to inspect the corn, and to see if in fact the bulk of it was "fancy." And he after examination refused to accept it for the reason that it was not "fancy." Every consideration of the evidence tends to the conclusion that the customer was willing to buy "fancy" corn. There is no warrant for a contrary conclusion.

Lastly, was the corn "fancy" corn? The evidence is undisputed that there are known to the trade two principal grades of packed corn; one is called "Standard" and the other "Fancy." "Fancy" corn is the higher grade. It is not the best part of the pack in any particular year. It is the very best part of a good pack. It is corn that is packed from tender, creamy corn, and with good consistency. It is sweet, tender, of extra flavor, not hard nor wet, and got when the corn is "right in the milk," as it is called. There is direct evidence in the case that the corn in question was not "fancy" corn, as that corn is regarded in trade. And a most significant piece of evidence on this issue is the low price at which the defendant was afterwards willing to sell the bulk of it, compared with the then going price for "fancy" corn. Aside from some evidence, which is disputed, that the plaintiff said after examination that the corn was all right, the defendant offered no evidence whatever that the corn was in fact "fancy." The highest praise given to the corn by the defendant's

witnesses, in our judgment, falls very considerably short of showing that it was "fancy." And counsel in the brief submitted makes no claim that the corn was "fancy."

Upon the record now before us, we think it is unmistakable that the verdict is wrong. Justice requires that it be set aside.

Exceptions sustained.
Motion for a new trial sustained.

DANIEL J. BUCKLEY

vs.

BANGOR AND AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion March 3, 1915.

Common Carrier. Contract. Damage. Due Care. Exemption from Liability. Exceptions. Highest Degree of Care. Injuries. Negligence Pass. Transportation. Traveling Gratuitously.

A shipper of potatoes over defendant's railroad had the option to ship them in Eastman Heater cars, by paying an additional charge for heating, or in the defendant's box cars, to be lined and heated at his own expense, and to be accompanied by a caretaker, also at his own expense. If the potatoes should be shipped in Eastman cars, the owner of those cars assumed the risk of freezing; if, in the defendant's cars, the shipper assumed that risk. The freight charge for transportation received and retained by the defendant was the same in either case, and was the same whether the potatoes should be accompanied by a caretaker or not. But when potatoes were shipped in box cars at the shipper's risk, he had the right to send a caretaker on the train with them to keep the cars warm and the potatoes from freezing, with no extra charge for transportation of the caretaker on the passage out, and with a reduced fare for his carriage home. The shipper chose to ship in defendant's box cars, and employed the plaintiff as caretaker. Before starting, the plaintiff, in accordance with the understood terms of shipment, signed a release or waiver of the defendant's liability to him, for injuries which might be causd by its negligence, or otherwise. The plaintiff was injured on the passage out, through the negligence of the defendant's servants. In a suit brought to recover for his injuries,

Held:

1. That the charge for the transportation of the potatoes included the carriage of the plaintiff as caretaker, and that the plaintiff was a passenger for hire.
2. That the plaintiff's release of the defendant from liability for the consequences of its own negligence, or that of its servants, was void.
3. That a common carrier of passengers cannot, by a prior contract of exemption, relieve itself from liability to a passenger for hire for the consequences of its own negligence, or that of its servants, It is otherwise in the case of a gratuitous passenger.

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

This is an action on the case to recover for personal injuries caused by the alleged negligence of the defendant, in the transportation of the plaintiff as a passenger. The defendant claims that the plaintiff, at the time he received his injuries, was traveling gratuitously on a freight train of defendant. Plea, general issue, with brief statement. To the refusal of the presiding Justice to direct a verdict for the defendant, the defendant excepted. The jury returned a verdict for the plaintiff of $600.00, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

Hersey & Barnes, and Howard Pierce, for plaintiff.

Powers & Guild, and Joseph F. Gould, for defendant.

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

SAVAGE, C. J. Case to recover for injuries sustained by plaintiff while traveling on the defendant's railroad, February 8, 1913. The verdict was for the plaintiff. To a refusal of the presiding Justice to direct a verdict for the defendant, the defendant excepted. It also filed a motion for a new trial. As the same questions arise under the exceptions as under the motion for a new trial, they will be considered together.

The essential facts are not in dispute. The plaintiff was employed by one Smith as caretaker of five cars of potatoes shipped by the latter from Mars Hill in this State to Boston, Massachusetts, and, in the course of his employment, was, at the time of the accident, traveling upon defendant's freight train, of which these cars formed a part. His duties, under his employment, were to keep the cars

warm and keep the potatoes from freezing. Before starting, the plaintiff signed a contract with the defendant, by which, in consideration of his carriage upon the freight train, he, in terms, "voluntarily assumed all risks of accident or damage," and released the defendant from all liability for personal injury sustained by him, whether caused by the negligence of the defendant or its employes, or otherwise." On the outward trip from Mars Hill he received the injury, for which he now seeks compensation.

The defendant admits that the plaintiff at the time of the accident was in the exercise of due care, that the injuries were caused by the negligence of the defendant's employes, and that the damages awarded are not excessive. But the defendant contends that the plaintiff was traveling gratuitously, and is therefore barred of his right to recover by his contract of release. On the other hand the plaintiff contends that he was, under the circumstances, a passenger for hire. And this is the single issue in the case. If the plaintiff was traveling gratuitously he cannot maintain the action; otherwise, the verdict must stand.

It was admitted at the trial that "at the time of the accident, there existed these methods and charges in transporting potatoes: First, the defendant company might furnish an Eastman heater car, and during the season when heat was required such car was heated by the Eastman Company, for which the shipper paid an extra charge known as the heater charge, this charge being collected by the defendant company at the time when it collected its transportation charges, but a separate receipt was given for the heater charges, and none of the money collected as a heater charge was retained by the defendant company, but was forwarded to the Eastman Company; secondly the defendant company might furnish to the shipper an ordinary box car, and, when the weather required it, the shipper might at his own expense line such car and furnish stove and fuel for heating the same, in which case a transportation charge alone was made. In any event, whether the potatoes were transported at a season of the year when heat was needed, or otherwise, or whether transported in an Eastman heater car or in a box car, lined or unlined, the charge for transportation was the same throughout the year. When the potatoes were shipped in a lined car, at a season requiring heat, a caretaker was furnished by the shipper at his own expense, and traveled on the defendant's road as this plaintiff was traveling.

When the potatoes were shipped in an ordinary car with lining and heat furnished by the shipper, and a caretaker also furnished by the shipper, the defendant corporation was not liable for damage sustained by having the potatoes frozen; on the other hand, when the potatoes were shipped in an Eastman heater car, the Eastman Company was responsible for any damages sustained by the freezing of the potatoes.

No ticket or pass was furnished to the caretaker, or in this case, to the plaintiff, on his trip from point of shipment to point of destination: but he traveled that part of his journey by virtue of the terms of a certificate" issued to him, which stated that he was a caretaker of the cars in question and that he was entitled to agreed caretaker's fare for the return trip. "Upon reaching his point of destination, the caretaker could obtain a return ticket at the reduced rate of one cent a mile, by exhibiting the certificate to the ticket agent at point of destination."

In this case the shipper chose the second of the modes of transportation referred to. It does not appear that he made any special contract with the defendant respecting liability. His implied contract was, as may be inferred from the admission, to assume the risk of freezing, but no other risks. He took ordinary box cars, furnished by the defendant, lined them, furnished fuel for them, and furnished the plaintiff as a caretaker for them, all at his own expense. And he paid the defendant company the ordinary transportation charges, but no heater charge. And he paid no charge for the fare of the plaintiff on the outward trip, unless such a charge is deemed to be included in the general charge for transportation of the potatoes.

The conflict between the parties is centered upon the question, what effect is to be given to the release signed by the plaintiff before starting? And that depends upon whether he was riding gratuitously, or was a passenger for hire.

It is settled with practical uniformity of decisions that a common carrier of passengers cannot, by antecedent contract or release, exempt itself from liability to a passenger for hire, for its own negligence, or that of its servants, no matter in what way the hire or compensation has been paid, or is to be paid. The denial of the right to contract for such exemption is based upon the salutary principle that the safety of the general traveling public requires that a common carrier of passengers must be held to the highest degree of

care. A contract for such exemption is contrary to public policy, a public policy which is based upon the interest which the State has in the lives of its citizens. The duty of exercising that care is one from which such a carrier cannot escape, when it undertakes to carry passengers for hire. *Libby* v. *M. C. R. R. Co.*, 85 Maine, 34; *Rogers* v. *Steamboat Company*, 86 Maine, 261; *Doyle* v. *Fitchburg R. R. Co.*, 166 Mass., 492; *Pennsylvania Co.* v. *Henderson*, 51 Pa. St., 315; *Flinn* v. *Philadelphia, etc., R. Co.*, 1 Houst. (Del.), 357; *Cleveland, etc., R. Co.* v. *Curran*, 19 Ohio St., 1; *Louisville, etc., R. Co.* v. *Keefer*, 146 Ind., 21; *Carroll* v. *Mo. Pac. R. Co.*, 88 Mo., 237; *Davis* v. *Chicago, etc., R. Co.*, 93 Wis., 470; *Louisville, etc., R. Co.* v. *Bell*, 100 Ky., 203; *Lackawanna, etc., R. Co.* v. *Chenewith*, 52 Pa. St., 382; *Southern R. Co.* v. *Watson*, 110 Ga., 681; *Kansas City, etc., R. Co.* v. *Simpson*, 30 Kan., 645; *Weaver* v. *Ann Arbor R. R. Co.*, 139 Mich., 590; *Baltimore, etc., R. Co.* v. *McLaughlin*, 73 Fed., 519; *Railroad Co.* v. *Lockwood*, 17 Wall., 357; *Grand Trunk Ry. Co.* v. *Stevens*, 95 U. S., 655; *Liverpool, etc., Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397. And one riding on a so called "free pass" for which a valuable consideration has been given is a passenger for hire. *Greswald* v. *N. Y. & N. E. R. Co.*, 53 Conn., 371; *Doyle* v. *Fitchburg R. R. Co.*, 162 Mass., 66; *Com.* v. *Vt. & Mass. R. R. Co.*, 108 Mass., 7. Or on a pass issued in connection with business in which the carrier has an interest. *G. T. R. Co.* v. *Stevens*, 95 U. S., 655.

It is generally held, also, upon grounds of public policy, that a common carrier of passengers is under the same liability, in the absence of exemption contract, for injuries resulting from its negligence, to persons traveling on a free pass, or gratuitously, as it is to passengers for hire. *Rogers* v. *Steamboat Co.*, 86 Maine, 261; *Quimby* v. *B. & M. R. R.*, 150 Mass., 365; *Griswold* v. *N. Y. & N. E. R. Co.*, 53 Conn., 371; *Louisville, etc., R. Co.* v. *Taylor*, 126 Ind., 126; *Todd* v. *Old Colony R. Co.*, 3 All., 18; *Williams* v. *Oregon Short line*, 18 Utah, 210; *Waterbury* v. *N. Y. C., etc., R. Co.*, 17 Fed., 671.

But it is well settled in this State that the rule of public policy does not prevent the carrier, in cases of purely gratuitous carriage, from contracting exemption from its liability, even for its own negligence. And one who accepts gratuitous carriage, having first contracted to exonerate the carrier from such liability, is to be held to the terms of his contract. *Rogers* v. *Steamboat Co.*, 86 Maine, 261. And such is the prevailing rule elsewhere. *Quimby* v. *B. & M. R. R.*, 150 Mass.,

365; *Griswold* v. *N. Y. & N. E. R. Co.*, 53 Conn., 371; *Kinney* v. *Central, etc., R. Co.*, 34 N. J. Law, 513; *Wells* v. *N. Y. C. R. Co.*, 24 N. Y., 181; *Payne* v. *Terre Haute, etc., R. Co.*, 147 Ind., 616; *Muldoon* v. *Seattle City, etc., R. Co.*, 7 Wash., 528; *Northern Pac. R. Co.*, v. *Adams*, 192 U. S., 440.

Some courts hold that while the carrier, in cases of gratuitous carriage, may exempt itself for liability for negligence not amounting to gross negligence, yet it cannot contract against liability for the consequences of its gross negligence. *Indiana, etc., R. Co.* v. *Mundy*, 21 Ind., 48; *Ames* v. *Milwaukee, etc., R. Co.*, 57 Wis., 46. A few other courts hold that a common carrier of passengers cannot by contract exempt itself from liability for negligence of any degree whatsoever, even to persons traveling gratuitously. *M. & O. R. Co.* v. *Hopkins*, 41 Ala., 486; *Mo. Pac. R. Co.* v. *Ivey*, 71 Tex. 409; *Gulf, etc., R. Co.* v. *McGowan*, 65 Tex., 640; *Rose* v. *Des Moines Valley R. Co.*, 39 Iowa, 246; *Pennsylvania R. Co.* v. *Butler*, 57 Pa. St., 335; *Jacobus* v. *St. Paul, etc., R. Co.*, 20 Minn., 125.

The question of what is gratuitous carriage has been discussed in a large number of cases known as "drovers' pass" cases. And it has been universally held that when a shipper of cattle or other live stock, or his caretaker, is transported in accordance with the contract of shipment, or by arrangement with the company, over the lines of a railroad company for the purpose of feeding, watering, or otherwise caring for the cattle which he accompanies, either upon what is nominally called a free pass, or upon contract express or implied that no compensation is to be paid for his carriage in addition to what is paid for the transportation of the cattle, he is not traveling gratuitously, but is a passenger for hire, and that any contract by the shipper, or by the caretaker, exempting the railroad company from liability for the consequences of its negligence to him as such a passenger is void, as under the general rule. The agreement for his carriage is a part of the agreement for the transportation of the live stock. It is virtually all one contract. While the compensation paid is professedly for the transportation of the stock, it involves the condition that the shipper or a caretaker is to be allowed to ride along for the purpose of caring for it. And the consideration for the carriage of the shipper, or caretaker, is included in the charge made for transporting the stock. The transportation is not a matter of charity or gratuity, but one for a valuable consideration. *Pennsylvania, etc.,*

R. Co. v. *Henderson*, 51 Pa. St., 315; *Rowdin* v. *Pennsylvania, etc., R. Co.*, 208 Pa. St., 623; *Carroll* v. *Mo. Pac. R. Co.*, 88 Mo., 239; *Smith* v. *N. Y. C., etc., R. Co.*, 24 N. Y., 222; *Smith* v. *N. Y. C., etc., R. Co.*, 26 Barb., 132; *Cleveland, etc., R. Co.* v. *Curran*, 19 Ohio St., 1; *Ohio, etc., R. Co.* v. *Selby*, 47 Ind., 471; *Weaver* v. *Ann Arbor R. R. Co.*, 139 Mich., 590; *Little Rock, etc., R. Co.* v. *Miles*, 40 Ark., 298; *Ill. Central R. Co.* v. *Beebe*, 174 Ill., 13; *New York, etc., R. Co.* v. *Blumenthal*, 160 Ill., 40; *Flinn* v. *Phil., etc., R. Co.* 1 Hust. (Del.) 469; *Ill. Cent. R. Co.* v. *Anderson*, 184 Ill., 294; *Saunders* v. *South Pac. R. Co.*, 13 Utah, 275; *Feldshmeider* v. *Chicago, etc., R. Co.*, 122 Wis., 423; *O. & M. R. Co.* v. *Nickless*, 71 Ind., 271; *Deleware, etc., R. Co.* v. *Ashley*, 67 Fed., 209; *B. & O. R. Co.* v. *McLaughlin*, 73 Fed., 519; *Kirkendall* v. *Union Pac. R. Co.*, 200 Fed., 197; *G. T. Ry.* v. *Stevens*, 95 U. S., 655; *Railroad Co.* v. *Lockwood*, 17 Wall., 357.

But the defendant company contends that the "drovers' pass" cases, though they seem analogous to the case at bar, are not in point in this discussion. It is claimed that the reasons, or some of them, stated for the rule in the "drovers' pass" cases, and particularly in the leading case of *Railroad Co.* v. *Lockwood*, 17 Wall., 357, are not applicable here. It seeks to distinguish those cases from the one now under consideration, by pointing out that while in earlier days shippers were at the mercy of the transportation companies, and were compelled to submit to such conditions as they thought fit to impose, this being one of the reasons assigned for the rule, now "powerful corporations no longer exercise absolute power over travel and transportation. The public are no longer compelled to accept such conditions as the corporations may see fit to impose upon the carrying trade. Shippers are no longer at the mercy of common carriers in regard to traffic rates. Neither passengers nor shippers or their employees are compelled to enter into contracts to exonerate the carrier from liability." Counsel add that the shipper in this case had a real freedom of choice, a practical alternative, and that it was immaterial to the defendant whether the potatoes were transported in a box car with a caretaker employed and paid by the shipper, or in an Eastman heater car; that the amount of compensation to be received by it was the same in either case; that it was not liable for freezing, whichever method was chosen by the shipper, because if shipped in an Eastman car the owner of that car assumed the risk, and if shipped in a lined box car, accompanied by a care-

taker, the shipper took the risk; that the defendant fulfilled its whole duty by offering two reasonable alternative methods of shipment; that the plaintiff, the caretaker, was the shipper's man; that he performed no duties that the defendant was bound to perform, and that his presence on the car did not relieve the defendant from the performance of any duty, or from any liability imposed upon it by law. And in these respects, it is claimed that this case differs from the Lockwood case, and other "drovers' pass" cases.

On the other hand, the defendant contends that this case does come within the principle laid down in the "express messenger" cases, of which *B. & O. R. Co.* v. *Voight*, 176 U. S., 498, is the leading one. We will examine this case before discussing the propositions already stated. In the Voight case, an express company had entered into a general continuing contract with a railroad company, by which the latter, for an agreed compensation, furnished cars and other facilities for the exclusive use of the former, in the transportation of express matter, in charge of messengers, who were to ride in the express cars free of charge. It was agreed that the express company would hold the railroad company harmless from all liability it might be under to employees of the express company for injuries sustained by them while being transported, whether the injuries were caused by the negligence of the railroad company or its employees, or otherwise. Voight, entering the service of the express company as messenger, signed a contract whereby he agreed to assume all risks of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railroad company. It was held that Voight was not a passenger for hire, that his contract of exemption was valid, and that he could not maintain an action against the railroad company for injuries occasioned by the negligence of the railroad company or its employees. The court said: "We have here to consider not the case of an individual shipper or passenger, dealing at a disadvantage with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the whole country. . . . The reason is obvious why special contracts in reference to this business is necessary. . . . It is evident that by these agreements, there was created a very different relation between Voight and the railway company than the

usual one between passengers and railroad companies. Here was no stress brought to bear on Voight as a passenger desiring transportation. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. . . . He was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered the same freely and voluntarily."

The defendant here quotes this language relating to Voight's relation to the railroad company there as describing very closely the relation of the plaintiff in this case to the defendant railroad company. But we think there is a vital distinction. It grows out of the essential difference between the character of the duties being performed by the carrier in the one case, and those being performed in the other. The carrier in one case is a private carrier, in the other a common carrier. As a private carrier it may contract for exemption from liability for its negligence; as a common or public carrier, it cannot.

A common carrier may become a private carrier, or bailee for hire, when as a matter of accommodation or special engagement, it undertakes to carry something which it is not its duty or business to carry. *Liverpool, etc., Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397; *Railroad Co.* v. *Lockwood*, 17 Wall., 357; *Coup* v. *Wabash, etc., Ry. Co.*, 56 Mich., 111; *Robertson* v. *Old Colony R. R. Co.*, 156 Mass., 525; *Chicago, etc., R. Co.* v. *Wallace*, 66 Fed. Rep., 506. A railroad is not a common carrier of common carriers. *Railroad Co.* v. *Lockwood*, 17 Wall., 357; *Blank* v. *Ill., etc., R. Co.*, 182 Ill., 332. It is not required by usage, nor by common law to transport the traffic of independent express companies over its lines in the manner in which the traffic is usually carried. *Louisville, etc., R. Co.* v. *Keefer*, 146 Ind., 21. It may be so required by statute. R. S., Chap. 52, Sec. 17. *N. E. Exp. Co.* v. *M. C. R. R. Co.*, 57 Maine, 188; *International Express Co.* v. *Grand Trunk Ry.*, 81 Maine, 92. But in the absence of statutory requirements, it is not required to furnish facilities for express companies. And being under no duty, it may make special contracts limiting its liability. It contracts then as a private carrier. It may contract for non-liability to a messenger who is being carried for the purpose of handling and caring for the express companies' goods,

which are being carried under the terms of a special contract, and which it was not otherwise bound to carry at all. *Bates* v. *Old Colony R. R. Co.*, 147 Mass., 255; *Hosmer* v. *Old Colony R. R. Co.*, 156 Mass., 506; *Blank* v. *Ill., etc., R. Co.*, 182 Ill., 332; *Pittsburgh, etc., R. Co.* v. *Mahoney*, 148 Ind., 196. In the last named case, the court said:— "An attempt is made to liken this case (express case) to the case where a person is carried with his stock or goods and where he is regarded as a passenger. There are many such cases where the carrier is bound to receive and carry goods or stock, and where by general usage or by the rules of the company, the owner or his agent may go or is required to go in charge of the property. In such case the owner is entitled to demand the carriage of his property as a part of the duty of the railroad company toward the public as a common carrier, under the conditions fixed by law. The railroad company is bound to receive and carry for anybody who shall appear, and by the rules or usage of the company the charge for carrying the stock includes the carrying of the person in charge. Such a person is a passenger. But the difference in the relation between such a case and this is apparent."

The difference between the express messenger cases and the case at bar is equally apparent. Here the railroad company was engaged in the performance of its duty as a common carrier, transporting potatoes. It could not limit its liability for negligence to a passenger for hire.

We now revert to the defendant's contention that this case should be distinguished from the "drovers' pass" cases. We think that in principle it cannot be distinguished. We do not think that the fact that the shipper had an election by which method the potatoes should be shipped is important in this case. Nor is the fact that the defendant's freight charge was the same by whatever method, or at what season, potatoes were transported; nor the fact, if it be a fact, that the plaintiff rendered no service to the defendant, and that his presence with the potatoes was of no benefit to the company.

Whatever right of election the shipper had, the plaintiff had none. And we are not now concerned with the shipper's right to a remedy. The shipper made the election. And out of that election arose, in accordance with the defendant's usage in such cases, an implied contract that the shipper was to ship his potatoes in lined box cars, and that some person was to accompany them as a caretaker to keep

the cars warm, and the potatoes from freezing. It was all one contract, and the plaintiff had nothing to do with making it. That implied contract having been made, the plaintiff appears on the scene as the caretaker contemplated. Under the implied contract he had a right to carriage with the potatoes. The sum agreed to be paid for the transportation of the potatoes included his carriage. His carriage therefore was not gratuitous. Having a right under the implied contract to travel with the potatoes, his release of the defendant from liability was without consideration and gratuitous. See *Deleware, etc., R. Co.* v. *Ashley,* 67 Fed. Rep., 209.

In a case where a shipper of cattle had the option to pay more and hold the carrier to its full responsibility as a common carrier, but chose to pay less and assume risks himself, and his caretaker signed a release from liability in consideration of his carriage on the stock train without charge, other than the sum paid for transporting the cattle, it was held that the caretaker's contract was based on the same consideration as the shipper's contract, and that the caretakers' contract of exemption was invalid. *Spriggs, Adm'r,* v. *Rutland R. R. Co.,* 77 Vt., 347.

With reference to the argument that the doctrine of public policy which holds common carriers liable in spite of contracts of exemption, because shipper and carrier do not stand on equal footing, is not applicable when the shipper has an election, we may observe in the first place that that may depend upon what kind of an election he has; again that that doctrine relates to cases of passengers for hire, and does not undertake to determine who are passengers for hire, and lastly, as already stated, this plaintiff had no choice of methods.

That the plaintiff's duties may have involved no service for the defendant makes no difference in this case. A caretaker accompanying stock or goods is a passenger for hire, either when he renders a service to the carrier which furnishes a consideration for his carriage, or when the contract of shipment included his carriage. *Weaver* v. *Ann Arbor R. R. Co.,* 139 Mich., 590; *New York, etc., R. Co.* v. *Blumenthal,* 160 Ill., 40. The facts bring this case, at least, within the latter alternative.

We conclude that the plaintiff was a passenger for hire. The same money that paid for the transportation of the potatoes paid for his carriage. And in this respect it makes no difference whether the shipper or the defendant received the benefits of his service. His carriage was paid for.

It follows in accordance with the universal rule that his contract releasing the defendant from liability for the consequence of its negligence was void. The presiding Justice so ruled in effect when he refused to direct a verdict for the defendant. The verdict for the plaintiff was right.

Exceptions overruled.
Motion overruled.

NATIONAL FURNITURE COMPANY

vs.

INHABITANTS OF CUMBERLAND COUNTY.

Cumberland. Opinion March 4, 1915.

Breach. Covenant for Quiet Enjoyment. Enjoyment. Eviction. Intention to Evict. Lease. Ouster. Possession. Repairs.

An action for breach of the covenant for quiet enjoyment, expressed and implied in a lease between the parties, dated January 1, 1912. The presiding Justice directed a verdict for defendant.

Held:

1. The case is not doubtful. The evidence would not have warranted a verdict for the plaintiff, and there was no evidence from which a different conclusion might be drawn by different minds.
2. Breach of a covenant for quiet enjoyment is the basis of the action. In resorting to this form of action, the plaintiff has mistaken his remedy, if he was damaged by the act of the defendant, for a covenant for quiet enjoyment in a lease is broken only by an eviction.
3. The lease made provision for the entry of the County Commissioners for making repairs and improvements and the performance of any other duties required by them, by virtue of their office, and for abatement of rent during any suspension of the plaintiff's occupancy.
4. These provisions were known to both parties, and the likelihood of their exercise must be held to have been in the contemplation of both parties at the date of the execution of the lease.

5. It is settled that to constitute an eviction, one must be actually dispossessed by one having the real title, or one under a paramount title.
6. An eviction is not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord for the purpose and with the intention of depriving the tenant of the demised premises.
7. Every eviction includes an ouster, either of the whole or some part of the demised premises, and may be accomplished by the wrongful acts of the lessor depriving the lessee of the beneficial enjoyment of the premises, and the lessee in consequence abandons the same.
8. Such wrongful acts amount in law to an eviction, without other evidence that the landlord intended to deprive the tenant of possession.
9. But the mere fact that by an act or default of the landlord, not unlawful in itself, nor accompanied with any intention to effect the enjoyment of the premises demised, they have been rendered uninhabitable, is not sufficient to constitute an eviction.
10. The plaintiff did not abandon the possession. The defendants' acts were not voluntary, but under stress of paramount necessity. They were compelled to do the acts complained of, and when the necessity for such acts ceased, the plaintiff resumed business.

On exceptions by plaintiff. Exceptions overruled.

This is an action for breach of the covenant for quiet enjoyment, under a lease from the defendants to plaintiff, dated January 1, 1912, of the county jail workshop. The defendants plead the general issue, with brief statement alleging that they did not enter and expel the plaintiff from the premises leased, but, the county commissioners entered said premises for the purpose of performing the duties required of them by virtue of their office. At the close of the evidence, the presiding Justice directed a verdict for the defendants, and the plaintiff excepted to said ruling.

The case is stated in the opinion.

D. A. Meaher, for plaintiff.

Samuel L. Bates, for defendants.

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

HANSON, J. This is an action for breach of the covenant of quiet enjoyment expressed and implied in a lease between the parties dated January 1, 1912. At the trial the presiding Justice on motion directed a verdict for the defendant, and the case is before the court on the plaintiff's exception to that ruling.

The plaintiff leased the county jail workshop in Portland for the term of two years, and entered into possession on January 1, 1912, and engaged in the manufacture of chairs. By the terms of the lease the defendant agreed to furnish and did furnish from the prisoners in the county jail such of their number as were sentenced to labor, to be employed by the plaintiff in its business.

The business was conducted without interruption until April 11, 1913, when as claimed by the plaintiff "the defendants entered and expelled the plaintiff from the possession thereof, by reason whereof the plaintiff was unable to have and to hold the said premises until the 21st day of May, 1913, and so the said defendants have not kept but have broken their covenants and the plaintiff could not hold and enjoy the said premises to the full end of the term mentioned in the said lease according to the form and effect of said intention."

The record shows that on or about February 5, 1913, complaint was made to the inspector of buildings for the city of Portland that the walls of the workshop were in a dangerous condition, that the inspector investigated, and made a detailed report of his examination to the county commissioners of Cumberland County. The inspector found that the walls of the building were in dangerous condition, and recommended immediate action by the county commissioners. Thereupon the county commissioners investigated further, and after much consideration of the subject, employed a contractor to make necessary repairs.

The plaintiff claims that the repairs made were unnecessary, and that even if necessary, the work could have been done by the use of due care and diligence, so that its enjoyment of its lawful possession would not have been disturbed, and further that the defendants are liable in damages because they did not give the plaintiff reasonable notice of the proposed repairs, less than 24 hours as claimed by its superintendent.

In answer to these contentions the defendants say that the necessity for immediate repairs was imperative, that they had already delayed the work too long, that life and property were in danger, that the safety of the inmates of the jail was endangered, and that further delay would be a violation of their duty. And the defendants claim that plaintiff's superintendent was notified of the intention of the defendants to repair several days before the 11th day of April, and that arrangements had been made and carried into effect to perform

the work so that the plaintiff's operations should continue, and that while so repairing the plaintiff continued to work for two days, and then ceased operations on its own motion and without necessity so far as the acts of the contractor were concerned.

The foregoing states the contentions of the parties, and it will serve no useful purpose to refer more particularly to the evidence. The record is long, and the elements of damage introduced occupy much of the report. We have examined the evidence with great care, and it is the opinion of the court that the ruling of the presiding Justice was correct. The case is not doubtful. The evidence would not have warranted a verdict for the plaintiff, and there was no evidence from which different conclusions might be drawn by different minds.

But the decision need not be based upon the foregoing reasons alone. There is another more potent, requiring little if any consideration of the evidence in the case for its application here, beyond the lease and the plaintiff's admissions. Breach of a covenant for quiet enjoyment is the basis of the action. In resorting to this form of action, we think the plaintiff has mistaken his remedy, if he was damaged by the act of the defendant, for a covenant for quiet enjoyment in a lease is broken only by an eviction. *Boothby* v. *Hatheway*, 20 Maine, 251. The evidence does not show an eviction or an intention to evict on the part of the defendants. There was no hostility alleged or apparent. There was a condition created, whether necessary or not, in view of which the plaintiff concluded to suspend its business for a period, but it did not surrender its possession, nor did the defendants claim or take possession, for the plaintiff resumed operations on May 21st, and so far as the case shows may still be in possession. By its own acts the plaintiff elected not to treat the acts of the defendant or the contractor as an eviction, and therefore cannot recover in this form of action. *William* v. *Holbrook*, 216 Mass., 239. The lease made provision for the entry of the county commissioners for making repairs and improvements and "the performance of any other duties required of them by virtue of their office, and for abatement of rent during any suspension of the plaintiff's occupancy." These provisions were known to both parties, the likelihood of their exercise must be held to have been in the contemplation of both at the date of the execution of the lease. The construction of the lease was for the court.

It is settled law that to constitute an eviction, one must be actually dispossessed by one having the real title, *Ferris* v. *Harshea*, 8 Tenn., 48, or one under a paramount title. Words & Phrases, 2520. An eviction is not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord for the purpose and with the intention of depriving the tenant of the demised premises. Words & Phrases 2518, and cases cited, 16 Cyc., 820. Every eviction includes an ouster, either of the whole or some part of the demised premises, and may be accomplished by the wrongful acts of the lessor depriving the lessee of the beneficial enjoyment of the premises, and the lessee in consequence abandons the same. Such wrongful acts amount in law to an eviction without other evidence that the landlord intended to deprive the tenant of possession. Idem 2519. But the mere fact that by an act or default of the landlord, not unlawful in itself, nor accompanied with any intention to affect the enjoyment of the premises demised, they have been rendered uninhabitable, is not sufficient to constitute an eviction. *Boyce* v. *Guggenheim*, 106 Mass., 202. Taylor's Landlord and Tenant, Chap. 10, Sec. 2, Note. In *Skalley* v. *Shute*, 132 Mass., 367, an action for violation of a covenant for quiet enjoyment, it is held that "if the wrongful acts of a lessor are such as to permanently deprive the lessee of the beneficial enjoyment of the premises, and the lessee, in consequence thereof, *abandons the premises*, it is an eviction; and the intent to evict is conclusively presumed."

The plaintiff did not abandon the possession. The defendants acts were not voluntary, but under stress of paramount necessity. They were compelled to do the acts complained of, and when the necessity for such acts ceased, the plaintiff resumed business.

In view of the undisputed facts, we hold that the case fails to disclose any of the elements necessary to be shown to constitute an eviction.

The entry will be,

Exceptions overruled.

SALOMON FREDERIK VAN OSS, et als.

vs.

PREMIER PETROLEUM COMPANY.

Cumberland. Opinion March 4, 1915.

Corporation. Directors. Equity. Injunction. Insolvency. Public Laws of 1905. Public Laws of 1907, Chap. 137. Receiver. Stockholders.

This is a bill in equity, brought under the provisions of Chap. 85 of the Public Laws of 1905, as amended by the Laws of 1907, Chap. 137, by the plaintiff in behalf of himself and all other stockholders of the defendant corporation who might become parties plaintiff, against the defendant, a Maine corporation, located at Portland, praying for an injunction, temporary and permanent receiver, and the liquidation and dissolution of the defendant corporation.

Held:

1. Where express power is given by statute, if sufficient cause exists, to issue an injunction both temporary and permanent, that having found sufficient cause to issue an injunction, the court is authorized by Sec. 2 of Chap. 85, Laws of 1905, to appoint at the same time, or at any time afterwards during the continuance of the injunction, one or more receivers to wind up the affairs of the corporation. The power to so appoint is limited only by the continuance of the injunction. The reason for such appointment is found in the reason and necessity for the injunction, and the exercise of the power to appoint in this or similar cases must be left to the sound discretion of the sitting Justice in setting in motion the equity powers of the court to accomplish that which he deems in equity and good conscience the rights of the parties require.
2. The record discloses a practical abandonment of the purposes of its original promotors and owners, and the defendant thereby became and is a holding company, and not a company doing the business for which it was organized.
3. The declared purposes of the company do not constitute it a holding company nor can such power be implied from the language used describing such purposes. True, certain powers were conferred to be exercised "to such extent as may be necessary and proper for the carrying on of the company's business;" but holding stock in another corporation was not one of such incidental powers especially when the anomalous condition presented here exists—a going concern whose active business has been exchanged for a passive minority representation in another company. It was not one of the purposes of the corporation, or an incident to the declared business purposes of the company, to supply another company a sufficient working capital.

4. The plaintiff and interveners had the right to demand liquidation, even if the same had not been promised. The corporation was out of the business in which they had invested. In the ordinary understanding of men, reasoning in the usual manner from actual facts disclosed, the business in which they had invested their money had stopped. The directors by their own act had exhausted their power to reinvest in a new enterprise, further than the vote warranted it, or to jeopardize the interests of stockholders in new ventures against their will, but became and were trustees in fact, for one purpose only, and that to liquidate the company, because the stockholders expected liquidation, and again because they had the right to expect it, and with that in view have demanded liquidation.
5. That the final fact found by the court that the defendant company had ceased to do business is supported by clear and convincing evidence, warranted both by the spirit and letter of the law, and in harmony with enlightened public policy.
6. The bill of complaint stated a case within the statute. No other conclusion could be reached without giving a new meaning to words of universally settled import and acceptation. And this applies to the words "to liquidate your company" as well as to "ceased to do business."

On appeal by defendant from decree of sitting Justice denying the motions to vacate the receivership and injunction ordered, and from the final decree sustaining the bill and ordering dissolution of defendant corporation, and that such injunction and receivership be made permanent.

This is a bill in equity, brought by Salomon Frederik Van Oss, in behalf of himself and all other stockholders of the defendant company, who may elect to join as parties plaintiff, against the Premier Petroleum Company, a Maine corporation, praying for an injunction, temporary and permanent receiver and the liquidation and dissolution of the defendant corporation. Defendant filed its answer to bill, and replications were filed by plaintiffs. From decree granting an injunction and appointing temporary receiver, and from final decree sustaining the bill and ordering dissolution of defendant corporation, and that such injunction and receivership be made permanent, the defendant appealed to the Law Court.

The case is stated in the opinion.

Woodman & Whitehouse, for complainant.

Robert T. Whitehouse, for interveners.

Verrill, Hale & Booth, for respondent.

SITTING: SAVAGE, C. J., SPEAR, KING, HANSON, PHILBROOK, JJ.

HANSON, J. This is a bill in equity brought under the provisions of Chap. 85 of the Public Laws of 1905, as amended by the Laws of 1907, Chap. 137, by the plaintiff in behalf of himself and all other stockholders of the defendant corporation who might become parties plaintiff, against the defendant, a Maine corporation, located at Portland, praying for an injunction, temporary and permanent receiver, and the liquidation and dissolution of the defendant corporation.

The case is before the court on appeal from the decree of the sitting Justice denying the motions to vacate the receivership and injunction ordered, and from the final decree sustaining the bill and ordering dissolution of the defendant corporation and that such injunction and receivership be made permanent.

The statute invoked by the plaintiff reads as follows:

"(Sec. 1). Whenever any corporation shall become insolvent, or be in imminent danger of insolvency, or whenever through fraud, neglect or gross mismanagement of its affairs, or through attachment, litigation or otherwise, its estate and effects are in danger of being wasted or lost, or whenever it has ceased to do business, or its charter has expired or been forfeited, upon application of any creditor or stockholder by bill in equity filed in the Supreme Judicial Court in the county in which it has an established place of business, or in which it held its last stockholders' meeting, upon which bill such notice shall be given as may be ordered by any justice of such court, in term time or vacation, such court may, if it finds that sufficient cause exists, issue an injunction, both temporary and permanent, restraining said corporation, its officers and agents, from receiving any moneys, paying any debts, selling or transferring any assets of the corporation, or exercising any of its privileges or franchises until further order, and may at any time make a decree dissolving said corporation.

(Sec. 2.) At the time of ordering any such injunction or at any time afterwards during its continuance, such court may also appoint one or more receivers to wind up the affairs of the company.

(Sec. 6.) The court shall have jurisdiction in equity of all proceedings hereunder and may make such orders and decrees as equity may require."

The defendant company is a corporation duly organized under the laws of the State of Maine, May 9, 1910, with $3,000,000 capital stock issued and outstanding, $1,000,000 of which is common stock, and $2,000,000 preferred stock. The purposes of the corporation as given in the certificate of organization are as follows:

"To mine for, prospect, drill for, produce, buy, and in any manner acquire, to refine, manufacture into its several products, and to sell, market and dispose of, petroleum, and its products and by-products and residual products, and to carry on the general business of oil producers and oil operators, and, to such extent as may be necessary and proper for the carrying on of the Company's business, to lease, buy, and otherwise acquire, to hold and operate, and to sell, lease, incumber, or otherwise dispose of, oil, oil lands, oil leases and rights to explore for and remove oil, and to erect, acquire, construct, operate, maintain and sell, lease, incumber and in any manner dispose of, plants, refineries, buildings, machinery, pipe lines, goods, wares, merchandise, real and personal property, rights of way, easements, ordinances, franchises, privileges and other facilities necessary and proper for the carrying on of such business."

The company entered upon the business for which it was organized, and continued the same actively for about thirteen months.

The following from the bill of complaint sets out the principal contention of the plaintiff:

"The plaintiff is a stockholder of record in said defendant corporation, owning and holding of record at the present time 5000 shares of preferred stock of said company, and four shares of the common stock of the same."

"That in the month of July, A. D. 1911, the said defendant company sold and transferred all its property and assets, including its oil leases of 3660 acres of oil producing properties situated in the State of Oklahoma, United States of America, also oil collecting tanks and other equipment and all cash assets to a certain French corporation, to wit L'Union des Petroles d'Oklahoma (hereinafter called the Union Company) in exchange for $200,000 worth at par value of the seven per cent. cumulative preference stock of said Union Company and $2,000,000 worth at par value of the common stock of said Union Company; and that thereafter, and prior to the month of October, 1912, the Board of Directors of the defendant company sold $100,000 of the preferred stock of said Union Company

so acquired as aforesaid, for the sum of approximately $100,000, which money was thereupon deposited in the name of the defendant company at interest and still remains so deposited with the Swiss Bankverein of 43 Lothbury London E. C. England; and that at about the same time said Board of Directors of the defendant company deposited certificates payable to bearer for the remainder of its holdings so acquired as aforesaid in the said Union Company, to wit $2,000,000 worth at par value of the common stock and $100,000 worth at par value of the preferred stock of said Union Company for safe keeping with the Head Office of the Credit Lyonnais Boulevard des Italians Paris, where the plaintiff is informed and believes, and therefore avers, said certificates still remain. And the plaintiff further avers that the said Premier Petroleum Company at the time of the transfer of its said property and assets as aforesaid, ceased to do business, and since that time has not done or transacted any business whatever."

By amendment other reasons for equitable relief are set up by the plaintiff, as follows:

"That, through fraud, neglect and gross mismanagement of its affairs by the officers in control, the assets of the defendant company were in danger of being wasted and lost, although the company was then wholly solvent. That the corporation and its officers and present majority of stockholders in control, having obtained consent of the plaintiff, and other stockholders intervening, to vote to sell the assets of the corporation by promise of liquidation and dissolution, are estopped to attempt to carry on business or to refuse to liquidate the proceeds obtained from the sale of the assets of the company and dissolve the corporation."

On June 9th, 1911, the board of directors of the defendant company issued a circular to the stockholders calling attention to the fact that the quarterly reports indicated that the production of its properties since the formation of the company "had not come up to expectations, and remains considerably behind the figures which the experts had led to expect," and further stating that "there seems little doubt that both the productive capacity of the Nowata fields and the staying power of the wells have been overrated," . . . and "as a consequence the net revenue for the current year is certain not to come up to expectations." After noting the probable earnings, the financial statements conclude with these words: "It will be

seen that the margin of security above this dividend is not sufficiently large to relieve your Board from some uneasiness as regards the possibility of maintaining the dividends on your preferred shares without interruption for a considerable time to come."

Mention is then made of plans to counteract the decrease, by acquiring new properties and leases, improving the processes used, and the erection of a plant to save the lighter constituents from the crude petroleum, and then outlines the proposition which in the end led to the bringing of the case at bar, in these words:

"Whilst these matters were under consideration, your Board received proposals for your Company to join a large combination of Oklahoma Oil Properties which is being effected under strong French auspices. There has been formed in Paris the Union des Petroles d'Oklahoma, with a share capital of 40 million francs, divided into:— 15,000,000 francs 7 per cent. Cumulative Preference Shares, and 25,000,000 francs Ordinary Shares" . . . .

"After protracted negotiations your Board have received a definite offer for all your properties and assets, as from June 1st, 1911, of 1,000,000 francs in fully paid Preferred Stock, and 10,000,000 francs in fully paid Common Stock of the said French Company. An offer has also been received to exchange your Common Stock against 50 per cent. of fully paid Ordinary Shares (that is to say to give 100 francs of Common Stock, Union des Petroles d'Oklahoma for every $40 Common Stock of your Company), to all such holders of Premier Petroleum Common Stock as are willing to accept this offer prior to October 1st next." . . . . "Having regard to this fact, to a possible increase of production owing to the development of the Robinson leases, and to the greater permanency and stability of production likely to result from the amalgamation, your Board have no hesitation in recommending the acceptance of the offer received, especially since the proposal seems to meet with the approval of some of your largest Shareholders, who together own a majority of your stock.

The Board have been informed that the Preferred Shares of the French Company will shortly be issued on the Paris Bourse, presumably at 110 per cent., whilst it is also intended to make a market in Paris and elsewhere for the Common Stock later on. It is intended to realize at some future date the shares in the 'Union' which your Company would acquire and to liquidate your Company.

We shall be glad to hear from you whether you approve of the offer being accepted, in which case we request you to return the enclosed form, duly signed, before June 16th next. In the event of the requisite majority approving in writing, the Board propose to use without delay the powers conferred upon them by Section V, sub-section III of Art. II of the Company's by-laws, and to accept the offer made to the Company. By order of the Board,

A. SCRIMGEOUR, Assistant Secretary."

The form of consent referred to, and which was signed by the holders of a majority of the stock issued, reads as follows:

"To the Board of Directors of

THE PREMIER PETROLEUM COMPANY

(Incorporated under the Laws of the State of Maine, U. S. A.)

Gentlemen,

I, the undersigned, being a Stockholder in the Premier Petroleum Company, and having read the Circular issued by the Board under date June 9th, 1911, and having furthermore noted Section 5, Subsection 3, of Article II of the Company's By-Laws giving the Board power

> 'To sell or dispose of any of the real or personal estate, property, rights or privileges belonging to the Company, whenever in their opinion its interests would be thereby promoted; and with the consent in writing or pursuant to the vote of the holders of a majority of the stock issued and outstanding to sell, assign, transfer or otherwise dispose of the whole property of the Company'

hereby give my irrevocable consent to the Company's Board of Directors proceeding to sell, assign, transfer or otherwise dispose of the whole property of the Company on the terms set forth in said circular.

Witness ..... (Name) .....

..... (Address) .....

....

(Date) ....."

At a meeting of the stockholders of the defendant corporation held on July 31, 1911, the following resolution was passed:

"Resolved, that having regard to the circular issued by the Board under date June 9th, 1911, and to section 5, sub-section 3 of Article II of the Company's by-laws giving the board power 'To sell or dispose of any of the real or personal estate, property, rights or privileges belonging to the Company, whenever in their opinion its interests would be thereby promoted; and with the consent in writing and pursuant to the vote of the holders of a majority of the stock issued and outstanding, to sell, assign, transfer or otherwise dispose of the whole property of the Company,' the Company's Board of Directors be, and are hereby authorized to sell, assign, transfer or otherwise dispose of the whole property of the company, on the terms set forth in said circular, and that all acts already done by the Board of Directors in connection with this transaction be, and are hereby, confirmed."

Said resolution was passed by the unanimous vote of all stockholders present.

The sale was made in July following, and this bill of complaint was brought in May, 1913.

Upon hearing, a writ of injunction was ordered, and a temporary receiver was appointed, May 26, 1913. On May 29, 1913, the defendant filed motions to vacate the temporary injunction, and order appointing a receiver. On May 31st, 1913, these orders were modified, practically suspending the operation of both until further order of court.

On July 23, 1913, twenty-seven stockholders representing 198,918 shares of the preferred stock of the Premier Petroleum Company filed their petition to intervene, and upon hearing were allowed to come in as plaintiffs under the bill of complaint as amended.

On October 2nd, 1913, the motion to vacate the temporary injunction, and motion to vacate the appointment of a receiver, were both denied, and a decree was entered restoring the effect of the original decree of May 26, 1913, granting temporary injunction and appointing a receiver, and the defendant thereupon claimed an appeal to this court.

On November 7, 1913, it was stipulated and agreed, by and between the plaintiffs and defendant, to submit the case upon the testimony already introduced at the previous interlocutory hearings, to cooper-

ate in the interest of an early determination of the case, preserving the status quo, "and it was further agreed between the parties hereto that in the event that upon appeal the Law Court shall decide in favor of the plaintiffs, the defendant shall cooperate with the plaintiffs in bringing about the dissolution of the defendant corporation and the liquidation of its assets and in obtaining the appointment of a permanent ancillary receiver satisfactory to said parties or to the Court making such appointment."

On November 24th, the case having been heard upon bill, answer, replication and proofs submitted, final decree was entered and filed, in which it was ordered, adjudged and decreed.

"1. That the plaintiffs' bill be sustained with costs to be fixed by the clerk, and that execution issue for the same;

2. That the defendant corporation, the Premier Petroleum Company, be and hereby is dissolved.

3. That the preliminary injunction . . . . be continued and made permanent.

4. The receiver heretofore appointed be continued as permanent receiver of said corporation to wind up its affairs," together with further authorization to the receiver usual in such cases.

From such final decree the defendant claimed and took an appeal to this court.

In support of the first appeal counsel for the defendant quotes *Clark* v. *Linseed Oil Company*, 105 Fed., 787, (C. C. A. 7th Cir.) 792, as laying down the rule "that cessation of business alone does not make a fit case for the appointment of a receiver of the remaining assets of the company;" and urges that in the absence of impending danger, or the neglect or refusal of the present officers to convert the assets into cash, no reason appears for the interference by the court before final hearing.

Upon this question, as upon the principal question involved, the findings of fact by the sitting Justice will not be disturbed unless appearing to be clearly wrong; but since the question is raised we find no difficulty in holding that, where express power is given by statute, if sufficient cause exists, to issue an injunction both temporary and permanent, that having found sufficient cause to issue an injunction, the court is authorized by Sec. 2 of Chap. 85, Laws of 1905, to appoint at the same time, or at any time afterwards during the continuance of the injunction, one or more receivers to wind up

the affairs of the corporation. The power to so appoint is limited only by the continuance of the injunction. The reason for such appointment is found in the reason and necessity for the injunction, and the exercise of the power to appoint in this or similar cases must be left to the sound discretion of the sitting Justice in setting in motion the equity powers of the court to accomplish that which he deems in equity and good conscience the rights of the parties require.

From the time of the sale, the defendant's assets have consisted wholly of cash and stock of another company, holding therein a minority representation; and it appears that from the date of the sale of its property until the date of the bill of complaint on May 26, 1913, a period of nearly two years, it practically abandoned the business for which it was organized, and it continued to be what it became on July 9, 1911, a holding company merely.

It is contended by the eminent counsel for the defendant that in passing the resolution above quoted, to dispose of "the whole of the property of the company on the terms set forth in said circular that "there was no intention on the part of the stockholders voting to vote for the dissolution of the corporation; that language in said circular letter expressing an intent to liquidate the corporation at some future time had no influence whatsoever on the stockholders in inducing them to vote to sell the assets of the corporation; that the sale of the assets of said corporation made as of July 1, 1911, was not conditioned on the proceeds of said sale being immediately converted into cash and distributed among the stockholders; that it was the intention of the stockholders that the officers of the corporation should continue in control of its affairs and that the assets of the corporation should be managed by them according to their best judgment for the benefit of the stockholders duly expressed at regular stockholders' and directors' meetings."

To determine the intention of the stockholders from the record before us, and whether or not they were influenced by the circular letter referred to, we must necessarily consider the acts and utterances of the board of directors in dealing with the stockholders in the circumstances. The directors in their circular outline first, the unsatisfactory business experience of the corporation, and point out certain proposed improvements in the conduct of the business of the company, and turning abruptly from the suggestion of means and methods to continue business, and secure expected results, an

offer to sell to the "Union" is communicated to the stockholders, its advantages emphasized, its consummation recommended, and its accomplishment foreshadowed by the statement that the proposal "seems to meet with the approval of some of the largest shareholders, who together own a majority of the stock." The directors further informed the stockholders that the preferred shares of the "French Company will shortly be issued on the Paris Bourse, presumably at 110 per cent., whilst it is also intended to make a market in Paris and elsewhere for the common stock later on. It is intended to realize at some future date the shares in the Union which your Company would acquire and to liquidate your Company." The record discloses a well considered plan of the board of directors, so well executed that it must have influenced the acts of the stockholders, by establishing in their minds a doubt as to the present value of their stock, and holding out a prospect in case of sale of a sure return of their money for their preferred stock, and that a market would be made for the common stock, and ending with the declared intention to liquidate the company. The plan was made by the directors, the details were arranged by them, the form of consent to be signed by the stockholders which they prepared made specific mention of the Company's by-laws, authorizing the sale of the "whole property of the Company," and the resolution to sell began with the words "that having regard to the circular issued, and to the Article of the By-laws giving the Board power to sell." There is disclosed a well-conceived plan, accompanied by a determined purpose to execute it. Assuming, as we must, that the stockholders had no intention or desire to liquidate their Company before the receipt of the circular and subsequent information, these acts of the Board of Directors could have no other effect upon a reasoning mind than to create a condition from which a normal brain could form but one intention, and that to intend liquidation, and get their money back; and the conclusion is irresistible that, from the receipt of the circular until the sale of their property, they were influenced by the representations and acts of the board of directors. Did the company by such sale cease to do business? Upon this question counsel on both sides have argued most earnestly, and upon their several contentions in relation thereto have relied most confidently, and we may say that aside from the consideration of this one question it is unnecessary to consider the other claims to relief, as it does

not appear that the differences admittedly existing between the larger stockholders had their foundation in fraud, or that there was necessarily mismanagement or impending danger. We must deal with the case as we find it, and construe the statute invoked in harmony with what we believe to have been the intention of the legislature in making provision for winding up the affairs of a corporation when it has ceased to perform the business for which it was organized. *Smith* v. *Chase*, 71 Maine, 164.

In the true interpretation and application of the statute resort must be had to a careful consideration of the powers conferred by, and the acts lawfully to be done under, the original organization of the defendant company, and to apply the same to the question here involved, in connection with the admitted and proven acts of both stockholders and board of directors.

The record discloses a practical abandonment of the purposes of its original promotors and owners, and the defendant thereby became and is a holding company, and not a company doing the business for which it was organized.

Defendant's counsel in his brief frankly makes the following statement in support of his main contention that the company has not ceased to do business, and that it was as well a holding company, viz: "In the lower court, plaintiffs' counsel laid considerable stress on the fact that the cash assets of the defendant corporation were conveyed to the Union Company, and from this argues an obvious intent to liquidate; but we submit that inasmuch as the assets taken over consisted in part of leases, the cash assets were taken over to avoid the complications incident to a computation of accruing rentals and similar bookkeeping problems, and were also taken over in order to provide the Union Company, which was to be the operating company, with a sufficient working capital."

The "Union" had taken over, with all the other property, the cash of the defendant in order to provide the Union Company, which was to be the operating company, a working capital. The "Union" was represented as having a share capital of 40 million francs, and a working capital of about 4,500,000 francs. The declared purposes of the company do not constitute it a holding company, nor can such power be implied from the language used describing such purposes. True, certain powers were conferred to be exercised "to such extent as may be necessary and proper for the carrying on of the Company's busi-

ness;" but holding stock in another corporation was not one of such incidental powers—especially when the anomalous condition presented here, exists—a going concern whose active business has been exchanged for a passive minority representation in another company. It was not one of the purposes of the corporation, or an incident to the declared business purposes of the company, to supply another company a sufficient working capital.

At that point in the life of the defendant company, the plaintiff and interveners had the right to demand liquidation even if the same had not been promised. The corporation was out of the business in which they had invested. In the ordinary understanding of men, reasoning in the usual manner from actual facts disclosed, the business in which they had invested their money had stopped. The directors by their own act had exhausted their power to reinvest in a new enterprise, further than the vote warranted it, or to jeopardize the interests of stockholders in new ventures against their will, but became and were trustees in fact, for one purpose only, and that to liquidate the company, because the stockholders expected liquidation, and again because they had the right to expect it, and with that in view have demanded liquidation. The directors were not without their rights, the principal one being to have a reasonable time in which to liquidate. Whether or not the time elapsing before suit was reasonable, we must assume was passed upon by the sitting Justice, and we see no reason to doubt that it was considered and found to be a reasonable time, for it was contended below, as it is here, that the company, through its board of directors, had still the right to reinvest in new propositions, and renew its business, if in the judgment of the board of directors it was deemed advisable. Such being the past and present attitude of the directors, the question of reasonable time may be treated as settled, but the condition develops irreconcilable differences between the contending parties which amply justifies the prayer for the interference of the court in equity. We are persuaded that the facts warrant the finding that the present condition of the defendant is not included within its original purposes, or necessary or incidental thereto, and that the final fact found by the court that the defendant company had ceased to do business is supported by clear and convincing evidence, warranted both by the spirit and letter of the law, and in harmony with enlightened public policy.

There is no allegation of present or imminent insolvency. The defendant alleges that it is solvent, denies that it has ceased to do business and denies any intent on the part of its officers to deal improperly in any way with its assets.

The question has not heretofore been raised in this State, but in two instances this court has had occasion to consider the statute under consideration as it related to other conditions set out therein. The first mention of the statute is found in *Moody* v. *Development Co.*, 102 Maine, 365, where it is held that "chapter 85, Public Laws, 1905, under which a receiver had been appointed, was in effect an insolvent law, but the clauses under consideration related to" corporations which had become insolvent, or in imminent danger of insolvency, etc., etc.; and we there expressly excluded from consideration all other clauses of section 1, and the question here involved was not before the court. In that case the corporation was insolvent, and the case turned upon that point. The conclusion therein is here affirmed, and the reasoning adopted, to wit, "that the act of 1905 was clearly intended "for the liquidation of business interests when they can no longer continue in the ordinary course." "The scheme of the Act was to accomplish this end. Its purpose could not have been more plainly stated. The law can be invoked when, in the language of the Act, "its (corporation) estates and effects are in danger of being wasted or lost."

By parity of reasoning, and because the clause in question could not have been stated in plainer terms, and misconstruction of the words used is impossible, it follows that "the law can be invoked when, in the language of the Act, "it (the corporation) has ceased to do business." Does a going concern, a corporation, partnership or joint stock company, cease to do business when it sells all its property, plant, assets of all kinds, including cash, and the buyer takes possession? We think it does, just as does the individual cease to do business who sells his business to another and the business is taken over by the purchaser. The business has been taken over by the purchaser, and the seller is out of business. He may enter another business. That is a matter of individual choice, but until he does, he is out of business, has ceased to do that business. "Ceased to do business" are words in common use, and are to be construed in their natural and ordinary significance. 36 Cyc., 1114; and a declared intention to sell and liquidate is a controlling factor in determining

whether a corporation has ceased to do business. *Manchester St. Ry.* v. *Williams*, 71 N. H., 312. It is a familiar rule that when the language is clear and unequivocal it must be intended to mean what it has plainly expressed, and in such case it is not permissible to interpret that which has no need of interpretation. *Jones* v. *Jones*, 18 Maine, 313; *Davis* v. *Randall*, 97 Maine, 36. See *Wellington* v. *Corinna*, 104 Maine, 252. Again in *Pride* v. *Pride Lumber Co.*, 109 Maine, 152; a bill of complaint by a minority stockholder against the defendant and individual stockholders. The prayer of the bill was that the corporation and the individual defendants "be restrained from issuing and selling stock, from paying salaries or expending the funds of the corporation, for an accounting, and for a receiver. The corporation had ceased to do business, and was solvent. Questions of jurisdiction were raised, and the right of the court to grant relief prayed for, under its general equity power, challenged. In reaching a conclusion therein the opinion holds that "it is well settled that a court of equity, in the absence of statutory power, has no jurisdiction over corporations for the purpose of decreeing their dissolution and the distribution of their assets at the suit of one or more stockholders. 2 Cook on Corporations, Sec. 629; 10 Cyc., 988. We have a statute in this State which authorizes the court, under some circumstances, to wind up the affairs of a corporation, and decree its dissolution, upon a bill in equity brought by a stockholder or creditor. Laws of 1905, Chap. 85, as amended by the Laws of 1907, Chap. 137. And this case shows a state of facts which would have supported a bill brought under that statute."

We think further citation of authority unnecessary to justify or fortify the finding of the Justice who heard the case. The bill of complaint stated a case within the statute. No other conclusion could be reached without giving a new meaning to words of universally settled import and acceptation. And this applies to the words "to liquidate your company" as well as to "ceased to do business."

The entry must therefore be,

Bill sustained with additional costs.
Decree affirmed.

JOSEPH E. MOORE, Appellant
from Decree of Probate Court.

Knox. Opinion March 13, 1915.

Account. Appeal. Decree. Exceptions. Guardian. Judgment. Order of Court. Probate Court.

The appellant in this case was a former guardian of Arthur T. Gould, whose petition to reopen the first and final account of appellant, as such guardian, was granted, and the appellant appealed from said decree to the Supreme Court of Probate and the case was thence reported to the Law Court for determination. The decision of the Law Court was as follows: "Decree of Probate Court affirmed. The case is remanded to the Supreme Court of Probate for the County of Knox for further action in accordance with this opinion." At the September term, of Supreme Court of Probate, 1914, the appellant filed a motion asking the court to state the appellant's account and make corrections, etc. The presiding Judge denied the motion and caused the following order to be entered: "In the above entitled cause, it is ordered; That in accordance with the certificate from the Law Court, the clerk of this court enter on the docket of the cause in this court, 'Decree of Probate Court affirmed.'"

Held:

1. It nowhere appeared in the report, nor was it mentioned in argument or brief that question was made as to any items appearing in the exceptions and now urged here. The case was reported for the determination of this court, and under the rule, the decision reached is necessarily final.
2. The case is here upon exceptions and may be considered upon that ground alone. The office of an exception generally is to preserve a known or supposed right, taken upon a hostile ruling upon a matter of law, or exclusion or admission of testimony, or order imperiling an asserted right.
3. Such exceptions must be taken in the trial court and not in the court of last resort, or to the decree or order of such court sitting as a court of last resort.
4. To the order of the Judge overruling the appellant's motion and entering judgment in accordance with the order of this Court, exceptions do not lie; otherwise, there would be no end of litigation. A ground of exception not stated in the trial court cannot be stated on appeal.
5. In order to present such a question, it was essential that exceptions to the findings be filed before judgment was rendered thereon.

6. The right of exception under the practice in this State is conferred by statute, and is based upon some opinion, direction or judgment on the part of the court which is erroneous and adverse and prejudicial to the party excepting.
7. When a party takes exceptions to the rulings of a presiding Justice, it is incumbent on such party to show affirmatively that there was error in such rulings and that he is aggrieved thereby.

On exceptions by appellant. Exceptions overruled.

The appellant, a former guardian of Arthur T. Gould, filed his final account as such guardian in the Probate Court, and the same was allowed. From this decree allowing said account, an appeal was taken to Supreme Court of Probate and the case was reported to the Law Court, and is reported in 112 Maine, 119. At the September term of the Supreme Judicial Court, 1914, the appellant filed a motion asking the court to state appellant's account and make corrections, etc. The presiding Justice denied the motion and ordered; "That in accordance with certificate from Law Court, the Clerk of this Court enter on the docket of the cause in this Court, 'Decree of Probate Court Affirmed.' That the motion of appellant asking this Court to state the appellant's account and make corrections and allowances therein for his benefit, as set forth in his said motion, cannot now be entertained and acted upon by this Court."

To this order the appellant excepted.

The case is stated in the opinion.

Arthur S. Littlefield, and Rodney I. Thompson, for appellant.

Alan L. Bird, and Norman L. Bassett, for appellee.

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

HANSON, J. The appellant was formerly guardian of Arthur T. Gould whose petition to reopen the first and final account of the appellant was granted by the Judge of Probate of Knox County on July 16, 1912. From the decree of the Judge of Probate granting said petition and adjudging the amount of the liability of the appellant as such guardian, appeal was taken by the appellant to the Supreme Court of Probate, and the case was then reported by agreement to this court for determination as in 112 Maine, 119.

The case was argued at the June Law Term, 1913. On July 1st, 1914, certificate of decision was sent down as follows: "Decree of

Probate Court affirmed. The case is remanded to the Supreme Court of Probate for the County of Knox for further action in accordance with this opinion."

At the September term of the Supreme Court of Probate 1914, the appellant filed a motion asking the court to state the appellant's account, and make corrections, 1, in a charge of $916.35 which is erroneously stated in the opinion as $918.35, 2, for further allowance and deductions for expenses,—3, for deduction for interest charged,—4, for special allowance of $22. for interest incorrectly figured, concluding the petition as follows: Wherefore the said Moore prays that this Court will state such account, using the items determined by the Law Court, and determine the items above mentioned and the rate of interest, if any, which shall be allowed in the final decree, and correct all errors which may be found; all of which he says is in accordance with the mandate and opinion of the Law Court."

The presiding Judge denied the motion and caused the following order to be entered:

"In the above entitled cause it is ordered: That in accordance with the certificate from the Law Court the Clerk of this Court enter on the docket of the cause in this Court 'Decree of Probate Court Affirmed'; That the motion of the appellant presented and filed at this term asking this Court to state the appellant's account and make certain corrections and allowances therein for his benefit as set forth in said motion cannot now be entertained and acted upon by this Court."

The appellant excepted to this order and the case is before this court on these exceptions.

The counsel for appellant says "we do not contend that there was any power in the court to in any way modify or change the determination of the Law Court; or that there would be any power in the Court, if the Law Court had simply affirmed the decree of the Probate Court and stopped there. Such affirmance would leave nothing for the Supreme Court of Probate to do." . . . . The mandate in this case does something more than affirm the decree of the Probate Court. It sends the case back to the Supreme Court of Probate for "further action in accordance with this opinion." Counsel cites *Farnum's Appeal*, 107 Maine, 493, where the order was "and that the case stand for further proceedings in the Supreme Court of

Probate," and *Merrill Trust Company, Appellant,* 104 Maine, 577, where it was ordered, "the case is remitted to the Supreme Court of Probate sitting for Hancock County to make and enter decree in accordance with this opinion," and adds "that in each of these cases there was something further to be done in the Supreme Court of Probate."

An examination of these cases will show as counsel for the appellant says, that "there was something more to be done" in each case. The rights of the parties required the direction sent down therein. The cases were not before the court for final determination upon the merits, or in such form as to warrant final decree or direction. Here the matters before the court were well defined, the questions involved comprehended all the elements of a completed case, aside from the agreement to abide the determination of the court. The new matters now urged were not urged at any time before the decision therein, and cannot therefore be now considered in these proceedings. *Laforest* v. *Black Co.*, 100 Maine, 218.

The reasoning of the counsel for the appellant is not at variance with the law governing the case but his conclusion that there was something further to be done by the Supreme Court of Probate beyond recording the decision of this court is at variance with both the law and the facts in the case. The case was reported in full to this court and argued at length. It nowhere appeared in the report, nor was it mentioned in argument or brief that question was made as to any items appearing in the exceptions and now urged here. The items were not called to the attention of this court or opposing counsel, and thus could not have been in contemplation of this court in reaching the opinion handed down. If it were the intention of the court to authorize further action, what was such action to be? There was nothing in the case calling for a further investigation. The case was reported for the determination of this court, and under the rule the decision reached is necessarily final. But the case is here upon exceptions and may be considered upon that ground alone. The office of an exception generally is to preserve a known or supposed right, taken upon a hostile ruling upon a matter of law, or exclusion or admission of testimony, or order imperiling an asserted right, and such exception must be taken in the trial court and not in the court of last resort, or to the decree or order of such court sitting as a court of last resort. When properly taken it must as properly have the

consideration of the court. But here no reason for consideration is present. The settled law and practice is opposed to the claim of the appellant that a presiding Judge could lawfully grant the motion in the case at bar.

In *Mitchell* v. *Smith*, 69 Maine, 67, the Law Court ordered that upon filing an amendment to the writ, judgment for the demandant should be entered. Upon filing the amendment, the presiding Justice at nisi prius ordered judgment, and exceptions were taken,—the court held that "after the amendment was filed there was nothing for the presiding judge to do but to enter up judgment for the demandant. The defendant's objections and motion, if sustained, required the judge to disregard the order of this court. That he could not rightfully do. To the order of the judge overruling the defendant's objections and motion, and entering up judgment in accordance with the order of this court, exceptions do not lie. Otherwise there would be no end to litigation, as the losing party might move, at nisi prius, to set aside the mandate of this court, ordering judgment, and, if his motion is overruled, bring the case back to this court on exceptions; and this might be repeated as often as a mandate was sent down."

In *Lunt* v. *Stimpson*, 70 Maine, 250, after judgment for the defendant exceptions were taken. The exceptions were overruled by the Law Court and mandate accordingly. At the succeeding term of the Superior Court the plaintiff filed a motion for rehearing of the action upon its merits. The motion was granted and the case reheard. It was held:—that "the question, therefore, is, had the judge of the superior court authority to reopen the case after receipt of the mandate of this court 'overruling the exceptions.' This question must be decided in the negative. For as already seen the facts were found by the justice. . . . But the plaintiff's motion asks the justice to revise that finding, even after the law court has in substance ordered a judgment thereon. . . . . This he was not authorized to do. . . . For if this motion could be entertained and the case reopened as to title and what might follow so could any other and an action might be endless." See *Huntress* v. *Hurd*, 72 Maine, 450.

A ground of exception not stated in the trial court cannot be stated on appeal. Vermont Supreme Court, Jany. 12, 1914, 89 Atl., 618. In *Town of St. George* v. *Tilley*, Vermont Supreme Court, Feby. 6, 1914, 89 Atl., 474, an action of assumpsit heard by the court at

September term, 1912, and entered "with court." After the final adjournment of the term and in vacation, on March 7, 1913, the findings of fact were filed. Thereupon the defendant filed his motion for judgment, which motion was overruled and exception saved. The court then, on said March 7, entered judgment on the facts found for the plaintiff to recover the sum of $369.07 and its costs, to which judgment the defendant was allowed an exception. Thirteen days later the defendant filed in the case a paper entitled 'Exceptions to the Court's Finding of Fact,' and the same was made a part of the bill of exceptions, and the court held, that, if thereby the exceptions present for review the sufficiency of the evidence to support the findings, then the transcript of the testimony and all exhibits are referred to on that question and made to control. In order to present such a question, however, it was essential that exceptions to the findings be filed before judgment was rendered thereon. This not being done, the only questions before us are those presented by the exception to the judgment. See *Ebling* v. *Borough of Schuylkill Haven*, 91 Atl., 361.

We think the credits now claimed should have been urged at the hearing and made a part of the report to this court. Not having been reported with the case determined, the claims set up in the exceptions cannot be sustained here, whether otherwise sustainable or not. *Cowan* v. *Bucksport*, 98 Maine, 305. *Verono* v. *Bridges*, Idem., 491. See *Mather* v. *Cunningham*, 106 Maine, 115, Id., 107 Maine, 242, and cases cited. *Stenographer Cases*, 100 Maine, 275; *State* v. *Dondis*, 111 Maine, 17; *Cole* v. *Cole*, 112 Maine, 315.

The right of exception under the practice in this State is conferred by statute, and is based upon some opinion, direction or judgment on the part of the court, which is erroneous, and adverse and prejudicial to the party excepting. *State* v. *Martel*, 103 Maine, 63.

When a party takes exceptions to the rulings of a presiding Justice it is incumbent on such party to show affirmatively that there was error in such rulings and that he is aggrieved thereby. *Hix* v. *Giles*, 103 Maine, 439.

No error could be shown here. The presiding Judge caused judgment to be entered in accordance with the order of this court. Exceptions to such entry do not lie. The entry will be,

Exceptions overruled.

CHARLES M. TIBBETTS et als. *vs.* WILLIAM G. TIBBETTS.

Lincoln. Opinion March 13, 1915.

Beneficiaries. Codicil. Exceptions. Fee. Home. Intention. Issue. Life Estate. Partition. Petition. Title. Trust. Will.

This is a petition for partition. Upon hearing the presiding Justice ruled as matter of law that under the provisions of the will of Charles P. Tibbetts, ancestor of the petitioners and from whom they derived their title, the court could not grant the prayer of the petition and ordered said petition dismissed; to which ruling and the dismissal of said petition, the plaintiffs seasonably excepted.

Held:

First. That testator's daughter Bessie T. Thorp took a contingent interest under the will, which she might waive by joining in the petition for partition.

Second. That there is no apparent reason why the trust created under the codicil should interpose any objection to partition, the petition therefor being signed by both the beneficiaries and the trustee representing their interests in the estate.

On exceptions by plaintiff. Exceptions sustained.

This is a petition for partition, made returnable at the October term of Supreme Judicial Court in Lincoln County, at which term the defendant filed a brief statement and the plaintiffs filed a counter brief statement. Upon hearing, the presiding Justice ruled as matter of law that under the will of Charles P. Tibbetts, ancestor of the petitioners and from whom they derived their title, the court could not grant the prayer of the petition, and ordered said petition dismissed. To this ruling and the dismissal of said petition, the plaintiffs excepted.

The case is stated in the opinion.

A. S. Littlefield, for plaintiffs.

W. M. Hilton, for defendant.

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

SPEAR, J. The exceptions state the case as follows:

This is a petition for partition, duly served and made returnable at the October term in Lincoln County, at which term the defendant filed a brief statement and the plaintiffs, a counter brief statement.

Upon hearing the presiding Justice ruled as matter of law that under the provisions of the will of Charles P. Tibbetts, ancestor of the petitioners and from whom they derived their title, the court could not grant the prayer of the petition and ordered said petition dismissed; to which ruling and the dismissal of said petition the plaintiffs seasonably excepted, and now present this their bill of exceptions, and pray that the same may be allowed; the petition, brief statement, counter brief statement and will of Charles P. Tibbetts being made part of these exceptions. The will of Charles P. Tibbetts, from whom all the parties to the petition derive their title, is as follows so far as pertinent to the issue here raised: "I give, bequeath and devise, unto my beloved wife, Sarah M. Tibbetts, all of my said estate, real, personal and mixed, of whatsoever nature, and wheresoever situated, to her, during the term of her natural life, to use and control, for her benefit, with the power to dispose of the whole or a portion, should it be necessary, for her comfort and support, or should the interests of all concerned, render it advisable; and at her decease, I give, devise and bequeath, all that may remain of my said estate, to my said children, or their representatives, equally, subject however, to the following provision; should my daughter, Bessie T. Thorp, from any untoward event, by the death of her husband, or from financial distress, be left without a home, I order and direct, that so long as she may live, and need a home, or desire it, either during the tenure of my said wife, or after her decease, my said daughter shall have a home, on my said estate and in my said house."

This will was made November 28, 1903. On February 2, he made a codicil as follows: "To those of my children who have no issue, at the time of my said wife's decease, a portion of my said estate, devised and bequeathed to them, shall be held in trust for them and managed for their benefit, by a Trustee, to be appointed by the Probate Court; and in case of the death of either of my said children, without issue their share shall be divided equally between my other children but should issue be born to either of my said children, whose portions are

held in trust, then the trust shall terminate, so far as they are concerned, and they come into possession of their share; I hereby ratify and confirm all of said will, not inconsistent with the provisions as above changed."

An interpretation of the will is not involved. Its language is clear and susceptible to but one meaning. By his will proper he gave a life estate to his wife with the right of disposal of the whole or any portion of it, and the remainder, if any was left, he divided equally among his four children or their representatives. But both the estate of his wife and the estate of the remainder was subject, upon the happening of certain contingencies, to the right of his daughter Bessie to have a home on the estate and in the house.

The codicil, as the language clearly shows, creates a trust estate to those of his children who had no issue at the time of his wife's decease, to be enlarged into a fee simple estate upon having issue. The children affected were Bessie T. Thorp and Walter W. Tibbetts. Upon death without issue, the trust estate was to be divided between his surviving children. Albert Thorp was appointed Trustee, under the will, of one undivided fourth for Bessie T. Thorp and of one undivided fourth for Walter W. Tibbetts, or of one-half the whole estate. Charles M. Tibbetts, owner in fee of one-fourth, Albert T. Thorp, Trustee for one-half, and Bessie T. Thorp and Walter W. Tibbetts, beneficiaries under the trust in one-half of this estate, joined in the petition against Wm. G. Tibbetts requesting that their interests may be set out to them in common.

It is the legal, if not the natural right, of parties owning real estate in common, to have their interests set off in severalty, unless some present or contingent right in the enjoyment of the estate, as a whole, intervenes to prevent it. There are no present interests which could be interposed to a partition of this estate. The contingent interests are of such a character that they may never become vested. The interest of Bessie T. Thorp, as shown by the language of the will, depends upon conditions that may never arise. The trust estate may be terminated by the birth of children to the beneficiaries. But the will of the testator cannot be thwarted by assuming that the very things he provided against may not come to pass. The will was not intended to be affected, either by the provision for Mrs. Thorp or for the termination of the trust, until the things provided for should happen.

Therefore, the first consideration is whether the provision of the will, to have a home on the estate and in the house of the testator, would be interfered with by partition when the contingencies might happen which would authorize Mrs. Thorp to avail herself of the provision. This may depend upon the intention of the testator, as determined from the language of his will and the circumstances anticipated, when the contingency might happen for which he provided. The language of the provision in favor of his daughter is very significant. In order that its import may be fully seen, we repeat it. "Should my said daughter, Bessie T. Thorp, from any untoward event, by the death of her husband, or from financial distress be left without a home, I order and direct that so long as she may live, and need a home, or desire it, either during the tenure of my said wife, or after her death, my said daughter shall have a home, on my said estate, and in my said house." This language, and the circumstances and conditions contemplated by the use of it, must be construed upon the assumption that the contingencies, or one of them, has happened and the daughter on that account is in need of a home. What kind of a home? But a right to stay in the house? Merely a place of shelter; a room to occupy perhaps with some strange tenant? We do not think so. We cannot avoid the conclusion that the testator intended by the use of this language and in contemplation of his daughter's possible distress that she should have upon that homestead both a home in his house and sustenance from the profits of the farm. The language of his will is peremptory with reference to the provisions for his daughter. "I order and direct." It contemplates that she may be suffering from "financial distress," a circumstance for which, when it may happen, he undertakes to provide. But a mere shelter for his daughter under such a misfortune would be but a mockery. The language of the provision negatives such an interpretation. It provides that she shall have a home, even during the tenure of his wife, in case of distress, and clearly implies that she should also have a maintenance even while his wife was living. But after her death the provision is made strong and does not depend upon the interpretation of the word "home" in the light of the circumstances. He goes much further and in express language reveals his intention wherein he says she shall not only have a home in his house, but "on my said estate." This language would become nugatory, in contemplation

of the testator's desire to provide for the anticipated want of his daughter, if her only right under the language of this will was to occupy a room in this house.

The law does not require such a construction. *Emery* v. *Swasey*, 97 Maine, 136; *Denfield, Petitioner*, 165 Mass., 265; *Lyon* v. *Lyon*, 65 N. Y., 339. While the daughter had the undoubted privilege, if the contingency happened which authorized its exercise, to a home upon the farm, such privilege by the terms of the will constituted, in the first instance, but a contingent interest, and charge upon the estate, of which Mrs. Thorp might avail herself or not, as she saw fit. Her interest in the estate was simply a right which she might or might not exercise. The will did not impose upon the owner of the land any duty to her, nor was the estate in any way put under any obligation, except upon the exercise of her choice. We are, accordingly, of the opinion that she could waive her contingent interest in the homestead, not only by omitting to avail herself of the privilege of living upon it upon the happening of the contingency which would enable her to do so, but can waive it now with equal effect. We are unable to discover any legal reason why this is not a right in futuro which she can as well relinquish now as when the right may accrue. Assuming that she can waive her interest, is her joiner in the petition for partition to have her present legal interest set off in common with the other petitioners a method which will accomplish waiver on her part and protect the party who does not join in the petition? That this can be done seems almost too obvious for argument. Partition can prevail only when legal interests are concerned. By her petition she asks that the non-petitioner's legal interest may be set off. She makes no reservation of any future right. She must, therefore, by her petition, be held to have waived such right and to be estopped in any future attempt to enforce it. Therefore, we are of the opinion that this contingent right interposes no objection to a portion of the estate.

Another provision of the will creates a trust in the portion of the estate to which Bessie T. Thorp and Walter W. Tibbetts are entitled, represented at the present time by Albert T. Thorp, as trustee, who joins in the petition with them for partition. The interest of each of these beneficiaries is a life estate in trust, which may be defeated by the birth of issue; but in case of death of either without issue, their share is to be divided equally between the other children.

There is no apparent reason why this trust should interpose any objection to partition. The trustee will still represent the interests of the beneficiaries and the non-petitioner will receive his share in severalty, and Charles M. Tibbetts will hold his share, in common, with the interests of Walter W. Tibbetts and Bessie T. Thorp, represented by the trustee. If issue be born, the contingency upon which the trust estate is to be terminated, the trust will terminate and the trust interests will become absolute in the beneficiaries. Instead of a life estate they will then hold a fee simple estate, in common with Charles M. Tibbetts. If the contingency does not happen, then upon the death of the beneficiaries under the trust, their interests would at once vest in the survivors, and Charles M. Tibbetts and William G. Tibbetts would each take in common the interests of the deceased beneficiaries. If one beneficiary should survive the other, he would take, in common with Charles M. and William G, in the estate of the deceased beneficiary, a life estate, if without issue, or fee simple if having issue.

It therefore does not appear that the trust estates, created under the provisions of the will, interpose any valid objection to partition.

Exceptions sustained.

CITY OF AUBURN *vs.* ETHER S. PAUL.

Androscoggin. Opinion March 18, 1915.

Arbitration. Assessment. Benefits. Debt. Notice. Re-assessment. R. S., Chap. 21, Sec. 10. R. S., Chap. 21, Sec. 5. Time Limit. Waiver.

An action of debt brought under the provisions of R. S., Chap. 21, Sec. 10, to recover of defendant $1330 alleged to have been assessed upon his land for benefits accruing thereto from the construction of a sewer.

Held:

1. An assessment made by a tribunal duly authorized cannot be regarded as a re-assessment, because a tribunal absolutely without authority has previously attempted to act in the premises.
2. When no limitation of time is fixed by the legislature within which an assessing board must act, the time when an assessment shall be made is confided to the discretion of such board. The court in such case can impose no limitation.
3. The award of arbitrators made without notice of hearing and hearing, in the absence of waiver of the party claiming to be thus aggrieved, is a nullity.

On report. Plaintiff nonsuit.

This is an action of debt, under the provisions of R. S., Chap. 21, Sec. 10, to recover the sum of thirteen hundred and thirty dollars, being the amount of an assessment levied by the municipal officers of the city of Auburn, upon defendant's land on Lake and Shepley Streets and Gamage Avenue in said Auburn, for the construction of a sewer through said streets. The defendant pleaded the general issue, and for brief statement of special matters of defense alleged, in substance, that the proceedings of the plaintiff and municipal officers of the city of Auburn, in making and levying the assessment demanded in plaintiff's writ were without authority of law.

At the conclusion of the evidence, this case was reported, by agreement of the parties, to the Law Court, for its determination, upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

Tascus Atwood, City Solicitor, for plaintiff.

John A. Morrill, for defendant.

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

BIRD, J. This action is reported to this court for determination upon so much of the evidence as is legally admissible. It is an action of debt brought under the provisions of Sec. 10, Chap. 21, R. S., to recover of defendant the sum of thirteen hundred and thirty dollars alleged to have been assessed upon his land in plaintiff city for benefits accruing thereto from the construction of a sewer, by virtue of section 5 of the same chapter. Questions arising from an attempted assessment of such benefits have already been considered by this court in *City of Auburn* v. *Paul*, 110 Maine, 192, in which it was determined that such assessment by the Board of Public Works of plaintiff was invalid as not within the statutory powers of the board.

Subsequent to the decision of that case, the municipal officers of plaintiff for the year of 1912 on the ninth day of January, 1913, voted to make the assessment upon land of defendant, as provided in R. S., Chap. 21, Sec. 5. Hearing upon the assessment was had on the twenty-second day of February, 1913. Five days later the municipal officers voted to revise the assessment and reduced the amount to $1330 and on the twenty-eighth day of February, 1913, notice of the revision was given to defendant.

The defendant, thereupon, requested that the assessment upon his lands be determined by arbitration in accordance with Sec. 6, Chap. 21, R. S. No question appears to be raised as to the regularity of the proceedings resulting in the selection of the three arbitrators. They, however, without notice to either the city of Auburn or the defendant and without hearing accorded to either, proceeded to view the land and make their award in which they reduced the assessment to $1200.

Three points or questions only need be considered.

The defendant asserts that the assessment made by the municipal officers is a re-assessment and urges that no power or authority is conferred by statute for a re-assessment. Conceding that, we think it sufficient to say that, whatever might be the case, when a body or tribunal empowered to make an assessment fails to make a valid assessment by reason of some irregularity in the proceedings, we cannot regard an assessment made by a tribunal duly authorized as a re-assessment, because a tribunal absolutely without authority had previously attempted to act in the premises.

It is contended that the municipal officers in office when the sewer was completed alone had authority to make the assessment. Examination of the statutes regulating the making of assessments discloses no limitation of time within which the assessment must be made. Whether such limitation be made and its extent, if made, are wholly matters for legislative action. The legislature having failed to fix a limit, the court is without power to impose one. In *Bradley* v. *Greenwich Board of Works*, L. R., 3 Q. B. D., 384, 388, where a similar question arose under the Metropolis Management Act, 1862, Sec. 53; it is said (Cockburn, C. J.) "The only question we have to consider is whether the apportionment of the amount payable by appellant was made within proper time. Now, turning to Sec. 53, we seek in vain for any limitation of time within which the apportionment is to be completed. And as the legislature have fixed no limit, it is impossible for us to introduce one." Upon the authority of the case last cited the court in *Fairbanks* v. *Fitchburg*, 132 Mass., 42, 48, says "When authority is given to make a similar assessment, and no limitation of time is fixed within which the assessing board must act, it must be held that the Legislature has confided to the discretion of the board the duty of deciding conclusively when the assessment shall be made."

But the defendant was entitled, upon due proceedings had, with which we must find upon his part full compliance, to have the amount of the assessment determined by arbitration, R. S., Chap. 21, Sec. 6. The amount has been fixed by arbitrators duly selected indeed, but without notice of hearing or hearing. It needs no citation of authorities to sustain the proposition that the award of arbitrators made without notice of hearing and hearing, in the absence of waiver by the party claiming to be thus aggrieved, is a nullity. *Auburn* v. *Paul*, 110 Maine, 192, 195-197. Of a waiver of his rights by defendant, we find no evidence. The defendant, therefore, has not had the benefit of the right, in the nature of an appeal, accorded him by statute. Until he has had an opportunity to be heard before unprejudiced arbitrators and they have duly made their report, there is no legal assessment upon which proceedings for the enforcement of an assessment can rest. See *Auburn* v. *Paul*, ubi supra. See also *Pierce* v. *Bangor*, 105 Maine, 413.

Plaintiff nonsuit.

CHARLES HORNE *vs.* MARTIN RICHARDS, Applt.

Oxford. Opinion March 18, 1915.

Assumpsit. Breach of Contract. Exceptions. Quantum Meruit. Special Contract. Under Seal. Written Contract.

The parties in this case entered into a written contract under seal in which plaintiff agreed to haul and load on cars all of defendant's wood cut on Mason lots, so-called, for $1.00 per cord, and defendant agreed to pay the price specified and to swamp the road through and by the wood cut and piled, and to help swamp any roads of over ten rods in length. After hauling 71 cords of the wood, it became impossible for him to continue to perform his part of the contract, because of the unjustifiable neglect and refusal of the defendant to perform his part of the contract.

Held:

1. If a special contract is at an end, having been terminated by the unjustifiable act of the defendant, or by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from labor performed or materials furnished by plaintiff, the latter may recover the value of such labor and materials in indebitatus assumpsit upon a count for quantum meruit.
2. If the plaintiff's claim was established in fact, that after he had hauled a part of the wood it became reasonably impossible for him to perform the rest of the contract on his part, because of the unjustifiable neglect and refusal by the defendant to perform his part of the contract, then the plaintiff was justified in regarding the special contract as at an end.
3. Therefore, the plaintiff was entitled to recover of the defendant in indebitatus assumpsit upon a quantum meruit the value of the work he had done, of which the defendant had received the actual benefit.
4. In proving the cause of action as laid in indebitatus assumpsit, the special contract necessarily became competent and material to be put in evidence, and its terms referred to, in order that it might be determined by the jury if it was at an end without the plaintiff's fault but on account of the unjustifiable default of the defendant to perform his part of it.

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

This is an action of assumpsit on an account annexed and a count upon a quantum meruit, to recover for hauling and loading on cars 71 cords of wood. The verdict was for plaintiff for $63.67. The defendant excepted to certain rulings and instructions of the presiding Justice, and filed a general motion for a new trial.

The case is stated in the opinion.

Lucian W. Blanchard, for plaintiff.

Albert Beliveau, for defendant.

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

KING, J. Assumpsit on an account annexed containing a count upon a quantum meruit to recover for hauling and loading on cars 71 cords of wood. The verdict was for $63.67, and the case comes up on defendant's exceptions and motion for a new trial.

The case shows that the parties on November 28, 1912, entered into a written contract under seal whereby the plaintiff agreed to haul and load on cars all of the defendant's wood cut on the Mason lots, so-called, for $1.00 per cord, and the defendant on his part agreed to pay the price specified for the work and in addition "to swamp the roads through and by the wood cut and piled, and furthermore agrees to help swamp any roads of over ten rods in length."

The plaintiff claimed, and introduced evidence tending to show, that after hauling and loading the 71 cords it became impossible for him to continue longer in an attempt to perform his part of the contract because of the unjustifiable neglect and refusal of the defendant to perform his part of the contract, particularly that part requiring him to swamp the roads.

1. THE EXCEPTIONS.

The defendant contended at the trial that the plaintiff's cause of action, if any, was for a breach of the written contract, and, as that was under seal, that his action should have been brought in debt or covenant and not in indebitatus assumpsit; and, further, that in this action of assumpsit the contract under seal was not admissible, nor any evidence tending to show a breach of it by the defendant. All

of the exceptions center about those contentions, and they need not be separately considered. Necessarily they will all stand or must all fall together.

If a special contract is at an end, having been terminated by the unjustifiable act of the defendant, or by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from labor performed or materials furnished by the plaintiff, the latter may recover the value of such labor and materials in indebitatus assumpsit upon a count for a quantum meruit. *Wright* v. *Haskell,* 45 Maine, 489, 492; *Poland* v. *Brick Co.,* 100 Maine, 133; *Hilton* v. *Hanson,* 101 Maine, 21; *Moulton* v. *Trask,* 9 Met., 577; *Fitzgerald* v. *Allen,* 128 Mass., 232, 234; *Bailey* v. *Marden,* 193 Mass., 277, 279.

If, therefore, the plaintiff's claim was established in fact, that after he had hauled a part of the wood it became reasonably impossible for him to perform the rest of the contract on his part because of an unjustifiable neglect and refusal by the defendant to perform his part of the contract, then the plaintiff was justified in regarding the special contract as at an end, and was entitled to recover of the defendant in indebitatus assumpsit upon a quantum meruit the value of the work he had done of which the defendant had received the actual benefit. And that is the action the plaintiff brought. It is not an action for damages for a breach of the special contract, but an action for the value of the plaintiff's services performed for the defendant under such circumstances as entitle him to recover therefor upon a quantum meruit.

Those services were performed under the special contract, but the plaintiff claimed that contract was at an end because of the defendant's default. Therefore, in proving the cause of action as laid in indebitatus assumpsit the special contract necessarily became competent and material to be put in evidence, and its terms referred to, in order that it might be determined by the jury if it was at an end without the plaintiff's fault but on account of the unjustifiable default of the defendant to perform his part of it. And it was offered and admitted for that purpose only, and the jury were so instructed. We think it may also have been material upon the question of the real value to the defendant of the plaintiff's services.

In the opinion of the court the rulings and instructions complained of were in accordance with well settled principles, and unexceptionable.

2. THE MOTION.

Upon the vital issue of fact in the case, whether the plaintiff was prevented from performing his part of the contract on account of an unjustifiable neglect and refusal of the defendant to perform his part, the evidence was conflicting. That issue was clearly presented to the jury. The weight and effect of the evidence was for them to pass upon, and it does not appear to the court that their finding was manifestly unwarranted by the evidence.

Exceptions and motion overruled.

LOUIS SHRIRO, et al., *vs.* SILVIO PAGANUCCI.

Kennebec. Opinion March 23, 1915.

Equity. Forcible Entry and Detainer. Forfeiture. Lease. Powers to Relieve. Rent. R. S., Chap. 96, Sec. 1.

In an action of forcible entry and detainer, the question presented was whether the defendant should have been ousted for non-payment of rent under the terms of the lease which provides that "the lessor may enter to view and make improvements, and to expel the lessee if he shall fail to pay the rent aforesaid, whether said rent be demanded or not."

Held:

1. That it is well settled that equity will relieve against forfeiture for non-payment of rent, when, under the circumstances, it would be inequitable, and full compensation can be made for the tenant's default by payment of the rent due and damages.
2. When a tenant has forfeited his lease by a breach of the covenant for the payment of rent, the courts of law and equity, considering the clause of reentry to be inserted principally for the landlord's security, will interfere in the tenant's behalf, although all the formalities of a common law demand on the part of the landlord may have been complied with, upon the tenants satisfying the rent due and making compensation for damages, which the landlord may have sustained by the breach.

3. A court of equity will relieve the tenant from a forfeiture when the breach is the result of accident or mistake, or where it has been incurred by neglecting to pay a sum of money, the interest upon which can be calculated with certainty and the landlord thereby compensated for the inconvenience he may have sustained by the tenants withholding payment.
4. That this court, as a court of law, has the power in the case at bar, and like cases, to grant relief, is sanctioned by unchallenged authority.
5. This court has the power to stay proceedings in support of an equitable defense, and the Superior Court for Kennebec County had the same power. That such power should have been exercised by the court below does not admit of doubt.

On exceptions by defendant. Exceptions sustained.

This is an action of forcible entry and detainer, commenced in the Municipal Court of Waterville. In this court, judgment was rendered for the plaintiff. The defendant appealed from said judgment to the Superior Court for Kennebec County. The case was heard by the Superior Court upon an agreed statement of facts, with the right of appeal reserved. The judgment of the court below was affirmed and the defendant excepted to said ruling.

The case is stated in the opinion.

F. K. Shaw, and P. A. Smith, for plaintiff.

Pattangall & Plumstead, for defendant.

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

HANSON, J. This is an action of forcible entry and detainer, commenced in the Municipal Court of Waterville where judgment was rendered for the plaintiff. The defendant appealed to the Superior Court for the County of Kennebec, and the case is before the Law Court upon exceptions to the ruling of the Judge of the Superior Court affirming the judgment of the Municipal Court of Waterville.

The defendant was occupying plaintiff's store, under a lease dated June 3, 1909. His rights under the lease would expire June 1, 1914. Rent was due and payable on the first day of each month. On January 1st, 1914, a month's rent was due and unpaid, but on January 3rd the plaintiff received the defendant's check for the rent, as had been the custom previously on a rent day, and on the 5th day of the month returned the same to the defendant and thereupon brought this action. Tender of the rent due was again made in the Municipal

Court, and a brief statement was filed setting out payment of the rent on the 2nd day of January. Judgment was rendered against the defendant, who sought and procured an injunction which was in a short time dissolved, the defendant was ousted, and the plaintiffs have occupied the store ever since. An agreed statement upon which the ruling of the court was based is filed with the case giving the foregoing information substantially as stated.

The question presented is whether the defendant should have been so ousted for non-payment of rent under the terms of the lease which provides that "the lessor may enter to view and make improvements, and to expel the lessee if he shall fail to pay the rent aforesaid whether said rent be demanded or not."

The plaintiffs contend 1, that there was a forfeiture completed at the expiration of the first day of January, and that it was too late to make a tender after forfeiture has been completed, even if the check had been a legal tender; 2, that the courts below have no equity powers which they could exercise under the facts as set forth in the agreed statement; 3, that equity will not relieve a tenant from forfeiture when there is a clear right to said forfeiture, and the exercise of that right is sought in a regular and proper manner; 4, and then only in case of accident or mistake; 5, and finally that equitable relief should not be had in this case because such relief in a court of law is the exception and not the rule.

The defendant contends "that the forfeiture clause in the lease was to secure the payment of the rent, and that under such circumstances as are disclosed here courts universally grant relief from technical forfeiture, and that courts of law as well as courts of equity may relieve from forfeiture."

As to the principal contention we may say that it is well settled that equity will relieve against forfeiture for non-payment of rent where under the circumstances it would be inequitable, and full compensation can be made for the tenant's default, by payment of the rent due and damages, 24 Cyc., 1364, and the same authority supports the claim of the defendant that relief may be granted by a court of law as well as by a court of equity, page 1365, citing *Atkins* v. *Chisholm*, 11 Metcalf, 112.

Other authority of no less repute restates the rule, established so long ago that the date of its origin is in doubt, the wisdom and justice of which, have been appreciated by all courts since the formation of

our laws,—as follows: "when a tenant has forfeited his lease by a breach of the covenant for the payment of rent, the courts of law and equity, considering the clause of reentry to be inserted principally for the landlord's security, will interfere in the tenant's behalf although all the formalities of a common law demand on the part of the landlord may have been complied with, upon the tenants satisfying the rent due and making compensation for damages which the landlord may have sustained by the breach." Taylor's Landlord and Tenant 9th Ed., Vol. 2, Sec. 495. And that author lays down anew the general rule that a court of equity will relieve the tenant from a forfeiture where the breach is the result of accident or mistake, or where it has been incurred by neglecting to pay a sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenants withholding payment. Id., Sec. 495, and cases cited.

The construction of the lease in this case requires no guidance aside from our own rule that like any other contract it is to be construed with reference to the intent of the parties, as gathered from all parts of the instrument, and the object and purposes of the transaction. *Briggs* v. *Chase,* 105 Maine, 319.

The relation of landlord and tenant had subsisted for four years and six months under the lease in question. The parties had been friendly, and the payment of rent had been regular and as on the date in question, always by check, a means of payment not then or now questioned as to certainty of payment. In the last months of a long contract as shown by the pleadings, a delay of less than thirty-six hours occurred in the payment of rent and on that account alone we are asked to affirm the judgment of the Superior Court, thus declaring in effect a forfeiture in this case.

It is not clear for what purpose the injunction was issued, what it accomplished, or why it was dissolved; but it is clear that the case warranted equitable relief. The equitable remedy having been abandoned, the defendant now seeks relief from forfeiture by raising an equitable defense in the pending suit at law.

That he may so defend and show that he is entitled to relief, and that this court as a court of law, has the power in the case at bar, and like cases, to grant relief, as has been seen, is sanctioned by unchallenged authority.

In *Atkins* v. *Chisholm*, 11 Metcalf, 112, a leading case, cited widely with approval, the court had under consideration a writ of entry to recover possession of a lot of land formerly leased by the demandant to the tenant for a term of years not then expired. The action was founded on an alleged breach of a condition in the lease, by the non-payment of rent, and a clause of entry thereupon reserved by the demandant in the lease.

The tenant incurred the forfeiture of his term by tendering a quarter's rent, through mistake a day or two before it was due and omitting to pay it on the quarter day. The lessor had refused to receive the rent for several previous quarters and had an action pending against the lessee to recover the demised premises on the ground of the forfeiture by non-payment of the aforesaid quarter's rent. Failing in that the lessor brought the writ of entry to recover the premises on the ground of the last forfeiture by non-payment. The court held, "that the proceedings in the last action should be stayed, on the lessees paying to the lessor, or bringing into court for his acceptance, the full amount of the rent in arrear, and with interest thereon and costs." It was there claimed that courts of common law had not the power to grant relief in such cases. This claim was met with the assertion "that the authorities cited by counsel for the tenant abundantly show that in many cases, and for a long period of time, the courts of common law in England have exercised such a power by granting relief in support of equitable defenses "for the easier, speedier and better advancement of justice," without turning the party over to a court of equity. . . . . But the rule more directly in point is that long since adopted by the courts in England, in ejectment, on a clause of reentry for non-payment of rent, as in the present case. So long since as the year 1837 Lee, C. J., remarked in the case of *Archer* v. *Snapp*, Andr., 341, that before the St. of 4 Geo. 11 the court of the King's Bench had exercised a discretionary power of restraining the lessor from proceeding for forfeiture, in case of non-payment of rent "by compelling him to take the money really due him." How long before courts of law had exercised that power is uncertain, and is not material. . . . "We have no doubt, therefore, of the power of this court to stay proceedings in support of an equitable defense. And if we have such power, that it ought to be exercised in this case, no one, we think, can doubt."

We think further citation of authority unnecessary to support the claim that this court has the power to stay proceedings in support of an equitable defense, and that the Superior Court for the County of Kennebec had the same power. That such power should have been exercised by the court below does not admit of doubt. The condition disclosed here has existed many times in the past, and will as certainly occur again. In the rapid development of business and the onward rush of events, it is to be expected that men will occasionally overlook a rent day, as they will overlook the minor affairs of life. In these omissions of duty the law does not supply an excuse, but does afford an opportunity for the delinquent to make amends, and at the same time lends assistance to the lessor in collecting his due under the security clause in his lease.

The entry will be,

Exceptions sustained.

IRA SCRIPTURE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion March 25, 1915.

Collision. Flagman. Grade Crossing. Injury. Last Chance. Negligence. Obscured Vision. Proximate Cause. Railroad Crossing. Want of Due Care. Warning.

1. It is negligence per se for the driver of a team to cross a railroad track without first looking and listening for a coming train.
2. Where two main lines of track exist, and the crossing of the first line is covered by a standing train, it is contributory negligence for the traveler to attempt to cross the second line after the crossing has been cleared without making all reasonable effort to determine whether a locomotive is passing on the second line.
3. That the plaintiff was clearly guilty of contributory negligence, especially in view of the fact that he was warned not to cross by various people in addition to the flagman. The jury were not warranted in finding a verdict in his favor.

On motion for new trial by defendant. Motion sustained. Verdict set aside.

This is an action on the case to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company, while attempting to cross the tracks of the defendant company, which extend across Railroad Street in the City of Bangor. Plea, general issue. The jury returned a verdict for plaintiff for $300, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

George E. Thompson, for plaintiff.

Fellows & Fellows, for defendant.

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

CORNISH, J. While the plaintiff was attempting to drive his team over a grade crossing on Railroad Street in the City of Bangor he was struck by an engine of the defendant and somewhat injured. The ground alleged in his writ for holding the defendant legally responsible for his injuries is that the flagman stationed at the crossing gave him the signal to go forward, and while obeying the invitation he was hit by an engine run in a negligent and reckless manner. Had these allegations been proved the verdict rendered in the plaintiff's favor would have been justified; but the evidence falls far short of substantiating these claims or of proving any negligence on the part of the defendant, and on the contrary establishes the plaintiff's own want of due care, as the proximate cause of the injury.

The situation was as follows: Front Street runs parallel with the tracks of the defendant company and is located between the tracks and the Penobscot River. Railroad Street leads from Front Street across the tracks at grade to Pleasant Street, and is situated between the old and the new passenger stations. At this crossing were two main lines of tracks, the east bound and the west bound with certain yard tracks branching off. The plaintiff, the driver of a double team with a dump cart, was an employe of the city and had been collecting rubbish on Front Street. His destination was the city dump, to reach which it was necessary for him to drive over Railroad Street crossing. When he reached the crossing it was blocked by a shifting engine with four cars on the east bound track, next to Front Street. He stopped and waited, as he says, probably two minutes, until the

crossing was clear, and the train had moved a short distance toward the east, that is toward the new Union Station. He says that the flagman, who was standing between the west bound and the east bound tracks, and who came into view when the crossing was cleared, then signalled him to cross and he had gone about half-way across the second track when another engine backing down from the Union Station struck the off hind wheel of his cart and he was thrown off. The point of controversy here is the act of the flagman, and on this the conclusion is irresistible that instead of inviting the plaintiff to cross he was using every endeavor to prevent him. Not only was he waving the flag, as the plaintiff himself admits, but he was also shouting to the plaintiff to stop; yet regardless of either visible or audible warning the plaintiff whipped his horses and kept on his course to the point of collision.

Under this state of facts, the truth of which is fully established by the evidence, no legal liability for this accident was imposed upon the defendant. It had performed its legal duty and was guilty of no breach, either in the way of omission or commission. It had provided a flagman at this crossing, who was at his post and performing his duty. The engine which struck the team had brought in the afternoon passenger train from the west and, detached, was on its way to the engine house situated west of the old passenger station. It was equipped with an automatic air bell which was constantly ringing. Its speed was eight or ten miles an hour, which could not be deemed excessive, when a flagman was at the crossing. As soon as the engineer discovered the signal to stop given by the flagman he put on the emergency brake but it was too late to avoid the collision. Clearly the defendant was not negligent and the last chance doctrine does not apply.

On the other hand the lack of due care on the part of the plaintiff is equally apparent. He had lived in Bangor twenty-five years and was thoroughly familiar with the crossing and its surroundings. He knew there were two main lines of track. When the first line was cleared by the moving of the shifting train he took no precaution to ascertain if any other engine or train was coming on the other track. This was inexcusable. If, as the counsel for the plaintiff contends, the shifting train in its new position prevented his seeing the engine approaching on the other line from the east, that fact did not excuse him for rushing into possible danger but on the contrary rendered

it necessary that he take other means of determining whether or not a train was approaching. Obscured vision does not remove the burden resting on the traveler. *Fletcher* v. *R. R. Co.*, 149 Mass., 127, *Lundergan* v. *R. R. Co.*, 203 Mass., 460. But it is clearly proved that had the plaintiff looked, after he had passed the end of the shifting train if not before, he could have seen the approaching engine and have stopped in ample season to avert danger. He did not look at any point. He himself admits it. He says, "I didn't look. I had no occasion to look."

In addition to this it is proved that the plaintiff was warned by others as well as by the flagman. The conductor of the shifting train, seeing the engine coming, dropped off the rear car, stepped close to the team, swung his arms and shouted to the plaintiff to stop; but the latter disregarded his warnings, whipped up his horses and started across. The brakeman on the same train, who was at a distance of eighty-six feet to the west, also shouted to the plaintiff to stop, but his cries also were unheeded. Evidently the plaintiff was either reckless or thoughtless, more likely the latter, but either is fatal to his recovery. He had perhaps become somewhat impatient at being obliged to wait the two or three minutes for the shifting train which was blocking the crossing on the first track and when he started he was oblivious to everything. The flagman testifies that the plaintiff paid no attention to his swinging of the flag nor to his shouting, "never looked at me at all, no more than I was not there." Such conduct on the part of the plaintiff bars his recovery under the fixed, familiar and wholesome rules of law in this State applicable to the duty of travelers at grade crossings of steam railroads. *Giberson* v. *B. & A. R. R. Co.*, 89 Maine, 337; *Blumenthal* v. *B. & M. R. R.*, 97 Maine, 255; *Lewis* v. *Washington Co. R. R. Co.*, 97 Maine, 340; *McCarthy* v. *B. & R. R. Co.*, 112 Maine, 1; *Goodwin* v. *Maine Central R. R. Co.*, 113 Maine. The verdict is so manifestly wrong that it cannot be allowed to stand.

Motion sustained.
Verdict set aside.

ERIE CITY IRON WORKS *vs.* CUSHNOC PAPER COMPANY.

Kennebec. Opinion March 25, 1915.

Contract. Delay in Delivery. Extra Cost of Fire Brick Used in Setting. Material Fact. Recoupment. Representation. Specifications. Warranty.

In an action of assumpsit for the balance due for the construction and delivery of a five hundred horse power boiler, a written contract having been entered into therefor and the defendant having set up various grounds for recoupment, it is

Held:

1. That the statement in the contract of the quantity of brick and tile required for standard setting of the boiler was an estimate merely and not a representation of an existing and material fact. It formed no material part of the contract itself, and the defendant cannot recoup for any excess of cost.
2. That the delay of three weeks in delivering the boiler did not work a breach, as the contract provided that the time of delivery should be contingent upon late mill deliveries or other hindrances beyond the plaintiff's control, and the evidence shows that late mill deliveries were the cause of the delay.
3. That, therefore, any excess of cost in constructing a brick instead of a cement boiler house, the change being caused as alleged, by the delay in delivery, cannot be allowed in recoupment, especially in view of the fact that all correspondence or conversations in regard to building a cement house were independent of the contract and merely personal matters between the agent of the plaintiff and the general manager of the defendant.

On report. Judgment for plaintiff for $1890, with interest from the date of the writ.

This is an action of assumpsit upon an account annexed to recover the sum of $1890, being the balance due for one five hundred horse power vertical water tube boiler and fixtures according to written contract between the parties dated August 12, 1912. Tried in the Superior Court for Kennebec County, September term, 1914. The plea was the general issue, with brief statement of special matters of defense to be used under the general issue, in which defendant claims to recoup in damages. At the conclusion of the evidence, the case

was reported to the Law Court for determination: The Law Court to determine the rights of the parties, assess such damages as a jury would be warranted to assess under the testimony in the case: Testimony offered and excluded to be a part of the report, excepting testimony relating to the question of fuel.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

M. S. Holway, for defendant.

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

CORNISH, J. The plaintiff, a corporation doing business at Erie, Pennsylvania, on August 24, 1912, through its New England Agent, C. H. Bradley, Jr., of Boston, Massachusetts, entered into a written contract with the defendant through its President and General Manager, Mr. Lyman, for the construction and delivery of one five hundred horse power vertical water tube boiler for the sum of thirty-one hundred dollars f. o. b. cars at Erie, freight allowed to Augusta, Maine, payment to be made, one-half on arrival at Augusta and the balance ninety days thereafter. The contract contains detailed specifications of the work. Delivery was to be made "three weeks from August 26," which was September 16, 1912. It was not in fact delivered until October 11, 1912. On its arrival in Augusta the boiler was accepted and set up by the defendant, and so far as the evidence shows was entirely satisfactory. On November 7, 1912, payment was made of one-half the purchase price. No further payments being made the plaintiff brought this action of assumpsit for the balance due and the defendant claims to recoup for damages sustained, in three particulars:

First, for extra cost of fire brick used in setting the boiler; second, for extra cost of tile in same; and third, for cost of brick boiler house in excess of estimated cost of cement house, the change being caused, as alleged, by the delay in delivery.

The claims for extra cost of fire brick and tile in setting the boiler may be considered together. The contract contains this paragraph:

"Brick required for standard setting, 35000 red brick, 4400 No. 1 fire brick, 5000 No. 2 fire brick, 1300 wedge brick, 360 tile 12 x 12 x 2, 18 tile 12 x 24 x $2\frac{1}{2}$." The quantity of fire brick actually used in the construction was 14,290 and of tile 460. For the cost of this excess

the defendant claims to recover on the ground that the plaintiff had represented or warranted the amount required, and was legally liable for the falsity of the representation.

We are unable to so construe the contract. This statement as to quantity of brick was not a representation of a material existing fact but merely an estimate on the plaintiff's part of what it would cost under standard setting to set the boiler which it had agreed to furnish. It formed no material part of the contract itself, but was one of the collateral matters connected with it, on which it gave its judgment. It is difficult to believe that the defendant relied on this estimate as the representation of a material fact, in making his contract, and was led to enter into the agreement because of this representation, a necessary element on which to base a claim for false representation. *Patten* v. *Field*, 108 Maine, 299; *Hotchkiss* v. *Coal & Iron Co.*, 108 Maine, 34. The record is barren of any evidence to support such a contention.

It further appears that the standard setting, suggested in the contract, requiring a four and one-half inch fire brick lining, was not followed, but a nine inch lining was substituted, which required, as the defendant admits, twice as much material. It is true that this change was suggested by the plaintiff's agent, Mr. Bradley, but it was made on November 21, long after the contract itself was made and the boiler furnished, and was simply one of many friendly suggestions made in the course of the erection, and was entirely independent of the contract itself. This claim cannot prevail.

The defendant's remaining contention is that by reason of the delay in delivery and the consequent lateness of the season it was forced to build a brick instead of a cement building, and thereby to incur an additional expense of six hundred dollars. This contention fails for two reasons. In the first place the evidence negatives a breach of the contract because of delayed delivery. The time specified was three weeks from August 26, but this must be construed in connection with another clause in the contract, which provides as follows: "Time of delivery to date from the receipt of full details of order, contingent upon delay caused by fire, strike, accident, late mill deliveries or other hindrance beyond our control." The plaintiff's evidence shows that the delay was caused by the Otis Steel Company's delayed delivery of the necessary boiler plate to the plaintiff, for which the plaintiff was in no way responsible. The

treasurer of the plaintiff company testified that the delays were all absolutely beyond the control of his company and this evidence stands uncontradicted.

In the second place, the contract itself is silent as to the kind of boiler house to be erected. That matter was not in the contemplation of the parties. The contract was for a boiler, not a boiler house. Mr. Lyman admits that he originally contemplated building a brick building, but that Mr. Bradley suggested a cement building as cheaper and sent plans therefor, all of which was independent of the contract, and was simply a personal matter between Mr. Bradley and himself in which Mr. Bradley was offering his friendly advice. This evidence annihilates the claim.

As the defendant's grounds for recoupment cannot be sustained the entry must be,

Judgment for plaintiff for $1890 with interest from date of the writ.

ERVING M. GREENWOOD, In Equity, *vs.* BERTHA M. GREENWOOD.

Androscoggin. Opinion March 25, 1915.

Agreement by Wife to Support Self and Children. Agreement to Separate. Consideration. Conveyance. Equity. Husband and Wife. Public Laws of 1913, Chap. 48. Public Policy. Separation Must Actually Take Place and Continue.

Bill in equity brought by a husband against his wife, under Chap. 48, Public Laws of 1913, to enforce the reconveyance of certain real estate deeded by him to her on April 10, 1914.

This conveyance was made contemporaneous with a written agreement of separation, whereby the plaintiff was to leave home, the defendant was to have the custody of the children without interference from the plaintiff and she was not to demand or receive from the plaintiff any further aid in their care, education or maintenance. No separation took place, and the family has remained unbroken. With the exception of the first two or three weeks, the husband has supported wife and children, as husbands and fathers usually do. He has bought the groceries and at his wife's request has furnished the money with which to buy the clothing. He has carried on the farm as before.

Held:

1. That the written agreement is in the nature of an agreement for separate support of both wife and children.
2. That the condition on which the validity of a post nuptial agreement for support rests, is, either that separation has already taken place, or that the agreement is made in contemplation of an immediate separation, which takes place as contemplated.
3. That the consideration for an agreement of separation fails and the contract is avoided when, as here, separation does not take place, or where, after it has taken place, the parties are reconciled.
4. That the wife has, therefore, received a conveyance of this homestead property which was not intended as a gift and for which she has paid no consideration, and to permit her to retain the title under these circumstances would be against equity and good conscience.

On appeal by the plaintiff. Appeal sustained. Bill sustained. Decree in accordance with opinion.

This is a bill in equity, brought by Erving M. Greenwood, plaintiff, against Bertha M. Greenwood, his wife, and is based upon the provisions of Chap. 48, Sec. 2 of the Public Laws of 1913, to recover back certain real estate conveyed by him to his wife April 10, 1914, in consideration that the parties should separate and thereafter live separately, and that the wife should care for herself and said minor children, without assistance from the husband and father. To the bill, the defendant filed her answer, and the plaintiff filed replication to said answer. The cause was heard by a single Justice, who ordered, adjudged and decreed that the bill be dismissed. From this decree, the plaintiff appealed to the Law Court.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Woodside, for defendant.

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

CORNISH, J. This is a bill in equity brought by a husband against his wife under Chap. 48 of the Public Laws of 1913 to enforce the reconveyance of certain real estate deeded by him to her on April 10, 1914. This statute provides as follows:

Section 2. "A wife may bring a bill in equity against her husband for the recovery, conveyance, transfer, payment, or delivery to her of any property, real or personal or both, exceeding one hundred dollars in value, standing in his name or to which he has the legal title, or which is in his possession, or under his control, which in equity and good conscience belongs to her and which he neglects and refuses to convey, transfer, pay over or deliver to her, and, upon proper proof, may maintain such bill. And a husband shall have the same right to bring and maintain a bill in equity against his wife for the purposes aforesaid, subject to the limitations aforesaid. Marriage shall be no bar to the maintenance of a bill in equity by a wife against her husband, or by a husband against his wife, brought for the purposes aforesaid," etc.

The facts upon which these proceedings are based as found by the sitting Justice are these. "Prior to April 10, 1914, the plaintiff became very much disturbed by the misconduct of the defendant and told her in substance that he would not stand it, that something had got to be done. Thereupon she asked him if he would be willing to

give her the property, meaning the farm in question, she to take care of the children. He assented. Two or three days later, namely April 10, 1914, they went together to the office of an attorney, who drafted, and they signed, the following agreement:

'Whereas Erving M. Greenwood has this day conveyed to Bertha M. Greenwood certain land in Turner, Androscoggin County, Maine, and in consideration of said conveyance the parties mutually agree as follows: Said Erving M. Greenwood is about to go away and leave his family, and it is agreed that the children of the parties are to remain in the custody of the mother, Bertha M. Greenwood, without interference from the said Erving M. Greenwood, and that the said Bertha M. Greenwood is not to demand or receive from the said Erving M. Greenwood any further aid in the care, education and maintenance of said children.'

And at the same time, in consideration in part at least, of this agreement, the plaintiff gave the defendant a deed of the farm in question. It was then understood that the plaintiff should sell his personal property within a reasonable time and leave the home. He sold some or all of the personal property to the defendant but he did not leave. He remained in the house and family and has carried on the farm until the present time (November 7, 1914) exactly as he was accustomed to do prior to April 10. For two or three weeks after April 10 the defendant purchased the family supplies. After that the plaintiff did. And he has since supported wife and children as husbands and fathers usually do. The defendant did not refuse to carry out her part of the agreement, but in view of the voluntary action of the plaintiff, above stated, she has had no occasion to do so. It is not shown that the parties have made any other definite agreement in the premises. Things have simply gone on without any express agreement."

The sitting Justice decided that the plaintiff had not shown a case of which the court in equity has cognizance under the statute aforesaid and dismissed the bill. From this decree the plaintiff appealed. The question therefore is sharply raised whether under the undisputed facts in this case (the defendant having introduced no evidence) and under the findings of the sitting Justice the plaintiff can invoke the aid of this remedial statute.

The written agreement is in the nature of an agreement for separate support, and while in express terms the mother binds herself to main-

tain the children only, and does not include herself, we think the clear intendment of the parties and the fair construction and purport of the instrument as a whole, in view of all the surrounding facts and circumstances, was that the mother was thenceforth to support the family, excluding the husband, and that the homestead farm was conveyed to her for that purpose. Thenceforth the husband was to look out for himself and the mother for herself and her children. The validity of an agreement for the separate support of the wife alone has been upheld in this State in *Carey* v. *Mackey*, 82 Maine, 516, where an action of debt on bond given by the husband to the wife for her separate support was held maintainable by the wife after she had obtained a divorce, and this is in accord with the general current of English and American authority.

Whether an agreement, like that in the case at bar, under which the mother attempts also to assume the burden of the care and maintenance of their minor children and to relieve the father from his fixed legal liability therefor, without the sanction of the court, can be upheld may well be doubted, *Grime* v. *Borden*, 166 Mass., 198, 200; *Wright* v. *Leupp*, N. J., Eq. (1905) 62 At., 464-5. As between the father and the children he was not thereby relieved of the duty of their maintenance, a duty imposed by their very relationship and which they had in no way surrendered. There is ground for holding that such a contract offends public policy. The wife may under certain conditions discharge her husband from liability for her own support but she has no authority to act for her children either in cutting off or transferring right of parental support to which they are legally entitled. The State has an interest in the welfare of the child, and in all divorce proceedings that welfare is held to be superior to the wishes of the parent, and governs the court in its decrees as to custody and maintenance. This jealous regard for the rights of the child should look askance at contracts between parents attempting to shift the legal responsibility. The relation between husband and wife is one thing, that between parent and child is quite another. But it is unnecessary to decide that question in the case at bar.

Nor is it necessary to hold that the transfer of the real estate by the father to the mother was void because the agreement given in consideration thereof was non-enforceable in law, although such a contention is not without force. Had the wife refused to carry out the contract the husband was remediless. He could not maintain

an action for its breach because neither party to the marriage contract can sue the other at common law while the marriage relation exists, *Hobbs* v. *Hobbs*, 70 Maine, 381, and this disability has not been removed by our statutes, *Haggett* v. *Hurley*, 91 Maine, 542, 547. The Massachusetts Court has therefore recognized such contracts between husband and wife only when made in the name of a third party as trustee, *Hollenbeck* v. *Pixley*, 3 Gray, 521; *Fox* v. *Davis*, 113 Mass., 255; *Whitney* v. *Closson*, 138 Mass., 49; *Grime* v. *Borden*, 166 Mass., 198; *Atkins* v. *Atkins*, 195 Mass., 124, and so has the Supreme Court of the United States, *Walker* v. *Walker*, 9 Wall., 743. Whether therefore in the case at bar the conveyance should be allowed to stand when the consideration therefor is a non-enforceable contract might well be questioned.

But for the purposes of this case, without deciding either of the questions already raised, the agreement must be held invalid on another ground.

The condition on which the validity of a post nuptial agreement for support rests is, to quote the language of this court, either "that separation has already taken place or that the agreement is made in contemplation of an immediate separation which takes place as contemplated." *Carey* v. *Mackey*, 82 Maine, 516. This condition is insisted upon and this peculiar species of contract, which by the very nature of the case and the relations of the parties is regarded as sui generis, is upheld and enforced only when that condition has been complied with, and both the separation and its continuance are proved as facts. In *Page* v. *Trufant*, 2 Mass., 159, cited in *Carey* v. *Mackey*, supra, separation had already taken place; in *Fox* v. *Davis*, 113 Mass., 255, the parties lived separately after the agreement. In this latter case the court say: "The great weight of authority sustains the validity of such contracts where the separation has taken place or is to take place immediately. . . . We are of opinion, therefore that when, in contemplation of an immediate separation, actually carried out, a husband, by indenture, places money in the hands of a trustee the income of which is to be paid to the wife during life, the indenture is binding on him and will not be set aside as against public policy." The element of continued separation is indispensable; *Bailey* v. *Dillon*, 186 Mass., 244. The query has even arisen as to what the effect of a bona fide offer to return on the part

of the wife might be, but the point has not been decided so far as we have been able to ascertain. *Allen* v. *Winn*, 134 Mass., 77-81; *Bailey* v. *Dillon*, 186 Mass., 244, 248.

The rule therefore, that actual and continued separation either before the agreement or immediately after, must exist in order to enforce such an agreement is fully established. The reason upon which the rule rests is that if such separation does not take place or is not continued the consideration fails. "The consideration for an agreement of separation fails, and the contract is avoided where separation does not take place, or where, after it has taken place, the parties are reconciled and cohabitation resumed." *Galusha* v. *Galusha*, 116 N. Y., 635, 22 N. E., 1114. It should also be added that such contracts do not stand upon the same footing in all respects as ordinary commercial contracts, and equity will not enforce them unless they are fair and reasonable. To hold a man liable for the separate maintenance of his wife and children while they are at the same time living together in the ordinary family relations, violates the idea of fairness and reasonableness.

The facts of this case illustrate the reason of the rule and call for its application. The agreement was made and the deed was given while the parties were living together in the usual family relations, and those relations have continued unchanged. It was contemplated at the time, that separation would follow forthwith, but it never has taken place. The family has remained unbroken. The wife purchased the family supplies for two or three weeks, but with that exception the husband has "supported wife and children as husbands and fathers usually do." He has himself bought the groceries while he has given his wife the money with which to purchase the clothing, and this at her request, in direct violation of the terms of the agreement that she was "not to ask, demand or receive from the said Erving M. Greenwood any further aid in the care, education and maintenance of said children."

The result is that the wife has received a conveyance of this homestead property which was not intended as a gift and for which she has paid no consideration, except an agreement on her part the consideration for which has failed and an element essential to its validity is lacking. It is both non-enforceable and void. To permit her to continue to hold the property under these circumstances would be

unfair, unreasonable and inequitable. "In equity and good conscience" it belongs to the plaintiff and therefore under Chap. 48 of the Public Laws of 1913, he should be permitted to recover it.

The entry must therefore be,

Appeal sustained.
Bill sustained.
Decree in accordance with opinion.

EMMA MUNROE CARTER, et al.,
Appellants from decree of Judge of Probate.

Knox. Opinion March 30, 1915.

Appeal. Bond. Entering Appeal. Exceptions. Notice. R. S., Chap. 65, Sec. 28. Will.

1. The statute regulates the right of appeal from decrees of the Judge of Probate; and but two ways are provided, Secs. 28 and 29, Chap. 65, of the R. S., and, unless the provisions of the statute are complied with, the right of appeal is lost.
2. Before an appeal can be entered under Sec. 30 of Chap. 65, there must be a petition and notice given thereon, and if, upon hearing, the petition is granted, the entry should be made at the term which it is granted, but before the appeal is entered the petitioners must file an appeal bond, as required by the statute giving the right of appeal.

On exceptions by appellants. Exceptions overruled.

The petitioners filed in the Probate Court notice of appeal from the allowance by the Probate Court of the will of Harriet A. Munroe by decree of February 21, 1911, to the September term, 1913 of Supreme Judicial Court. Notice of this appeal was served upon the executor. Appeal and reasons of appeal were entered at the September term, 1913, and upon entry day the executor filed a motion to dismiss the appeal. At the January term, 1914, the motion to dismiss was granted and appeal dismissed. To this ruling the petitioners excepted.

The case is stated in the opinion.
Coggan & Coggan, for appellants.
R. I. Thompson, for executor.

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

HALEY, J. An instrument, purporting to be the last will and testament of Harriet A. Munroe, was proved and allowed as her will by the Probate Court for Knox County on February 20, 1911. No appeal was claimed within twenty days, as provided by Sec. 28, Chap. 65, R. S., but, on September 16, 1911, the petitioners, residents of Hancock County and heirs at law of said Harriet A. Munroe, filed a petition in the Supreme Judicial Court, as provided by Sec. 30, Chap. 65, R. S., alleging that, without fault on their part, by accident, mistake, or defect of notice, they omitted to claim or prosecute an appeal, and asked for leave of court to enter and prosecute an appeal from said decree with the same effect as if it had been seasonably done. Notice was given upon the petition, and at the January term, 1912, a motion to dismiss the petition was filed by a beneficiary under the will, and, after hearing, the motion was granted and the case came to this court upon exceptions. The exceptions were sustained, *Carter, Petr.*, 110 Maine, 186, and at the January term, 1913, the petition to enter the appeal was granted. The appeal was not entered until the April term of court following, at which term the executor named in said instrument filed a motion to dismiss the appeal because the petitioners had not filed an appeal bond, as required by statute. The court ordered the appeal dismissed. Exceptions were taken and the case brought to this court, and the exceptions were overruled and the appeal dismissed. *Carter, Petr.*, 111 Maine, 1.

While the last mentioned exceptions were pending in the Law Court, the petitioners filed in the Probate Court another notice of appeal and reasons of appeal and an appeal bond, claiming an appeal from the allowance by the Probate Court of the will by decree of February 21, 1911, to the September term, 1913, of the Supreme Judicial Court. Notice of this appeal was served by a deputy sheriff upon the executor and legatees named in said instrument. The appeal and reasons of appeal were entered at the September term, 1913, and on the entry day the executor named in said will

filed a motion to dismiss the appeal, "because it does not appear from said alleged appeal that any appeal was taken from said Judge of Probate for said county within the time required by law, nor in the manner provided by law, or in any manner."

The case was continued to the January term, 1914, when the mandate from the Law Court dismissing the petitioners' appeal entered at the April term, 1913, having been entered, this case was heard, the motion to dismiss granted, and the appeal dismissed. The petitioners bring the case to this court upon exception to that ruling.

The statute regulates the right of appeal from decrees of the Judge of Probate; and but two ways are provided, Secs. 28, 29, 30, R. S., 65, and unless the provisions of the statute are complied with the right of appeal is lost. *Moore* v. *Phillips*, 94 Maine, 421; *Carter, et al., Applts.*, 111 Maine, 186.

It cannot be claimed that this is an appeal under section 28, which gives the right, if claimed within twenty days from the date of the proceeding appealed from. The appeal states that the petitioners appealed from a decree of the Judge of Probate made February 21, 1911, to the Supreme Court of Probate, to be held the third Tuesday of September, 1913, more than two and one-half years thereafterwards. Neither is it an appeal under section 30, as there is no petition for leave to enter the appeal, and the petitioners proceeded as if acting under sections 28 and 29, the appeal and reasons therefor, as entered, being as provided in sections 28 and 29, and notice was served upon the executor and beneficiaries as if it were under sections 28 and 29. Before an appeal can be entered under section 30 there must be a petition therefor, and notice given upon the petition, and if, upon hearing, the petition is granted, the entry should be made at the term at which it is granted, but before the appeal is entered the petitioners must file an appeal bond, as required by the statute giving the right of appeal.

The Massachusetts statute regulating probate appeals is the same as ours, and the court in *Baily* v. *Frances*, 153 Mass., 11, construes the statute as follows: "It (the appeal) can be entered at the prescribed time as of course; it can be entered after that time for cause, upon petition therefor and notice to the appellees, but the notice is to answer to the petition and not to the appeal. If the petition is allowed and the appeal entered, the appellee is to take notice of the entry, and is under the jurisdiction of the court to answer to it as if it had been entered as of course."

The bill of exceptions does not show why the appeal which the court granted leave to enter at the January term, 1913, was not entered at that term; but that is not material in these proceedings. The petitioners were given leave to enter an appeal at the January term, 1913, and the appeal was afterwards entered and a hearing had. That appeal was dismissed and finally ended, *Carter, Petr.*, 111 Maine, 186. It was pending when the petitioners attempted to claim and enter the appeal in this proceeding. The appeal was not entered by leave of court, as provided in section 30. This court had granted but one leave to enter an appeal from the decree of the Judge of Probate allowing the instrument as the will of Harriet A. Munroe, which was acted upon by the petitioners and entered at the April term, 1913. When that appeal was entered it exhausted the rights of the petitioners under the order granting them leave to enter an appeal. The leave granted was to enter an appeal, not to enter appeals. It was not a continuing leave, to be exercised whenever and as often as they desired.

As the record in the case shows the appeal was not entered as provided by sections 28 and 29 or by leave of court as provided by section 30, it was not properly before the court, and the ruling below was correct.

Exceptions overruled.

ERASTUS EUGENE HOLT *vs.* GEORGE F. ELWELL.

Cumberland. Opinion March 30, 1915.

Amendment of Verdict. Check. Judgment for Return. Receiver. Replevin. Sale. Sealed Verdict. Tender. Verdict.

1. The jury, after having been instructed by the court, were furnished by the clerk blank verdicts used in actions of tort, instead of verdicts used in cases of replevin. The jury returned to court a verdict signed by foreman, the one marked "Defendant," that the defendant was not guilty.
2. The verdict is not so clearly against the evidence as to authorize the court to set it aside as against law and evidence.
3. The verdict, pleading and facts in this case show that the jury intended to return a verdict for the defendant, but by a clerical error, returned a wrong verdict.
4. The law does not allow a clerical error in a matter of form to deprive a suitor of a verdict won upon the merits of the case, and the verdict may be amended by the court and nominal damages awarded the defendant and a return ordered.

On motion for new trial by plaintiff. Motion overruled.

Replevin for four pigs, tried in the Supreme Court for Cumberland County at December term, 1914. Plea, general issue, with brief statement alleging title is not in plaintiff, but in the defendant. The jury returned a verdict that the defendant is not guilty in manner and form as plaintiff has declared against him. The plaintiff filed the usual motion for new trial, with the additional reason that the verdict is not responsive to the issues presented.

The case is stated in the opinion.

Sidney St. F. Thaxter, for plaintiff.

Hinckley & Hinckley, and E. H. Wilson, for defendant.

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

HALEY, J. This is an action of replevin for four pigs, tried at the December term, 1914, of the Superior Court for Cumberland County.

The verdict was for the defendant, and the case is before this court upon a motion to set aside the verdict because: 1. As against law and evidence. 2. Because the verdict was not responsive to the issue.

The plaintiff claimed that he had repudiated and rescinded the sale of the pigs by his man servant, whom he claimed he instructed to sell them to a packing company. The defendant claimed that, if the servant did not have authority to sell the pigs to him, the plaintiff ratified the sale with full knowledge of all the facts, and that the plaintiff did not return to him the check and money paid to the servant for the pigs and given the plaintiff by the servant. The plaintiff claimed he tendered them to the defendant after the pigs were replevied and the defendant refused to receive them, but the plaintiff did not keep his tender good by bringing them into court, or offering at the trial to return them.

The verdict is not so clearly against the evidence that we are authorized to set it aside as against law and evidence. When the jury retired to their room it was seven o'clock P. M., and they were instructed, if they agreed upon a verdict, to seal the verdict and notify the officer, who would allow them to separate, and to return the verdict at the coming in of court in the morning.

It seems that the clerk, instead of furnishing the verdicts usual in cases of replevin, gave the jury the blanks used in actions of tort, and they used and returned to the court, signed by the foreman, the one marked "Defendant," "that the defendant was not guilty," and the plaintiff asks that the verdict be set aside because it is not responsive to the pleadings and does not settle the title.

The plaintiff states in his brief: "The only issue presented was one of title as between the plaintiff and defendant, and the burden rested upon the plaintiff to establish his title." The court instructed the jury, "If they (the pigs) were the property of the plaintiff, then of course your verdict would be for him. If they were the property of the defendant, or any person other than the plaintiff, your verdict would be for the defendant, which means a judgment for the return to him of the pigs."

In *Moulton* v. *Bird*, 31 Maine, 296, the court said: "It is apparent by the record that no other fact was in issue, than that of property, which must have been found for the defendant, and he being in possession is entitled to a return." And in *Moulton* v. *Smith*, 32

Maine, 406, the court, referring to the above case, said: "Although a return was ordered to Bird, it was not done upon the verdict alone, but upon that, with the pleadings and the facts of the case." The verdict, pleadings and facts in this case show that the jury intended to return a verdict for the defendant, but, by a clerical error, returned a wrong verdict. In *Hoey* v. *Candage*, 61 Maine, 257, the plea was "Not Guilty" and the verdict returned was that the defendant "did promise," and the court said: "The verdict was clearly erroneous in point of form; but we fail to see how the substantial rights of the parties have been affected by the mistake. There is no room for doubt as to the party in whose favor the jury intended to decide, nor as to the amount which they held him entitled to recover. The form of the verdict was doubtlessly inadvertently furnished by the clerk and never engaged the attention of the jury," and the court allowed the verdict to be amended.

In this case, as in that, the form of the verdict was inadvertently furnished by the clerk and never engaged the attention of the jury, and the law does not allow a clerical error in a matter of form to deprive a suitor of a verdict won upon the merits of his case. The verdict may be amended by the court, and nominal damages awarded the defendant, and a return ordered *Moulton* v. *Bird*, supra.

Motion overruled.

ELMER E. HARLOW, et al., *vs.* FRED E. PERRY.

Androscoggin. Opinion March 30, 1915.

"Caveat Emptor." Deceit in Sale of Goods. Examination. Inspection. Kind and Quality. Negligence. Reasonable Care. Representations.

An action of deceit in the sale of a stock of goods in bulk. At the close of the charge, the plaintiff requested the following instruction, which was refused:

"That if the defendant represented to the plaintiffs that the goods, as they showed on the shelves in front, were of like quality and conditions as those behind, and the plaintiffs believed such representations, they were not bound to make an examination of the goods, except as they showed in front, but were entitled to rely on the representations of the defendant."

Held:

1. That the instruction requested should have been given, at least in substance. The law does not allow one to take advantage of his own wrongful assertion, made to induce another to rely upon, and that the other does rely upon by claiming that the one who relied upon it ought to have known, or to have investigated, and learned that the assertion was untrue.
2. The well settled rule to be applied here is that, if one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so, he cannot afterwards excuse himself by saying that the one trusting him was negligent, in not investigating and learning that the assertion was untrue.

On exceptions by plaintiff. Exceptions sustained.

This is an action on the case for deceit in the sale of a stock of miscellaneous goods, belonging to the estate of J. K. Haslem, of whose estate the defendant is administrator. Plea, general issue. The plaintiff excepted to certain instructions and refusal to give certain instructions by the presiding Justice.

The jury returned a verdict for the defendant.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiffs.

R. W. Crockett, for defendant.

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

HALEY, J. This is an action on the case for deceit in the sale of a stock of goods, consisting of toys, crockeryware, glassware and miscellaneous articles, including those usually found in the so-called ten cent stores, at the time of the sale contained in the basement, two stories and an attic of a store about twenty-five feet wide and eighty to ninety feet deep. The goods were sorted and placed upon the shelves under the direct supervision of the defendant, who was present at the store most of the time. The plaintiff claimed and introduced evidence tending to show that the defendant represented that the goods were in the same condition as when they were arranged in the preceding spring, were of the same kind and quality as they appeared arranged upon the shelves and in the various receptacles, and those behind and out of sight of the same kind and quality as those in front, and that, when removed from the shelves and receptacles, the goods in the back part and out of sight were inferior in quality and condition to those which could be seen from the front.

The exceptions relate to the following instructions by the court:

"Now further the defendant says that the plaintiffs were not justified in relying upon whatever statement he made in regard to the goods as they were arranged upon the shelves. The contention of the defendant is that the plaintiffs came there, saw the goods, had an opportunity to examine them, and that it was their duty to examine them, and that they had no right, as he says, as a matter of fact, to rely upon his statement; they could see the goods and did inspect them.

"Well, a person who is purchasing property is obliged to use his own eyes and see what is to be seen. But the plaintiffs claim here that under the circumstances of this case, considering the character of the goods, the articles comprising the stock, the multitude of articles, that they were of such a kind that upon the shelves, there would be numerous articles upon the same shelf, and considering the fact that the defendant had made the statement to them that they had been arranged to show them fairly, and considering the further fact, as the plaintiffs claim, that the defendant had said that there

had been an appraisal made by the appraisers amounting to eight thousand ($8000) dollars, that they were justified in not making any further investigation than they did make.

"Now, I leave that as a question of fact for you to determine under all of the circumstances of this case. Were these plaintiffs negligent? Did they have abundant opportunity to inspect this stock of goods and ascertain if the goods, as they could see them, were a fair representation of all the goods? Did they exercise reasonable care on their part? If they did not then they did not reasonably rely upon the statement. What do you say about it. That is the purpose for which the plaintiffs have introduced into this case the evidence in regard to the appraisal at eight thousand thirty-five ($8035) dollars, as bearing upon their justification, so to speak, in not making any further investigation of the goods. And it is for you to say whether that has any bearing upon it or not.

. . . . . .

"Counsel calls my attention to the fact that perhaps I have not as fully spoken of what is called the rule of *caveat emptor* in the purchase of personal property. That means, in language, to let the buyer beware. It is simply, in this case, as applied to this case, that these plaintiffs were required to exercise ordinary reasonable care in examining the goods which they were purchasing. If they had an equal opportunity with the defendant under all the circumstances to examine the goods then they should stand upon their own footing and make their examination. But if he had better opportunity than they did and made a representation of fact, a material representation of fact under all the circumstances, it is for you to say whether they were justified in relying upon that."

At the close of the charge the plaintiffs requested the following instruction, which was refused:

"That if the defendant represented to the plaintiffs that the goods as they showed on the shelves in front were of like quality and conditions as those behind, and the plaintiffs believed such representation, they were not bound to make an examination of the goods, except as they showed in front, but were entitled to rely on the representations of the defendant."

We think the learned Justice erred in the instruction quoted, and that the instruction requested should have been given, at least in substance. The law does not allow one to take advantage of his own wrongful assertion;" made to induce another to rely upon, and that the other does rely upon, by claiming that the one who relied upon it ought to have known, or to have investigated, and learned that the assertion was untrue. The same argument advanced by the defendant in this case was urged in *Bank* v. *Cunningham*, 103 Maine, 455, and the ruling of the court upon that branch of the case was: "But the defendant contends further that if the plaintiff did not know, it ought to have known, and would have known but for its own negligence. We think this defense cannot avail. There are cases which hold that where one carelessly relies upon a pretense of inherent absurdity and incredulity, upon mere idle talk, or upon a device so shadowy as not to be capable of imposing upon any one, he must bear his misfortune, if injured, he must not shut his eyes to what is palpable before him. But that doctrine, if sound, is not applicable here. We think the well settled rule to be applied here is that if one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so, he cannot afterwards excuse himself by saying, 'you were foolish to believe me.' It does not lie in his mouth to say that the one trusting him was negligent." The above quotation clearly states the rule of law that governs in actions for deceit, which rule is decisive in this case. Therefore we hold that the instructions given did not fully state the law as applicable to this case, and that the instruction requested should have been given, in substance at least, and that, by the instructions and refusal to instruct, the jury were authorized to disregard the well established rule of law as laid down in the above case, and the exceptions must be sustained.

Exceptions sustained.

EMERSON H. DOUGHTY *vs.* JOHN W. SULLIVAN.

Cumberland. Opinion March 30, 1915.

Allegations. Disclosure. Disclosure Commissioner. False Oath. Fraudulent Concealment of Property. Proof of Oath. R. S., Chapter 114, Sec. 76.

The defendant was cited before a disclosure commissioner, was examined, and the oath refused him by the commissioner. This action was brought under R. S., Chap. 114, Sec. 76, alleging false oath, and fraudulent concealment of his estate or property.

Held:

1. It is necessary, in an action, under Sec. 76 of Chap. 114 of the R. S., to allege in the writ the false oath of the debtor and the fraudulent concealment of his estate or property, and to entitle the plaintiff to judgment, the allegations must be proved.
2. The statement by the stenographer that the defendant was duly sworn is no proof of the fact. There is no provision of law making unsigned and unsworn statements of a stenographer, in disclosure proceedings, proof of the facts stated by him.
3. To entitle the plaintiff to a verdict for such highly punitive damages as are allowed by the statute, the evidence must be clear and convincing that the defendant on oath wilfully disclosed falsely, or withheld or suppressed the truth upon an issue material to the subject being investigated.
4. The burden was upon the plaintiff to prove that the defendant did have in his possession, or under his control, at the time of the disclosure, property not exempt from attachment and execution.
5. The examination required is designed to secure such a disclosure as will present the pecuniary condition of the debtor and the history of the property, which he may have owned, since the debt upon which he was disclosing was contracted and the disposal of the same so far as it may have been disposed of, and that of which he may still be the owner, and of which he may have the control.

On report. Judgment for defendant.

This is an action, on the case, based upon the provisions of R. S., Chap. 114, Sec. 76, to recover damages of the defendant, because the said defendant wilfully disclosed falsely concerning his business and

property before a disclosure commissioner. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court for final judgment.

The case is stated in the opinion.

Hinckley & Hinckley, for plaintiff.

William C. Eaton, and Henry Cleaves Sullivan, for defendant.

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

HALEY, J. This is an action on the case, brought under Sec. 76 of Chap. 114 of the R. S. The defendant was cited before a disclosure commissioner, in Cumberland County, by the owner of a judgment for $8000 debt or damage, and costs of suit, $42.76, an examination was had, and on February 4, 1913, the commissioner refused to administer the oath to the defendant. March 7, 1913, this action was brought. At the October term of the Supreme Judicial Court for Cumberland County the testimony was taken out and the case reported to this court for final judgment.

The statute provides, Chap. 114, Sec. 76: "When a debtor, herein authorized or required to disclose on oath, wilfully discloses falsely, or withholds, or suppresses the truth, the creditor of record or in interest may bring a special action on the case against him, whether he is criminally prosecuted or not, particularly alleging the false oath and fraudulent concealment of his estate or property; and, on oath, before a justice of the peace, he may declare his belief of the truth of the allegations in the writ, such justice shall certify the oath on the writ."

By the statute it is necessary to allege in the writ the false oath of the debtor and fraudulent concealment of his estate or property. The writ in this case contains the allegation that the defendant in the disclosure proceedings took a false oath; it being a necessary allegation, to entitle the plaintiff to judgment that allegation must be proved. The case as reported consists of the testimony of the Clerk of Courts, who showed by the record the recovery of the judgment for $800 and costs, upon which judgment it is alleged the disclosure was had; the testimony of the plaintiff that the judgment had not been paid; the testimony of the disclosure commissioner, who read his record in the case, which does not show that the defendant was

sworn; a copy of the disclosure commissioner's record which does not show that the defendant was sworn, and a copy of what purports to be the examination of the defendant before the commissioner, certified as "A true copy of evidence. Jacob H. Berman, Disclosure Commissioner."

An examination of the so-called evidence shows that it was taken by a stenographer, presumably a court reporter, who did not sign it, and it was not signed by the defendant. It is stated in the so-called evidence, "John W. Sullivan, having been duly sworn by the Commissioner, testified as follows:" The statement by the stenographer that the defendant was duly sworn is no proof of the fact. There is no provision of law making unsigned and unsworn statements of a stenographer, in disclosure proceedings, proof of the facts stated by him. The testimony of the commissioner who administered the oath would have proved the allegation. The certificate of the magistrate before whom the oath was taken, his signature being proved, would have been competent and sufficient prima facie evidence of the oath. *Commonwealth* v. *Warden*, 11 Met., 406; Greenleaf on Evidence, Sec. 512; *State* v. *Welch*, 79 Maine, 99, and the fact that the defendant was sworn might have been proved by circumstantial evidence, as in *U. S.* v. *Gardiner*, 205 Fed., case No. 15186A. But to award a plaintiff judgment for $1685.52 for the sole reason that the defendant testified under oath falsely, there must be legal proof of the oath; without the oath there is no cause of action. The record does not contain any legal evidence that the defendant was under oath in the disclosure proceedings.

Even if the paper claimed to be the examination of the defendant before the disclosure commissioner is admissible, the result is the same. To entitle the plaintiff to a verdict for such highly punitive damages as are allowed by the statute, the evidence must be clear and convincing that the defendant on oath wilfully disclosed falsely, or withheld or suppressed the truth upon a material issue, material to the subject being investigated. Under the allegations of the writ there were but two issues:

1. Did the defendant at the time of the hearing own any real or personal estate, or interest in any, except what was exempt from attachment and execution?

2. Had the debtor, since the debt, or cause of action upon which the judgment was obtained, directly or indirectly sold, conveyed or

disposed of, or intrusted to any person any of his real or personal property to secure it, or to receive any benefit from it to himself?

As there is no claim by counsel, or any statement in the examination before the disclosure commissioner, that would authorize a judgment for the plaintiff upon the second issue, the question is narrowed down to whether he swore falsely as to his ownership, legal or equitable, of property at the time of the disclosure? For, as stated by counsel for the plaintiff, "This is not a question as to whether or not we would be entitled to recover any part of property which has been transferred by the debtor prior to the cause of action, because the testimony of the debtor clearly discloses that he never transferred to his wife, who is the only third party in question, any property that was not paid for by her out of money which had never belonged to the debtor," which statement clearly eliminates the second issue, and the defendant was not questioned nor gave any testimony relating to any disposal of his property after the cause of action accrued, viz., November 21, 1910. There remains, therefore, as the only material issue, the question as to whether the defendant at the time of the disclosure hearing owned any real or personal estate or interest therein, and to entitle the plaintiff to a verdict he must show that, at the time of the disclosure hearing, he did own real or personal estate, or an interest therein, and that he wilfully testified falsely upon this particular point. As stated by the court in *Ledden* v. *Hanson*, 39 Maine, 355, "The examination required is designed—to secure to the creditor—such a disclosure as will present the pecuniary condition of the debtor and the history of the property, which he may have owned since the debt was contracted, and the disposal of the same so far as it may have been disposed of, and that of which he may still be the owner, and of which he may have the control." The examination before the commissioner related almost wholly to matters which happened years before the cause of action accrued, which could only be material as they tended to show that he had property at the time of the disclosure, and testified falsely in regard to it. A large part of the examination related to money that the defendant testified was given to his wife by her mother thirty-four years before the disclosure hearing, which he testified consisted of several thousand dollars in money, and had been kept in the house and never deposited in the bank up to the time of the disclosure, at which time the plaintiff claims that the defendant testified there was more than a thousand

dollars in the house. The plaintiff earnestly contends that the story of that gift, as told by the plaintiff, is untrue, that it is a "fairy tale," that the defendant swore falsely in his statement in regard to it, and that the balance of the money in the house (in the strong box) is the property of the defendant. If it be admitted that the story is unreasonable and improbable, it does not aid the plaintiff, because if the story is false and no such gift was made, there is no proof that there was any such money in the house, and, if it is true, it is the property of the wife, and the defendant was not bound to disclose truly as to the property of his wife, but only as to his property, and the defendant testified positively that he did not know whether any of that money was on hand or not, so in no event can it be claimed that the testimony upon that branch of the case tended to prove that the defendant owned or had in his possession at the time of the disclosure property of his own. The defendant was inquired of as to the different businesses that he had been engaged in, some of which were lawful and some unlawful. He was in the restaurant and saloon business, but that business had been discontinued, according to the testimony, nine years before the disclosure hearing, and the defendant stated that the business belonged to his wife, except the illegal part of it, and there is no testimony that shows that there was any great profit in the business, and there is a total absence of any testimony that any of the profits were in the defendant's possession, or under his control at the time of the disclosure hearing nine years later, and without testimony of some of the profits being in his possession, or under his control at that time, it cannot be found that he testified falsely in regard to the only issue in the case. It also appears from the examination that the defendant had for many years been interested in the game of policy, but that he ceased to be interested in 1910, and the plaintiff claims that the defendant testified falsely when he stated that he had no income after 1904, when he had been interested in the game of policy up to 1910, but the defendant explained that, in the examination, by saying, that he supposed that the question referred to the income from legitimate business, and the court cannot infer from the fact that the defendant was engaged in illegal business for that number of years that he necessarily had on hand at the time of the disclosure three years after he had ceased that business, money or property obtained in that business, there being no evidence of any net profits from the business. The same

can be stated of the other business that the defendant was interested in, they all ceased years before the cause of action accrued, and there is nothing in the examination that showed, or tended to show, that the defendant at the time of the hearing owned or had under his control any property. His examination shows that some of his answers were careless or inconsistent, but that would not be sufficient evidence to maintain this action, unless the further fact appears that the defendant did at the time of the hearing own real or personal property, or an interest therein.

The defendant stated, in the examination, that he did not own any real estate of any description. He was asked in regard to his ownership of a watch, and stated that the one he wore belonged to his son, that he had previously owned one bought by his wife, and that he gave it to his oldest boy some five years before. He was also questioned in regard to another watch which he obtained from a soldier about seven years before the disclosure, which he gave to his boy who was in the high school. He was also inquired of how long since he had worn a diamond ring, and he testified that he had not done so for seven or eight years, at which time he had sold the ring to a man, stating his name.

The burden was upon the plaintiff to prove that the defendant did have in his possession, or under his control, at the time of the disclosure, property not exempt from attachment and execution. His disclosure states he had none, and he attempts to explain his property affairs, and the plaintiff has not furnished any evidence that he had, except as he claims it can be inferred from the disclosure and we do not think such an inference is authorized.

Judgment for defendant.

SARAH C. GOWER *vs.* CHARLES G. KEENE, Administrator.

Cumberland. Opinion March 30, 1915.

Bank Deposits. Equity. Husband and Wife. Title. Trust. Trustee.

The case was heard before a single Justice, who found and ruled that deposits on account of No. 7718 of the Brunswick Institution standing, at the time, in name of Francis S. Gower, of $400 October 1, 1900, $54.41 October 28, 1901 and $300 October 3, 1903, were the monies of complainant.

Held:

1. The evidence does not satisfy the conscience of the court that complainant has overcome the presumption that the deposit of $310 on the 17th of October, 1905, and $200 on the 23d day of November, 1906, were the property of Francis S. Gower, deceased.
2. The fact that the deposit was in the name of deceased and was controlled by him in his lifetime and was not controlled or in the possession of his wife, would make it assets in the hands of his administrator, unless charged with a trust at the time of deposit, or that said Francis S. Gower was in some way divested of it in his lifetime.
3. It is admissible to vary, by evidence aliunde, the effect of the entry in the bank and deposit book, and to show that the person in whose name the account stands is not the real owner, but holds the legal title as trustee for another.
4. A perfect or completed trust is created when the donor makes an unequivocal declaration, either in writing or by parol, that he himself holds it in trust for the purposes named.
5. To create a trust, the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another.

On appeal by defendant. Appeal dismissed. Decree below affirmed.

This is a bill in equity, brought by Sarah C. Gower, widow of Francis S. Gower, late of Pownal, against Charles G. Keene, Administrator of the estate of Francis S. Gower, praying that the defendant may be declared a trustee of the sum of fifteen hundred dollars, out of the deposit of $2040. The defendant filed answer, and the plain-

tiff a replication. The cause was heard before a single Justice, and the final decree, sustaining the bill and decreeing that the sum of $2040 received by defendant May 10, 1910 from the Brunswick Savings Institution in the name of Francis S. Gower, the sum of $400 deposited October 1, 1900, the sum of $54.51 deposited October 28, 1901 and the sum of $300 deposited October 3, 1903, is declared to be the property of the plaintiff. The defendant appealed from this decree to the Law Court.

The case is stated in the opinion.

W. H. Judkins, for plaintiff.

Wilford G. Chapman, for defendant.

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

HALEY, J. This is a bill in equity wherein the plaintiff asks that the defendant, the administrator of Francis S. Gower, deceased, the husband of the plaintiff, may be declared a trustee of the sum of $1500, with interest thereon, out of a deposit of $2040, received by the defendant as administrator aforesaid, from the Brunswick Institution for Savings, on deposit account No. 7718, for the benefit of the plaintiff, and that he be ordered and decreed forthwith to pay over said sum to the plaintiff. The case was heard before a single Justice, who made a finding of facts, and ruled "That the deposits on account No. 7718 of the Brunswick Savings Institution standing, at the time of his decease, in the name of Francis S. Gower, of $400 October 1, 1900; $54.41 October 28, 1901, and $300 October 2, 1903, were the monies of the complainant, to which she is entitled. The evidence does not satisfy the conscience of the court that complainant has overcome the presumption that the deposit of $310 on the 17th day of October, 1905, and $200 on the 23d day of November, 1906, were the property of Francis S. Gower, deceased," and the case is before this court upon appeal by the defendant.

The account was opened March 9, 1889, with a deposit of $500 in the name of Francis S. Gower, and there is no question but that that deposit represented his own money. On October 1, 1900, there was a deposit of $400; October 28, 1901, there was a deposit of $54.41; October 2, 1903, there was a deposit of $300; October 17, 1905, there was a deposit of $310, and November 23, 1906, there was a deposit of $200, making the total deposits $1764.41, and the dividends

credited upon said account were $727, making a total of $2491.46. There was withdrawn by Mr. Gower in his lifetime $451.46, leaving to his credit at the time of his death $2040.

The first deposit represented pension money deposited by Mr. Gower. It is the claim of the plaintiff that all of the other deposits were made by her upon the account No. 7718, standing in the name of her husband, with his consent, with the intention on the part of herself and her husband that the monies so deposited by her should be and remain her separate property, although on his account, and with the understanding and agreement on the part of her said husband that he would hold the legal title to her said deposits in his name on said book, but that as to all of her said deposits made on said account with his consent, with all dividends accruing thereon, should be and remain the plaintiff's individual property, and that the deposits were so made by her because she had standing in her own name in said institution a deposit of $2000, and could receive no interest upon any further increase of said deposit.

The plaintiff was also possessed of other property, owning the farm upon which she and her husband lived, having obtained the title, subject to a mortgage November 17, 1882, from her husband, and she afterwards discharged the mortgage debt, which was the only consideration for the conveyance. The plaintiff also had bonds, town notes and money in other savings institutions, and claimed that she had several thousand dollars at interest. Francis S. Gower, at his death, had no property except the deposit No. 7718. The evidence shows that the bank book and deposits were always controlled by Francis S. Gower in his lifetime, and there is no evidence in the case of any understanding or agreement between the husband and wife, as alleged in the bill except testimony of what is claimed to be an admission by Mr. Gower that some of the deposit No. 7718 belonged to his wife.

The fact that the deposit was in the name of the deceased, and was controlled by him in his lifetime and was not controlled or in the possession of his wife, would make it assets in the hands of his administrator, unless charged with a trust at the time of the deposit, or unless said Francis was in some way divested of it in his lifetime. The plaintiff relies entirely upon an agreement between her and her husband at the time of the deposits.

It appears from the testimony of Mr. Riley that Mr. and Mrs. Gower usually went to the bank each year, in the fall, and obtained from the officials of the bank an envelope that had been left in the bank by them, containing their securities, consisting of the wife's bonds, town note and deposit book, and the husband's deposit book; that after cashing the coupons and receiving the interest upon the town note, "And then, as a rule, they went over to the shelf in the corner of the bank and conversed together for a while, and they would go back to the savings bank window and make a deposit. Q. Do you remember who brought the money? A. Really, I could not say that under oath, because they invariably came to the window together, and I could not really tell which one actually put the money in there."

The circumstances of the deposit, as testified to by Mr. Riley, together with the facts that the deposit was in the name of the husband and the book was always in his possession, are evidence that the deposit was the property of the husband and assets in the hands of his administrator, because the deposits were not identified as being Mrs. Gower's money, and are not shown to have been made by her, and the bank book and account, as testified to, were always under the complete dominion and control of the defendant's intestate, differing materially from the case of *Bank* v. *Fogg*, 83 Maine, 374.

But it is admissible to vary by evidence aliunde, the effect of the entry in the bank and deposit book, and to show that the person in whose name the account stands, is not the real owner, but holds the legal title as trustee for another, but the evidence should be clear and convincing. "A perfect or completed trust is created when the donor makes an unequivocal declaration, either in writing or by parol, that he himself holds it in trust for the purposes named. . . . To create a trust the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another." *Bank* v. *Merriam*, 88 Maine, 151; *Chace* v. *Chapin*, 130 Mass., 128.

The plaintiff read the depositions of Mr. and Mrs. Webster, taken August 28, 1911, which showed that May 25, 1905, in a talk between Mr. Gower and the plaintiff, she accused him of having no property, and he stated that he was no pauper, that he had $500 in the bank, and that the wife said she had more money on his book than he had himself, and that he virtually admitted it. After that the two deposits of October 7, 1905, of $310 and November 23, 1906, of $200, were

made. Their testimony, given six years after the conversation that they attempted to state, when cross examined, shows that their memory was not clear as to the language used; but, taken in connection with other facts and circumstances, if believed by the sitting Justice, was sufficient to authorize the finding that the deposits after the $500 to the time of the conversations were the property of the wife, and upon the well established rule that the decision of a single Justice upon a matter of fact in an equity case shall not be reversed, unless the appellate court is clearly convinced of its incorrectness, the finding should stand. But there is no evidence of any admission by the husband after that, or any testimony as to how the remaining deposits were made, or by whom, and the court states: That the evidence did not satisfy the conscience of the court that the complainant had overcome the presumption that the last two deposits were the property of Francis S. Gower, deceased, and ruled that the last two deposits were the property of the estate, and that the declaration or admission of the deceased only applied to those deposits that had been made at the time of the declaration or admission.

It is urged that the case shows that the wife received interest and dividends at the time the last two deposits were made; that the husband had no way to obtain the money to make the deposits; that the wife did not make a present of the money to the husband; that she was present at the time the deposits were made, even if she did not make them herself; that the husband only drew the dividends on the $500 deposit, which is admitted to have been his, and that the court should have held that, as the three above named deposits were her property the last two were also her property; that the above circumstances and the manner of their life were sufficient to authorize the finding. The case does show that the plaintiff received $310 October 17, 1905, the date that sum was deposited, but on the day of the last deposit, November 23, 1906, she only received $125, all of which, if true, would be material facts in deciding the case.

But the defendant contests not only the facts, but the inferences to be drawn from the facts, and claims that, although October 17, 1905, she received a dividend and cash for coupons amounting to $310, it is not shown that that was the money deposited; that the husband did have an income sufficient to enable him to make the deposits; that he was an industrious man; that he carried on the farm, kept cows and hens and worked upon the highway and received

a pension; that it is not unreasonable to infer that the wife may have given some money to the husband, and the fact that they usually went to the bank together, when they had business there, does not warrant the inference that they were together when the last two deposits were made, and that when the last deposit was made the wife had an account in the Freeport branch of the Lewiston Savings Bank, where she could have deposited the money in her own name and the amount have drawn interest.

A consideration of the evidence shows a possibility in favor of each contention, but fails to prove, by clear and satisfactory evidence, that a trust was declared when the last two deposits were made, and to accept either contention would be guess work and not decision. As the plaintiff has not proved, by clear and convincing evidence, that a trust was declared when the deposits were made, and as the acts and words relied upon by the plaintiff do not unequivocally imply that the husband held the last two deposits in trust for the wife, the plaintiff has failed to prove that a trust was declared when the deposits were made, or to furnish satisfactory evidence of a subsequent declaration of trust, and the finding of that fact by the sitting Justice was authorized.

Appeal dismissed.
Decree below affirmed.

LEONARD F. HATCH, Trustee,

vs.

HOLLINGSWORTH & WHITNEY COMPANY.

Kennebec. Opinion March 30, 1915.

Bill in Equity. Chap. 226 of Laws of 1909. Cloud upon Title. Deed. Forfeiture. Publication. Recitals in Deed. R. S., Chap. 9., Secs. 42-43-44. Sale. Taxes. Title. Treasurer's Deed.

The defendant claims title to the land described in plaintiff's bill under a deed from the treasurer of the State, dated November 30, 1909, having sold said land for non-payment of taxes assessed thereon for the year 1907.

Held:

1. The defendant, claiming the premises under a tax deed, given by an officer in pursuance of the statute, must prove that, the officer complied with the provisions prescribed in the statute, giving him the power of sale, for he is not only bound to know the law, but also is bound if he desires to claim under the deed, to see that all of the substantial requirements to authorize the sale have been complied with.
2. It is held to be a condition precedent to the passing of the title, at such sales, that all of the proceedings of the officers who have anything to do with the listing and valuation of the land, the levy and collection of the tax, the advertisement and sale of the property, the return, filing, the record of the proceedings, whether the acts are to be preformed before or after the sale, must be in strict compliance with the statute authorizing the sale.
3. The recitals in the deed are not evidence of the facts stated therein, and must be shown by proof aliunde the deed.
4. There being neither proof, nor admission that the facts recited in the treasurer's deed, prescribed by Sec. 42 of Chap. 9, R S., were complied with, the case does not show that the land had been forfeited; the State Treasurer had no power of sale, and his deed to the defendant conveyed no right, title or interest in the land of the plaintiff.

On report. Bill sustained with costs. Decree according to opinion.

This is a bill in equity brought by the plaintiff for the purpose of removing an alleged cloud upon his title to real estate in Day Academy

Grant, so called, in the County of Piscataquis. The defendant filed its answer to the bill and the plaintiff filed his replication thereto. By agreement of the parties, the case was reported to the Law Court, upon amended bill, amended answer, replication and proof, said proof to consist of the certified copy of the State Treasurer's records relating to the sale to defendant of land claimed by plaintiff, and also of certified copy of the tax deed filed by said defendant with the Clerk of Courts.

The case is stated in the opinion.

Richard Webb, for plaintiff.

Andrews & Nelson, for defendant.

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

HALEY, J. A bill in equity brought by the plaintiff to remove a cloud upon his title to real estate, in Day Academy Grant, so called, in Piscataquis County, and it is before this court upon report.

The report consists of the bill, answer, replication, a warranty deed to the plaintiff and Walter Merritt, as trustees for the Hojoalmean Club, dated May 22, 1900, duly recorded in the Registry of Deeds; a deed from the State Treasurer to the defendant, dated November 30, 1909, duly recorded in the Piscataquis County Registry of Deeds, and a certificate of a record from the State Treasurer's office, showing a sale for taxes of what is claimed to be the property described in said warranty deed, to the defendant November 30, 1909, the date of the tax deed above mentioned.

The report shows that Walter Merritt, one of the trustees named in the plaintiff's deed, is deceased, and the plaintiff is now the sole trustee under said deed for said club; that the legislature of 1907 assessed a tax on the premises of $1.05, and the County of Piscataquis assessed a tax of 0.32 for that year; that on the 30th day of November, 1909, the State Treasurer executed and delivered the writing purporting to be a deed to the defendant; that the plaintiff had no knowledge of said assessment, the property not having been assessed from the date of the deed under which he claims title to the date of the above assessment; that upon learning of said sale to the defendant he offered to reimburse the defendant for such sums as it had paid for said real estate, and expenses with interest thereon, and requested it

to give him a quitclaim deed to remove the cloud cast on the plaintiff's title by said tax deed, and the defendant refuses to abandon its pretended claim against said real estate.

The defendant claims that the premises conveyed to the plaintiff by the warranty deed dated May 22, 1900, have been forfeited to the State, and that it has acquired, by the Treasurer's deed of November 30, 1909, the title to the premises.

The defendant claiming the premises under a tax deed, given by an officer in pursuance of the statute, must prove that the officer complied with the provisions prescribed in the statute giving him the power of sale, for they are not only bound to know the law, but are also bound, if they desire to claim under the deed, to see that all of the substantial requirements to authorize the sale have been complied with.

It is held to be a condition precedent to the passing of the title at such sales, that all of the proceedings of the officers who have anything to do with the listing and valuation of the land, the levy and collection of the tax, the advertisement and sale of the property, the return, the filing, the record of the proceedings, whether the acts are to be performed before or after the sale, must be in strict compliance with the statute authorizing the sale. *Shimmin* v. *Inman*, 26 Maine, 228; *Smith* v. *Bodfish*, 27 Maine, 295; *Brown* v. *Veazie*, 25 Maine, 362; *Cushing* v. *Longfellow*, 26 Maine, 306; *Hobbs* v. *Clements*, 32 Maine, 67; *Mathews* v. *Light*, 32 Maine, 305; Bolster's Tax Collector, 21.

The recitals in the deed are not evidence of the facts stated, and "must be shown by proof aliunde the deed." *Bank* v. *Parsons*, 86 Maine, 514; *Phillips* v. *Sherman*, 61 Maine, 548, 554; *Bennett* v. *Davis*, 90 Maine, 102; *Green* v. *Martin*, 101 Maine, 232; and Blackwell on Tax Titles, 72.

The defendant claims, (as the record from the office of the State Treasurer states), that the sale was as provided by Chap. 226 of the Laws of 1909, which amended Sec. 44, Chap. 9, R. S. To make a valid sale under the laws of 1909 the land must have been forfeited, as provided in Secs. 42 and 43, R. S., Chap. 9, and amended by Chap. 235 of the Laws of 1909, which reads:

"Sec. 42. When the legislature assesses such state tax, the treasurer of state shall, within three months thereafter, cause the lists of such assessments, together with the amounts of county tax on said

lands so certified to him, both for the current year, to be advertised for three weeks successively in the state paper, and in some newspaper, if any, printed in the county in which the land lies, and shall cause like advertisement of the lists of such state and county taxes for the following year to be made within three months after one year from such assessment. Said lands are held to the state for payment of such state and county taxes, with interest thereon at the rate of twenty per cent to commence upon the taxes for the year for which such assessment is made at the expiration of six months and upon the taxes for the following year at the expiration of eighteen months from the date of such assessment."

Section 43 provides that if the taxes are not paid within the time specified after being advertised, as provided in section 42, the land "shall be wholly forfeited to the state, and vest therein free of any claim by any former owner."

If Secs. 42 and 43 of Chap. 9, as amended, were complied with, the treasurer was authorized to sell the property, as prescribed in section 44.

The deed recites, "Whereas the treasurer of state within three months after the assessment of said taxes by the legislature caused lists of such assessments, together with the amount of county tax on said lands lawfully forfeited to him, to be advertised for three weeks successively in the state paper, and in some newspaper printed in the county where each piece of said land lies (where any such was published), and did cause like advertisement of the lists of such state and county taxes for the following year to be made within three months after one year from said assessment." The recital in the deed is no proof of the facts stated, and the report does not show that the tax was advertised for three weeks successively in the state paper, and in some newspaper, if any, printed in the county in which the land lies, or that like advertisements of the lists of such State and county taxes for the following year were made within three months after one year from such assessment, as recited in the deed and as required by section 42 before the lands so advertised are declared forfeited to the State by section 43. The record from the office of the Treasurer, which states that prior to said sale within three months therefrom, "I caused notice of the time and place of said sale, a list of said tracts intended for sale, with the amount of such unpaid taxes, interest and cost on each parcel, as heretofore specified, to be published in the

Piscataquis Observer, a newspaper published in Piscataquis County, a list of all said tracts intended for sale which lie in that county, with the amount of such unpaid taxes, interest and cost on each parcel as above mentioned," is a record of proceedings under Sec. 44, Chap. 9, R. S., as amended. As there is neither proof nor admission that the facts recited in the Treasurer's deed, prescribed by Sec. 42, Chap. 9, were complied with, the case does not show that the land had been forfeited, as provided in sections 42 and 43, and, not having been forfeited, the State Treasurer had no power of sale under section 44, which provides only for the sale of "land thus forfeited," and the so-called Treasurer's deed to the defendant conveyed no right, title or interest in the land of the plaintiff, as described in his warranty deed of May 22, 1900.

Other objections to the validity of the Treasurer's deed are urged, but as many of them have been passed upon by the court, and as the objection above considered disposes of the case finally, it is unnecessary to consider them. The deed from the State Treasurer, under which the defendant claims, and the record thereof, constitutes a cloud upon the title of the plaintiff, which entitles him to the relief prayed for.

Bill sustained with costs.
Decree according to opinion.

IDA V. POLAND *vs.* ZENAS LOUD.

Lincoln. Opinion April 1, 1915.

Assignee. Deed. Equitable Defense. Equity. Life Estate. Mortgage. Trespass quare clausum.

An action of trespass quare clausum.

R. conveyed a life estate in his farm to his wife Ruth, his children to have a home thereon as theretofore accustomed; upon the decease of R., the wife, Ruth, entered into possession and Z., one of the children, had a home upon the premises; some years later, the wife brought a writ of entry against Z. demanding a life estate in the premises; to this action defendant Z. set up, by brief statement, an equitable defense; upon hearing, the court decreed that the case is to be determined under the rules of equity, that defendant has the equitable right to the same occupation of the premises as before the death of the father R., and that, in case of disagreement of the parties as to the nature of the occupation to be enjoyed by Z., the question is to be determined by the court; subsequently to the decree, the wife, Ruth, conveys to the present plaintiff, Poland, who brings this action of trespass.

Held:

1. That the action of the wife, Ruth, against defendant became to all intents and purposes a cause in equity save in matters of form in pleading and procedure.
2. That while this action is not by the language of the decree expressly retained, it is by implication and quite as effectually.
3. That a final decree is that which fully decides and disposes of the whole cause, leaving no further question for the future consideration and judgment of the court.
4. That whether or not the decree was treated as final and the case improvidently dropped from the docket is immaterial. The cause is still pending.
5. That the present plaintiff, Poland, the assignee of the former plaintiff, having failed to agree with defendant, the contingency provided for in the decree has arisen and she should become a party to that suit in order that the particular occupancy to which defendant is entitled may be assigned him.
6. That a bill in equity in the nature of a supplemental bill is not necessary, to enable her to become a party, but she may file an amendment under Equity Rule XXI.

On agreed statement of parties whereby this court may render such judgment in law, or make such decree in equity, as the rights of the parties may require, irrespective of the form of action.

Plaintiff nonsuit.

This is an action of trespass quare clausum to recover damages for trees cut by defendant, upon land alleged to belong to the plaintiff. The defendant pleaded the general issue, with brief statement of equitable matters in defense, based upon the provisions of the deed of Robert Loud to Ruth Loud, his wife, of his farmstead.

The case is stated in the opinion.

R. I. Thompson, for plaintiff.

W. M. Hilton, for defendant.

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

BIRD, J. This is an action of trespass quare clausum to recover damages for trees cut by defendant upon land alleged to be of plaintiff. The defendant pleaded the general issue with brief statement of equitable matters in defense based upon the provisions of the deed hereinafter referred to, the character of defendant's occupancy of the premises and a former decree in equity. The case is before us upon agreed statement of the parties whereby this court "may render such judgment in law, or make such decree in equity as the rights of the parties may require, irrespective of the form of action."

The facts are, stating them as briefly as may be: One Robert Loud, having title to a farmstead, on the ninth day of October, 1897, a few days before his death, conveyed a life estate in the premises to his wife, Ruth Loud," she to have the care and custody of the same, but not to make any unnecessary waste or use thereof, and the understanding is, that my children shall continue to come and go, and have a home on the place, as they have been accustomed heretofore, and at the decease of my said wife, said property or estate, or whatever remains shall descend in order of law to my said children or their representatives." It is under this clause, quoted from the deed, that the controversy between the parties arises.

The defendant, Zenas Loud, was one of the children referred to. Upon the decease of Robert Loud, Ruth Loud entered into possession and Zenas Loud enjoyed a home upon the premises. In 1905 or 1906, however, Ruth Loud brought her writ of entry against Zenas

Loud demanding a life estate in the premises described in the deed. To this action the defendant pleaded the general issue and, by brief statement, an equitable defense setting up his rights under the deed of his father and his enjoyment of a home upon the premises during the life of his father and since his death. The cause was heard by the court and it was decreed:—

"First: That this case is to be determined under the rules of equity.

"Second: That the equitable rights of the defendant in the premises described are:

"1st. To occupy the house, outbuildings and farm as he has been accustomed to prior to his father's decease.

"2nd: In case of a failure of the parties to agree as to what occupancy of the house, outbuildings and farm in the language of the deed constitute 'a home on the place as they (including Zenas) have been accustomed to heretofore,' then this question of fact is to be determined by the Court and the particular occupancy to which Zenas is entitled shall thereby be assigned to him."

By deed of December 16, 1913, Ruth Loud conveyed the premises to the plaintiff who at the same time gave the former a bond for her support secured by mortgage of the interest conveyed.

The court having determined and decreed that the case of *Ruth Loud* v. *Zenas Loud* was to be determined under the rules of equity, the case became to all intents and purposes a cause in equity, save in matters of form in pleading and procedure: R. S., Chap. 84, Secs. 14, 17, 19, 21: *Miller* v. *Packing Co.*, 88 Maine, 605, 611, 615; *Hussey* v. *Fisher*, 94 Maine, 301, 306; *Hurd* v. *Chase*, 100 Maine, 561, 564; *Clark* v. *Chase*, 101 Maine, 270, 277, 278; *Martin* v. *Smith*, 102 Maine, 27, 31; *Bradley, etc., Co.* v. *Mfg. Co.*, 104 Maine, 203, 207.

While the action is not by the language of the decree expressly retained, it is by implication and quite as effectually. A final decree is that which fully decides and disposes of the whole cause leaving no further question for the future consideration and judgment of the court. *Gilpatrick* v. *Glidden*, 82 Maine, 201, 203: See *Lothrop* v. *Page*, 26 Maine, 119; see also *Gerrish* v. *Black*, 109 Mass., 474, 477; *Forbes* v. *Tuckerman*, 115 Mass., 115, 119. Whether the decree recited above was treated as a final decree and the case improvidently dropped from the docket is immaterial. It is still pending.

The present plaintiff, the assignee of Ruth Loud, has failed to agree with defendant and the contingency provided for in the decree has arisen. To the proceedings in which that decree was entered, the plaintiff in this suit may become a party in order that the particular occupancy to which defendant is entitled may be assigned to him. To enable her thus to become a party, a bill in equity in the nature of a supplemental bill would formerly have been necessary, *Mason* v. *Y. & C. R. R. Co.*, 52 Maine, 82, but the same result may be now accomplished by amendment, served as such bill should be served. XXI Equity Rules: See *Collins* v. *Snow*, 218 Mass., 542, 545. The motion for such amendment should be accompanied, if the case is no longer upon the docket, by a petition asking that the action be brought forward. Or defendant may file such petition or motion at any time.

Until the nature of the occupancy to which defendant is entitled has been determined and assigned to him by decree, in the suit brought by Ruth Loud, an action at law by the present plaintiff, even if ever maintainable, which will depend largely, if not wholly, upon the nature of such decree, is at least prematurely brought.

Plaintiff nonsuit.

JETHRO D. PEASE *vs.* OBADIAH GARDNER, et als.

Knox. Opinion April 3, 1915.

Automobile. Collision. Due Care. Master and Servant. Negligence. Possession and Control. Proximate Cause.

In an action of tort to recover damages for injuries received by the plaintiff by a collision between a wagon in which he was riding and an automobile driven by the defendant Herrick as chauffeur and in which the defendant Gardner was a passenger, it is

Held:

1. That due care on the part of the plaintiff and want of due care on the part of the chauffeur are clearly proved so that liability on the part of some one is established.
2. That Mr. Gardner was not legally responsible, because he was not in the legal possession, control and management of the car, nor was the chauffeur acting as his servant. Mr. Gardner was simply a passenger or invited guest, and although the car was put in his charge for the trip, so far as directions to the chauffeur were concerned as to the route to be taken, that did not create the relation of master and servant between them.
3. That the chauffeur was the servant of Messrs. Hurley and Hobbs who had engaged the car from its owner for this trip, the former supplying the gasolene, and the latter engaging and paying the chauffeur, and who had put the car in the quasi charge of Mr. Gardner as a passenger, and that Messrs. Hurley and Hobbs are the parties liable.
4. That the fact that Mr. Hurley was a member of a political State Committee and Mr. Hobbs of a political town Committee, does not relieve them from personal liability. They were not agents, acting under orders from a superior, but were themselves principals in a larger body.

On report. Judgment for plaintiff against William P. Hurley and Josiah H. Hobbs, in the sum of $500. Judgment for defendants Obadiah Gardner and Arthur L. Herrick.

This is an action on the case to recover damages against the defendants for personal injuries by reason of the negligent operation of an automobile by the defendant Arthur L. Herrick, acting as chauffeur.

Each defendant separately pleaded the general issue. At the conclusion of the evidence, the case was reported to the Law Court, with the consent of the parties, and upon the evidence mentioned in the agreed statement of the parties; the Law Court to decide all questions of law and fact involved in the case.

The case is stated in the opinion.

Charles T. Smalley, for plaintiff.

Montgomery & Emery, for defendants.

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

CORNISH, J. On September 7, 1912, the plaintiff was injured by a collision between a wagon in which he was riding and an automobile, driven by the defendant Herrick as chauffeur and in which the defendant Gardner was a passenger.

The plaintiff's team was being driven by his father, and was standing near the platform of a store in the town of Hope and about ten feet behind the automobile. Mr. Gardner and others came from a hall over the store in which a public meeting had been held, entered the machine and, in starting, the chauffeur suddenly backed the automobile against the plaintiff's horse, frightened him and caused him to cramp the wheels of the wagon in such a way that the plaintiff either jumped out or was thrown out, and his right leg was caught in the spokes of the wheel and injured. The top of the car was up, obscuring somewhat the view to the rear. The chauffeur evidently did not know of the presence of the team, but he took no sufficient means to ascertain the fact and his conduct was clearly such as to render him negligent under the circumstances. To suddenly back an automobile in a public street of a village without first ascertaining or making reasonable efforts to ascertain whether another vehicle was standing within a short distance behind, and without giving any preliminary warning or signal, save perhaps the cut-out, which sounded almost at the same instant that the team was struck, cannot be deemed the act of a reasonably prudent man. The mere statement of the case proves negligence on the part of the chauffeur.

Nor is there any evidence of want of due care on the part of the plaintiff. The record is barren of any facts warranting such a conclusion. He did nothing which the ordinarily prudent man should not have done, nor did he fail to do anything which the ordinarily

prudent man, under like circumstances, should have done. The negligence of the chauffeur and that alone was the proximate cause of the injury. Liability on the part of someone, therefore, is established.

But the crucial question is, are these defendants, or any of them, legally responsible?

The machine was owned by Mr. Montgomery and he was riding in it at the time of the accident. Suit was first brought against him, but it was held that the action could not be maintained, because "although the owner of the automobile, he was not in the possession, control and management of it; nor was the chauffeur acting as his servant at the time of the accident." *Pease* v. *Montgomery,* 111 Maine, 582. Subsequently the pending suit was brought against these defendants, Messrs. Gardner, Hurley, Hobbs and Herrick.

The precise problem to be solved therefore is, in whose possession, control, and management, was the automobile in the eye of the law and whose servant at the time of the accident was the chauffeur Herrick. The facts upon which this solution depends are uncontroverted. The machine itself was owned, as we have said, by Mr. Montgomery, who lived in Camden. Herrick was his regularly employed chauffeur. The defendant, Captain Hurley, who was a member of a political State Committee for Knox County asked Mr. Montgomery, a day or two before the accident, as Mr. Montgomery says, "for the use of my car for some speakers on Saturday to take a trip through the County, and I asked him who were going and he told me, and I told him he could have the use of the car. . . . . Captain Hurley when he engaged the machine said he would furnish and pay the chauffeur and the gasolene." Captain Hurley corroborates this testimony and says that as he was unable to procure a public car he engaged Mr. Montgomery's for this special trip and was to pay for the gasolene and the services of the chauffeur, Mr. Montgomery making no charge for the car itself. The defendant Hobbs was at the same time Chairman of a political committee of the town of Camden, and was also interested in the conduct of the campaign. He testifies: "I remember talking with you, (Mr. Montgomery), that you told me that Judge Hurley had asked you if he could have your car, that he couldn't get any public car down here, and you told him he could and told me I could have it and go with him. I didn't come down to

Rockland. . . . . I told Mr. Herrick about noon that we wanted him to go down there so as to bring Mr. Gardner up there at two o'clock. . . . I thought if he would do it I would give him five dollars to complete the trip that day and bring Mr. Gardner back here Saturday night." "Q. And did you have him take the car and go down? A. He did. Q. And did you afterwards settle with him? A. I did."

The engagement and operation of the car on this special trip therefore seem to have been a joint enterprise on the part of Captain Hurley and Mr. Hobbs, who were interested in a common undertaking. Captain Hurley engaged the car and apparently furnished the gasolene, while Mr. Hobbs engaged and paid the chauffeur. The car was sent to Rockland where it took on Senator Gardner and Mr. Butler who were the speakers on the tour, which was to include Camden, Hope and other towns. Mr. Gardner's wife and daughter also accompanied them, and Mr. Montgomery boarded the car at Camden and went to Hope. Captain Hurley who was present when the car reached Rockland put it, as he says, in "Mr. Gardner's charge when he left the hotel. The car was for his use, and to be returned when he got through with it, at the end of his tour, the way I understood it."

Under these facts it is clear that no liability rested upon Mr. Gardner. He had nothing to do with engaging the car. He was simply one of the passengers for whom the car was engaged, and although it was put in his charge during the trip, so far as directions to the chauffeur were concerned as to the route to be taken that did not create the relation of master and servant between them. It was as if the owner of a car should invite a friend to ride, without the owner accompanying him and instruct the chauffeur to go wherever the friend might direct. The chauffeur would still remain the servant of the owner and the friend would still be merely the passenger for whose pleasure or convenience the ride is taken. That was the situation here so far as Mr. Gardner was concerned. He was not the master in any sense and Herrick was not his servant.

It is equally obvious that on this trip, Herrick whose want of care caused the accident was the servant of Messrs. Hurley and Hobbs. True, he was the regular employe of Mr. Montgomery but by mutual agreement between all the parties, including Herrick himself, he had become for the time the servant and employe of Hurley and Hobbs.

Mr. Montgomery had loaned them his car without charge, and they had made, with Mr. Montgomery's consent, an independent contract with Herrick and had hired him as chauffeur and subsequently paid him. They had the right to employ whom they pleased and the fact that they employed, with Mr. Montgomery's consent, the man who was accustomed to run this car made him no less their servant in that particular transaction. It was a new employment mutually agreed upon and attended with all the legal consequences usually pertaining to such a relation. This principle is well recognized. A servant admittedly in the general employment of one person may be loaned or hired to another in such a way as to become the servant of that other for the time being in a particular transaction with all the legal consequences of the new relation. *Wyman* v. *Berry*, 106 Maine, 43, 20 A. C., 439 and note; *Wilbur* v. *Construction Co.*, 109 Maine, 521-525. The same principle applies when as here the servant is hired by the new master with the consent of the general or original master. The test to be applied in the application of the rule has been clearly stated as follows: "The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise control." 26 Cyc., 1522. *Janik* v. *Ford Motor Co.*, 147 N. W., 510 (Mich., 1914) 52 L. R. A., N. S., 294. This test is fully met in the case at bar. So far as this trip was concerned the original master Montgomery was as a stranger and the new masters, Hurley and Hobbs, not only had the right to exercise control over the chauffeur, but actually did exercise it. The original master surrendered the right to control and the new masters assumed it. Herrick, for the time being, was their chauffeur whom they could retain or discharge at will and who was in charge of a car over which they had the temporary right of possession. He was conveying their invited guests and the fact that the guests were allowed by the new masters to choose the route which they should travel did not take away the legal right of control existing in such masters. Herrick still remained their servant and for his negligent acts while thus employed they were legally liable.

The learned counsel for the defendants seek to avoid this liability on the ground that Captain Hurley was a member of a State Com-

mittee, and Mr. Hobbs of the Camden Town Committee and claim that an agent is not ordinarily held liable for the misfeasance of a sub-agent. The fallacy in this proposition lies in the fact that these two men were not agents, but were members of a larger body and principals in themselves. They were carrying out no orders from a superior authority but were acting on their own initiative in forwarding the campaign. Captain Hurley had charge of Knox County and Mr. Hobbs was chairman of the Committee of the town of Camden. They each had associates and equals in their work but no superiors, and so far as the transportation of speakers was concerned there is nothing to show that each did not have absolute authority to conclude all necessary arrangements. By their own acts and those of their servant Herrick in this particular they must both be bound.

There remains the question of damages, as this case is before the Law Court on report, the evidence at the first trial being made a part of the record in this case by agreement. The injury was to the knee of the right leg. The jury rendered a verdict for $475 at the first trial held in April, 1913. At the trial in the case at bar held at the September term, 1914, further medical evidence was introduced by the plaintiff tending to show from an examination made during that month that the injury was permanent, and although a physician representing the defendants was present at that examination he did not take the stand to contradict this evidence. In fact, the defendants introduced no medical testimony whatever at either trial. In view of the nature and extent of the injury, and the subsequent history of the case, we think the sum of five hundred dollars would be fair compensation.

The entries must therefore be,

Judgment for plaintiff against William P. Hurley and Josiah H. Hobbs in the sum of $500.

Judgment for defendants Obadiah Gardner and Arthur L. Herrick.

JAMES CROSBY, Adm'r, *vs.* MAINE CENTRAL RAILROAD COMPANY.

Oxford. Opinion April 3, 1915.

Accident. Automatic Crossing Signals. Children. Contributory Negligence. Due Care. Excessive Speed. Flagman. Gates. Negligence. Public Laws, 1905, Chap. 94. Railroad Crossing. R. S., Chap. 89, Secs. 9 and 10. R. S., Chap. 52, Sec. 86.

In an action on the case, brought under R. S., Chap. 89, Secs. 9 and 10, to recover damages by reason of the death of the intestate, Howard Crosby, caused at a highway grade crossing in the town of Rumford, it is

Held:

1. That the intestate, a bright and intelligent boy about twelve years of age was sui juris.
2. That, therefore, the intestate was bound to exercise that degree or extent of care which ordinarily prudent boys of his age and experience are accustomed to use under similar circumstances. The standard is the conduct of boys who are ordinarily careful.
3. That the boy's conduct in this case fell far below the required standard; that not only did he fail to exercise the care of the ordinarly prudent boy of his age and experience, but he failed to exercise any degree of caution whatever. He was clearly guilty of contributory negligence and the jury were not warranted in finding the contrary.

On motion for new trial by the defendant. Motion sustained. Verdict set aside.

This is an action on the case brought under Secs. 9 and 10 of Chap. 89 of the R. S., by James Crosby, the father and administrator of the estate of Howard Crosby, deceased, for the benefit of the parents of the deceased. Plea, the general issue with brief statement alleging contributory negligence by deceased. The jury returned a verdict for plaintiff of $1200 and the defendant filed a motion for a new trial.

The case is stated in the opinion.

George A. Hutchins, and Matthew McCarthy, for plaintiff.

Bisbee & Parker, and White & Carter, for defendant.

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

CORNISH, J. This is an action on the case brought under R. S., Chap. 89, Secs. 9 and 10, by James Crosby, Administrator, to recover damages by reason of the death of his intestate, Howard Crosby.

The accident, by which the intestate, whom we shall hereafter designate as the plaintiff for the sake of convenience, lost his life, occurred on the afternoon of Saturday, March 9, 1912, at the Lincoln Avenue grade crossing in the town of Rumford. The plaintiff, a boy lacking only two months of being twelve years of age, had left his home in Mexico, a town across the Androscoggin River from Rumford, at eleven-thirty o'clock in the forenoon to carry dinner, as he was accustomed to do when not in school, to his father who was employed in one of the Rumford mills. He obtained the consent of his mother to attend the moving pictures in the afternoon, which he did, in company with Fred Clark, a companion nine or ten years of age. After the moving picture show was over, and at about four-thirty o'clock, the two boys started for home and on the way accosted one Memont, the driver of a bakery team with whom they were both acquainted, for a ride. Memont assented and the boys got into the team, Memont sitting on the right and driving, Clark on the left and the plaintiff in the middle. The team consisted of a single horse and a low covered baker's pung. On their way to Mexico they had to pass over Lincoln Avenue, a public highway and the usual travelled road between the two towns across which the tracks of the Maine Central Railroad Company run practically at right angles and at grade. No automatic crossing signals, gates nor flagman are maintained at this crossing, but there is the usual standard crossing sign. On reaching this crossing the team was stuck by a special train consisting of an engine and single car, on its way north from Rumford. The pung was demolished, Memont and the plaintiff were killed, but Clark fortunately escaped without injury. These facts are not in dispute.

The plaintiff contends that the defendant was negligent (1) in running its train at an excessive rate of speed, and greater than allowed by statute at a crossing near the compact part of the town, R. S., Chap. 52, Sec. 86, and (2) in failing to give the necessary signals and warning by sounding the whistle and ringing the bell, as required by Public Laws 1905, Chap. 94. A large number of witnesses testi-

fied as to the issues of fact raised by these allegations, but it is unnecessary to consider the force and effect of their testimony or to pass upon the question of the defendant's negligence, further than to say that a careful study of the evidence on these points leads to the conclusion that the train was moving at the rate of between eighteen and twenty-five miles per hour, and that the customary signals were given. The positive evidence introduced by the defendant on the question of signals is hardly overcome by the evidence of the plaintiff, largely negative in character. The plaintiff however is precluded from recovering because of his own want of due care, and that is the only question that needs discussion here. Failing in that, his case fails. What took place immediately prior to the accident is not left to conjecture, but is intelligently and graphically described by the Clark boy, the survivor of the sad accident, and that testimony alone ends the plaintiff's case. His own version is as follows:

"Q. Did you turn down Lincoln Avenue in front of Stanley Bisbees?

A. Yes, sir.
Q. That was down hill?
A. Yes, sir.
Q. How was he driving the horse then?
A. Trotting him.
Q. That was the top of the hill?
A. Yes, sir.
Q. Did he whip him or anything on the way down?
A. He did when he was about half way.
Q. When he was about half way down he whipped him?
A. Yes, sir.
Q. Did the horse kick or trot or run when he whipped him?
A. Trotted all the way.
Q. Along about then what were you and Howard doing?
A. Laughing at him.
Q. Laughing at who?
A. Mr. Memont.
Q. What for?
A. For hitting him and pulling him back.
Q. What was he doing that for?
A. To make him go.
Q. To make him go faster?

A. Yes, sir.
Q. Did you and Howard think anything about any train?
A. No, sir.
Q. You knew there was a railroad track there?
A. Yes, sir.
Q. You didn't pay any attention to it?
A. No, sir.
Q. You and Howard were fooling and playing?
A. Yes, sir.
Q. Did Mr. Memont stop the horse at all?
A. He tried to down to the track.
Q. That was when the horse was right on the track?
A. Yes, sir.
Q. And just when you got hit and didn't know any more?
A. Yes, sir.
Q. And right up to that time, you and Howard had been fooling and playing between yourselves all the time?
A. Yes, sir.
Q. And had not thought anything about the train?
A. No, sir."

Such conduct on the part of the driver, Memont, a man of mature years, was inexcusably and grossly careless, and it could not with reason be contended that any recovery could be had on his part. *Warren* v. *B. & A. Ry. Co.*, 95 Maine, 115; *Day* v. *Boston & Maine R. R.*, 96 Maine, 207; *Blumenthal* v. *Maine Central R. R. Co.*, 97 Maine, 255; and many other cases to the same effect.

But the plaintiff is likewise prevented from maintaining his action, not on the ground of imputed negligence, a doctrine which does not obtain in this State,—*State* v. *B. & M. R. R.*, 80 Maine, 430,—but because of his own want of due care. He was a boy about twelve years of age and was sui juris. *Grant* v. *Ry. Co.*, 109 Maine, 133. He was in possession of all his faculties, a regular attendant at school and was bright and intelligent. He was familiar with the crossing and its approaches as he had occasion frequently to pass over it, and knew it was a place of danger, and yet as one of the party of three he approached and reached the crossing without taking the slightest precaution, either by looking or listening, to ascertain whether or not a train was drawing near. He was at the moment thoughtless and reckless. Children, sui juris, are not relieved from exercising pru-

dence and care merely because they are children. The well established rule is that they are bound to exercise that degree or extent of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances. The standard is the conduct of boys who are ordinarily careful. Measured by this standard the plaintiff falls far below the requirement. Not only did he not exercise the ordinary care of boys of his age under like conditions, but he failed to exercise any degree of caution whatever. A certain amount of heedlessness is to be expected in a boy of his age, and may be consistent with due care on his part, but nothing but utter inattention existed here. He was "fooling and playing" with his companion up to the very instant of the collision. Entirely oblivious to all danger, thoughtlessly, rashly and recklessly he went to his death. Such conduct must be condemned as grossly negligent even in a boy twelve years of age, and brings this case within the decisions in *Hayes* v. *Norcross*, 162 Mass., 546 (the case of a child of about six years of age), *Gleason* v. *Smith*, 180 Mass., 6, (a boy of twelve), *Godfrey* v. *Boston Elevated Ry.*, 215 Mass., 432, (a boy of seven); *Brown* v. *European & N. A. Ry. Co.*, 58 Maine, 384, (a boy of nine); *Calomb* v. *Portland and Brunswick St. Ry.*, 100 Maine, 418, (a girl of nearly eleven). The very recent case of *McCarthy* v. *B. & A. R. R. Co.*, 112 Maine, 1, where two boys of about fourteen riding in a milk cart were struck at a grade crossing is strikingly in point in many of its features and the principles of law there laid down, apply with equal force here.

The case of *Wood* v. *Maine Central R. R. Co.*, 101 Maine, 469, relied on by the plaintiff is readily distinguished, because in that case the plaintiff was a passenger for hire riding in the rear seat of a public stage, and such a passenger has a right to rely in some measure upon the watchfulness of the driver and is not, as a matter of law, required to be so alert in looking and listening for an approaching train as he. But in the case at bar the plaintiff evidently placed no reliance upon the driver or his watchfulness, and he had no occasion to do so. All three, sitting on the same seat, were apparently playfellows together, much as they would have been had they been walking on the street instead of driving, and in their sport had gone blindly upon the crossing, as in *Godfrey* v. *Ry. Co.*, 115 Mass., supra. The fact that the older man was driving rendered the plaintiff no less careless in this case. Nor does the fact that in approaching the

crossing the vision was obstructed by the higher banks, the trees and a woodyard, change the situation. The more dangerous the crossing, the greater the care demanded of the traveller. At a point fifty feet from the crossing there was a clear view of the track for a long distance. Had the plaintiff looked then he could have seen the approaching train, but it is admitted that he did not. The difficulty of seeing and hearing the train is therefore immaterial as it is the absence of even the smallest effort on the plaintiff's part, not his inability to see or hear with reasonable effort, which convicts him of contributory negligence. *Day* v. *R. R.*, supra.

The accident was deplorable, but unless we are prepared to hold that in every instance where a child of tender years is injured by the negligence of another he is entitled to recover, we cannot sustain this verdict.

Motion sustained.
Verdict set aside.

HARRY W. CLARK *vs.* FRANK P. STETSON.

Androscoggin. Opinion April 3, 1915.

Contract. False Representation. Inherent Power of Courts to Preserve and Protect their own Records and to Substitute Copies of Lost Records. Money had and received. Opportunity to see the Condition of Land and Personal Property. Purchase Price. Rescission. Sale of Farm.

In an action for money had and received to recover the sum of fifteen hundred dollars, paid on account of the purchase price of a farm and certain personal property, before this court on defendant's motion for a new trial, it is

Held:

1. That a valid contract was made between the parties, the terms of which were clearly understood by both, and if the plaintiff's verdict is based upon the contention of the absence of a contract between the parties, it is manifestly wrong.
2. That there is no sufficient evidence of false representations on the part of the defendant to justify the verdict. The plaintiff evidently failed to carry out the terms of the purchase, not because of any legal fault on the part of the defendant, but because he had either changed his mind or was unable to secure the balance of the purchase price.
3. That had such actionable deceit been proved, rescission was not made within a reasonable time.
4. It is within the power of the Justice presiding at the trial at nisi prius to permit a copy of a deposition to be substituted for the original in making up the case for the Law Court, the original having been introduced at the trial, but having been subsequently lost or mislaid, and the substantial accuracy of the copy being conceded.

On motion for new trial by defendant. Motion sustained.

This is an action of assumpsit for money had and received to recover fifteen hundred dollars, paid to defendant by plaintiff as a part of the purchase price of defendant's farm and certain personal property.

Plea, the general issue. The jury rendered a verdict for the plaintiff for $1105.42, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

White & Carter, for plaintiff.

Newell & Skelton, for defendant.

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

CORNISH, J. This is an action for money had and received brought to recover the sum of fifteen hundred dollars, paid on account of the purchase price of a farm and certain personal property. The plaintiff obtained a verdict in the sum of $1105.42 and the case comes to the Law Court on the defendant's general motion.

The plaintiff sets up two grounds on either of which he bases his right of recovery, first that the minds of the parties never met and agreed upon the purchase price so that no contract was made between them; and second, if a contract was made, it was voidable because of the false representations of the defendant and was seasonably rescinded by the plaintiff. On neither ground was there sufficient evidence to sustain the verdict.

1. *No contract.* It appears, without contradiction, that the plaintiff was a locomotive engineer, a resident of Lewiston, and was desirous of purchasing a farm in the suburbs of that city. Through a friend his attention was called to the farm of the defendant, and in the month of February, 1913, he called upon the defendant and proposed a purchase, but the defendant had not then made up his mind to sell and no trade was made. The defendant was then, and still is, an invalid and confined to the house, and it was on that account that he had been thinking of selling but had not reached a definite conclusion. Two weeks later the plaintiff called again, and between that time and April 22 made several more visits to the farm, during one of which the defendant named $5000 as his price. In response to the question as to what the defendant asked for the farm, the plaintiff testified, "Five thousand dollars, that was his price." Nothing more was said about price between the parties. It was accepted on both sides as fixed. On April 22, the plaintiff went again to the defendant and the trade was consummated on that basis. The plaintiff says: "I told him I came up to trade for the farm and

to give him my money." He paid the $1500 on account and took a receipt for the $1500, "in part payment the farm." "I told them I would pay the purchase price the 15th of May, between the first and the 15th of May" says the plaintiff. What purchase price? Five thousand dollars, because the plaintiff neither claims nor intimates in his testimony that he was purchasing on any other basis, and on cross examination he squarely states that the price of the farm was $5000, and he knew that was the price when he paid in the $1500. Two days later, on April 24, the defendant moved off from the farm and the plaintiff moved on. On May 15, the plaintiff met the defendant's wife, and a Mr. Pike who was to furnish $2500, at Judge Newell's office, and the time for completing the contract was extended thirty days. The receipt for $1500, that had been given the plaintiff on April 22, bears the indorsement "30 days from 15th of May." The balance never was paid and the plaintiff moved off the premises on July 7. There is absolutely nothing in the plaintiff's own testimony, regardless of that of the defendant and his wife, to substantiate the claim that the purchase price was not clearly agreed upon. There is also substantial agreement between the parties as to what was embraced in the sale. The plaintiff says "Everything on the farm except the household furniture and a few hens, six or eight hens, that they wanted to keep, and a light team they had there to ride with, driving team," and the defendant says: "farm, stock and tools." It is true that the question subsequently arose whether the plaintiff obtained all the personal property that he had bought; but that in no way affects the certainty of the contract itself. It is also true that there is evidence of certain statements made by the defendant's wife to the plaintiff's wife as to reducing the price. But these are denied by Mrs. Stetson and, even if true, the plaintiff does not claim to have known or acted upon them.

If the verdict is based upon the contention of absence of contract between the parties it is clearly wrong.

2. Admitting the contract, a verdict based upon false representations and legal rescission is equally wrong.

The contract was made between the parties themselves, the seller and the purchaser. The representation as to the soil, according to the plaintiff's testimony was this: "I asked him if the farm was rocky and he said, 'only what you see.' He said 'all the rocks on the farm was what you could see.'" It appears that the farm was

situated on a high hill, that ledge cropped out in many places and the plaintiff had a full and fair opportunity to see its condition on the many visits that he had made to it before the purchase. The fields were in plain view from the house. After the purchase the plaintiff had a small piece plowed and found many rocks, but one of his own witnesses, a practical farmer, testified that the soil was good and the fields fertile and under a good state of cultivation. The learned counsel for the plaintiff in argument urges other alleged representations, as to quantity of hay cut, the existence of plum trees and strawberry patch, condition of farming tools, etc. The evidence as to the hay is too indefinite to be of importance, the plaintiff admits that plum trees and strawberry patch were not mentioned, and the condition of the tools the plaintiff could determine for himself, for he had full opportunity to inspect them and did inspect them prior to the purchase.

Clearly all these claims are afterthoughts. The plaintiff does not pretend that he was led to make this purchase by reason of any such representations, nor that he gave it up because he found them to be untrue. The apparent fact is that either he grew tired of his bargain for other reasons, or he was unable to raise the balance of the purchase price. In none of the interviews that took place between the parties after the trade was made did the plaintiff charge the defendant with making false representations. At the interview on May 15th, the date for consummating the trade, the plaintiff says "I told them I shouldn't carry it out, and didn't want to have anything further to do with it," giving no reasons whatever for his change of attitude, and he says Mrs. Stetson then told him at that time that if he threw up the trade he would lose his $1500. The defense claims that the plaintiff said the party from whom he expected to obtain the $1,000 which with the $2500 to be furnished by Mr. Pike would make up the balance of the $3500 had declined to let him have it and therefore he was not prepared to complete the bargain that day. There is force in this because it is conceded that an extension of thirty days was given the plaintiff and he went back and continued to occupy and carry on the farm, until July 7, when he finally left, and when he surrendered the keys on July 8, he did so with the words "I am all done with your farm." It is unnecessary to go into this branch of the case with greater detail. It is clear that the plaintiff broke the contract and not the defendant,

and that even on his own testimony he had no valid reason for doing so on the ground of actionable deceit in the sale, the essential elements in which have been recently restated by this court in *Hotchkiss* v. *Coal & Iron Co.*, 108 Maine, 34.

Moreover the defendant urges that had there been such actionable deceit, and plaintiff had attempted to rescind therefor, the rescission was not made within a reasonable time. This point is well taken. The plaintiff was in occupation from April 24 until July 7, and all the facts of which his counsel now complain must have been ascertained by him long before he decided not to carry out his contract. Even after the interview of May 15, he continued to occupy the premises for a further period of nearly two months. While courts stand ready to protect the legal rights of a party against the wrongs of another, they cannot permit contracts to be abrogated merely because they are not advantageous or the expected means for carrying them out are not forthcoming. Men must be bound by their bargains legally and honestly made, and while a jury is apt from sympathy to favor the party who has made financial loss, a verdict resting on such flimsy grounds as in this case should not be allowed to stand.

3. A point of practice, raised by the plaintiff, should be noticed.

At the trial, the deposition of the defendant was introduced in evidence and read to the jury, but was subsequently lost or mislaid by the clerk, and the defendant's counsel asked leave to substitute a carbon copy thereof in making up the case for the Law Court. To this the plaintiff objected. The Justice who had presided at the trial term granted the motion, the right being reserved to the plaintiff to raise any question as to procedure before the Law Court.

We think the ruling was correct. The substantial accuracy of the copy is conceded. The carbon copy is accompanied by the affidavit of the stenographer who took the deposition to the effect that it is a true and complete carbon copy as transcribed from her notes, that before the original was delivered by her to the court a single unimportant change was made in it by agreement of counsel, and that no other change was made in the original to the best of her knowledge and belief. The plaintiff relies upon the *Stenographer cases*, 100 Maine, 271, where the court held that when by reason of the death of an official Court Stenographer, a party who has filed a motion for a new trial is unable to procure any report of the evidence, the Law Court must

overrule the motion for want of prosecution. The ground of the decision was that the right of a hearing upon motion in the Law Court is purely statutory, and that the statutory right is conditional upon furnishing the Law Court with a report of the evidence. No report, no hearing. That is quite different from the case at bar where the single question is whether in sending the case forward to the Law Court the presiding Justice has the right to permit what he is satisfied is a copy of an original paper to be used by the printer instead of the original, the original having been lost. It would be a gross miscarriage of justice if this could not be done.

At common law courts have the inherent power to preserve and protect their own records and to substitute copies of lost records. "Every Court of record has power over its own records and proceedings to make them conform to its own sense of justice and truth, so long as they remain incomplete and until final judgment has been entered." *Lothrop* v. *Page*, 26 Maine, 119. It has accordingly been held that the contents of a complaint and warrant in a criminal case, lost after being returned into court, may be proved by secondary evidence. *Commonwealth* v. *Roark*, 8 Cush., 210, and that a copy of a lost indictment may be substituted for the original. *State* v. *Ireland*, 109 Maine, 158. The same rule applies to lost depositions. *Auluger* v. *Smith*, 34 Ill., 534; *Gage* v. *Eddy*, 167 Ill., 102, 47 N. E., 200; *Burton* v. *Driggs*, 20 Wall., 125; *Stebbins* v. *Duncan*, 108 U. S., 32.

If such copies can be introduced in evidence at the trial, with even greater reason should they be allowed in making up a record for the Law Court, when the original was actually used in the trial below. "Cases in which there are motions for new trials" reach the Law Court "upon evidence reported by the Justice." R. S., Chap. 79, Sec. 46, and Chap. 84, Sec. 53. It is judicial history that before the day of stenographers the presiding Justice made up the report from a comparison of his own minutes with those of the counsel in the case. In case of disagreements between the counsel as to any particular evidence the Justice decided what the report should contain. It was all within his control, and the evidence was received by the Law Court "as reported by the Presiding Justice," to use the words of the original act. Public Laws of 1852, Chap. 246, Sec. 8. That power still inheres in the Justice. And when, as here, an original document has been lost, it is clearly within his power to permit a copy

thereof to be substituted, to the end that justice and truth may prevail and at the same time the legal rights of all parties be carefully preserved.

The testimony of the defendant is properly before us, and upon the general motion the entry must be,

Motion sustained.
Verdict set aside.

GEORGE C. NICHOLS, Pet'r, *vs.* ARTHUR J. DUNTON, et als.

Sagadahoc. Opinion April 5, 1915.

Exceptions. Judicial Duty. Mandamus. Ministerial Duties. Motion. Petition. Writ.

1. When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is ministerial in character and performance may be compelled by mandamus, if there is no other remedy.
2. When the law requires a judicial determination to be made, such as the decision of a question of fact, or the exercise of judgment in deciding whether the act shall be done or not, the duty is regarded as judicial and mandamus will not lie to compel performance.

On exceptions by petitioner. Exceptions overruled. Petition dismissed with additional costs.

This is a petition for a writ of mandamus in which the petitioner asks that the Mayor and Aldermen of the City of Bath be compelled to give him an "official and judicial hearing" on a complaint made by him to said Mayor and Aldermen against a police officer of said city, for alleged misconduct of said officer towards said petitioner. Notice for a hearing on said petition was ordered. The petition was filed

and the respondents filed a motion to dismiss the petition on the ground that the petitioner was not entitled by law to such official and judicial hearing. The Justice who heard the cause sustained the motion and dismissed the petition with costs. To this ruling the petitioner excepted. The case was thereupon certified to the Chief Justice of the Supreme Judicial Court for decision, as provided in R. S., Chap. 104, Sec. 18.

The case is stated in the opinion.

Franklin P. Sprague, for petitioner.

Arthur J. Dunton, for respondents.

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

PHILBROOK, J. This is a petition for a writ of mandamus. The petitioner, feeling aggrieved by the conduct of a police officer of the City of Bath, filed a statement of his grievance with the respondents, who were then the Mayor and Aldermen of said city, and accompanied his statement with a demand that the officer be discharged from his official position. A copy of the petitioner's statement and demand make a part of the record, and while these do not disclose a request for a hearing before the board yet the petitioner avers in his bill that such a hearing was requested but never given.

This petition was then filed praying that a writ of mandamus might issue commanding the respondents to give the petitioner an official and judicial hearing upon his complaint and demand.

The respondents in due time filed a motion to dismiss the petition on the ground that the petitioner was not by law entitled to such official and judicial hearing. The Justice who heard the cause sustained the motion and dismissed the petition allowing costs to the defendants. To this ruling the petitioner seasonably excepted and exceptions were allowed.

While authorities are numerous and in entire harmony upon the point in issue, we find a well expressed statement in a very recent note to *State* v. *Stutsman,* 776 Ann. Cases, 1914D, where the following language is used; "When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is ministerial in character and performance may be compelled by mandamus if there is no

other remedy. When, however, the law requires a judicial determination to be made, such as the decision of a question of fact, or the exercise of judgment in deciding whether the act should be done or not, the duty is regarded as judicial and mandamus will not lie to compel performance." See also High's Extraordinary Legal Remedies, Sec. 24; Wood on Mandamus, Page 19; extensive note to *Dane* v. *Derby,* (54 Maine, 95) found in 89 Am. Dec., 722; and extensive note to *State* v. *Gardner,* 98 Am. St. Rep., 858; *Dennett* v. *Acme Mfg. Co.,* 106 Maine, 476.

The act of giving an official and judicial hearing by Mayor and Alderman, under the circumstances of the case at bar, is clearly within the rule of judicial and not ministerial duty, and the ruling that the motion to dismiss be sustained was correct.

Exceptions overruled.
Petition dismissed with additional costs.

LUKE A. SPEAR, In Equity,

vs.

ROCKLAND-ROCKPORT LIME COMPANY, et als.

Knox. Opinion April 5, 1915.

Bonds. Corporation. Creditors. Demurrer. Discretionary Power. Dividends. Mortgage. Net Earnings. Preferential Dividends. Preferred Stockholders.

1. The preferential rights of a preferred stockholder arise from his contract, and are enforceable in equity against the corporation and other stockholders in accordance with the terms of his contract. But aside from his special contract he stands on no better footing then any other stockholder.
2. A preferred stockholder is not a creditor. He cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts.
3. Directors may use profits for the development of the corporate business, so long as they do not abuse their discretionary power, or violate the charter, or the contracts made, as to profits, with particular classes of stockholders.
4. When the certificate of a preferred stockholder provides that "he shall be entitled, out of the net earnings of the company, to a semi-annual, preferential, cumulative dividend, to be paid or provided for before any dividend is set apart or paid on the common stock;" he is entitled to have such dividend paid semi-annually, if there are net earnings.
5. A case in which it appears that the net earnings of a corporation have been applied to the enlargement of the plant, and in which it also appears that by a sale of all the assets, concerning which there is no allegation of fraud, so small a sum was realized, as to show that the net earnings have all disappeared, and the capital itself has been greatly impaired, and in which it further appears that the corporation has apparently ceased to do business, is not a case which calls for the declaration of a dividend to preferred stockholders. The proper remedy of such stockholders is not dividends, but dissolution.
6. In a bill brought by one stockholder for the benefit of himself and all other stockholders, to compel the declaration of a dividend, it must be alleged that application has been made to the directors for the declaration of such a dividend, or some reason must be alleged why such an application would be ineffectual. The demand of one stockholder for the payment of the amount claimed to be due to him individually is not an application for the declaration of a general dividend.

On exceptions by plaintiff. Exceptions overruled.

This is a bill in equity against the Rockland-Rockport Lime Company and the directors thereof, in which plaintiff prays that said company be required to declare and pay a dividend upon its preferred stock from the year 1902 to 1910. The directors who had been served with process, demurred to the bill, which the Justice hearing the case sustained. The plaintiff filed exceptions to the ruling sustaining the demurrer, which exceptions were allowed.

The case is stated in the opinion.

R. I. Thompson, for plaintiff.

A. S. Littlefield, for defendants.

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

SAVAGE, C. J. Bill in equity by a preferred stockholder, for himself and in behalf of all other preferred stockholders, against the Rockland-Rockport Lime Company and its directors, for the purpose of requiring a declaration of "a dividend of seven per cent, payable on the first days of March and September of each year with interest on each dividend from the time it became due, until the date of the bill." The case comes before this court on exceptions to the sustaining of the defendants' demurrer.

The facts stated in the bill, and which must be taken on the demurrer to be true, are these. The defendant corporation was organized in 1900 for the purpose of the manufacture and sale of lime. Its capital stock of $2,000,000 was divided into preferred and common stock. $825,000 of preferred, and $875,000 of common stock have been issued. Each kind of stock was of the par value of $100 a share.

On January 23, 1901, the plaintiff purchased ten shares of preferred stock which he still owns. He received a certificate of stock which contained an agreement "that the preferred stock is entitled, out of the net earnings of the company, to a semi-annual, preferential, cumulative dividend at the rate of seven per centum per annum, and no more, payable on the first days of March and September in each year, to be paid or provided for before any dividend shall be set apart or paid on common stock, that in case of liquidation or dissolution, the preferred stock shall be paid in full at par, together with accrued and unpaid dividends, before any payment is made on the common stock," and so forth.

January 18, 1900, the defendant mortgaged its property and franchise for $1,000,000, to secure the payment of bonds, the proceeds of which, with that of the capital stock gave it a working capital of $2,700,000. In April, 1901, it issued its debenture bonds for $1,000,000 from which it realized the sum of $950,000, thereby increasing the working capital to $3,650,000. Its net earnings to and including 1910 are alleged to have been about $688,000. It is alleged that on December 31, 1910, the corporate assets amounted in value to $4,131,039.76, and its liabilities, outside of capital stock, and including "undivided profits" were $2,431,039.76; that the excess of assets over liabilities is composed in part of the net earnings, which have been applied by the directors to the increase and enlargement of the company's plant, and otherwise to the increase of its assets, instead of being applied to the payment of dividends to preferred stockholders. The complainant alleges that he has duly demanded the sum which should have been due and payable to him, but that the demand has not been complied with.

It is alleged that by the issue of debenture bonds in April, 1901, it was intended wrongfully to create such a large additional indebtedness as would deprive the preferred stockholders of the dividends to which they were entitled; that the refusal to declare dividends was for the purpose of increasing the value of the plant, and of making the claim that the debenture bonds could not be paid at maturity, if dividends on preferred stock were paid; that no provision was made for the payment of the debenture bonds, and that three days before they became due, the company announced that it was not in position to pay them.

Afterwards, another corporation was organized, called the Rockland and Rockport Lime Company. And on July 1, 1911, the defendant sold all its assets, subject to the first mortgage bonds, for $1,081,000, to one Kalloch, the purchaser assuming all the debts, liabilities and obligations of the company, and on the same day Kalloch sold the assets to the Rockland and Rockport Lime Company. And in this connection it is alleged that among the liabilities assumed by Kalloch were undivided profits amounting to $212,256.32.

The foregoing statement embodies the allegations in the bill. And the question is whether upon such a statement, assuming the allegations to be proved, there would be any justification for equitable interference at the suit of a preferred stockholder to compel a distribution of dividends.

As a general rule, the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with the proper exercise of that discretion. Yet, when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it. Directors are not allowed to use their power illegally, wantonly, or oppressively. *Belfast & M. Lake R. R. Co.* v. *Belfast*, 77 Maine, 445. The rights of a preferred stockholder are enforceable in equity against the company in accordance with the terms of his contract. *Hazeltine* v. *Belfast & M. Lake Railroad Company*, 79 Maine, 411. And all unfair discrimination between preferred stockholders and common stockholders will be prevented. 1 Morawetz, Priv. Corp., Sec. 280.

But even as to a preferred stockholder, unless his contract otherwise provides or requires, the profits or net earnings may be allowed to accumulate, and remain invested in the business. The officers of a corporation are invested with a discretionary power with regard to the time and manner of distributing its profits. They may use the profits for the development of the company's business, so long as they do not abuse their discretionary power, or violate the charter, or the contracts made, as to profits, with particular classes of stockholders. 1 Morawetz, Priv. Corp., Secs. 276, 447.

The preferential rights of a preferred stockholder arise from his contract, which in this case is found in his stock certificate. His contractual rights the court may enforce against the corporation and other classes of stockholders. But aside from his special contract he stands on no better footing than any other stockholder. He can require the payment of dividends, when others cannot, only in case and to the extent that dividends were promised or guaranteed in his contract. Such dividends he may require whenever the company has acquired funds which may rightfully be used for the payment of dividends. 1 Morawetz, Priv. Corp., Sec. 459.

Moreover, a preferred stockholder is not a creditor. He is a stockholder, although his peculiar rights arise from contract. He is a stockholder as to creditors in general, and his rights are subordinate to theirs. He cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts. *Belfast & M. Lake R. R. Co.* v. *Belfast*, supra. He is entitled to a dividend out of net earnings only.

The plaintiff's contract is that he shall be entitled, out of the net earnings of the company, to a semi-annual, preferential, cumulative dividend, to be paid or provided for before any dividend is set apart or paid on the common stock. And that is why it is called preferential. By being cumulative, if net earnings at any dividend period are insufficient to pay the contract dividend it is to be made up out of subsequent net earnings. And in any event, upon liquidation or dissolution of the corporation, the contract goes on to say, the preferred stockholders are to be paid in full for their stock at par, with all accrued and unpaid dividends, before common stockholders receive anything. One feature of the contract remains to be noticed. The contract was that the preferred stockholder was entitled, out of the net earnings, to semi-annual . . . . dividends." The defendant contends that under this contract, the plaintiff was not entitled, even if there were net earnings, to have dividends paid for any half year, year, or series of years, that the directors might use the net earnings for the development of the business, and that there was but a single limitation, namely, that the plaintiff must be paid all accrued and unpaid dividends before anything is paid to common stockholders. In other words, it is claimed that the defendant made no promise or guaranty to the plaintiff of any dividends to be paid out of net earnings, at any particular time, and that it will have fully kept and performed the obligation of its contract, if at any time, past or future, it has paid or will pay, the preferred dividends before common ones are paid. That is, it may indefinitely postpone payment. We are unable to concur in this view. This contract like all others must be interpreted in accordance with the expressed intention of the parties, reading the contract in the light of its purposes and existing conditions and surrounding circumstances. And reading the contract in that way, we think it obvious that when the parties agreed that the plaintiff was to be entitled, out of the net earnings, to a semi-annual dividend, they intended that he should be entitled to have a dividend *paid* semi-annually if there were net earnings. Such we think would be the ordinary acceptation of the words used. And if there is any ambiguity in meaning, the contract should be construed more strictly against the company. The phraseology was its own, and it should be held to the significance which the words would ordinarily imply to an investor.

It follows, therefore, that the plaintiff is now entitled to cumulative dividends, if there are net earnings, and if now there is any available fund out of which dividends may properly be paid. Here lies the difficulty in the plaintiff's case. It is alleged that the net earnings to December 31, 1910, were $688,000. It is also alleged that these net earnings were applied by the directors to the increase and enlargement of the plant, and "also to the increase of the assets" of the corporation, whereas they should have been applied to the payment of dividends. The plaintiff claims also that the company has $212,256.32 of "undivided profits," which should be applied to dividends. This claim relates to the allegation respecting assets and liabilities on December 31, 1910. It is alleged specifically that the value of the plant of the corporation was $3,567,477.14, and that there were other assets to the amount of $563,562.62, the whole amounting to $4,131,039.76. The liabilities are alleged to be, first mortgage bonds, $988,500; debenture bonds, $1,000,000; interest accrued and unpaid, $33,094.13; accounts payable, $113,689.31; mortgage note account, $80,000; contingent reserve, $3,500. These items amount to $2,218,783.44. If to this be added the capital stock liability of $1,700,000, the total liabilities amounted to $3,918,783.44. And this amount deducted from the total assets leaves a balance of $212,256.32, which is properly called "undivided profits," and which the plaintiff claims is a basis for dividends. But it will be noticed that it is a bookkeeping item, entered to make a complete balance sheet. It indicates, indeed, the excess of all assets over all liabilities, and that is profit. But it does not indicate that there is any fund immediately available for dividends. And as the net earnings had been $688,000, and as no dividends had ever been declared, it shows that the net earnings applied to the increase of the plant and other assets, in excess of $212,256.32, had disappeared in a shrinkage of the value of the plant and other assets.

But it is also alleged that six months later, July 1, 1911, the corporation sold "its entire property of every kind and nature, including its accounts due and cash on hand, through an intermediary, to another corporation, for $1,081,000. This sale was subject to the first mortgage for $1,000,000. And the purchaser assumed all the debts, liabilities and obligations of the old corporation, and agreed to pay the purchase price in debenture bonds. The phraseology of the allegation leaves it uncertain whether the assumption of debts and

so forth was a consideration additional to the $1,081,000, or whether the debts were to be paid out of the $1,081,000. Counsel on both sides have treated the question as if the latter alternative were the true one. And we assume it to be so.

Plaintiff's counsel in argument criticises this sale, but the plaintiff's bill does not suggest any illegality in it. It rather criticises the directors for not having before that time made provision for the extinguishment of the debenture bonds, by payment, renewal or otherwise. It is not alleged that there was any fraud, or want of good faith, in the sale, nor that the purchaser was not a bona fide purchaser. It is not alleged that the property was sold for less than its real value. And even if there were fraud and collusion, and if the directors abused their discretion in making the sale, it is clear that the remedy for such acts does not lie within the scope of this bill, as framed. This bill seeks only a declaration of a dividend and that presupposes a fund or other property out of which it can be paid.

The concrete fact is that all the defendants' property was sold to a purchaser, who under the allegations of the bill must be regarded as a bona fide purchaser, for $1,081,000. No explanation is afforded by the bill of the apparent shrinkage in the net assets of nearly $1,000,000 from December 31, 1910 to July 1, 1911. For present purposes, on demurrer, we must take the statement as of December 31, 1910, to be true. It may be that upon a hearing it would appear that the assets were largely overstated. Or it may be that there was some other cause of shrinkage. Whatever may be the explanation, the fact remains that after the sale, $1,081,000 in new debenture bonds was all the property the corporation had. Whatever may have been the duty of the corporation previously to make provision for dividends, it had made no such provision. The plaintiff did not insist upon his dividends, and did not undertake to compel the company to pay them. And now at the end of the chapter there is only $1,081,000 with which to pay debts and dividends. The net profits had disappeared. The capital stock was practically wiped out. The company owed $1,000,000 of debenture bonds, then overdue. Six months before it had owed nearly $147,000 for unpaid interest and accounts payable. There is no allegation, and there is no presumption, that this indebtedness had been reduced. The provision for the payment of the debenture bonds would absorb $1,000,000 of the purchase price, leaving only $81,000, even if there were no other indebtedness.

The plaintiff contends, however, that as a preferred stockholder he should have had priority over the debenture bonds liability. We do not think so. Stockholders, even preferred stockholders, can have no priority over creditors. The debenture bonds were a lawful indebtedness of the corporation, and were entitled to payment, whether the corporation would be able to keep its contract with the plaintiff for dividends, or not. But if it were otherwise, the length of time that has elapsed since the purchaser assumed the debts and agreed to pay in new debenture bonds, and the nature of the transaction itself, warrants the inference that the transaction is completed, and that $1,000,000 of the purchase price has long since passed, in one form or another, to the holders of the old debenture bonds, and is not now held by the defendant. And if that be so, it is not available for dividends.

The plaintiff also contends that there was no necessity for providing for the payment of all the debenture bonds when due, and relies upon *Hazeltine* v. *Belfast & M. Lake R. R. Co.*, 79 Maine, 411. But that case is not like this one. There the corporation having a large current income sought to set apart enough of it as a sinking fund to pay the entire bonded indebtedness which would become due many years later. The court held that it was not necessary, as a legal proposition, thus to provide for the payment of all the indebtedness at maturity, to the exclusion of dividends for preferred stockholders. But here we have a case where presumably the payment of the bonded indebtedness is an accomplished fact. It is too late, now to recall the payment. It is now immaterial whether it was necessary to pay all of the old debenture bonds, if they are paid. Upon the allegations, we would not be justified in saying that the corporation now has any property in excess of $81,000 available for dividends, and not that, if there is indebtedness to be paid out of it.

It is true that the plaintiff alleges that "there is property out of which a dividend can and should be paid," but that indefinite statement must be interpreted of course in connection with the definite statement of the results of the sale of the property. There is nothing in the bill to indicate what the property is, but counsel argues that the $212,256.32 "undivided profits" shown in the trial balance is property. We have already discussed this question. Although there is a bookkeeping item of "undivided profits," they certainly are not tangible for dividend purposes.

If we assume that at the time of the sale there were no debts except the debenture bonds, and this is the most favorable assumption for the plaintiffs that can be made upon the allegations, and if we assume that the corporation still holds $81,000 of the purchase price, the bill does not show a situation calling for the declaration of a dividend. The corporation having sold all its property, it has apparently "ceased to do business." *Van Oss* v. *Premier Petroleum Co.*, 113 Maine, 180. And the stockholders' remedy is rather by compelling it to be wound up, than by seeking dividends out of net earnings, which no longer exist. Laws of 1905, Chap. 85, as amended by Laws of 1907, Chap. 137. When the entire assets have been reduced to less than ten per cent, at most, of the preferred stock, and the entire corporate plant has been sold, the proper remedy is not dividends, but dissolution. And under the situation described in the bill, dissolution is the only proper remedy, since in no other way can the interests of all parties, including creditors, if any, be safeguarded.

We hold therefore that upon proof of the facts alleged in the bill, without more, the court would not be justified in ordering the payment of a dividend to preferred stockholders, and for that reason the demurrer was correctly sustained.

There is another good ground of demurrer. The plaintiff has not alleged in his bill that any application has been made to the directors to declare the dividend sought for, nor is any reason alleged why such an application would be ineffectual, if there were any funds to divide. One or the other allegation is essential. *Ulmer* v. *Maine Real Estate Co.*, 93 Maine, 324. The plaintiff alleges that he has demanded payment of the amount due by contract, as he claims, on his own stock. His suit is brought for the benefit of all stockholders of his class, and his demand for payment falls far short of an application to have a dividend declared for the benefit of all.

Exceptions overruled.
Bill dismissed with costs.

GODFREY M. HYAMS, In Equity, *vs.* OLD DOMINION COMPANY.

Cumberland. Opinion April 5, 1915.

Application for Relief. Breach of Trust. Charter. Directors. Discretionary Powers. Fraud. Holding Corporation. Indispensable Party. Misapplication of Corporate Powers. Ratification. Stockholders.

1. A ratification of the acts of directors by the stockholders in meeting assembled is ineffective when it does not appear that the stockholders generally had any knowledge of the acts claimed to have been ratified.
2. Ratification of ultra vires acts of directors, or of acts done in manifest disregard of the duties of the corporation to its stockholders, and of the legal rights of minority stockholders, is nugatory.
3. A stockholder seeking a remedy for corporate wrongs must first make application for relief through corporate channels, or allege and prove sufficient reasons why such an application would be futile. But such application is not necessary where it is alleged, and the case shows, that application would be useless.
4. Wrongs begun before a stockholder became such, but continued after, may be redressed at his suit.
5. When it is sought by bill in equity to require a Maine corporation, which owns stock in a New Jersey corporation, the certificates whereof have been transferred in blank, to have the same transferred of record to itself on the books of the New Jersey corporation, the latter corporation is not an indispensable party to the bill.
6. The court is of opinion that the laws of New Jersey authorize stock in a corporation of that State to be owned and held by a corporation of another State, when empowered by its own State to do so.
7. Courts will not undertake to control the discretionary powers of the directors of corporations, or of the majority of the stockholders expressed in stockholders' meeting, as to acts intra vires, except in cases of fraud, or in cases of such acts as are a breach of the trust and confidence which are implied by the very nature of the corporate relations.
8. Courts can and will control corporations with respect to such acts as tend to the destruction of the corporate franchises, and such as are in violation of, or inconsistent with, the charter. They may and will prevent the abuse, misuse, or misapplication of corporate power prejudicial to the stockholders, and amounting to a breach of trust.

9. The relation between a corporation and its stockholders is essentially contractual. The corporate authority is considered to have been conferred by the stockholders upon a trust and confidence that it will be exercised to effectuate the purpose of the charter.

10. It is a contractual duty of a corporation, and in the nature of a trust, arising from the corporate relations of stockholders among themselves, and with the corporation, that it will perform its corporate functions, according to and within the meaning of, its charter. To abdicate its corporate functions and utterly abandon the performance of its corporate duties, to the prejudice of stockholders, is a breach of duty and trust.

11. The defendant is a holding corporation. More than one-half its assets consist of shares of stock in a New Jersey corporation. These shares constitute more than one-half of the issued capital stock of that corporation. These shares are represented by certificates of stock standing in the name of two of its directors, but in fact transferred in blank and placed in the defendant's vault. For ten years, and from its very organization, it has neglected to have the shares transferred of record to itself. It has not voted upon the shares. It has not directed those in whose name the stock stands of record how to vote. It has taken no corporate action whatever with respect to the stock. The two directors have voted this stock as they pleased. *Held*, that the corporation has been guilty of a breach of trust to its stockholders.

12. When a holding corporation intentionally, persistently and unreasonably deprives itself of the exercise of the highest function and privilege of a stockholder, and so proposes to continue, it is such a breach of its duty to its stockholders, and so far removed from any characteristics of internal management and control, that a minority stockholder may successfully invoke the intervention of the court. It is essentially a breach of trust. It is a perversion of the spirit of the chartered corporate purposes.

On appeal by defendant from final decree in favor of plaintiff. Decree below affirmed with additional costs.

This is a bill in equity in which the complainant, Godfrey M. Hyams, on behalf of himself and all other stockholders of the Old Dominion Company, prays that the defendant, Old Dominion Company, shall be enjoined from causing, making or allowing any further alienation of its assets and that said Company be ordered to get, take and secure the legal title in its own name, to all the shares of stock of other corporations to which it is rightfully entitled, and that a receiver be appointed to take charge of the assets and affairs of said Old Dominion Company, if it does not comply with said order. Answer was filed by defendant to said bill and replication thereto was filed. The cause was heard by a single Justice on the 12th day of December, 1913, upon bill, answer, replication and agreed statement

of facts, and said Justice found that the complainant had sustained by proof the allegations of his bill of complaint and was entitled to a decree accordingly, and ordered a decree to be entered in accordance with the above findings. From this decree, the defendant appealed.

The case is stated in the opinion.

Isaac W. Dyer, for complainant.

Brandeis, Dunbar & Nutter, Edward F. McClellen, and William M. Bradley, for respondent.

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

SAVAGE, C. J. Bill in equity in which the plaintiff, a stockholder, on behalf of himself and all other stockholders of the defendant corporation, seeks to have transferred to the defendant certain shares of the capital stock of the Old Dominion Copper Mining and Smelting Company, which it is claimed belong, or should belong to the defendant, but which stand of record in the names of two of its directors, Dodge and Smith. The prayer of the bill is that the defendant "be ordered to get, take and secure the legal title in its own name, to all the shares of stock in other corporations to which it is rightfully entitled," and in particular the shares above referred to. There are other prayers in the bill, but they are not pressed, and need not be specifically stated. The case comes before this court on the defendant's appeal from a decree sustaining the bill.

The parties have agreed upon a statement of facts, and from that statement we glean the following as material to the questions to be decided.

In 1903, the Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, had an authorized capital stock of 200,000 shares of the par value of $25 each, of which 150,000 shares had been issued. The United Globe Mines, a New York corporation, had a capital of 23,000 shares of the par value of $100 each. Both corporations owned mining properties in Arizona, which were near to each other. A large majority of the stockholders of each of these corporations, believing that it would be for the advantage of each corporation, if they operated in harmony, determined to make a practical amalgamation of them by organizing a new corporation to own and hold the stock of these two corporations, and in pursuance of this determination, they organized the defendant corporation, the Old Dominion

Company of Maine. The defendant corporation has an authorized capital stock of 350,000 shares of the par value of $25 each, of which 293,245 shares of the par value of $7,331,125 have been issued. Among the incorporated purposes of the defendant is the following:— "to purchase, acquire, hold, sell or otherwise dispose of, or deal with shares of the capital stock, bonds, evidences of indebtedness or other securities of, or issued by, any corporation or corporations."

By the scheme agreed upon, stockholders in the Old Dominion Copper Mining & Smelting Company, designated by us hereafter as the New Jersey corporation, were to have the right to exchange their stock, share for share, for stock in the Old Dominion Company of Maine. It was provided in effect that 138,000 shares of the Maine corporation should be issued in payment of the entire capital stock, 23,000 shares, of the United Globe Mines, and for $350,000 in cash, in addition. It was also provided, that before the agreement should be made effective, the assent of two-thirds in interest of the outstanding stockholders in the New Jersey corporation, and of all of the stockholders of the United Globe Mines should be secured.

In 1904, in accordance with the scheme thus outlined, the whole of the capital stock of the United Globe Mines was first deposited with a banking house agreed upon, and afterwards transferred to the defendant company for 138,000 shares of its stock and $350,000 in cash. More than two-thirds in interest of the stockholders of the New Jersey corporation deposited their shares, and received in exchange stock in the defendant corporation, share for share. Since then, other shares have been exchanged, so that, in all 155,245 shares in the New Jersey corporation now belong to the defendant. Among the shares in the Maine corporation thus received were 150 shares which after passing through various transfers were purchased by the plaintiff in 1912, in the name of another, and transferred of record to him in May, 1913, and are now owned by him.

The shares in the New Jersey corporation now in controversy which have been exchanged for shares in the defendant were never transferred to the defendant corporation, but were transferred to Cleveland H. Dodge and Charles S. Smith on the books of the New Jersey corporation. The certificates for those shares have upon their backs a transfer in blank signed by Dodge and Smith, and they have all been placed, and now remain, in the defendant's vaults. Smith and Dodge are directors of the defendant corporation, and Smith is vice president.

Smith is president and a director of the New Jersey corporation. Dodge is a director of the United Globe Mines, and the directorates of the three corporations are more or less interlocked otherwise. The directors of Phelps, Dodge & Company, one of whom is Dodge, own severally about one-half of the shares in the defendant corporation.

Dodge and Smith admit that they hold record title to these shares in the interest of the defendant. There has been no written or other formal trust agreement executed between them and the defendant, nor have they made any written declaration of trust respecting this stock. But when the stock of the New Jersey corporation was deposited, in furtherance of the scheme agreed upon, Smith, the president of the New Jersey corporation, was advised by counsel that a legal doubt had been expressed as to whether stock in a New Jersey corporation could, under the laws of New Jersey, be held by a corporation organized under the laws of another State, and the defendant claims that it was because of this uncertainty that Dodge and Smith took title to these shares in their own names, in order that the plan and agreement might be carried out in a lawful manner, and the chance that anyone would raise the question avoided.

The by-laws of the defendant provide that "the Board of Directors shall have the general control and supervision of the business of the corporation, with all the powers that could be exercised by the stockholders, except so far as limited by the vote of the stockholders or by law; may among other things sell, assign, transfer, convey or otherwise dispose of the property, real or personal, of the corporation, and may delegate any part of their power to any officer or committee of the board."

It appears that neither the stockholders in meeting nor the directors as a board have ever passed any vote, directing, sanctioning, or expressly ratifying, or even mentioning the holding of this stock by Dodge and Smith for the defendant corporation. But the fact that the stock stood in the names of Dodge and Smith has been at all times known to a majority in interest of the defendant's stockholders, and to all of its directors. By whose particular authority, unless it be that assumed by Dodge and Smith themselves, the stock was placed in their names is not disclosed.

At the annual meeting of the stockholders in 1905, and at each annual meeting since, "all acts, matters and things entered into and

performed by the officers and directors" have been by unanimous vote "fully and in all respects, ratified, confirmed and approved." Some of the persons who at different times owned the stock which the plaintiff now owns were present at various ones of these annual meetings. But what knowledge they had of the fact that Dodge and Smith held the New Jersey corporation stock is not made to appear, nor is it shown what information was possessed by the minority stockholders in general. The annual balance sheets since 1908, if accessible to the stockholders, or made known to them, would have indicated to them that the defendant had full title to the stock.

The plaintiff never owned any shares in the defendant prior to September, 1912, and there has been no assent by him or by his predecessors in title to the retention of the stock in the names of Dodge and Smith, except such, if any, as has been shown by the foregoing statement.

There has been no dissipation of the assets of the defendant corporation, unless the retention of the title to the stock by Dodge and Smith be regarded as such a dissipation. The dividends in the stock of the New Jersey corporation held by Dodge and Smith are paid directly to them when declared, and by them paid forthwith to the defendant.

The purposes and powers of the defendant corporation, as stated in its certificate of organization, embrace the doing of many kinds of business, other than the holding and owning of shares of the capital stock of other corporations. But so far as the record shows it has never attempted to exercise any of those additional powers. Its entire assets consist of the shares of capital stock of the New Jersey corporation and of the New York corporation, and claims for money loaned to those corporations. It is therefore, so far as any of the rights here involved are concerned, a mere holding corporation, and it is to be treated as such.

From these agreed facts we draw certain conclusions of fact, and state them now without regard to their effect upon the rights of the parties. We think that it must be held that the stock was placed and still remains in the name of Dodge and Smith with the acquiescence and tacit approval of the board of directors. Directors of a corporation must act as a board, but it is not necessary that their action be formal or their votes recorded. *Pierce* v. *Morse-Oliver Building Co.*, 94 Maine, 406. It may be sufficient as to third parties, if they

establish a mutual understanding. *York* v. *Mathis,* 103 Maine, 67. Their action or their mutual understanding may be shown by circumstances or conduct. Cases just cited. When it appears, as it does in this case, that for nine years all the directors have been conversant with the fact that two of their number hold in their names the record title to more than one-half of the assets of the corporation, and have made no objection, it certainly affords very strong evidence of their mutual understanding and unanimous assent.

In the next place we must find that there has been no ratification of the acts of the directors, if any was necessary, by the stockholders. The fact that a majority in interest of the stockholders knew of the situation and approved it, has no legal significance. Stockholders can act only as a body, and in meeting assembled. While it is undoubtedly competent for the stockholders to ratify unauthorized acts of directors, which are within the corporate powers, he who relies upon a ratification has the burden of showing that attempted ratification really ratified. Neither individuals, nor stockholders in a body, can be said to ratify acts of which they have no knowledge. The resolutions of ratification were sweeping. They referred to no particular act. It does not appear that the stockholders generally outside of the directors had any knowledge that the directors had authorized the New Jersey stock to be put into the names of Dodge and Smith. It does not appear that this was known to the stockholders then holding the stock now owned by the plaintiff. Such a ratification is ineffective because it really does not ratify. It is a paper ratification, not a real one. A decent respect for the rights of stockholders, especially of minority stockholders, should require that he who seeks to bind them by votes of ratification should show that the stockholders generally knew specifically what they were voting about. *Camden Land Co.* v. *Lewis,* 101 Maine, 78.

Again, we find that Dodge and Smith have no interest in the stock. Whether they are even naked trustees is left uncertain. They have signed transfers of the stock certificates in blank, and have put them into the defendant's vault. Whether they have delivered them to the defendant in such way as to divest themselves of any actual control of them is not clear. But we think it is immaterial. The stock in fact belongs to the defendant. The certificates of stock are in the physical possession of the defendant. As sole owner in fact it has the undoubted right to reduce them to its legal possession, fill out

the blank transfers, and present them to the proper officer of the New Jersey corporation to be transferred of record to itself. And that is what the plaintiff seeks to have it compelled to do.

Several defenses are offered: 1, that the complainant has not sufficiently attempted to obtain redress by application to the directors or to the corporation itself; 2, that the defendant corporation has duly ratified the holding of the New Jersey corporation stock by Dodge and Smith; 3, that the complainant cannot complain because if any wrong was done it was done long before he became a stockholder; 4, that the holding was approved by his predecessors in title; 5, that a transfer on the books of the New Jersey corporation should not be required in a suit to which that corporation is not a party; 6, that the alleged uncertainty of the law of New Jersey with respect to the susceptibility of stock in any New Jersey corporation to be transferred to and held by a foreign corporation was an adequate reason for having the shares of the New Jersey corporation stand, of record, in the names of individuals, rather than in the name of the defendant; and, 7, that the defendant corporation has the right, with the approval of its directors and a majority of its stockholders, irrespective of any question about the law of New Jersey, to have individuals hold the record title to this stock.

I. It is a wise rule of procedure which requires that aggrieved stockholders seeking remedies for corporate wrongs should first make application for relief through corporate channels, or allege and prove sufficient reasons why such applications would be ineffectual. *Ulmer* v. *Maine Real Estate Co.*, 93 Maine, 324; *Trask* v. *Chase*, 107 Maine, 137. They must apply to the directors or the corporation before they apply to the court, unless it appears from the bill and proof that such application would be useless. But the law requires in this respect no useless formality. The plaintiff in his bill alleges that he has made no application to the directors or corporation, for the reason that such application would be futile. And we are of opinion that his apprehension is well founded. The policy pursued by the directors and the majority interests controlling the defendant corporation is deliberate and of long standing. And whatever the motives for it may be, there is not the slightest reason to be drawn from the history of the corporation to think that the policy would be abandoned at the request or demand of a minority stockholder, but rather the contrary. This point in defense is not tenable.

II. The matter of ratification by stockholders vote has already been discussed in part. We will add that if it should turn out as claimed by the plaintiff that the act of the directors in keeping the stock in the names of private individuals, though they were possessed by by-law with full corporate powers, was ultra vires the corporation, or if it should appear that the act was in manifest disregard of the duties of the corporation to its stockholders, and of the legal rights of minority stockholders, the ratification must from the nature of things be nugatory. In fact, there was no such ratification as should be held to bind non-assenting stockholders with regard to unauthorized acts of the directors not known, or made known, to the body of the stockholders.

The matter of ratification, however, is not very important. For if the act of the directors was ultra vires the corporation, as the plaintiff claims, ratification would not help it. And if, as the defendant claims, the act was intra vires and proper, ratification was unnecessary.

III. The third objection is that the plaintiff cannot complain because the wrong, if any, was done before the plaintiff became a stockholder. One answer to this, and a sufficient one, is that the wrong is a continuing one. If there was a wrong before the plaintiff became a stockholder it is no less a wrong since. It is an existing condition, alleged to be a corporate wrong, that he complains of. This point is not sustainable.

IV. The claim that the holding of the stock by Dodge and Smith was assented to and approved by the plaintiff's predecessor in title does not appear to be true in fact. At least it is not shown. Whether his predecessors were among those stockholders who knew of it does not appear.

V. We think the New Jersey corporation is not a necessary party to this suit. As a corporation it can have no interest in the ownership of its own capital stock. The New Jersey corporation is not asked to do anything. The bill assumes that its officers will upon request, and as a matter of customary business, transfer the title of record of the Dodge and Smith stock to the defendant, who is the owner.

VI. The defendant contends that it was proper as a matter of business policy for it to allow the record title to the New Jersey stock to remain in the names of Dodge and Smith, on account of the

doubts expressed as to whether under the laws of New Jersey, stock in a New Jersey corporation can legally be held by a corporation of another State. This point is material, because if it cannot be done, it would be futile to grant the plaintiff's prayer and direct the defendant to try to have it done. If such were the case, it might be that the promoters of the defendant corporation would find it expedient to adopt some other method by which they could adjust themselves to the law. But we think there is no considerable doubt with respect to the law of New Jersey.

We do not propose to discuss the law of New Jersey at length. It is settled law generally that one corporation cannot hold the capital stock of another corporation, without legislative authority. But it appears from the cases cited from the New Jersey courts that by statute in that State, "any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of . . . . any corporation of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon." Under this statute there is no doubt that a New Jersey corporation can hold stock in a Maine corporation. But here the question is, can a Maine corporation hold stock in a New Jersey corporation? Will the New Jersey law permit it? The case of *Warren* v. *Pim*, 66 N. J., Eq. 353 (1904), which has been discussed by counsel, is somewhat illuminating, but by no means decisive. The question in that case was not whether a corporation created by another State could own and hold shares in a New Jersey corporation, but whether an English corporation or association organized purely as a voting trust, and having no beneficial ownership of the shares themselves could so own and hold. The question was answered in the negative, but for reasons in no one of which did the majority of the court concur. The opinions of the Justices are interesting, however, in this connection, inasmuch as they show the tendency of judicial thinking, though the expressions touching the power of a corporation of another State to hold stock in a New Jersey corporation are mere dicta. Chancellor Pitney, now Mr. Justice Pitney, said that he could find nothing in the New Jersey statute that satisfied him that any discrimination was intended to be made against alien or foreign corporations, either as to their ownership of such stock, or as to their right to vote upon it. Other Justices expressed similar views. One

intimated that the corporations of a sister State, whose laws permitted them the right to hold stock in the corporations of another State, might invoke the doctrine of comity to support them in exercising a similar right in New Jersey corporations. Some of the Justices expressed no opinion on this question as it was not in issue. No one advised that the power did not exist.

In *State* v. *Atlantic City and Shore R. R. Co.*, 77 N. J. L., 465, (1909), which was an information in the nature of quo warranto, the question was whether a New Jersey railroad corporation could buy and hold the capital stock of another New Jersey railroad corporation. The power of a corporation of another State to hold stock in a New Jersey corporation was not involved. But Chancellor Pitney, speaking for the court, took occasion to refer to the case of *Warren* v. *Pim*, and to make the cautionary observation that a majority of the court had not agreed upon any legal proposition involved in that case. It is not improper to add that the question before us was not involved in that case.

But in *Denver City Water Works Co.* v. *American Water Works Co.*, 82 N. J., Eq. 365, (1913), we get a little clearer light. The plaintiff, a Colorado corporation, held stock in the defendant, a New Jersey corporation, which was insolvent, and began proceedings to wind up the affairs of the defendant. Later it applied to the court to direct the receiver to discontinue a certain suit commenced by him. Objection was made that the plaintiff had no interest to protect, was a mere volunteer, and had no right to invoke the judgment of the court. Howell, V. C. said: "I think it sufficiently appears that the complainant is still the owner or holder of shares of stock in the defendant, the American Water Works Company, and if so, there can be no question of its right to prosecute this matter." 81 N. J., Eq. 139. The Court of Errors, on the appeal from the Vice Chancellor's decree, said:—"The decree appealed from will be affirmed, for the reason stated in the opinion filed below by Vice Chancellor Howell." 82 N. J., Eq. 365. Here it seems to us is a distinct recognition of the power of a corporation of another State to hold capital stock in a New Jersey corporation. It is true the question was not debated. It seems to have been assumed. If the corporation of another State has not lawful power to hold stock in a New Jersey corporation, or to put it the other way, if the stock of a New Jersey corporation is not susceptible, by reason of New Jersey law, of being held by a corpora-

tion of another State, it is difficult to perceive how an outside corporation by reason of its attempted, but unauthorized holding of stock, could get a standing in court to proceed for the appointment of a receiver and the winding up of the New Jersey corporation, whose stock it had. Its status in court depended solely upon its rights as a stockholder. If a stockholder, it could be recognized; otherwise not. This point was decided. If an outside corporation can be enough of a stockholder to be able to cause the dissolution of the corporation whose capital stock it held, it would seem that it should be enough of a stockholder to hold its stock in its own name, and to require the transfer of record to it of any stock that it owns. It is our judgment that the law of New Jersey permits a corporation of another State, when empowered by its own State to do so, to hold shares in a New Jersey corporation.

VII. We are now brought to a consideration of the fundamental question in this case. It is this. Has a minority stockholder in a corporation the right to insist, under such circumstances as are shown in this case, that it shall hold in its own name the shares of capital stock which it owns in another corporation?

The facts, briefly stated, are these. The defendant is a mere holding corporation. More than one-half of its estate and assets consist of shares of stock in the New Jersey corporation. These shares constitute more than one-half of the issued capital stock of that corporation. It, therefore, by stock ownership, has the right and the power to control the New Jersey corporation. For ten years it has neglected, and apparently is now unwilling, to have the record title to those shares transferred to itself, but has tacitly permitted them to stand in the names of two of its officers, although the certificates of stock, with transfers signed in blank, have all the time been in its physical custody. It has taken no corporate action with respect to these shares. It has not voted at the corporate meetings. Neither has the corporation itself, nor have the directors, so far as the case shows, directed the holders how to vote upon any matter at stockholders' meetings. As a corporation, it has abandoned the exercise of the rights, powers, and privileges appertaining to stock ownership, and has left the exercise of those rights, powers and privileges to the will of individuals, who have no interest in these shares, and who are not in any way made accountable to it for the manner in which they exercise functions committed to them, not by the cor-

poration itself, but by stockholders in the corporation, holding a controlling interest. This state of things has existed from the very organization of the corporation. And as it seems to be in accord with the settled policy of the majority stockholders, it is likely to continue, unless minority stockholders may interfere and obtain a remedy from the court.

The positions of the parties may be briefly stated as follows:—The plaintiff contends that the conduct of the defendant in permitting its stock in the New Jersey corporation to be held of record and voted by individuals in the manner stated has been ultra vires, beyond the legitimate power of the corporation; and that it has been such wilful neglect of its corporate duty to its stockholders as to constitute a corporate breach of trust. The defendant contends that the conduct complained of has been purely intra vires, that it related to the internal management of its business affairs, and that minority stockholders have no remedy.

The general policy of the law is so well settled that the citation of many authorities is unnecessary. It is well settled that courts will not undertake to control the discretionary powers of the directors, or of the majority of the stockholders expressed in stockholders' meetings, as to acts intra vires. Such acts cannot be questioned by minority stockholders, except in cases of fraud, and, as for a breach of trust, of such acts as imperil the existence of the corporation itself. As to acts, within the power of the corporation, which concern the internal management of the corporation,—as to questions of corporate policy and economy, questions of business discretion and judgment, the majority stockholders and the directors to whom the corporate powers are delegated, ordinarily have absolute control, and the minority must submit. The courts will not undertake to pass upon the wisdom or unwisdom of such corporate acts. 2 Cook on Corporations, Sec. 684; 4 Thompson on Corporations, Sec. 4443.

On the other hand, corporate powers are limited to these expressly granted and the incidental implied powers necessary to carry into effect the powers so expressly granted. The exercise of any other power is ultra vires. *Franklin Co.* v. *Lewiston Inst. for Savings*, 68 Maine, 43; 2 Cook on Corporations, Sec. 669; Morawetz Priv. Corp., Sec. 682. The relation between a corporation and its stockholders is essentially contractual. The charter is the embodiment of the contract. See same cases. The rule of the majority over the minority

as to acts intra vires is implied from the very nature of the contract. But the corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exercised within the chartered powers, and with a view to advance the interests of the stockholders. *Dodge* v. *Woolsey*, 18 How., 331; *Wright* v. *Oroville M. Co.*, 40 Cal., 20; *Forbes* v. *Memphis, etc., R. Co.*, 4926 Fed. Cases. No stockholder is bound to submit to the doing of ultra vires acts. Such submission is not a part of his contract. He may have relief from ultra vires acts. 2 Cook on Corporations, Sec. 669.

It seems also to be well settled that for practical purposes a corporation may in some respects be treated as a trustee for the benefit of its stockholders, whenever necessary for the protection of their interests. In a sense it holds the corporate property in trust for the stockholders. *Peabody* v. *Flint*, 6 All., 623; *Sawyer* v. *Hoag*, 17 Wall., 623; 1 Morawetz Priv. Corp., Sec. 237.

There is no doubt, we think, that a court of equity may, at the instance of a stockholder, afford a remedy from the consequences, not only of fraudulent acts of the corporation, or its officers, but of such acts as are a breach of the trust and confidence which are implied by the very nature of the corporate relations. It may control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred. *Dodge* v. *Woolsey*, supra; *Wright* v. *Oroville M. Co.*, 40 Cal., 20; *March* v. *East R. R. Co.*, 40 N. H., 548; *Taylor* v. *Holmes*, 14 Fed., Rep., 498; *Forbes* v. *Memphis, etc., R. R. Co.*, supra. It may also control them with respect to acts tending to the destruction of the corporate franchises, and acts in violation of, or inconsistent with, the charter. It may prevent the misuse or the misapplication of corporate power prejudicial to the stockholders, and amounting to a breach of trust. *Pond* v. *Vermont Val. R. R. Co.*, 12 Blatchf., 280.

It should be borne in mind that this is not a bill brought in behalf of a corporation which is unwilling or unable to sue, against directors who have undertaken to do ultra vires or otherwise illegal acts, but one against the corporation itself to compel it to perform a corporate duty which it is claimed it owes to all its stockholders, and a duty which it is capable of performing. That a corporation owes duties to its stockholders outside of mere business duties we think should admit of no question. One such duty is that it will perform its

corporate functions, according to, and within the meaning of, its charter. The manner of performing those duties may be left to the discretion of its directors, or majority stockholders. But the corporation should not be permitted to abdicate its corporate functions and utterly abandon the performance of its corporate duties, to the prejudice of stockholders. These are matters which involve more than mere internal administration, and they are matters which affect the interest of each individual stockholder.

We recur again to the facts. The defendant corporation is the owner in fact of more than $3,500,000 of the capital stock of the New Jersey corporation. It is the owner of a controlling interest. Its one corporate power, involved in this inquiry, is the power to "hold" it. Growing out of that power is a duty to hold it so as to enjoy the privileges of ownership. That we think is necessarily implied, in the case of a holding corporation. For ten years it has neglected, and, as we must assume, now declines, to become the owner of record. As none but stockholders of record can vote, *Warren* v. *Pim*, supra, it has thereby voluntarily disenabled itself from performing its most important function as a stock owner. It has permitted that function to be usurped, so far as minority stockholders are concerned, by individuals. It has had no corporate voice in the management of the New Jersey corporation. It has subjected itself to the liability of loss, with respect to the shares themselves. In the present status it is unable to perform the duties which it owes to its stockholders.

We do not say that a corporation may not, for business reasons, hold property in the name of another. We do not say that it may not so hold temporarily the capital stock which it owns in another corporation. What we do say is that when a holding corporation, intentionally, persistently, and unreasonably deprives itself of the exercise of the highest function and privilege of a stockholder, and proposes so to continue, it is such a breach of its duty to its stockholders, and so far removed from any characteristics of internal management and control, which the majority stockholders may properly exercise, that a minority stockholder may invoke the intervention of the court. It is essentially a breach of trust. If a corporation has no lawful power to give away its property,—and it has none,—no more should it have authority to divest itself of corporate power and virtually to give away to others the exercise of its essentially corporate functions.

The essential purpose of such a holding corporation as the defendant is, is not only to hold shares of stock, but so to hold them as to be able to vote upon them, and give them their proper effective influence in the management of the subsidiary corporation. For such a holding corporation to decline to hold in its own name the shares of stock that it owns, and thereby to abdicate its functions and privileges as a stock owner seems to us to be a perversion of the spirit of the one corporate power which it has so far undertaken to exercise. It is inconsistent with the character of the contractual duties which it owes to its stockholders. It is not only a breach of trust, but it is a neglect to perform the duties which are implied from the very fact that it is a holding corporation.

It is no answer to say that the same gentlemen who now hold of record, and vote upon, these shares, will, by reason of their interests, and of the intercorporate associations, be able to control the exercise of the defendant's privileges of stock ownership, after they shall have been transferred to it of record. Whatever shall be done then will be done under corporate responsibility, of which there is none at present. Besides that, it is, humanly speaking, certain that the gentlemen who now control the defendant, and in whose interests Dodge and Smith are supposedly acting, will not do so forever. We think the bill is sustainable.

Decree below affirmed with additional costs.

VICTOR BEAUDETTE, et al., *vs.* JOSEPH MARTIN.

York. Opinion April 8, 1915.

Assumpsit. Burden of Proof. Cruelty. Delivery. Husband and Wife. Ill-treatment. Living Apart from Husband. Sale.

Assumpsit for merchandise furnished to defendant's wife while she was living separate from him.

Held:

1. The burden was upon the plaintiffs to prove, by a preponderance of evidence, that the wife was compelled to leave her husband because of his ill-treatment, amounting in law to cruelty.
2. The evidence introduced by the plaintiff having established prima facie that fact, the burden of proceeding changed and it became the defendant's duty to introduce evidence showing, or tending to show, the contrary, if he would make such defense.
3. It is immaterial in such cases to whom the articles were charged.
4. It is well settled that if the husband abandons the wife, or by his ill-treatment compels her to leave his house, he is liable for her necessaries and gives her a general credit to that extent.
5. When the wife is justified in living apart from her husband, he is not discharged from liability by showing that the contract was in fact made without his authority and contrary to his wishes, nor will his general advertisement or particular notice effect the case.
6. In all such cases, if the husband seeks to escape her pledge of his credit, he should not only provide suitable necessaries through persons of his own choice, but make that provision known to his wife.

On motion for new trial by the defendant. Motion overruled.

This is an action of assumpsit on an account annexed, brought in the Municipal Court for the City of Biddeford, in the County of York, at May term, 1914, to recover for certain merchandise furnished by plaintiffs to the defendant's wife, who was living apart from her husband. Plea, the general issue.

The Judge of the Municipal Court gave judgment in favor of the defendant, and the plaintiff thereupon appealed from said judgment to the Supreme Judicial Court. The jury returned a verdict in favor of plaintiff for $14.69, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Paquin & Webber, for plaintiffs.

Louis B. Lausier, for defendant.

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

HANSON, J. Action of assumpsit for merchandise furnished to the defendant's wife while she was living separate from him. The jury returned a verdict for the plaintiffs in the sum of $14.69. The case is before this court on the defendant's general motion for a new trial.

The plaintiffs are grocers in the City of Biddeford. Between September 19 and October 8, 1913, they delivered to the defendant's wife upon her request groceries amounting to $14.69. The goods were not charged to the defendant when the account was opened. Whether they were charged to the defendant at all was questioned sharply in cross examination. The plaintiffs claimed that while the account was still open the charges were made to the defendant,—as soon as they ascertained his full name, and the defendant's attorney says that the account was not charged to the defendant until after all the goods were delivered, and therefore contends that the defendant is not liable because, 1—credit was given to the wife and not to the defendant; 2—and because she left the defendant voluntarily and through no fault of the defendant.

The defendant was present in court but offered no evidence. The burden was upon the plaintiff to prove by a preponderance of evidence that the wife was compelled to leave her husband because of his ill-treatment, amounting in law to cruelty. The testimony introduced by the plaintiffs from the wife and daughter who were reluctant witnesses, corroborated by the testimony of the Judge of the Municipal Court of Biddeford, and the City Marshal of that city, established prima facie, that fact.

That having been done, the burden of proceeding changed, and it became the defendant's duty, if he would make such defense, to introduce testimony showing or tending to show the contrary. This he failed to do, but relied upon a rigid cross examination to establish his rights.

The principal issue raised was presented to the jury as follows:— "did the wife leave by reason of the fault of the husband, or did she leave by reason of mutual fault, incompatability of temper . . . . displeasure at her surroundings."

The record shows that the case was submitted to the jury under proper instructions, the points made by counsel for defendant and now urged here were fully and correctly covered by the charge of the Justice presiding.

As to the first contention it is immaterial in cases of the kind to whom the articles are charged. As to the second objection, it is well settled that if the husband abandons the wife or by his ill-treatment compels her to leave his house, he is liable for her necessaries and gives her a general credit to that extent. Such is the general rule. *Thorpe* v. *Shapleigh*, 67 Maine, 235. *Hancock* v. *Merrick*, 10 Cush., 41; *Reynolds* v. *Sweetsir*, 15 Gray, 78, 2 Kent Com., 146, 147 Schouler, 5 Ed., Part 2, Sec. 66.

The last authority quoted, adds, "where the wife is justified in living apart from her husband, he is not discharged from liability by showing that her contract was in fact made without his authority and contrary to his wishes, nor will his general advertisement or particular notice to individuals not to give credit to his wife affect the case. The legal presumption must prevail for the wife's protection. In all such cases if the husband seeks to escape her pledge of his credit, he should not only provide suitable necessaries through persons of his own choice, but make that provision known to his wife." *Preston* v. *Bancroft*, 62 Vermont, 86. See *Mahew* v. *Thayer*, 8 Gray, 172.

Husband and wife in this case were living apart. There was no question as to the articles being among the necessaries of life, and suitable to the defendant's condition in life. The controverted questions were all for the jury. There was evidence to sustain the verdict, and we find nothing in the case to warrant granting a new trial.

The entry will be,

Motion overruled.

FIRST NATIONAL BANK OF BOOTHBAY HARBOR

vs.

FRED C. BLAKE, THOMAS J. BLOSSOM and EUGENE MURRAY.

Lincoln. Opinion April 20, 1915.

Consideration. Extension of Time of Payment. Indorser. Original Promisor. Promissory Note. Release. Surety.

1. It is the well settled principle of law in this State that a person, not a party to the note, who signs his name upon the back of it in blank at its inception, and before it is negotiated, is an original promisor as to a bona fide holder of the note before maturity.
2. In this case both Thomas J. Blossom and Eugene Murray put their names on the back of this note at its inception, before it was delivered to the payee, and accordingly, the plaintiff bank, if it had no knowledge to the contrary, had a right to rely upon the note itself and the presumption of law arising therefrom that Blossom and Murray, whose names appeared upon the back of it, were original promisors.
3. If Murray notified the bank, before it accepted the note, that he revoked his indorsement, then he was not liable in this action.
4. In order to relieve a surety from liability on a note on account of an extension of time of payment to the maker, it must be shown that the contract relied upon was a valid, enforceable one against the bank, founded on a sufficient consideration, the effect of which would be to give further and definite time to the maker of the note, without the consent of the surety.

On motion by plaintiff for new trial as to Thomas J. Blossom and Eugene Murray. Motion as to Blossom sustained and new trial granted, as to him only. Motion as to Eugene Murray overruled.

This is an action of assumpsit by the First National Bank of Boothbay Harbor against Fred C. Blake, Thomas J. Blossom and Eugene Murray, to recover amount due on a promissory note dated March 8, 1911, signed by defendant and payable in four months. Each defendant pleaded the general issue and Blossom and Murray

filed brief statements. The jury returned a verdict for the plaintiff against Fred C. Blake and in favor of Thomas J. Blossom and Eugene Murray. The plaintiff filed motion for new trial against Blossom and Murray.

The case is stated in the opinion.

C. R. Tupper, for plaintiff.

J. B. Perkins, for defendants.

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

KING, J. Action upon a promissory note, dated March 8, 1911, on four months, payable to the plaintiff's order, signed by Fred C. Blake as maker and endorsed by Thomas J. Blossom and Eugene Murray. The writ was dated December 18th, 1913. The jury returned a verdict for the plaintiff against Blake for the amount due on the note and a verdict in favor of the other defendants. The case is before us on plaintiff's motion to set aside the verdict in favor of Blossom and Murray.

It is the well settled principle of law in this State that a person, not a party to the note, who signs his name upon the back of it in blank at its inception, and before it is negotiated, is an original promisor as to a bona fide holder of the note before maturity. *Bradford* v. *Prescott*, 85 Maine, 482; *Banking Co.* v. *Jones*, 95 Maine, 335.

Both endorsers put their names on the back of this note at its inception, before it was delivered to the payee, and accordingly the plaintiff bank, if it had no knowledge to the contrary, had a right to rely upon the note itself and the presumption of law arising therefrom that Blossom and Murray, whose names appeared upon the back of it, were original promisors.

But Mr. Murray testified that, having learned things that changed his mind, he went to the bank, before it had accepted the note, and told the acting cashier, Mr. Simpson, that he did not want to be endorser on that note, or on any other note for Mr. Blake, and that Mr. Simpson promised him that the note would not be discounted. Mr. Simpson, on the other hand, denied that he had any such conversation with Mr. Murray, and testified that the note was discounted by the bank in good faith, without any knowledge that Mr. Murray refused to be bound by his endorsement. If Mr. Murray

notified the bank, before it accepted the note, that he revoked his endorsement, then he was not liable in this action. That was an issue of fact for the jury to determine from the conflicting testimony and such other facts and circumstances as the evidence disclosed. They saw and heard the witnesses whose testimony was in conflict, and decided that contested issue in Mr. Murray's favor. The court does not find from an examination of the evidence that their decision on that issue was so manifestly erroneous that it ought to be set aside.

There is no evidence in the case that Mr. Blossom revoked his endorsement or notified the bank directly or indirectly, before it accepted the note, that he was unwilling to be bound thereby. Mr. Murray's revocation of his own endorsement did not affect Mr. Blossom's liability as endorser. The bank had the right to rely upon that, in the absence of any knowledge to the contrary. It was a bona fide holder of the note as to him, and his liability to the bank was that of an original promisor of the note.

But he contends that he was released from his liability to the plaintiff on account of an extension of time of payment given to the maker of the note. We find no sufficient evidence to support that contention. Assuming, although it does not affirmatively so appear, that Mr. Blossom's liability to the maker of the note was that of a surety, and that the bank had knowledge of that fact at the time of the alleged extension, the evidence falls far short of showing any such a contract on the part of the bank with the maker of the note for an extension of time for its payment as the law requires to absolve a surety from liability. It must be shown that the contract relied upon was a valid, enforceable one against the bank, founded on a sufficient consideration, and the effect of which would be to give further and definite time to the maker of the note, without the consent of the surety. *Berry* v. *Pullen*, 69 Maine, 101, and cases cited.

The evidence shows clearly that no payment whatever, either of principal or interest, was ever paid on the note by the maker or by anyone else. From its maturity, July 8, 1911, the note remained in the bank overdue and wholly unpaid, notwithstanding the fruitless efforts of the bank to have it paid or renewed. May 13, 1912, the cashier of the bank wrote Mr. Murray sending him a new note signed by Blake for $375, dated May 8, 1912, on four months, "to renew one due of his which you are an endorser on, of which he pays a little

and the interest." In explanation the cashier testified, that if the new note had been completed the maker was to pay $3 as the difference between the new note and the old one, together with the back interest, and the discount on the new note. But the new note was not completed, Murray refused to sign it, and nothing was paid on the old one, either of interest or principal. It continued overdue and this action was brought upon it.

The act of the cashier in trying to get that overdue note fixed up, in the manner indicated in that letter, is not sufficient evidence of such a contract on the part of the bank to extend the time of payment of the note as would absolve the endorser, Blossom, from his liability to the bank. It was a justifiable, though fruitless, effort to get the old note paid by some cash from the maker and a new note of the same parties.

We fail to find any sufficient evidence in the case to support the verdict in Mr. Blossom's favor. It is manifestly wrong and should not be permitted to stand. The conclusion of the court therefore is, that the verdict in favor of Eugene Murray is not to be disturbed, but the verdict in favor of Thomas J. Blossom is to be set aside and a new trial granted the plaintiff as to him only.

So ordered.

L. O. LESIEUR *vs.* INHABITANTS OF RUMFORD.

Oxford. Opinion April 20, 1915.

Assumpsit. Board of Health. Contract. Exceptions. Physician. Public Policy. Quarantine. Services. Town.

1. It may be assumed that the contract in question is not expressly prohibited by statute; it does not stipulate for the doing of anything repugnant to morality, on the contrary the services contracted for were necessary and lawful to be done.
2. Where the contract is not prohibited by statute and stipulates for nothing that is *malum in se* or *malum prohibitum*, if it clearly appears to be in violation of some well established rule of law, or that its tendency will be harmful to the interests of society, it is against the policy of the law to uphold and enforce it.
3. It is well established as a general rule that one acting in a fiduciary relation to others is required to exercise perfect fidelity to his trust.
4. The law, to prevent the neglect of such fidelity and to guard against any temptation to serve his own interests to the prejudice of his principal's, disables him from making any contract with himself binding on his principal.
5. The invalidity of a contract entered into in violation of this rule does not necessarily depend upon whether the fiduciary intended to obtain an advantage to himself, but rather upon whether it affords him the opportunity, and subjects him to the temptation to obtain such advantage.
6. The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result.
7. The members of a local board of health of a town, when making a contract under the statute for the care of persons in quarantine, act in a fiduciary capacity, and anything having a tendency to prevent their exercising the utmost fidelity is contrary to public policy, and will not be recognized as lawful and enforceable through the administration of the law.
8. That a contract between a local board of health and one of its own members, for the care of a person in quarantine with smallpox, is of no binding force as a contract, because in violation of public policy. But that conclusion does not imply that the plaintiff may not be entitled to recover upon a *quantum meruit*.

On exceptions by plaintiff. Exceptions overruled.

This is assumpsit upon an account annexed to recover for services as physician in caring for one Boussalari, who was quarantined, having smallpox. Plea, general issue.

At the conclusion of the evidence for plaintiff, the presiding Justice directed a nonsuit and the plaintiff excepted thereto.

The case is stated in the opinion.

Albert Beliveau, for plaintiff.

James B. Stevenson, for defendant.

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

KING, J. Action of assumpsit to recover for services performed in attending Wilfred Boussalari who was infected with smallpox and placed in quarantine. The declaration contains three counts, (1) a count on an account annexed for ten days services at $10 per day, (2) a count declaring on an express contract alleged to have been made with the plaintiff by the board of health of Rumford whereby he was to perform the particular service at the specified price of $10 per day, and alleging that he performed the service for the period of ten days, (3) an omnibus count. During the trial the plaintiff voluntarily struck out the omnibus count and stipulated that he would rely solely upon his alleged express contract. At the close of the evidence for the plaintiff a nonsuit was ordered, and the case is before this court on exceptions to that ruling.

We think the evidence would have justified the jury in finding that the express contract was made as alleged; and no question was raised as to the performance of the services sued for.

The defendant claimed that the plaintiff was not entitled to recover because it was his duty to perform the services sued for in his capacity as "town physician." But that claim is not sustainable under the evidence. The plaintiff's contract with the town as town physician was to take care "of the town paupers" so far as they required medical aid. There is no evidence that Boussalari was a pauper at the time he became infected with this contagious disease. And the statute expressly provides that persons who become needy and are assisted with necessary food, medicine, etc., while in quarantine on account of a contagious disease, shall not "be considered a pauper, or be subject to disfranchisement for that cause unless such

persons are already paupers as defined by the revised statutes." Public Laws 1909, Chap. 25, Sec. 2. *Eden* v. *Southwest Harbor*, 108 Maine, 489.

But it appears that the plaintiff was one of the three members of the board of health of Rumford at the time the contract between him and the board was made and while the services thereunder were being performed, and for that reason the defendant contends that the contract was illegal and unenforceable. That is the vital question presented. Does such a contract so contravene public policy that it should not be enforced?

It has been said that no exact definition of public policy has ever been given. The courts, however, have frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare. *Egerton* v. *Earl Brownlow*, 4 H. L., Cas. 1, 235. This principle has been termed the policy of the law, or public policy in relation to the administration of the law. Precisely what public policy is in any given case may be a difficult question to answer with precision. It has been well said, however, that whenever the courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for a well fitting definition of public policy, or hesitate in its practical application to the law of contracts. It may be said, as a general statement of some of the principles underlying the doctrine of public policy as applied to the law of contracts, that a contract is against public policy if it contravenes some public statute, or tends clearly to injure the public health, or the public morals, or to work injustice and oppression and thereby injure the public welfare, or to impair the public confidence in the purity of the administration of the law, "or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."

It may be assumed that the contract in question is not expressly prohibited by statute. Nor does it stipulate for the doing of anything repugnant to morality, on the contrary the service contracted for was necessary and lawful to be done. Nevertheless, where the contract is not prohibited by statute and stipulates for nothing that is *malum in se* or *malum prohibitum*, if it clearly appears to be in viola-

tion of some well established rule of law, or that its tendency will be harmful to the interests of society, it is against the policy of the law to uphold and enforce it.

It is well established as a general rule that one acting in a fiduciary relation to others is required to exercise perfect fidelity to his trust, and the law, to prevent the neglect of such fidelity, and to guard against any temptation to serve his own interests to the prejudice of his principal's, disables him from making any contract with himself binding on his principal. The invalidity of a contract entered into in violation of this rule does not necessarily depend upon whether the fiduciary intended to obtain an advantage to himself, but rather upon whether it affords him the opportunity, and subjects him to the temptation, to obtain such advantage. The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result.

Applying this rule to the contract declared on, and testing it by those principles which constitute public policy as recognized by the common law, and as evidenced by the trend of legislation and judicial decisions, we are constrained to hold that the contract does so far contravene public policy that it ought not to be upheld and enforced through the administration of the law.

Local boards of health are authorized by statute, and it is their duty, when any person is infected with a disease or sickness dangerous to the public health, to provide for the safety of the inhabitants, as they think best, by removing him to a separate house, if it can be done without great danger to his health, and by providing nurses, and other assistants and necessaries for such person, all the expenses thus incurred to be at his charge, or that of his parent or master, if able, otherwise at the expense of the town where the person fell sick if he resides there, but if he does not reside there the board of health has power to determine how much of the expenses shall be borne by that town and how much by the town of his settlement. See *Eden* v. *Southwest Harbor*, 108 Maine, 489, where the statutory provisions are compared and construed.

In making such provisions for the care of a person placed in quarantine the members of the board of health act in a fiduciary capacity. Their contracts therefor impose upon others the burden of paying the expenses thereby incurred. They are public officers clothed by the

legislature with power to incur expenses for others to pay. The law requires of them perfect fidelity in the exercise of that power, and whatever has a tendency to prevent their exercise of such fidelity is contrary to the policy of the law, and should not be recognized as lawful and enforceable through the administration of the law.

It is suggested by the plaintiff that in making the contract in question there was no dishonesty, fraud or concealment on the part of the board or himself; that he acted openly and avowedly for himself, and that the other two members represented all others interested in the contract. But we think that does not answer the requirements of the law. In making provision for the care of Boussalari it was the plaintiff's duty as a member of the board of health to act for others and for their interests, and not for himself and for his interests. That his personal interest in making the contract, and its performance, was antagonistic to a proper performance of his duties as a member of the board of health is most apparent. As to the price to be paid for the services contracted for, as to the length of time they should continue, as to the manner in which they should be performed, in respect to all these, his personal interest was naturally in conflict with his duty as a member of the board. The statute provides that no one having access to any person infected with a contagious disease shall mingle with the general public until he has complied with such sanitary precautions as the board of health may prescribe. He cannot leave the premises without a certificate from the board that the necessary sanitary precautions required have been carried out. The board has power to order the destruction of clothing and other articles of property which have been exposed to infection if they deem it necessary to prevent the spread of the infection. The plaintiff was a physician, and undoubtedly the health officer of the board. It is a reasonable inference that the other members of the board would be influenced by his suggestions even as to those precautions which it was the duty of the board to require of him as an attendant upon an infected person. The inevitable conclusion therefore is, that the making and performing of the contract declared on placed the plaintiff in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official. Accordingly we think the contract must be regarded as violating a well established principle of law, one

which it is the policy of the law not to have violated, as is evidenced in uniform judicial decisions, and recognized by legislative enactments.

No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof; and contracts made in violation thereof are void. R. S., Chap. 4, Sec. 39. No trustee, superintendent, treasurer or other person holding a place of trust in any State office or public institution of the State, shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place of trust, and any contract made in violation thereof is void. R. S., Chap. 121, Sec. 11. Assuming, as we do, that these statutory prohibitions do not directly apply to a member of a local board of health, yet the principles on which they are founded are quite as applicable to a contract made by a board of health with one of its own members, as to the contracts expressly inhibited in those statutes. They also clearly indicate that it is the policy of the State that persons, whom the law has placed in positions where they may make, or be instrumental in making, or in superintending the performance of, contracts in which others are interested, should not themselves be personally interested in such contracts. See *Opinion of the Justices*, 108 Maine, 548, and cases there cited.

In *Gaw* v. *Ashley*, 195 Mass., 173, it was held that the board of health of a city, who are authorized to appoint a quarantine physician under an ordinance giving him a compensation fixed by the city council with the right in extraordinary cases to charge to the sick under his care for medicine and medical attendance such sums as the board of health may approve, could not lawfully appoint one of their own members such quarantine physician. The decision was put on the ground that the appointment was against public policy because his personal interests under the appointment were inconsistent with the proper performance of his duties as a member of the board of health.

And in *Spearman* v. *City of Texarkana*, reported in 24 S. W., 883, (Ark.) where a city board of health, having power to employ a physician for the purpose, employed a member of their own board, who was a physician, to make a personal examination of a case of diphtheria said to exist in the city and which had caused the closing

of the public schools, it was held that the contract of employment being between the board and one of its members was against public policy and not enforceable. But the court there further held that while the agreement of employment was of no binding force as a contract, yet if the services were performed in good faith the plaintiff might recover upon a quantum meruit what his services were reasonably worth.

Our conclusion, therefore, in the case at bar is that the nonsuit was properly ordered. The plaintiff relied solely upon the express agreement made between him and the board of health of which he was a member. That agreement had no binding force as a contract, and is not enforceable through the administration of the law, because in violation of public policy. But this conclusion does not imply that the plaintiff may not be entitled to recover upon a *quantum meruit* what he is reasonably entitled to for the services performed of which the defendant has had the benefit.

Exceptions overruled.

EDWARD E. TALBOT, Admr.,

vs.

JAMES E. HATHAWAY and Trustees.

Washington. Opinion April 20, 1915.

Administrator de bonis non. Presumption. Promissory Notes. Statute of Limitations. Surety. Will.

1. The plaintiff offered in evidence a memorandum on the back of each note, in the handwriting of decedent, to the effect that she paid the note. The fact that they were written on the back of the notes, instead of on a separate paper or private book, is immaterial. They are nothing more than private memoranda made by the surety herself in her own favor.
2. A party is not permitted to introduce such entries made by himself in support of his own case.
3. The decedent's possession of the notes at the time of her death is prima facie evidence that she paid them, and that fact unexplained is presumptive evidence that she paid them and had not been repaid.
4. The fact that the defendant has resided continuously out of the State since the latter part of the year 1865 renders unavailing his plea of the statute of limitations, because the time of his absence from the State is not to be taken as a part of the time limited for the commencement of the action.
5. Independently of the statute of limitations, the defendant urges in bar of the action the common law presumption of payment arising after the lapse of twenty years. The presumption of payment arising from the lapse of time is a matter of evidence. It is the presumption of a fact, and may be rebutted by evidence of other facts and circumstances tending to show non-payment or sufficiently accounting for the delay of the creditor.
6. The presumption of payment may be repelled by any facts which destroy the reason for it. It is not essential that the evidence to rebut the presumption should contain any new promise on the part of the debtor or positive act of unequivocal recognition of the debt by him within the period.
7. There was no contract for an extension of time to maker that would release the surety.

On report. Judgment for the plaintiff for amount due on both notes.

This is an action of assumpsit by plaintiff, as administrator de bonis non, with will annexed, of the estate of Ursula M. Penniman, late of Machias, in said County, deceased, to recover money claimed to have been paid by decedent as surety on two promissory notes given by defendant James E. Hathaway to I. Sargent and Mary E. O. B. Harding dated respectively, July 10, 1865 and July 13, 1865. The defendant pleaded the general issue and filed brief statement of statute of limitations. 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.

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

O. H. Dunbar, and H. H. Gray, for principal defendant.

S. W. Sawyer, for trustees.

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

KING, J. The case comes up on report. It is an action by the administrator de bonis non with the will annexed of the estate of Ursula M. Penniman, late of Machias, Maine, to recover sums alleged to have been paid by her as surety for the defendant on two promissory notes, one, dated July 10, 1865, for $100 payable "in October next with interest," and the other, dated July 13, 1865, for $100 payable "in one year from date with interest."

Miss Penniman, the decedent, was the defendant's aunt. She died March 3rd, 1893. The notes in question were in her possession at the time of her death, were included in the inventory of her estate filed by her first administrator, and came into the possession of the plaintiff as her administrator de bonis non.

The defendant has resided continuously out of the State of Maine since the autumn of 1865. His plea is the general issue and the statute of limitations. He offered no evidence, except his deposition taken in the State of Washington; but he was disqualified as a witness to facts happening before the death of the testatrix, because the plaintiff is prosecuting the suit as an administrator, and that objection was raised both at the taking of the deposition and at the trial. R. S., Chap. 84, Sec. 112.

The plaintiff offered in evidence a memorandum on the back of each note, in the handwriting of the decedent, to the effect that she paid the note. We find no authority for the admission of those entries. The fact that they were written on the back of the notes instead of on a separate paper or private book is immaterial. They are nothing more than private memoranda made by the surety herself in her own favor. A party is not permitted to introduce such entries made by himself in support of his own case. *Libby* v. *Brown*, 78 Maine, 492; *Townsend Bank* v. *Whitney*, 3 Allen, 455.

But the plaintiff contends that the decedent's possession of the notes at the time of her death is prima facie evidence that she paid them. We think that contention is sustainable. The notes had been negotiated. The decedent had signed them as surety. She was liable to pay them. If she paid them we should expect to find them in her possession until she was repaid. They were in her possession at the time of her death, and that fact unexplained is presumptive evidence that she paid them and had not been repaid. In *McGee* v. *Prouty & another*, 9 Met., 547, 551, the court said: "We have no doubt that where a promissory note has been negotiated, and afterwards comes into the possession of one of the parties liable to pay it, such possession is prima facie evidence of payment, and that he is to be treated as the bona fide holder, unless the contrary is made to appear. *Dugan* v. *United States*, 3 Wheat., 172; *Baring* v. *Clark*, 19 Pick., 220; *Northampton Bank* v. *Pepoon*, 11 Mass., 288." The same rule was recognized in *Heald* v. *Davis*, 11 Cush., 318.

The fact that the defendant has resided continuously out of the State since the latter part of the year 1865 renders unavailing his plea of the statute of limitations because the time of his absence from the State is not to be taken as a part of the time limited for the commencement of the action. R. S., Chap. 83, Sec. 106.

Independently, however, of the statute of limitations, the defendant urges in bar of the action the common law presumption of payment arising after the lapse of twenty years. In other words, he urges that if he ever became indebted to the decedent on account of her payment of the notes in question, that indebtedness is more than twenty years old, and is presumed to have been paid. And it is true that more than twenty years elapsed after the decedent paid the notes before the action was commenced. But the presumption of payment arising from the lapse of time is a matter of evidence. It is

the presumption of a fact, and may be rebutted by evidence of other facts and circumstances tending to show non-payment, or sufficiently accounting for the delay of the creditor. The presumption may be repelled by any facts which destroy the reason for it. Nor is it essential that the evidence to rebut the presumption should contain any new promise on the part of the debtor or positive act of unequivocal recognition of the debt by him within the period. *Jenkins* v. *Andover Theological Seminary*, 205 Mass., 376, 382.

It appears, as above noted, that the defendant has resided continuously out of the State since the autumn of 1865. There are cases in some jurisdictions holding that the non-residence of the debtor during the time relied on to create the presumption of payment does not prevent that presumption arising; but in other cases, including those in this State, it is held that continued non-residence of the debtor rebuts the presumption of payment. Cyc., Vol. 30, page 1280 and cases cited. It was so expressly held in *McLellan* v. *Crofton*, 6 Greenleaf, 307, 334, where the court approved an instruction that the debtor's absence from the country during the twenty years was sufficient to control and repel the presumption of payment from lapse of time. But of more significance than the debtor's continuous absence from the State, is the fact that the notes were in the possession of the decedent up to the time of her death, the place where we should expect them to be if she paid them as surety and had not been repaid therefor, and where we should not expect them to be if he had repaid her. This fact of her possession of the notes stands unexplained by any other fact or circumstance, and, therefore, renders it most improbable that he paid his liability to her arising on account of those notes. We are, therefore, constrained to the conclusion that the facts and circumstances appearing in this case are sufficiently strong to repel the presumption arising from lapse of time that the defendant paid the decedent the amounts she paid as his surety on the notes.

It remains to determine the amount for which the plaintiff is entitled to judgment. There are no indorsements of payments on the first note. But on the second note there are two, one dated Nov. 3, 1865 for $20 and the other dated Dec. 20, 1865 for $30. The note, however, was not due till July 13, 1866, and accordingly, both payments appear to have been made before its maturity. It is not to be expected, in the usual course of business, that a surety on a note

would pay it until after the default of the principal. And if partial payments appear to have been made on a note before its maturity we think the prima facie inference is that they were made by the maker rather than by the surety. The payment of the balance due on this note by the decedent would account for her possession of it, and we think the presumption of payment arising from her possession of it should be limited to the balance due on it at its maturity.

It is therefore the opinion of the court that the plaintiff is entitled to judgment for the amount due on both notes, the defendant to have the benefit of the partial payments made on the second note as they appear by the indorsements thereon.

So ordered.

HOWARD T. RICHARDSON, et als., *vs.* FRANK W. WOOD.

Cumberland. Opinion April 20, 1915.

Brief Statement. Exceptions. General Issue. Motion to Dismiss. Petition. Pleadings. Selecting his Tribunal. Statements of Presiding Justice during trial. Trespass Quare Clausum.

1. Where defendant has filed a motion to dismiss upon the ground that the suit has been brought without the authority or knowledge of one or more of several plaintiffs, and, upon hearing by the court, the motion is overruled, it is not open to defendant to raise the same issue by brief statement. The defendant, without objection of plaintiffs, submitted the issue to the court and, having thus selected his tribunal, he must abide the result.
2. Nor is defendant aggrieved by the joinder of the persons named, who made no complaint of their joinder nor asked to be dismissed. The most that is shown is indifference on their part.
3. Where exceptions are taken to statements or remarks of the court made from time to time during the progress of the trial without other specification than a reference to the record of the case, the familiar rule must be invoked that, where,

instead of presenting each ruling or statement objected to by itself, clearly and comprehensively, such rulings or statements are presented indiscriminately, they cannot be considered.

4. The exceptions lack the particularity and clearness required by law, but a careful reading of the portion of the charge which is before us does not disclose that the defendant was prejudiced or aggrieved.

On exceptions by defendant. Exceptions overruled.

This is an action of trespass quare clausum, brought by Howard T. Richardson, Leland S. Richardson, Daniel T. Richardson, John S. Richardson, A. E. Flint, Clara A. Allen and George P. Richardson, being all and the only heirs at law of their father Daniel T. Richardson, deceased intestate, who owned the premises at the time of his death, against Frank W. Wood for cutting and carrying away trees therefrom. The defendant plead the general issue and filed brief statement. The defendant filed a petition, asking that the suit be dismissed, because it was commenced and entered in court without the knowledge and consent of John S. and Howard T. Richardson, two of the plaintiffs. Upon hearing, the presiding Justice denied the petition, to which ruling the defendant excepted. The defendant also had several exceptions to the admission and exclusion of evidence.

The case is stated in the opinion.

William Lyons, for plaintiffs.

Hinckley & Hinckley, for defendant.

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

BIRD, J. This is an action of trespass *quare clausum* to recover damages for the unlawful entry upon the wood lot of plaintiffs and the cutting and carrying away of trees therefrom. The case is here upon exceptions of defendant. The brief of his counsel declares three questions to be presented to this court.

I. "Whether or not after petition has been addressed to the Presiding Justice, asking that case be dismissed on the ground that suit was brought without authority, or even knowledge of plaintiffs, and the Court orders the case to trial, this question would then be a proper matter for the jury to determine the facts under proper pleadings."

The petition referred to does not appear in the record of the case. We shall assume it to have been a motion to dismiss. A motion to dismiss can be only sustained where the defect is disclosed upon inspection of the writ. So this court has repeatedly held from *Upham* v. *Bradley,* 17 Maine, 423, 426, to *Hubbard* v. *Limerick W. & L. Co.,* 109 Maine, 248, 250. The motion, however, was heard by the Justice presiding without objection on the part of plaintiffs and overruled. To this ruling defendant took no exceptions.

The defendant then filed the general issue and set up, by way of brief statement, the same matter covered by the motion, that is that the suit was brought without the authority, consent or knowledge of several of the joint plaintiffs. Whether such an objection can ever be set up by brief statement filed with the general issue (*Trustees, etc.,* v. *Kendrick,* 12 Maine, 381) we need not determine, as we think it was not open to defendant to do so under the circumstances of this case for two reasons:

1. The defendant without objection of plaintiffs submitted the issue to the court without reserving the right to exceptions, if, indeed, exceptions lie, and taking none. Having selected his tribunal he must abide the result.

2. The defendant is not aggrieved by the joinder, as plaintiffs, of the persons named. The latter made no complaint of their joinder nor asked to be dismissed. The most that is shown is indifference on their part. See *Cinfel* v. *Malena,* 67 Neb., 95, 100; see also *Webster* v. *The Kansas, etc., Ry. Co.,* 116 Mo., 114, 122.

II. "Whether or not the jury were liable to be prejudiced or influenced by the statements of the Presiding Justice, as appears in the printed copy of the case and referred to in the argument."

This court is not certain that it understands what is intended by this inquiry. If it refers to the exceptions to the instructions of the court, they will be considered later. If, however, it refers to statements made from time to time by the presiding Justice while the testimony of witnesses was being taken out, contained in twenty-two pages of record, the court must invoke the familiar rule that where, instead of presenting each ruling or statement by itself, clearly and comprehensively, the rulings and statements are presented indiscriminately, they will not be considered. *McKown* v. *Powers,* 86 Maine, 291, 293; *Wilson* v. *Simmons,* 89 Maine, 242, 258.

III. The third inquiry is stated to be "a question of requested instructions whether or not, after excluding evidence, the Presiding Justice was right in referring to this excluded matter he did in his charge to the jury, that part of the charge being printed with the case."

Finding no requested instructions in the case as printed, we conclude this inquiry must refer to the exceptions taken to the charge to the jury which are

"Exceptions to all that part of charge pertaining to lack of knowledge of plaintiffs or lack of authority to use plaintiff's name in bringing suit, and any and all discussion in charge relating to evidence or evidence excluded in connection with this matter."

"Exceptions to Court's charge in discussing matters excluded by Court at trial and explaining in charge matters excluded which the evidence and records do not reveal; referring especially to matters properly coming under brief statement."

In these exceptions there is again the lack of the particularity and clearness required by law. Upon careful reading, however, of that portion of the charge which appears in the record, we are unable to find that defendant was prejudiced or aggrieved thereby. See *Donnelly* v. *Granite Co.*, 90 Maine, 110, 117; *Freeman* v. *Dodge*, 98 Maine, 531, 538; *Hovey* v. *Chase*, 52 Maine, 304, 318; see also *Copeland* v. *Hewett*, 96 Maine, 525, 529.

Exceptions overruled.

FORGIONI & ROMANO CO., et al.,

vs.

BURNHAM & MORRILL COMPANY.

Cumberland. Opinion April 20, 1915.

Adopting Contract. Insurance. Payments. Signature. Written Contract.

Where two persons are by its terms made parties to a contract and one of them executes the contract and acts upon and in performance of it from its date and the other, with full knowledge of the execution of the contract and acts in performance of its terms by the former, the latter must be held to have adopted it as of the time it was signed by the former and the contract becomes evidence that the contract was, in point of fact, made by both plaintiffs at the time of the earlier signature.

On report. Judgment for plaintiff for $33.39 with interest from date of the writ.

This is an action on the case to recover a balance claimed to be due for labor performed under a written contract. At the conclusion of the evidence, the case, by agreement of parties, was reported to the Law Court for determination, upon so much of the evidence as is legally admissible: The court to render such judgment as the rights of the parties require, with full jury powers.

The case is stated in the opinion.

Arthur Chapman, and Strout & Strout, for plaintiffs.

Bradley & Linnell, for defendant.

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

BIRD, J. This action is reported to this court for the rendition of "such judgment as the rights of the parties require, with full jury powers." It is an action for the balance of the amount claimed to be earned upon a written contract for work and labor in building a wall

and grading a roadway upon land of defendant. The total amount due upon completion of the contract is $1991.09. The plaintiffs admit two payments aggregating $1350, made to one of them and seek the recovery of the balance of $641.09, while defendant claims a further payment of $607.70 made to the other of the plaintiffs—Shannahan—and that the balance due is but $33.39.

For about ten days prior to the date of the contract in suit, the defendant corporation had been in treaty with one R. D. Shannahan, ordinarily doing business as R. D. Shannahan & Co., then engaged in the performance of another contract with it (dated June 27, 1912) for work of similar character, looking to the undertaking of the building of a sea wall and doing certain grading. On the 14th day of August, 1912, the minds of the defendant and Shannahan met. At this time Shannahan stated to defendant that he might not be able to give personal attention to the work but would employ one Forgioni as foreman. Defendant undertook to prepare the contract and Shannahan engaged to call the following day to execute it. The contract was prepared in two parts, bearing the date of August 14, 1912, and, among other things, stipulated that the work was to be begun on the following day, August 15. The persons made parties to this contract were defendant, described as a corporation, of the first part, and "R. D. Shannahan & Company, associated with Forgioni , hereinafter called the Contractors." The evidence is uncontradicted that defendant did not know the Christian name of Forgioni and that the blanks before and after the name Forgioni were left to be filled as occasion might require. The defendant adduces evidence that Shannahan did not call as agreed, that Forgioni appeared in his stead, that he gave defendant his Christian name "Antonio" which was inserted in each part of the contract before the word "Forgioni," that both parts of the contract were signed by defendant and that Forgioni took them with him for the purpose of obtaining the signature of Shannahan. Work, in performance of the contract, was begun by Shannahan on the fifteenth day of August and continued by him on the two following days—August 16 and 17—when it apparently was discontinued and not resumed until August 21, when Forgioni placed his men upon the work and continued thereafter to provide the men and oversee it. The defendant claims that Forgioni returned to its office on the seventeenth day of August with the contract and, upon excision of a clause, to which he stated both

he and Shannahan objected, signed the contract as follows, "R. D. Shannahan and Co. By Antonio Forgioni Mang. Contractors." The signature R. D. Shannahan and Co. was a few days later ratified and confirmed by Shannahan. At this time—August 17—Forgioni stated, as the uncontradicted evidence is, that "they (he and Shannahan) were all together and it was one and the same thing," substantially as defendant claims he had stated at an earlier date, that "he and Shannahan were all the same thing at that time." At this time, however, as plaintiffs claim, he made some remark as to his insurance but there is no evidence that any intimation was then given that Forgioni and Romano Co. was, or might be, interested in the contract. It appears that the agent of the company, with which insurance had been effected against loss from accident suffered by employees, was absent from Portland from August 15 to August 20. On the 20th day of August, he was approached by Forgioni, who had with him plaintiffs' part of the contract, Exhibit 1, and inquiry was made as to the form of the contract meeting the requirements of the contract of insurance. He was informed that R. D. Shannahan and Forgioni and Romano Co. were the parties insured and that the contract with the defendant should be conformable. Forgioni testifies that he did not sign the contract on the 17th of August on which date he claims he first saw and took away the contracts, and the agent of the insurance company states that the part of the contract shown him was executed only by defendant. The plaintiff Forgioni also testifies that the contract was not signed by either of plaintiffs until August twenty-second when he claims he signed it "R. D. Shannahan, Forgioni and Romano Co. by Antonio Forgioni Mang. Contractors," making, as he asserts, corresponding changes in the body of the contract. In the body of the contract, both parts show the word "Antonio" erased before Forgioni and the words "& Romano Co." inserted after Forgioni, while plaintiffs' part alone shows the erasure of "& Company" after Shannahan. In both parts of the contract as they now appear "Forgioni and Romano Co." is inserted as a signature between those of "R. D. Shannahan and Co." and "By Antonio Forgioni Mang," but in plaintiffs' part only are the characters "and Co." erased as part of the signature of R. D. Shannahan and Co. On the morning of August 17, the defendant's part of the contract was found in the receptacle in which its executed contracts were kept. The inference is almost irresistible from this fact and the fact that the characters

"and Co." are erased upon plaintiff's part of the contract and still appear unerased upon that of defendant, that the contract was signed as claimed by defendant before Forgioni saw the agent of the insurance company. And we think it may as justly be inferred that by that signature and execution Forgioni intended to bind himself as well as R. D. Shannahan Co. and that it was regarded by both parties as a fully executed contract. That Shannahan discontinued his work on the seventeenth of August, the date of execution alleged by defendant, and that the work was resumed by Forgioni on the day following his interview with the insurance agent warrant the inference that Forgioni's delay in causing resumption of the work and in making changes in the execution of the contract were solely for the purpose of ascertaining the contractual liability of the insurance company and making the contract of August 14, 1912, strictly conformable. Unless the contracts. were taken by Forgioni on August 15, executed as claimed by defendant on August 17, before the interview with the insurance agent, (and plaintiffs supply no other tenable date) and altered as to signature at a later date, August 21 or 22, the insertion of the word "Antonio" and both the insertion and erasure of the characters "and Co." in part of the contract cannot be explained. We are forced to conclude that the contract was executed as claimed by defendant by both parties, and before the payment made to Shannahan which was made on the seventeenth day of August after the contract had been placed by defendant in its file of finished contracts, but before defendant knew, or ought to have known, that Forgioni and Romano Co. was, or even contemplated becoming a party to the contract.

As to the payment to Shannahan: Defendant was called by telephone from Shannahan's office and asked if it could advance him one thousand dollars on the contract. The defendant knowing that Shannahan was engaged in the performance of the earlier contract of June 27, 1914, and had commenced work on the contract of August 14, 1914, gave the messenger, later sent by Shannahan to the office of defendant, a check for $1000 and took from the messenger a receipt for this sum applying it as a payment upon both contracts. Within a week following August 17, Shannahan was advised by defendant of the application of payments made the receipt and made no dissent. Later, upon the amount due upon the earlier contract being ascer-

tained and debited in settlement of that contract, the balance was debited upon the contract in suit. The objections of plaintiffs to the allowance of this payment are not persuasive.

Moreover, we think if the contract is now to be regarded, as technically it must be, as that of Forgioni and Romano Co., instead of Antonio Forgioni, by reason of the former becoming a party after its execution by Forgioni in the manner stated, that Forgioni and Romano Co. is bound by the payment made to Shannahan because Forgioni and Romano Co., of which Antonio Forgioni was general manager and treasurer, by becoming a party to the contract with full knowledge that Shannahan had executed the contract and had acted upon it from its date thus adopted the contract as of the time it was signed by Shannahan, which we have found to be August 17. The contract becomes evidence that the agreement was, in point of fact, made by all the plaintiffs at that time. *Stearns* v. *Haven*, 16 Vermont, 87, 91. See also *Young* v. *Ward*, 33 Maine, 359. *Bradstreet* v. *Rich*, 74 Maine, 303.

Judgment must therefore be entered for plaintiffs for the sum of thirty-three dollars and thirty-nine cents with interest from the date of the writ.

So ordered.

GODFREY M. HYAMS, In Equity,

vs.

OLD DOMINION COMPANY, et al.

Cumberland. Opinion April 24, 1915.

Bill in Equity. Capital Stock. Demurrer. Indispensable Party. Interlocking Directorates. Minority Stockholder.

In a bill in equity brought by a minority stockholder in a New Jersey corporation against a Maine Corporation owning a large majority of the stock of the New Jersey Corporation, alleging among other things that the defendant is dominating and controlling the officers of the New Jersey Corporation, that such domination is oppressive and injurious to, and greatly prejudices the interests of, the minority stockholders of the New Jersey Company, that the minority stockholders have been illegally divested of their rights in and to the assets and earnings of said company, that by a continuance of such domination and control the assets and earnings of said New Jersey Company are in danger of being transferred through illegal contracts and arrangements entered into by interlocking boards of directors from the minority stockholders to the stockholders of other allied companies, and praying that the Maine Company may be restrained and enjoined from voting its stock for the purpose of continuing such domination, and that it be ordered to take immediate steps to divest itself of its holdings in the New Jersey Company,

Held:

1. That the New Jersey Corporation is an indispensable party to the proceeding, and being beyond the jurisdiction of this court the bill in equity cannot be maintained.
2. That indispensable parties to a bill in equity are those whose interests in the subject matter of the suit and the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed.
3. That the allegations in the pending bill rest upon injury to the corporate interests and hence to the plaintiff as a stockholder therein. If the plaintiff as a minority stockholder is injured it is because the corporation itself is injured.
4. That all the wrongs, done or threatened, as set out in the bill are wrongs against the corporation itself and, except through the corporation, they have no relation to the plaintiff. Therefore, the corporation is an indispensable party.

On appeal by plaintiff. Appeal dismissed. Bill dismissed with costs.

This is a bill in equity by the plaintiff, a minority stockholder of the Old Dominion Copper Mining and Smelting Company of New Jersey, asking for a temporary injunction restraining the Maine Company from voting any of its stock at a meeting of the New Jersey Company and that the Maine Company be perpetually enjoined and restrained from voting any of its stock for the election of any officer, director, etc., of the Maine Company. The defendant filed a demurrer to said bill, and on the 29th day of November, 1914, the cause was heard before a single Justice on bill and demurrer, and it was ordered and decreed that said demurrer be sustained and the bill be and hereby is dismissed without prejudice, from which order and decree the plaintiff appeals to the Law Court.

The case is stated in the opinion.

Isaac W. Dyer, Carl W. Smith, and Scott Wilson, for plaintiff.

William M. Bradley, Brandeis, Dunbar & Nutter, and Edward F. McClennen, for Old Dominion Company.

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

CORNISH, J. This is a bill in equity brought by a minority stockholder of the Old Dominion Copper Mining and Smelting Company of New Jersey, hereinafter referred to as the New Jersey Company, in behalf of himself and such other stockholders as may see fit to join in the proceedings, against the Old Dominion Company of Maine, hereinafter referred to as the Maine Company, which holds a majority of the stock of the New Jersey Company, asking certain relief which will be considered later.

The total capital stock of the New Jersey Company is 162,000 shares of which the plaintiff owns 3,056 shares and the Maine Company 155,245 shares.

The bill alleges that the New Jersey Company, prior to 1904, was a wholly independent corporation and that prior to that time the members of a copartnership known as Phelps, Dodge & Company, were the owners of all the capital stock of the United Globe Mines, a New York corporation operating a mine contiguous to the mines of the New Jersey Company in Arizona, and this partnership or its individual members also owned or controlled numerous other com-

panies engaged in mining ores or fuel, in furnishing transportation and in purchasing supplies. The various steps leading up to the formation of the Maine Company as a holding company, thereby effecting a practical amalgamation of the New Jersey Company with the United Globe Mines, have been fully described in the recent case between the same parties in this court, involving the right of the Maine Company to have the stock owned by it in the New Jersey corporation held by Trustees, *Hyams* v. *Old Dominion Company*, 113 Maine, 294, and need not be repeated here. The result of the consolidation is that the Maine Company owns all the capital stock of the United Globe Mines and 95% of the stock of the New Jersey Company, and the majority of the stock in the Maine Company is in turn owned and controlled by the officers and directors of Phelps, Dodge & Company, the partnership having become incorporated.

It is further alleged that the New Jersey Company has various inter-relations, contractual and otherwise, with the United Globe Mines and the other corporations referred to, and by means of interlocking Boards of Directors and controlling ownership in the Maine Company the same set of men are in practical domination of the entire situation, and are exercising that domination to the injury of the plaintiff as a minority stockholder in the New Jersey Corporation. Stated baldly the plaintiff's claim is that the majority party in power are using that power to the advantage of the other allied corporations and to the detriment of the New Jersey Company, and therefore to the plaintiff's injury, the parties in power evidently having a greater financial interest in the allied companies than in the New Jersey Company and the plaintiff having less, so that what works a gain to them works a loss to him.

The prayers of the pending bill are for a temporary injunction, restraining the Maine Company from voting any of its stock at a meeting of the New Jersey Company the date of which has now long since passed; and further that the Maine Company be perpetually enjoined and restrained from voting any of its stock for the election of any officer, director or stockholder of the Maine Company or of any of the corporations referred to in the bill and controlled by Phelps, Dodge and Company or the Maine Company, excepting the minority stockholders of the New Jersey Company, as a director or other officer of the New Jersey Company, or from voting any of its stock for the purpose of continuing the domination and control of the affairs

of the New Jersey Company by the Maine Company through the election of its corporate officers or in any other manner; and that the Maine Company be ordered to take immediate steps to divest itself of its holdings in the New Jersey Company in such manner as the court shall deem proper.

The Maine Company demurs to the bill, assigning eleven distinct grounds, but it is necessary to consider only one of these grounds, viz: that the New Jersey Company is an indispensable party to this proceeding and is not within the jurisdiction of this court. The New Jersey Company is made a party defendant but has not appeared. The single question therefore to be decided is whether that company is an indispensable party to this suit. In our opinion it is.

What is meant by the term indispensable party? Under what circumstances and state of facts is a party held to be in that category? Definitions of the term vary in language but not in essence. "When a person will be directly affected by a decree, he is an indispensable party." Justice Bradley in *Williams* v. *Bankhead*, 19 Wall., 563; *Douglass Co. Supervisors* v. *Walbridge*, 38 Wis., 179. "An indispensable party is one who has such an interest in the subject matter of the controversy, that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such situation that its final determination may be inconsistent with equity and good conscience." *Rogers* v. *Penobscot Mining Co.*, 154 Fed., 606. "Indispensable parties to a bill in equity are those whose interests in the subject matter of the suit and the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed." *Kendig* v. *Dean*, 97 U. S., 423; Words and Phrases, Vol. 4, page 3559.

Can there be any doubt that the interests of the New Jersey Company would be directly affected by a final decree in this case, carrying out what the plaintiff asks to be carried out? or that the subject matter of the suit and the relief sought are bound up with the interests of the corporation itself?

The plaintiff's allegations answer the question. In the last analysis the pending bill rests upon injury to the corporate interests and hence to the plaintiff as a stockholder therein. There can be no diversity in the effect of a certain act or course of conduct upon

different stockholders. All must be injured or benefited alike in proportion to their amount of ownership. If a minority stockholder is injured it is because the corporation itself is injured and he as a minority stockholder feels the effects, and the majority stockholder must be likewise injured. If in this particular case it happens that the defendant is not injured, it is due to the peculiar fact that its interest in the allied companies which are receiving the benefits, exceeds its interest in the New Jersey Company which is sustaining the losses. In other words its loss from this source is made by its gain from other sources. That however is beside the question. Its loss as a stockholder in the New Jersey corporation follows inevitably from the loss to the corporation itself, so that all the stockholders, minority and majority alike, are sufferers from and only because of injuries to the New Jersey Company.

The plaintiff's complaint is not as an individual but as a stockholder and such an injury necessarily implies and grows out of an injury to the corporation itself. All the wrongs done or threatened as set out in the bill are wrongs against the corporation itself, and except through the corporation they have no relation to the plaintiff. Therefore the corporation is an indispensable party. And, although this bill is most artfully drawn to disassociate the stockholder from the corporation, in the endeavor to make the contest one between stockholders alone, and to suppress if possible all idea of the interest of the corporation in the controversy or the results, still that interest crops out persistently. To illustrate: In the very first paragraph it is alleged that the plaintiff is seeking to terminate the domination and control of the officers of the New Jersey Company by the Maine Company which has been "oppressive and injurious to the interests of the minority stockholders of the New Jersey Company and greatly prejudices their interests in the future." This is but another way of saying that the plaintiff is injured because the corporate interests are injured, through the domination of the defendant. After describing the various interlocking directorates and the centralization of management in one group of men represented by Phelps, Dodge & Company, the bill goes on to allege that the minority stockholders of the New Jersey Company, including the plaintiff, have thereby "been illegally divested of their rights in and to the assets and earnings of said Company," "that said control, obtained through said holding Company, has resulted in numerous abuses of such control, under which the

interest of your complainant has suffered, and if allowed to continue will be further jeopardized;" that "through means of such control the profits and assets of said Old Dominion Copper and Smelting Company are in danger of being transferred through illegal contracts and arrangements entered into by said interlocking boards of directors and diverted from said minority stockholders of said Old Dominion Copper Mining and Smelting Company, including your complainant, to the stockholders of said other corporations." And the plaintiff for these reasons seeks to have the affairs of the New Jersey Company placed under the control of an independent board of directors.

Various instances are cited where either possible profits are alleged to have been lost or surrendered, or unnecessary expenditures to have been made. The gist of all these charges is that the assets, property and rights of the New Jersey corporation are being illegally dissipated. If this is true then the corporation itself should be before the court. It is directly and necessarily interested in the result of the litigation. Its rights are directly involved. Its interests are so interwoven with those of its stockholders that they are inseparable. These alleged illegal contracts have been and are being made by the corporation through its officers, and to effectually prevent their continuance or repetition the corporation itself must be in court. In no other way can a decree of the court be binding and effective. This is settled law.

Passing from the particular allegations in the bill to its general scope and purpose it is obvious that the internal affairs of the corporation are under investigation and correction, and in these the corporation itself is necessarily concerned. The whole control is sought to be taken from one set of stockholders, representing 95% of the stock, and given to another representing less than 2% of the stock. The old officers are to give place to new. The old policies are to be changed. The conduct of its business is to be revolutionized, and perhaps the very continuance or existence of the corporation itself may be at stake.

This is not a case between two stockholders involving the title to certain shares of stock claimed by each. The rights of the corporation would not necessarily be involved in such a controversy. Nor is it a case involving the duty of a holding company to have its stock in its own name and not in the name of trustees. With that contest the corporation itself is not concerned and need not be a party.

Hyams v. *Old Dominion Co.*, 113 Maine, 294. It is a controversy involving the rights, powers, property and assets of the corporation itself, and both by necessary implication and under the specific allegations of fact in the bill we have no hesitancy in holding that the New Jersey Company is an indispensable party to these proceedings. It requires no argument to prove that these proceedings should be so conducted that any decree which shall be made upon the merits shall conclude the corporation, in order that it may not in the future take any action antagonistic to the decree and claim that it was not bound thereby.

This same question, between the same parties and on facts so similar as to be substantially the same, has recently been passed upon by the Federal Court in this District, and the same result is reached as here. *Hyams* v. *Old Dominion Co.*, 204 Fed., 681, (1913). In that case the plaintiff alleged the same material facts as to interlocking directorates and illegal domination by the holding company with the consequent danger of dissipation of assets in dividends, and claimed as here the right to have the New Jersey Company managed by an independent Board of Directors. The defendant filed a motion to dismiss under the new Federal equity rules, which corresponds to a demurrer to the bill under the former practice, on the ground that the New Jersey Company was an indispensable party. The District Court granted the motion and dismissed the bill. After discussing the allegations in the bill the learned Judge says: "It is clear then, that without the presence in court of the New Jersey corporation, the whole controversy cannot be tried out and that whatever decree the complainant obtains in this suit will be no bar to a suit of the New Jersey corporation founded upon the same inequitable acts of this defendant. In my opinion the Court cannot pass adequately upon the questions presented by this bill without having before it the corporation of which the complainant is a minority stockholder in order that the whole controversy may be settled."

This decision was later affirmed in the Circuit Court of Appeals, *Hyams* v. *Old Dominion Co.*, 209 Fed., 808, and in the course of the opinion, in considering the identical arguments presented to us here, the court say:

"It is said by the appellant that the interests of the New Jersey Corporation are not "directly or adversely affected;" that the relief asked for does not seek to control the New Jersey Corporation but

only to secure an independent board of directors for it, so that the New Jersey Corporation shall be in no way hampered, nor can be, by any decree in this cause; that no decree granting the relief asked for can be injurious to the New Jersey Corporation, for all that could happen to it would be a board of directors capable of acting independently and fairly in its affairs; that its business is not sought to be regulated or interfered with by this bill, and finally that the bill does not seek to meddle with its affairs but only with the conduct of the Maine corporation in its capacity as a stockholder, and so forth and so forth. It is beyond the scope of legal intelligence to comprehend how it is that a bill, which, if sustained, might put the affairs of a corporation in control of a very small minority thereof, or perhaps disenable it, whether directly or indirectly, from the ability of securing a legal quorum, according to its local statutes or its by-laws, at any meeting of its shareholders, has no such operation as claimed by the appellant in the way we have stated. On the other hand the position of the litigation is frankly stated by the opening of appellant's brief to the effect that he seeks to have the New Jersey Corporation 'controlled by an independent board of directors.' There is no doubt that the purpose of the bill is to control the management of a corporation not made a party to it and therefore without its having any judicial hearing in reference thereto. The control sought for by the complainant may be for the good of the New Jersey Corporation or it may not be; but whether, if the relief asked for is granted, it would be for its good or evil, is a matter which cannot be disposed of without its being heard in reference thereto. The effect of the decree asked for might be to seize and maintain the control of the New Jersey Corporation in violation of the fundamental rule in equity, that the Court must hear before it strikes. . . . . No doubt the appellant is not left by us without remedy, because at least the Federal Courts in New Jersey would have full jurisdiction to grant him all the remedy which he needs, so far as on the merits he is entitled to it. . . . . It is also to be remembered especially in proceedings in equity, it is the substance which governs and not the form; and that a distinction cannot be sustained merely on the ground that the bill is against a stockholder, and does not in form affect the corporation, when, through the stockholder, the bill seeks to take practical control of it, as it does here."

The bill in the case at bar has evidently been reframed so as to omit the bald allegation of "damage and injury to said corporation" which appeared in the bill in the Federal Court, and otherwise to veil the corporate entity, but other equivalent allegations do appear as we have already seen, and a careful comparison of both bills finds them essentially the same so far as the point under consideration is concerned. The reasoning of the Federal Court applies with equal force here and the conclusion is accepted as consonant with proper equity procedure. It also has high authority. *Minnesota* v. *Northern Securities Co.*, 184 U. S., 422.

The plaintiff calls attention to various cases in this and other States where bills in equity were sustained although a party out of the jurisdiction was interested in the subject matter and would be a necessary party if within the jurisdiction. Those cases are readily distinguishable. Thus in *Lawrence* v. *Rokes*, 53 Maine, 110, a case regarded as conclusive by the plaintiff, a bill was brought by a member of a partnership against his four copartners to enforce contribution for advances. The partnership business had been finished, the property disposed of and all debts to and from the copartnership had been adjusted. Three of the four defendants resided outside the State and the plaintiff was permitted to maintain the bill against the fourth living within the State, to recover the amount due from him. The reason was that the absent defendants were not indispensable parties. The amount to be paid by the resident defendant to the plaintiff was a matter merely between those two persons, and could in no way be affected by the absence of the non-residents. It would be neither greater nor less were they also present. And their rights would be in no way affected by a decree against the resident defendant. The amount due from them would not be changed by such a decree. In other words the facts did not create the condition of an indispensable party and therefore the rule as to indispensable parties was held not to apply. The distinction between proper and indispensable parties is however recognized in the opinion in these words: "In *Mallow* v. *Hinds*, 12 Wheat., 193, it was held that where an equity cause may be finally decided as between the parties litigant, without bringing others, who would generally speaking, be necessary parties, such parties may be dispensed with, if process cannot reach them. But not if a final decree cannot be made without affecting the rights

of absent parties." The same jealous regard for the rights of absent parties runs through all the cases relied upon by the plaintiff. In each we come back to the fundamental question, would the rights of the party, who is not before the court, be directly affected by a decree against the parties who are before it. If so, the rule as to indispensable parties must be enforced, otherwise not; and the vast number of cases cited by counsel align themselves on one side or the other according to the facts of each. As is often the case, any difficulties involved arise, not because of any doubt as to the rule itself, but as to its application.

Our conclusion therefore is that under the allegations in this bill, which must be taken as true on demurrer, the New Jersey Corporation is an indispensable party to the proceeding, and as it is not before the court, the entry must be,

Appeal dismissed.
Bill dismissed with costs.

CUMMINGS MANUFACTURING COMPANY

vs.

CLYDE H. SMITH, et als.

Somerset. Opinion May 1, 1915.

Assumpsit. Corporation. Credit. Directors. Equity of Redemption. Exceptions. Foreclosure. Implied Contract. Misrepresentation. Mortgage. Obtaining Credit. Partnership.

1. The case shows that the plaintiff believed it was giving credit to a going concern, possessed of apparent assets and good will of the business, and acted upon this understanding. It follows as a matter of law, under these circumstances that the plaintiff cannot be held to have given credit to the F. J. Smith Company, although its account is charged to that company.
2. The defendants cannot avail themselves of the theory that the form of bookkeeping controls the merits of this transaction.
3. Withholding information when good faith and honest dealing require it to be given, is as culpable as misrepresentation when good faith and honest dealing require the truth to be spoken.
4. It is not necessary that the other party should have created the false impression or intended it; it is sufficient that he knows it and takes advantage of it.
5. The question is, who are the real parties in interest; who obtained credit of the plaintiff, and who had the benefit of that credit?
6. Upon the principle of implied contract, those who had the benefit of the credit obtained should be held responsible.

On exceptions by the defendants. Exceptions overruled.

An action of assumpsit on an account annexed, in which the plaintiff seeks to charge the defendants, as copartners. A denial of partnership was seasonably filed. The defendants excepted to the introduction of plaintiff's account as it appeared upon the book of the F. J. Smith Company. At the conclusion of the evidence, the defendants moved that a verdict be directed for defendants, which

motion the presiding Justice overruled. The court then instructed the jury to return a verdict for the plaintiff, to which rulings and instructions the defendant excepted. Plea, general issue.

The case is stated in the opinion.

Fred F. Lawrence, and Samuel W. Gould, for plaintiff.

George W. Gower, for defendant Greene.

Merrill & Merrill, for defendant Smith.

Walton & Walton, for defendant Hill.

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

SPEAR, J. This was an action of assumpsit on account annexed in which the defendants are sought to be charged as copartners. The general issue was pleaded. A denial of copartnership was seasonably filed. It was in evidence and not controverted that for many years prior to 1910, F. J. Smith Company, a Maine corporation, was located at Portland and doing a publication and mail order business, and that during that time it had had dealings with the plaintiff. The F. J. Smith Company on February 17, 1911, gave a mortgage of all its assets, good will and choses in action which came into the hands of the defendants, and was by them foreclosed August 9, 1911, a record of which was made August 29, 1911, the equity of redemption of which expired October 28, 1911.

From the expiration of the redemption of the mortgage, October 28, 1911, to the date of the organization of the Smith Publishing Company, the new corporation, December 26, 1911, the defendants were the absolute owners of every conceivable item of property of which the F. J. Smith Company had been possessed. During this time they proceeded to do business in the name of the F. J. Smith Company, as they had a right to do, and contracted the whole account for which the plaintiff brings this suit, except one item. But doing business in its name did not alter the fact that this company was out of business and was dead in law and in fact. *Van Oss* v. *Petroleum Company,* 113 Maine. So far as financial responsibility was concerned, they might just as well have done business in the name of the F. J. Jones Company. But it is said, although they owned the property, they did not take possession of it, but continued the business in the name, and obtained credit on the responsibility, of the cor-

poration; and that the plaintiff having given credit upon this theory, should now be confined for redress to the corporation to which he gave credit. This might be true if the plaintiff had known or had been informed of the true condition of the corporation. But had it known that this company had been stripped of every vestige of property, and was utterly worthless, it may be fairly assumed that it would not have given any credit whatever.

The case shows that the plaintiff believed it was giving credit to a going concern, possessed of the apparent assets and good will of the business, and acted upon this understanding. It follows that the plaintiff cannot, as a matter of law, under those circumstances, be held to have given credit to the F. J. Smith Company, although its account is charged to that company. Accordingly, the defendants cannot avail themselves of the theory that the form of bookkeeping controls the merits of this transaction. The question is, who are the real parties in interest? Who obtained credit of the plaintiff? Who had the benefit of that credit? Upon the principle of implied contract those who had the benefit should be held responsible. There can be no question as to whose benefit the credit of the plaintiff inured, as appears from the following transactions.

After October 28, 1911, and during all the time this bill was being contracted, the defendants, as before stated, were the absolute owners of every vestige of property of which the F. J. Smith Company had been possessed. This corporation, by its mortgage and foreclosure, was left absolutely penniless, without one dollar in property or capital, and was utterly stripped of every attribute of corporate existence, except the right to dissolve. Under the circumstances, after having obtained credit on the strength, as they say, of the corporation and its assets, they formed a new corporation named the Smith Publishing Company, S. C. H. and G., directors of this new corporation, purchased of S. C. H. and G., directors in, and sole owners of, the assets of the F. J. Smith Company, under the foreclosed mortgage, not only all the assets included in the mortgage but also the increment to the property after the foreclosure, the very gain of which may be due in part to the credit they now seek to avoid. The motion and vote to purchase show the following, to wit: "On motion, voted to purchase of Greene, all of the personal property which said Greene acquired by virtue of the foreclosure of a chattel

mortgage held by them against the F. J. Smith Publishing Company; also to purchase all additions made to said property, of every name, nature and description, by said S., C., H., and G. or either of them, since the commencement of the foreclosure of said mortgage, together with the good will of the business." In other words, S., C., H. and G. sold to the Smith Publishing Company, but really to themselves, property and good will, taken under foreclosure, of the F. J. Smith Company, which they valued at $60,000, and contended, although actually doing business for themselves, and getting credit on the strength of these assets, that they were not responsible for the credit received, because they had not taken manual possession of the property; yet, when they chose to sell they assumed an unqualified right to possession—although the same right had existed every moment while getting credit—and took it, and did sell every item that had belonged to the F. J. Smith Company, and the profits, if any, besides.

Whatever the subjective reasons for this action, the objective reasons demand that the defendants shall be regarded as in possession of all the assets of this defunct corporation from the beginning of the foreclosure, and held responsible for the business done during such possession. Good faith forbids that they should be allowed to deny possession, while the property was used as a muniment of credit, and be permitted to take possession, to relieve both the property and themselves from the credit so obtained, when there was no change in their relation to the property. While we make no intimation of the kind, yet this sort of practice would throw the door wide open to fraud and cannot be permitted to receive the approval of judicial sanction. Nor do we believe the defendants, with a full understanding of the situation, would wish to avail themselves of so unjust an attitude.

But it is said there are no equities in favor of the plaintiff; that it knew the corporation with which it was dealing was not sound financially. Grant this. But it did not know that the directors of the corporation had stripped it of every vestige of financial responsibility. It was a going concern with a subscription list of 250,000 valued by one of the directors at twenty-five cents per name. Had the directors, and later owners, left this property in the corporation, the plaintiff may have had no ground for complaint. But for these defendants, themselves, officers of the corporation, knowing all the facts, to allow the plaintiff to give credit, in ignorance of the facts, can be

regarded as nothing less than withholding information which it was their duty to disclose, if they would bring themselves within the requirements of the law. Withholding information when good faith and honest dealing require it to be given, is as culpable as misrepresentation when good faith and honest dealing require the truth to be spoken. Withholding material information when it ought to be given has been regarded as evidence of fraud from time immemorial. In *Lapish* v. *Wells*, 6 Maine, 175, in 1829, this question was elaborately discussed in which it is held: "The fraud, said counsel, consists, in such cases, in dealing with the party in ignorance, and leaving him so. It is not necessary that the other party should have created the false impression or intended it; it is sufficient that he knows it, and takes advantage of it." In the case at bar the defendants did create the false situation by taking all the property of the corporation, and selling it to themselves.

Relating to the same question, it is again said: "The laws of morality can never give sanction to such a proceeding; and it surely cannot be the duty of a court of justice to be more indulgent in its judgment. It would be a reproach to our laws and tribunals which administer them, to permit fraud to accomplish its designs, when those designs are detected and disclosed."

Again, disclaiming even an intimation of actual fraud on the part of the defendants, the situation here disclosed must be regarded as sufficient in law to hold them responsible, in some capacity, for the credit given in the plaintiff's account.

The remaining question is: In what capacity was the credit obtained by the defendants, as partners or tenants in common? The broadest definition of partnership should be invoked to cover the relation of the defendants to the plaintiff in this case. At least technicality of definition should not be allowed to defeat the plaintiff's suit. It should be observed that a partnership is not what the associated parties say it is; nor what they think it is; nor does it depend upon any particular agreement; but is an inference of law from existing facts. *Dwinel* v. *Stone*, 30 Maine, 384, and many subsequent cases. Therefore what the defendants intended or thought does not necessarily control. The question is whether the plaintiff when it discovered the true state of affairs was authorized to regard the relation of the defendants to the credit it had given as that of a partnership in this particular case. The case at bar falls fairly with-

in the facts found in *Bearce* v. *Washburn, et al.*, 43 Maine, 564, which the report shows to be as follows: "It appears that this action was brought against the defendants as copartners in a lumbering operation, and that the goods sued for were used in that operation for the benefit of both defendants, who shared equally the profits, one having furnished the funds and the other performed the necessary labor." The court say: "The facts reported in this case, so far as the lumbering operation, in which they were engaged, is concerned, bring the defendants clearly within the definition of co-partners, both between themselves and in their relations with others. The evidence also shows that the goods sued for went to the use of the partnership, and were purchased with the knowledge and assent of both of the defendants. The papers referred to in the report have not come into the hands of the court." There was a community of interest among the defendants. They had the benefit of the credit. They, not the corporation, had the benefit of the profits, if any. They sold them to themselves, by the vote of purchase. The inference of law is in this particular transaction that they were partners in obtaining the credit which they received from the plaintiff. At the close of the testimony the presiding Justice ordered a verdict for the plaintiff, to which exceptions were taken.

Exceptions overruled.

LEON V. WALKER, Administrator de bonis non of Estate of Emma S. Schoppee

vs.

PORTLAND SAVINGS BANK.

Cumberland. Opinion May 11, 1915.

Administrator De Bonis Non. Agreed Statement of Facts. Deposits. Executor. Executor De Son Tort. Facts. Forged Order. Payment.

An action on the case brought by the administrator de bonis non of Emma Schoppee, deceased, for the recovery of one thousand dollars alleged to have been paid by it to one E. and charged to the deposit of decedent upon the forged order of decedent.

E. was subsequently appointed administrator of decedent's estate and duly qualified as such.

Held:

1. That E. did not deal with defendant bank as executor de son tort and that it had no reason to believe him such.
2. That payment to one who seeks it, not as a representative of the estate but as an individual with pretended rights against the estate, which induce the payment, is not legalized as to the party making the payment by a subsequent appointment of the wrong-doer as administrator.
3. That, while it may be true that the administrator de bonis non is bound by the acts of his predecessor lawfully performed within the scope of his duties, it has never been held that he is affected or prejudiced by such as are fraudulent or illegal.
4. By Chap. 193, Public Laws of 1903, the authority of an administrator de bonis non was extended and it was made his duty to collect from his predecessor or his heirs, etc., and from all other sources, all the property and assets of the estate of the deceased, including the proceeds from the sale of real estate, not already distributed.

On report. Judgment for plaintiff for the sum of one thousand dollars with interest as claimed in plaintiff's specifications in his writ.

This is an action on the case by plaintiff as administrator de bonis non of Emma S. Schoppee, deceased, to recover one thousand dollars claimed to have been paid by the defendant to one Arthur G. Eaton and charged against the deposit of said Schoppee.

Plea, general issue and brief statement. At the January term of Supreme Judicial Court, 1914, this case was reported by agreement of parties to the Law Court for determination of the rights of the parties upon writ, plea and agreed statement of facts.

The case is stated in the opinion.

Libby, Robinson & Ives, for plaintiff.

Ardon W. Coombs, for defendant.

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

BIRD, J. The administrator de bonis non of Emma S. Schoppee, deceased, brings this action of the case against the defendant bank for the recovery of one thousand dollars alleged to have been paid by it to one Arthur G. Eaton and charged against the deposit of said Emma S. Schoppee. The action is here upon report upon the agreed statement of the parties.

Upon the facts agreed, it is manifest that the defendant made the payment or transfer under such circumstances as to render it liable to the depositor herself, had she been alive at the time of payment. *Ladd* v. *Savings Bank,* 96 Maine, 510, 518; *Bourgeois* v. *Penobscot Savings Bank,* 107 Maine, 526. The defendant does not contend otherwise.

The transfer upon the forged order of deceased, made payable to the order of Eaton, to Ephraim Schoppee the appointee of Eaton, was made upon the eleventh day of April, 1910, and on the same day Eaton deposited the bank book issued in the name of Ephraim Schoppee with the Fidelity Trust Company accompanied by an order for one thousand dollars purporting to be signed by Ephraim Schoppee, whose signature was forged by Eaton, upon defendant as security for the payment of his, Eaton's, note for like amount payable May 16, 1910. On the 18th day of April, 1910, Eaton was appointed, and qualified as administrator of decedent.

But defendant bank claims that Eaton in so receiving payment of the sum of one thousand dollars was acting as executor *de son tort*

and that its act, as well as his, was legalized and validated by his subsequent appointment as administrator of Emma S. Schoppee and that its payment to him binds her estate. See *Pinkham* v. *Grant*, 78 Maine, 158.

An executor de son tort is one who derives no authority from the testator, but who assumes the office by virtue of his own interference with the estate of one deceased. He intrudes himself into the office without lawful authority. Such intermeddling, or intrusion, is in effect holding out one's self as executor, and authorizes the conclusion that he hath the will of deceased wherein he is named as executor, but has not yet taken the probate thereof. *Hinds* v. *Jones*, 48 Maine, 348, 349. An executor de son tort is a person, who without any authority from the deceased or the Ordinary, does such acts as belong to the office of an Executor or Administrator. 2 Bac. Abr., 387. An executor in his own wrong is one who wrongfully intermeddles with the goods of the deceased, or does any other act characteristic of the office. *Allen* v. *Hurst*, 120 Ga., 163. The slightest circumstance may make a person executor *de son tort* if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor. Demanding payment of debts due to the deceased, paying the deceased's debts, carrying on his business, disposing of his goods, may make a person executor de son tort, but setting up a colorable title to the deceased's goods is not enough. 14 Halsbury, 147-148.

And in discussing the acts of the executor, named in a will, which will prevent his afterwards refusing to prove the will, it has been said "But if an executor seizes the Testator's Goods, claiming a Property in them himself, tho afterwards it appears that he had no right, yet this will not make him Executor; for the claim of property shows a different view and Intention in him, than that of administering as Executor." 2 Bac. Abr., 406.

Again it has been stated that an executor de son tort is a person who without authority intermeddles with the estate of a decedent and does such acts as properly belonging to the office of an executor or administrator, and thereby becomes a sort of quasi-executor, although only for the purpose of being sued or made liable for the assets with which he has intermeddled. 18 Cyc., 1354.

To constitute intermeddling, the person sought to be charged as executor *de son tort* must take possession or some control of property

belonging to the decedent; without this the performance of acts which are in their nature such as an executor or administrator would do cannot make one an executor *de son tort.*

An agent sold goods of an intestate in his lifetime and collected the purchase money after his death. It was held that he was not an executor de son tort, even as to creditors, because his right to collect was colorable which gives character to the transaction, as showing that it was not done as executor or as an officious intermeddler. *Outlaw* v. *Farmer,* 71 N. C., 31, 34.

In *Parker* v. *Kett,* speaking of stewards de facto, Holt, C. J., says "and this is agreeable to the reason of the law in other cases, as a legal act done by an executor de son tort will bind the rightful executor, 5 Co., 30b., and yet he is but an *executor de facto* and if the rightful executor shall bring trover against him, he shall recover only so much in damages, as he has administered unduly; and the reason is, because the creditors are not bound to seek farther than him who acts as executor." 1 Ld. Raym., 658, 661.

How far he is bound, in his character of rightful administrator by his own acts done while executor de son tort, may be a question, but it is certain that he can ratify and make valid, by relation, all those acts which would have been valid, had he been the rightful administrator. *Outlaw* v. *Farmer,* 71 N. C., 31, 35; *McClure* v. *The People,* 19 Ill., App. 105, 107.

Generally speaking, all lawful acts done in the professed administration of the estate by a person purporting to act as executor, which a rightful executor would have been bound to perform in due course of administration, bind the estate. But where the alleged executor does one single act only of an administrative character, that act is not binding on the estate. To render an act binding it must be shown that at the time in question the executor de son tort was acting in the character of an executor; 14 Halsbury, 149.

In light of the foregoing we are unable to hold that Eaton dealt with the defendant as executor *de son tort* or that the defendant had reason to believe him such. See *Smith* v. *Porter,* 35 Maine, 287, 291. He produced, what purported to be the written order upon the bank of the decedent. It was payable to him individually and in no representative capacity. If genuine, it must have been executed and delivered before the decease of decedent, payable by statute within thirty days after her decease. In no sense can it be held that Eaton

thus appeared to defendant or could be viewed by it as one collecting and receiving payment of assets of the estate but rather as one receiving a sum transferred to him by decedent in her lifetime and no longer part of her estate. Such being the case, it must follow that while he, having possession of the funds, might have been charged with them in his representative capacity after his appointment as administrator, we cannot assent to the proposition that his appointment legalized or validated the payment of the bank to him under the circumstances. The doctrine of validation by subsequent appointment was adopted, at least, originally to relieve the executor *de son tort* from the suits of creditors.

And while we conceive it to be true that little more than the reception of assets of an estate may be needed to constitute one an executor de son tort as to creditors, something more than the payment alone of assets of an estate even if required to constitute one an executor de son tort with the result that the payment is legalized and validated by his subsequent appointment as administrator. In other words payment to one who seeks it, not as a representative of the estate but as an individual with pretended rights against the estate, which induce the payment, is not legalized as to the party making the payment by a subsequent appointment of the wrong-doer as administrator. See *Lee* v. *Chase*, 58 Maine, 432, 435. *Hodge* v. *Hodge*, 90 Maine, 505, is relied upon by defendant as conclusive. It is, however, but authority for the position that, as the law then was, an administrator de bonis non could not recover of the representative of the deceased administrator assets of his decedent received before appointment but administered in whole or in part. It is not, however, authority to the effect that such administrator de bonis non might not bring his action against one who improperly and illegally made payment of assets to an executor *de son tort* although the latter be later appointed administrator.

While it may be true that it is now law that the administrator de bonis non is bound by acts of his predecessor lawfully performed within the scope of his duties, it has never been held that he is affected or prejudiced by such as were fraudulent or illegal. See *Woolfork's Admr.* v. *Sullivan*, 23 Ala., 548; 58 Am., Dec. 305, 307.

By the amendment of 1903, (Public Laws, Chap. 193) the authority of an administrator de bonis non was extended and it was made

his power and duty to collect from his predecessor or his heirs, etc., and from all other sources, all the property and assets of the estate of the deceased, including the proceeds from the sale of real estate, not already distributed.

Judgment for plaintiff for the sum of one thousand dollars with interest as claimed in plaintiff's specification in his writ.

MARSHALL G. COLE, Lib't, *vs.* LILLIAN COLE.

Kennebec. Opinion May 22, 1915.

Attachment. Demurrer. Divorce. Jurisdiction. Libel. Motion for Continuance. Plea of Libel for Divorce. "Power." Service.

Exceptions to the rulings of the Judge of the Superior Court for Kennebec County on questions of law.

1. The first exception is to the refusal of the presiding Judge to grant a motion for a continuance of the case. Rule 3 of the Superior Court provides that libels for divorce will not be in order for trial at the return term, but contested libels may be heard by agreement. The presiding Judge found, as matter of fact, that there was such an agreement and ordered the case to proceed to trial.

Held: No exceptions lie to this finding.

2. The libel in this case was inserted in a writ of attachment with power of attachment and an order to attach property of the value of $100, while the officer's return disclosed that he made a nominal attachment of "a chip." The libellee claimed that on the face of the paper no legal service was made upon the defendant and that the Court had no jurisdiction.

Held: That the Statute cannot be given so narrow a construction. The language does not require it.

3. Libellants may file in the clerk's office a libel signed by him, or insert it in a writ of attachment with power to attach real and personal property to respond to the decrees of the Court.

Held: This clause "with power to attach" was not intended to limit, but enlarge the force of the word "attachment" and as used here means the right, not the duty.

4. In a libel for divorce, the phrase "in a plea of" is not a necessary part of the pleading, and if it was it should be taken advantage of by plea in abatement.
5. In a libel, an erroneous date of marriage is amendable, at the discretion of the Court.

On exceptions by defendant. Exceptions overruled.

This libel for divorce was inserted in a writ of attachment dated May 28, 1914, returnable at the September term, 1914, of the Superior Court for Kennebec County. At said September term, the libellee appeared and filed a motion to dismiss, a motion for continuance, and a demurrer, all of which were overruled by the court, and the libellee excepted to the several rulings by the court. The jury returned a verdict for libellant. The exceptions are considered in the opinion.

The case is stated in the opinion.

Andrews & Nelson, for libellant.

Connellan & Connellan, for libellee.

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

SPEAR, J. This case involves the trial of a libel for divorce and comes up on exceptions to the rulings of the Judge of the Superior Court, of Kennebec County, on questions of law.

The first exception is based upon the refusal of the presiding Judge to grant a motion for continuance. The defendant moved for a continuance under Rule 3 of the Superior Court that "libels for divorce will not be in order for trial at the return term, but contested libels may be heard by agreement." A controversy arose as to whether there was an agreement for the trial of this case which was to be contested. The presiding Judge found as a matter of fact that there was such an agreement and ordered the case to proceed to trial. No exceptions lie to this finding.

The second exception is based upon the contention that it appeared upon the face of the papers that no legal service of the libel was made upon the defendant, and that consequently the court had no jurisdiction. This contention is founded upon the fact that the libel was inserted in a writ of attachment with an order to attach property of the value of $100, while the officer's return shows that he made a nominal attachment of "a chip." In other respects no complaint

is made of the service. We do not think the statute can be given the narrow construction for which the defendant contends. The language does not require it. It says the libellant may "file in the clerk's office a libel, signed by him, or insert it in a writ of attachment with power to attach real and personal property, to respond to the decrees of the court as in other suits." The clause "with power to attach," etc., was not intended to limit but enlarge the force of the word "attachment." The word "power" is significant. As used here it means the right, not the duty. Had the legislature intended the latter they would have made their meaning plain by the use of apt language to express it. It is accordingly evident that they used the word to confer authority, capacity or right. That is, the libellant may insert his libel in a writ of attachment, make a nominal attachment, and proceed to have it served; or he has the power, the right, to go further, and make an attachment of real or personal property, and then proceed to have it served; the service, under the statute being precisely the same whatever the form of attachment. The service gives jurisdiction, even though the attachment may be faulty.

The third exception is founded upon the contention that the writ declares "in a libel for divorce" instead of a plea of "libel for divorce," and that the phrase "in a plea of" is necessary in a writ of attachment. There are two reasons why this exception should be overruled. First, if the phrase was a necessary part of the pleading it should be taken advantage of by plea in abatement. Second, it is not a necessary part of the pleading. The statute says the libellant may insert his libel in a writ of attachment. And it will be observed that the word "libel" is used but once, to designate the form of pleading to begin a divorce proceeding, and is precisely the same form whether filed in the clerk's office or inserted in a writ. It will not be claimed that the libel filed in the clerk's office must be "in a plea of;" yet the statute says this same libel "may be filed in the clerk's office, or inserted in a writ of attachment." The statute requires no change of form. Accordingly if it can be filed in the clerk's office without "a plea of" it can be inserted in a writ without "a plea of." It is also analogous to inserting a bill in equity in a writ of attachment where "a plea of" is not required.

The fourth exception is that the allegation in the libel sets out an impossible date of marriage, it being averred that three children

were born prior to the date of the writ. But this anachronism was clearly a clerical error, and amendable at the discretion of the court. Upon motion an amendment was properly allowed to which no exceptions lie. *Clark, Appl.*, 111 Maine, 399.

The fifth exception raises the question of pleading whether, under the last clause of section two, it is necessary to allege the absence of collusion. But this is a matter of proof and not of pleading.

The sixth exception avers that the "writ fails to set forth the necessary allegation that there was a lawful marriage." The complaint of this allegation is that the word "lawful" is omitted. The allegation in the libel is "that he was married to said libelee at Waterville," etc. This question was raised by demurrer in *Huston* v. *Huston*, 63 Maine, 184, and summarily disposed of in an opinion of two paragraphs, holding: "Where the allegations in a libel for divorce are sufficient to give the court jurisdiction of the case, and to grant a divorce under its discretionary powers, the libelee cannot avail himself of merely circumstantial omissions to defeat the libel by demurrer."

"If, in such case, the libellee desires greater particularity of statement he should move the court at nisi prius to order the libellant to furnish it."

After these proceedings the defendant filed a general demurrer, which was joined and overruled by the presiding Judge. All the questions which are raised by the demurrer having been disposed of in the foregoing exceptions, the ruling must be sustained.

Exceptions overruled.

FRANCES L. LAZELL *vs.* JUSTUS C. STRAWBRIDGE.

GRACE C. TIBBETTS, In Equity,

vs.

HEIRS OF CHARLES CROOKER AND WILLIAM D. CROOKER.

Waldo. Opinion May 22, 1915.

Equity to Reform Deed. Interveners. Legislative Resolve. Possession. Quitclaim Deed. Writ of Entry.

1. The writ of entry must fail, not only for want of title, but because the plaintiff, since her suit, has conveyed her interest to George C. Tibbetts.
2. In the absence of evidence, except the resolve of the legislature of 1845, tending to show that these islands were omitted by mistake, this long lapse of time must be regarded as conclusive against any effort to reform the deed at this late day.

On report. Plaintiff in writ of entry, nonsuit. Bill in equity dismissed with costs.

The first of these two cases is a writ of entry to recover a certain Island in Penobscot Bay known as Saddle Island, to which the defendant plead the general issue, and the second is a bill in equity in which the plaintiff seeks to rectify and reform a certain deed given to the State of Maine in 1846 by Charles and William D. Crooker, from which she claims that said Island was inadvertently omitted. Answers to said bill were filed and replications to said answers were filed. By agreement of parties, these cases were reported to Law Court upon so much of the evidence and agreed statement of facts as is legally admissible. The Law Court is to decide all questions of law and fact involved and to order such judgments as the rights of the parties require; The evidence and agreed statement of facts to be used in both cases as far as applicable and are to be argued together.

The case is stated in the opinion.
J. P. Cilley, for plaintiff in first case.
Reuel Robinson, for defendant.

J. P. Cilley, for plaintiff in second case.
Arthur J. Dunton, for defendants.
Reuel Robinson, for parties intervening.

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

SPEAR, J. These cases are, first, a writ of entry, and second, a bill in equity to reform an ancient deed. They are brought to determine the ownership of a certain island in Penobscot Bay, known as Saddle Island, and come to the Law Court on report, with an agreement that they shall be argued together.

In the first case the plaintiff claims to own said island from a quitclaim deed given by the State of Maine by Edwin C. Burleigh, its land agent, in January, 1879.

In the second case the plaintiff, being the grantee of the plaintiff in the first case, claims the right to rectify a certain deed given to the State of Maine in 1846 by Charles and William D. Crooker, from which she claims said island was inadvertently omitted.

The defendant in the first case (whose devisees and executors are interveners in the equity case), claims title to the island through a long chain of record title running back more than fifty years.

The defendant in the second case claims that he together with the other heirs of Charles and William D. Crooker, owns an undivided half of the island through a deed from the States of Maine and Massachusetts to the Crookers in 1839, which one-half the Crookers never conveyed.

The history of the island abbreviated is as follows: Saddle island is outside of the three mile limit from the main land and therefore, unlike some other islands of Penobscot Bay, was not included in the Muscongus Grant. See *Lazell* v. *Boardman,* 103 Maine, 292. Therefore, the island remained the property of the Crown and from that descended to Maine and Massachusetts, who held it in 1839. During that year the land agents of the two States, by their joint deed, conveyed to Charles Crooker and William D. Crooker, a group of islands

in the Bay, including Saddle, which is described as containing 11 acres. These islands were all quite small with the exception of one, "Job's Island," which contained some 75 acres.

Job's Island was claimed by one Charles Pendleton who appeared to be in possession of the same, and the Crookers brought a writ of entry to determine the title of this island which this Law Court decided in favor of Pendleton in 1843. *Crooker* v. *Pendleton,* 23 Maine, 339.

The Crookers, having paid the two States the sum of $300 for the conveyance of the islands, and having lost by the above decision, the only one of the islands purchased that apparently had any particular value at that time, asked the two States to return to them the consideration paid for the conveyance. This the States did by passing a resolve in the Crookers' favor, providing that they should reconvey to the two States the interest which they acquired in all the islands specified in the deed of the two land agents to them, in 1839. Resolves of Maine, 1845, Chap. 395.

On August 10, 1846, apparently in pursuance of this resolve, the Crookers gave a deed of quitclaim to the Commonwealth of Massachusetts, of one undivided half of all the islands described in the deed of the two land agents, specifying in the deed, as a consideration, the sum of $200. And on August 21, 1846, they gave a similar deed to the State of Maine, of one undivided half of all of the islands, except Saddle and Mark Islands, naming as a consideration the sum of *$195.00.*

This history shows, that the plaintiff in the writ of entry had no record title to one undivided half of Saddle Island. In 1839 this State with Massachusetts sold this island with others to the Crookers. While the Crookers, as the history shows, reconveyed some of the islands, in the grant of 1839 to them, they did not reconvey Saddle Island to Maine. Accordingly the State, in 1879, had no record title of an undivided half of this island which it could convey to the plaintiff. Nor is any prescriptive title shown by the agreed statement. But the writ of entry must fail, not only for want of title, but because the plaintiff, since her suit, has conveyed her interest to Grace C. Tibbetts. *Powell* v. *Hayden,* 40 Maine, 582.

In the bill in equity Grace C. Tibbetts, grantee of the plaintiff, in this writ of entry, of this same island, admits that the State had no record title to an undivided half thereof in 1879, and asks in her bill

that the deed of Charles and William D. Crooker of 1846 to the State may be reformed so as to include within its description an undivided half of Saddle Island, which it avers was omitted by mistake. But the only evidence presented tending to show a mistake in omitting Saddle and Mark Islands is the resolve of 1845, requiring, in consideration of refunding the money paid for the islands, that the Crookers "shall reconvey to this State and Massachusetts, the interest which they acquired in all the islands specified in the deed to them." This bill is dated April 14, 1914. In other words, this deed of the Crookers to the State, omitting the two islands in question, has been acquiesced in for a period of sixty-nine years.

In the absence of evidence, except the resolve quoted, tending to show that these islands were omitted by mistake, this long lapse of time must be regarded as conclusive against any effort to reform the deed at this late day. Besides there may be reasons, not now susceptible of proof, why these islands were omitted. Their value at the time was of no consequence, and they may have been omitted by mutual consent. In fact, it is impossible, after sixty-nine years, to find any evidence, upon which a reasonable conclusion could be founded.

As we understand the report, we are requested to proceed further and determine the present ownership of Saddle Island. It is claimed by the devisees of Justus C. Strawbridge on the one hand, and Charles T. Jackson on the other. But this we cannot do. These claimants are not properly made parties to the proceedings. They petition and are permitted to come in as interveners to defend. Accordingly no affirmative action can be taken in their behalf. The entry must be,

Plaintiff in the writ of entry, nonsuit.
Bill in equity dismissed with costs.

FRANK E. JACKSON, In Equity, *vs.* WILBUR A. MAXWELL.

Kennebec. Opinion May 22, 1915.

Conditional Sale. Deed Intended as Mortgage. Equity of Redemption. Mortgage. Quitclaim Deed. Warranty Deed.

Plaintiff claims that defendant agreed to advance amount due from plaintiff to Tolman and take a deed from Tolman purporting to convey a fee and be absolute on its face, but which in fact would be a mortgage for money advanced.

Held:

1. It is incumbent upon the plaintiff to prove by the degree of evidence required in this class of cases that not only he, himself, understood this transaction to be a mortgage, but that Maxwell, as well, understood it in the same way.
2. The degree of evidence required to convert a deed into a mortgage is and should be very high; otherwise, no man would be safe in taking a deed of property, especially with prospects of rapid increase in value.
3. The evidence must be of such weight and character as would justify a Court in reforming a written instrument, which upon the ground of mistake did not set forth the intention of the parties thereto.
4. In each case, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument.
5. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.

On appeal. Appeal sustained. Bill dismissed with costs.

This is a bill in equity, brought by plaintiff to redeem the premises described in plaintiff's bill from an alleged equitable mortgage held by the defendant on said premises, in favor of the plaintiff. An answer and replication were filed. The cause was heard by a single Justice, and from the decree entered by said Justice, the defendant appealed to the Law Court.

The case is stated in the opinion.

C. A. Knight, and Alfred B. White, for plaintiff.

Andrews & Nelson, for defendant.

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

SPEAR, J. The undisputed facts in this case are as follows: In 1889 the plaintiff became the owner of an orchard in the town of Monmouth, which has become the subject of the present controversy. It would appear from the evidence that this property was, all along, until it was paid, subject to a mortgage to Dr. Marston. In 1892 the plaintiff by warranty deed conveyed the orchard, subject to the Marston mortgage, to B. F. Tolman of Waltham, Mass. At the time, the plaintiff was owing Tolman $2000 and later had more money of him. Although informed by Jackson, as he says, that the Marston mortgage was "all paid up," Tolman found upon investigation that he "had only two days to redeem it in." Upon this mortgage he paid $1210. The equity expired in his hands and he acquired an absolute title, free from any agreement, whatever, with Jackson.

The case also shows that Tolman, on May 24, 1895, gave to Wilbur A. Maxwell, the defendant, a quitclaim deed, with covenants of warranty against all incumbrances made or suffered by him and against the lawful claims and demands of all persons, claiming, by, through or under him. The plaintiff so far as the papers show was an entire stranger to this transaction. The bill alleges that Tolman held the warranty deed as a mortgage, and the title by foreclosure in trust, for him. While under the evidence this contention could not be conceded, it is immaterial whether it be so or not. A, holding absolute title, may convey to B, by absolute deed, and make the deed an equitable mortgage in favor of C. Whether this can be done is a matter of proof, not of law.

The plaintiff further alleges that the defendant agreed to advance the amount due from the plaintiff to Tolman, and take a deed from Tolman, "which should purport to convey a fee and be absolute on its face but which in fact should be a mortgage on security," for the money advanced.

It is incumbent upon the plaintiff to prove by the degree of evidence required in this class of cases that not only he, himself, understood this transaction to be a mortgage, but that Maxwell, as well, understood it in the same way. *Stinchfield* v. *Milliken*, 71 Maine, page 517. "The criterion is the intention of the parties."

We may perhaps first properly allude to the degree of evidence required to convert a deed into a mortgage. It is and should be very

high. Otherwise no man would be safe in taking a deed of property, especially with prospects of rapid increase in value. When it had doubled or trebled, it would be only necessary for the grantor to bring witnesses to testify to an agreement, that the deed was regarded as an equitable mortgage, to enable him, upon payment of the purchase price and interest, to redeem. So dangerous is the doctrine of converting an absolute deed into a mortgage that some States deny the application of the doctrine at all, except upon proof of fraud, accident or mistake. This is the rule in Connecticut, Florida, Georgia, Kentucky, North Carolina and Rhode Island. In New Hampshire, R. S., Chap. 139, Sec. 2, and Pennsylvania, Act of June 8, 1881, *Sainsby* v. *Howley*, 118 Pa. St., 301; *O'Donell* v. *Vandersael*, 213 Pa. St., 551, such agreements have no force unless inserted in the deed. By Code 1906, Miss., Par. 4783, the grantor must be in possession, to attack a deed. In every other State the rule gives expression to the high degree of evidence required to convert a deed absolute into a mortgage, by the use of such terms as "clear and certain," "conclusive," "unequivocal." The great source of authority holds that the plaintiff must prove his case, "by force of evidence sufficient to command the unhesitating assent of every reasonable mind." "The evidence must be of such weight and character as would justify a court in reforming a written instrument, which upon the ground of mistake did not set forth the intention of the parties thereto." *Howland* v. *Blake*, 97 U. S., 624. The degree of evidence required to reform a written instrument is found in the cases collated in *Liberty* v. *Haines*, 103 Maine, 182. These citations all agree in demanding proof practically beyond a reasonable doubt. The testimony must be above suspicion. It cannot be warped by the bias or interest of a party. See paragraph 1, page 627, *Howland* v. *Blake*, supra. Finally may be cited the principle found in this case on page 626, as a salutary rule for the government of this class of cases: "In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed of writing, are of too much solemnity to be brushed away by loose and inconclusive evidence.

Story, Eq. Jur., Sec. 152; *Kent* v. *Lasley*, 24 Wis., 654; *Harrison* v. *Juneau Bank*, 17 id., 340; *Harter* v. *Christoph*, 32 id., 246; *McClellan* v. *Sanford*, 26 id., 595."

If we now advert to the testimony upon which the plaintiff seeks to transform a deed, absolute in terms, into a mortgage, we find the following given by Jackson, the party in interest, nineteen years after the alleged conversation is claimed to have taken place. After stating that he had been to several parties with an endeavor to find some one who would pay his indebtedness to Tolman he proceeded to say: "And in the meantime, I wrote my cousin, Mr. Maxwell, about taking up the mortgage, and we went up to Mr. Maxwell's house and met him in the yard. I introduced Mr. Tolman to him and I said to Mr. Tolman: 'You have a claim on the orchard there to about one-third of the value of it;' and I said to Mr. Maxwell: 'It is a small amount and I want you to take it up;' and he said he would. He said: "I will, why certainly I will;' and we went into the house and had dinner and I went home with Tolman and the arrangement was, Mr. Maxwell should take Mr. Tolman down to Augusta and fix up the deeds." But this statement was evidently not satisfactory to counsel and he attempted to call his attention to a further statement as follows: Q. In this conversation was there anything said about— This was objected to and counsel did not proceed further in this particular line, but asked this question: Q. To come back to the conversation you had with Mr. Maxwell in the yard in Tolman's presence, what else was said? A. I said, you are located here to take care of the place while I am away—I am going away. Then counsel further says: I simply want to remind you— At this juncture the court intervened and observed that it would hardly be proper to make any suggestion at this point. But counsel persisted and finally asked the question as to what conversation he had with Maxwell "relative to your financial condition," and here the plaintiff, having finally got a clue to what he wanted to say, makes another entirely different statement from his first one, saying: "After introducing Mr. Tolman, I said to Mr. Maxwell; 'Mr. Tolman has a claim over this orchard for $2000, and I want you to take it up and hold it on a mortgage until I can pay it back, and I will pay it back with interest, and you pick the apples and look after the orchard while I am away.'"

It should here be observed that we are now considering this testimony as the uncontradicted evidence of the plaintiff. No finding of fact can change it. The only finding to be made is one of law, whether such testimony comes within the well settled rules of evidence, touching the proof required to convert a deed absolute into a mortgage. Accordingly, independent of any finding of fact by the sitting Justice, we are of the opinion that this ex parti testimony, nineteen years old, conflicting in itself, does not meet the high degree of proof demanded in this class of cases. In his voluntary statement before he was allowed to make his later conflicting statement Jackson never mentioned the word "mortgage" at all. Tolman in his testimony adds nothing to the force of the plaintiff's evidence tending to establish that the deed given by him to Maxwell was to be regarded as a mortgage. We think the true inference of law to be derived from this undisputed testimony is, that the most the plaintiff could claim, was that the conveyance of Tolman to Maxwell was a conditional sale.

But this testimony does not stand uncontradicted. It is squarely and positively denied by the defendant, Maxwell, who, from anything that appears in this case, must be regarded, at least, to be as reliable a witness as the plaintiff. The evidence shows him to be a man of substance and character, who, through an industrious and proper use of his efforts for nineteen years, has successfully cultivated and cared for this orchard. At the outset Maxwell freely admits that he agreed with Jackson that if he wanted to pay for this orchard within a year he would convey it to him. But this, as the evidence shows, was on condition that he paid within a year. On cross-examination the defendant testified as follows: Q. You knew perfectly well he had an interest in the orchard? A. I knew he had had. Q. Didn't you know at the time? A. No; I knew he had had. Q. What was he around there for? A. To help Mr. Tolman get rid of it; Mr. Tolman and he were good friends. Q. And did he tell you he had an interest in the orchard? A. No; Tolman was the one that had the orchard. Q. Why did you give him the right to redeem? A. He was fussing around there and made a lot of talk about too cheap, and I says: "If you want this back at the end of the year, you can have it." Q. Tolman claimed to you he owned the orchard outright? A. Tolman owned that orchard outright. Q. He told you so? A. Yes, sir. Q. Then what did

you want to pay any attention to Jackson's claim for? A. I don't know why I did. He was around there talking that way and I told him that. Q. Didn't he tell you that the orchard was his? A. No. Q. And that he had a claim on it? A. He didn't have any claim. Q. And you simply gave him the right of redemption out of the goodness of your heart? A. Yes, sir; I don't know whether he had any right there. Q. But he did stay around and talk? A. Yes, sir; he did. Q. And you told him that? A. I told him he might have that at the end of a year if he would pay the bills on it. In effect this testimony differs but little from that of Jackson and Tolman, but fairly establishes the conclusion that it was never Maxwell's intention that this conveyance to him should be regarded as a mortgage. The last answer, above quoted, shows just how Maxwell understood the matter.

But it is said, in response to a letter from Mrs. Jackson, who appears as a witness under the name of Mrs. Johnson, that he went to see her and had conversation with her regarding Jackson's right to take back this orchard. This happened just a few days before the year expired. This conduct on the part of Maxwell was in perfect harmony with what he claims was his arrangement with Jackson, that if he would pay the debt and for the improvements, within a year, he would convey the property back to him. Mrs. Johnson's testimony has no tendency to contradict the defendant's contention. On the other hand, the testimony of Mrs. Maxwell with reference to this conversation corroborates the position of the defendant. She says in answer to the question of what conversation took place, "She came out to the carriage and asked how much that orchard was. She said Frank thought he would like it back and asked how much it would be and Mr. Maxwell gave her the figures." She says Mr. Maxwell further told the then Mrs. Jackson after she said she did not think Frank would want it at the price—about $3000 which was due on it—that Maxwell would like to know as soon as possible because there were fences to build. It was in the spring of the year and there were fences to build; and he wanted to go to work there. And if Mr. Jackson wanted to buy the orchard back he would not care to do the work; and she said: 'I will cable him and let you know.' " This language clearly shows that in the mind of Maxwell and Mrs. Johnson the question was whether Jackson "would like it back." This is confirmed by the further question of

Maxwell, as above shown, if he "wanted to buy the orchard back" he would not care to do the work, etc. The language "to buy the orchard back" is significant and shows what Maxwell's conception of the transaction was. The testimony of Mrs. Maxwell from anything that appears in this case is certainly as reliable as the testimony of Mrs. Johnson and in so far as it contradicts her is entitled to equal weight.

The burden is heavily upon the plaintiff to establish the truth of his contention. To do this under the universal rules of law it was incumbent upon him to produce testimony that should be conclusive and convincing, as has already been shown by the authorities cited.

But the evidence in favor of the defendant does not end here. The circumstances and probabilities corroborate his contention. In *Howland* v. *Blake*, above cited, the court held that the fact that a deed, alleged to have been a mortgage, was not challenged for eight years was a circumstance in contradiction of the claim. In the case before us, however, for nineteen years the plaintiff slumbered on his rights, with the exception of an inquiry made at the end of the first year, to which allusion has been made; and not a scrap of writing ever passed between the parties during this time, nor did the plaintiff, himself, ever make any inquiry about it except that, about five years after the transaction, he called at Maxwell's blacksmith shop in Monmouth, when he says he told Maxwell he was not acting square; that he agreed to give up the orchard on payment of money and improvements, Maxwell's version of which is, "he wanted me to give him $20.00; he said he was hard up. He said I got that orchard too cheap. I told him I put in all the money I wanted to; that is the last I heard until this started up last April." This indifference and delay is not the conduct of a man who believed that he had a subsisting interest in this orchard and a right of redemption. It is inconsistent with the claim that the deed was a mortgage and consistent with the defendant's contention that it was an absolute sale, conditioned upon the right of the plaintiff to pay the debt and improvements and take it back at the end of a year.

But this is not all. The testimony of Daniel Boynton, the only witness in the case, whose testimony as to the value of this orchard in 1895, can be considered as of any value, gives this very significant testimony. A. Mr. Jackson came to me, and wanted to know if I would buy that orchard; and I told him I had not thought of it;

and he talked some time, and he said to me to make a price of what I thought the orchard was worth; and after a while I told him what I thought it would be worth. Q. What was it? A. Two thousand dollars, if it was in such good shape as I thought it might be. And then nothing would do but I must go and look at it. Q. And did you go? A. Yes, sir; I harnessed my team and we went up there and looked at it. And I told him I would not give $2000—it was not worth it to me, the condition it was in. The place had been neglected for three or four years, and somebody had went in there—they had hired somebody to do the cutting of the bushes. And they had been cut so they laid down; and the small brush and bushes had grown up all through this brush and all through the orchard; and I didn t want the job myself of clearing it up; and I didn't take the orchard." This testimony, if true, is an overwhelming circumstance touching the true character of this transaction. Mr. Boynton was an orchardist himself, living right across the pond from this orchard, and familiar with the value of orchards in the vicinity of Monmouth. He says he examined this orchard, upon request of Jackson, as a prospective purchaser and declined to offer $2000. The first inquiry is, is this testimony true? Can its character and truthfulness be questioned? It is rebutted, indeed, by Jackson on his cross-examination before Boynton had testified, by a denial that he ever saw Mr. Boynton till the trial. But after Boynton had testified, in detail, as to what was said and done, both upon direct and cross-examination, Jackson did not take the stand to deny or contradict a single sentence given by Boynton. This testimony shows a reckless indifference, on the part of Jackson, of a proper regard for truth, and stamps with suspicion the character of the testimony upon which he seeks to reform a written instrument. The testimony of such a witness, whatever the source of its weakness, does not meet the standard of proof required. It is unquestionably erroneous if not intentionally false, for the statement of Boynton cannot be challenged.

Again, if Mr. Boynton's testimony be true, there appears another statement which not only contradicts Jackson's word, but his whole attitude towards this transaction when he got Maxwell to advance $2000. Boynton says Jackson asked him to make an offer on this orchard, "and after a while I told him what I thought it would be worth. Q. What was it? A. Two thousand dollars if it was in such good shape as I thought it might be." Now what occurred is

the crucial test of Jackson's position, showing his manifest eagerness to sell for $2000. Mr. Boynton says: "And then, nothing would do but I must go and look at it," and he did and declined to pay $2000. He did not say anything to Boynton about an equitable mortgage, or obtaining money on the orchard as security. He wanted to sell. And the only reasonable inference from this uncontradicted testimony is that he was ready and even anxious to sell for $2000, as he insisted upon Boynton's examination of it at this price.

This fully corroborates Maxwell and fairly authorizes the inference that Jackson's only aim was to get a purchaser who would pay the debt of his friend, Tolman, and that his claim at the time of the transaction of the great value of the orchard in excess of the amount due Tolman was to induce Maxwell to advance the money. Furthermore, the testimony of Boynton shows that the market value was not over $2000. If this be so, then appears another unimpeachable circumstance that proves the transaction was not a mortgage. Is it probable that Maxwell would have taken a mortgage on a piece of real estate in Monmouth at its full face value? It is almost inconceivable that any ordinary business man would do it. But it was perfectly business like for Maxwell to say, when Jackson was magnifying the value of this property, that if he wanted to buy it back in a year, with the improvements, he could do so.

But it seems unnecessary to go further. We are of the opinion that the true inference to be drawn from the unquestionable facts is that the transaction in question was not a mortgage, but a conditional sale, if anything. Again, the delay of nineteen years is utterly inconsistent with the contention that the deed absolute in form was a mortgage. Men do not slumber on their rights in this way. Maxwell most certainly would not have expended his labor and applied his personal skill as an orchardist, to have them both consumed in the inadequate return to be found, in an accounting, and the amount due for redemption. His natural skill, the bestowal of which upon an orchard makes the difference between a thrifty, good bearing tree and a scrubby worthless one, so commonly contrasted, side by side, in adjacent ownerships, Maxwell will have entirely lost, as he can recover nothing for the prosperous condition of the orchard. That he would have wasted his entire time and energy, for the best part of his life, upon an orchard he did not consider his own seems absurd and preposterous. From the inherent

evidence of the whole case, it is apparent Maxwell never understood he was giving a mortgage and accordingly no such mutuality of understanding is found as is necessary to establish proof of a mortgage.

Appeal sustained.
Bill dismissed with costs.

JOHN W. TRUE, Petitioner,

vs.

MAINE CENTRAL RAILROAD COMPANY.

FRED H. CHANDLER, Petitioner,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion June 1, 1915.

Assessment of Damages. Eminent Domain. Injunction. Mandamus. Public Laws 1864, Chap. 231. R. S., Chap. 51, Sec. 33. Right of Way.

The County Commissioners ordered and directed the railroad company to construct and maintain, upon the land and across the tracks of said railroad, cattle guards, cattle-passes and farm-crossing; and an underpass, fourteen feet high and twelve feet wide.

Held:

1. That the statute authorizing the County Commissioners to order the corporation to make and maintain cattle-guards, cattle-passes and farm-crossings does not contemplate such a structure as is here prescribed.
2. An appeal, in these cases, lies only to the assessment of pecuniary damages.
3. The County Commissioners, in a case of this kind, cannot order a cattle-pass, or any other structure that will exceed the full measure of damages.
4. They cannot assess the full measure of damages and order, in addition, any of the structures authorized by statute.

On exceptions by the defendant. Exceptions sustained in each case.

This is a petition for writ of mandamus to enforce a judgment of the County Commissioners directing the railroad company to construct and maintain cattle passes and an underpass. Upon hearing, the Justice ordered a peremptory writ to issue, and the defendant excepted to said ruling.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiffs.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SPEAR, J. In 1870 the defendant company purchased, through the lands of the present petitioners, of the then owners a right of way for the location of its railroad tracks. In 1912 the defendant company took by right of eminent domain a strip of land belonging to the petitioners from 20 to 30 feet wide on the westerly side of, and adjoining the old location. After acquiring the increased width by eminent domain, thus owning the original location in fee simple and the widening in easement, the defendant company raised the grade along the new line of the road passing through these farms to a height of about 20 feet. Over this new grade access from one part of these farms to the other was made impossible for any practical purpose except by the erection of underpasses.

After the new road bed had been completed, and within the time limited by law, the owners of the land taken by right of eminent domain filed a petition under R. S., Chap. 51, Sec. 33, for the assessment of land damages, and for the erection of underpasses. Upon this petition all the necessary preliminary notices were given and a hearing ordered on the 11th day of September, 1912, at which the parties upon both sides appeared with their counsel and were fully heard. The County Commissioners, on the second Tuesday of January, 1913, rendered their judgment that the damages sustained by the petitioners were estimated "to be nothing" and further ordered and directed "that the said railroad company construct and maintain upon the land aforesaid and across the track of said railroad, cattle-guards, cattle-passes and farm-crossing as follows: An underpass

fourteen (14) feet high and twelve (12) feet wide, located" etc. From this order no appeal was taken by the defendant company and the plaintiffs have brought a writ of mandamus to enforce the judgment. Upon this state of facts the sitting Justice ordered a peremptory writ to issue. The case comes up on exceptions to this ruling. The statute authorizing this order reads as follows: "Said commissioners shall order the corporation to make and maintain such cattle-guards, cattle-passes, and farm-crossings as they think reasonable; prescribe the time and manner of making them, and consider this work in awarding pecuniary damages."

First. Does the statute authorizing the County Commissioners to order the corporation to make and maintain cattle-guards, cattle-passes and farm-crossings contemplate such a structure as is here prescribed? We are of opinion that it does not. These structures were first authorized by the Public Laws of 1864, Chap. 231, and were regarded as incidental to the assessment of damages as an analysis of the chapter will show. No amendment has been made except one in 1893 relating to the right of appeal.

While the language of the present statute differs from that of the earlier one, the change was made in the revision of 1871, not by amendment, but by the revisors for the purpose, not of varying the original meaning, but more clearly and succinctly expressing it. The terms, cattle-guard, cattle-pass and farm-crossing, have significance, only, in connection with the construction of a railroad that has divided a farm in such a manner as to expose the stock of the owner to the danger of passing trains, to deprive him of access to some part of his pasture or some part of his tillage land. These terms, separately analyzed, each have a distinct and limited application. Cattle-guard signifies some kind of a device alongside a railroad crossing to keep cattle off the track. Cattle-pass applies to a narrow passage-way, under a railroad track, wide enough and high enough to admit the passage of a cow, horse or ox to and from a pasture. Farm-crossing means a roadway over the track at grade, for the purpose of reaching the tillage land, cut off. Without further observation, it is evident that the structure, which the County Commissioners ordered in the present case, did not come within their jurisdiction, by any of the provisions of the statute under which they assumed to act. There is no pretense that it was a cattle-guard. It could not be regarded as a cattle-pass as its dimensions were 12 feet

in width and 14 feet in height, making it a veritable roadway, wide enough for two ordinary teams to pass each other. It is evident that the cattle-pass intended by the statute could never be expanded into a passage-way of this magnitude. Such a structure, capable of bearing an engine of a hundred tons, would require heavy masonry and an iron bridge, at a minimum cost of $12,000 and a maximum cost of $17,000, in each case, as estimated by the engineers, an expense all out of reason in view of the end to be attained by the enactment of the statute. Nor was it a farm-crossing for the reason already stated. Accordingly, the structure ordered by the commissioners was not authorized by the statute, and their order was beyond their jurisdiction and void.

We might pause here but as the case will be in order for trial again, it may not be deemed improper to suggest a second reason why the present order was nugatory, in order that the same error may not be repeated in case of another hearing. The second question is: Does the statute, authorizing the County Commissioners to order a cattle-pass, contemplate that they may prescribe a structure that shall exceed in cost the full amount of damages to which the individual may be entitled, without the right of appeal? To the order of a cattle-guard, cattle-pass and farm-crossing, there is no appeal. An appeal lies only to the assessment of pecuniary damages; to the order for the cattle-pass it is expressly denied, as will appear from the last sentence of Sec. 34, R. S., Chap. 51, which reads: "In case of appeal by either party, the only question in issue shall be the amount or measure of damages on the terms and conditions imposed by the commissioners."

This interpretation is made certain by the clause in Section 33 which provides: "And if the corporation after forty-eight hours' notice in writing to its president or superintendent, neglects to commence the work or complete it within a reasonable time," etc., the owner may apply to the court for summary process to enforce the specific performance of the order. Section 36 providing for appeal, "more than thirty days after the report of the commissioners," also confirms this construction, as it would otherwise be inconsistent, in time, with Section 33. The evidence shows that the two underpasses ordered would cost from $24,000 to $37,600.

Accordingly, if the commissioners had jurisdiction to order a cattle-pass of unlimited dimensions, it would yet be clearly nugatory

in this case, as the cost of the award would many times exceed the full measure of damages to which the petitioner would be entitled, thus imposing a disproportionate and unreasonable burden upon the defendant without any right of appeal. Such a proceeding would be in defiance of due process of law. It then follows that the County Commissioners in a case of this kind cannot order a cattle-pass, or any other structure that will exceed the full measure of damages. Nor can they assess the full measure of damages and order, in addition, any of the structures authorized by statute. They can assess the full measure of damages and order one of the structures prescribed in part payment, as was expressly provided in the original statute of 1864, or "consider the work (the cattle-pass) in awarding pecuniary damages," as said in the present statute.

Inasmuch as the present proceedings are declared void for causes not affecting the merits, new proceedings may be begun within one year under R. S., 1903, Chap. 51, Sec. 31.

Exceptions sustained in each case.

RACHEL M. PALMER *vs.* HENRY F. BLANCHARD, Administrator.

Lincoln. Opinion June 8, 1915.

Agent. Change of Date. Expert. Forgery. Material Alteration. Newly Discovered Evidence. Promissory Notes. Signatures. Special Findings. Witness.

1. The defense being forgery, the plaintiff was obliged to prove, by a preponderance of the evidence, that the signatures were genuine signatures, and testimony that they were forgeries should be clear and convincing.
2. The commission of crime is so improbable that, under such circumstances, the law requires stronger proof to justify a verdict that in effect fastens upon the plaintiff the felonious crime of forgery than is required to prove a defense that imports no crime.
3. The plaintiff having introduced the notes signed by George E. Trask, containing the words "value received," could rely upon the presumption of law as proof of consideration, for the words "value received" are equivocal to proving an admission by George E. Trask, in his lifetime, that there was an original consideration for the notes.
4. The opinion of handwriting experts in some cases are of great assistance. Their experience and studies have so qualified them that, from a comparison of the disputed writings with admitted standards, they can detect peculiarities in writings that might escape the observation of one with less experience.
5. The fact that they are qualified to testify as experts only qualifies them to give an opinion of the genuineness of the handwriting.
6. Unless they can state reasons for their opinions that may be considered by the jury, their opinions are entitled to but little weight.
7. A material alteration of a note by a party holding it after it was made and delivered would be a good defense.
8. Such alteration would be a fraud, but as fraud is not to be presumed, it must be proved.
9. It was for the jury to determine from the evidence whether such alteration was made at the time of delivery of the note, or afterwards. If altered after the signing and delivery, it would vitiate the note; if before, it would not.

On motion by plaintiff. Motion sustained; new trial granted.

This is an action of assumpsit on two promissory notes, one dated April 1, 1908 for $2400, purporting to be signed by George E. Trask

and Trask Brothers, and the other dated October 30, 1908 for $3600, purporting to be signed by George E. Trask and Trask Brothers, both notes payable to the plaintiff. Plea, the general issue and brief statement alleging that said notes were without consideration, that same was obtained by deceit and fraud. Defendant also filed an affidavit denying signatures. The jury returned a verdict for the defendant, and plaintiff 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.

Henry W. Oakes and Joseph B. Reed, for plaintiff.

A. S. Littlefield and C. L. Macurda, for defendant.

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

HALEY, J. An action of assumpsit upon two promissory notes alleged to have been given by George E. Trask in his lifetime, one dated April 1, 1908, for $2400 payable to the plaintiff or order in one year from date, purporting to have been signed by George E. Trask and Trask Bros., a firm composed of said George E. Trask and Henry Trask, and witnessed by B. A. Bailey; the other dated October 30, 1908, for $3600, payable to the plaintiff or order, purporting to have been signed by George E. Trask and Trask Bros. and witnessed by Henry A. Bailey. The case was tried at the April term of the Supreme Judicial Court in Lincoln County, the verdict was for the defendant, and the jury returned special findings; that the signatures of George E. Trask to said notes were not genuine signatures of said George E. Trask; that there was no consideration for the notes; that both notes were materially altered after the delivery without the knowledge or consent of said George E. Trask, and the case is before this court upon a motion to set aside the verdict as against law and evidence, and upon a motion for a new trial upon the ground of newly discovered evidence. If the evidence authorized either of the special findings, the general verdict for the defendant was right; if it did not, the general verdict was wrong and it is necessary to consider each of the special findings.

George E. Trask and Henry L. Trask, his brother, for many years before the death of George were engaged in the lumber business, and owned and operated mills, one of them situated at Alna, was purchased of the plaintiff as administrator of her husband's estate. They were both old men at the time of the transaction in question, and George E.'s eyesight was so impaired that he could not read, but he was able to drive a team and he attended to the operation of the mills and made his home with the plaintiff. Henry L. Trask was old and infirm, and did not attend to the financial part of the business, and never, until after the death of George E., signed any notes or checks. The plaintiff kept the books of the firm, wrote the letters and made out the checks for George E. to sign, boarded the men employed in the mill, paid off the help, and took charge in part of the operation of the mill, giving orders and directions to the help. Henry L. claims that, a few hours after the death of George, he went to the plaintiff's home and that during his visit the plaintiff informed him that she had two notes of George E., and at other times she referred to the notes and stated that they were given her by George E. in payment of the amount due her, and also stated, in substance, that she had an arrangement with George whereby she was to share in the profits of the business.

The plaintiff was not allowed to testify to events that took place before the death of George E. Trask, and did not recall the statement testified to as having been made by her after the funeral, but stated that they had talk about the notes, and then they were spoken of as the notes of George E., and afterwards there were other conversations in the presence of others at one of which it is claimed that Henry L. stated that George E.'s estate could not pay the notes, and that afterwards the plaintiff stated that the notes were signed not only by George E. but also by Trask Bros., and she afterwards let the agent of the defendant make a copy of the notes.

The defense being forgery, the plaintiff was obliged to prove, by a preponderance of the evidence, that the signatures were genuine signatures, and testimony that they were forgeries to establish the defense should be clear and convincing, for death and the law had sealed the lips of the alleged maker and payee, and the commission of crime is so improbable that under such circumstances the law requires stronger proof to justify a verdict that in effect fastens upon the plaintiff the felonious crime of forgery than is required to prove a

defense that imports no crime "because the improbability or presumption to be overcome in one case is much stronger than it is in the other." *Decker* v. *Ins. Co.*, 66 Maine, 406; *Ellis* v. *Buzzel*, 60 Maine, 211.

Were the signatures to the notes genuine? It was admitted that the plaintiff filed in the Probate Court, in writing supported by her affidavit, a claim against the estate of George E. Trask, describing the notes produced at the trial, and that the body of the notes was in the handwriting of the plaintiff. Benjamin A. Bailey testified that he signed, with his fountain pen, the first note as a witness at its date, at the request of George E. Trask, who signed it in his presence and in the presence of the plaintiff, a sister to the witness. It appears in the case that Mr. Trask was an aged man and that his eyesight was very much impaired, but that he did business and signed notes and checks. The testimony of this witness is clear and positive, and is only criticised as to the date, because it is claimed that he did not deliver nursery stock for a month after the date, but the witness did not state he was delivering nursery stock at that time. Henry A. Bailey testified that he signed the note dated October 30, 1908, as a witness, at the request of George E. Trask, who signed it with a fountain pen in his presence and in the presence of the plaintiff, the witness's sister, and that the note was read by the plaintiff to said Trask before it was signed and that the witness read it before he signed it, and his memory seems to be clear as to the transaction.

The defense called upon this branch of the case but one witness, a handwriting expert, who testified that in his opinion the signatures of both George E. Trask and Trask Bros. to the notes were not genuine signatures, and that the signatures of Trask Bros. were written a long time after the notes and the signatures of George E. Trask, and attacked the signatures on two grounds, (1) comparison of the appearance of the signatures in respect to form, claiming that details of the different letters differ from the standards, (2) difference in age of signatures with respect to time of writing by comparison of mental models of different periods, and by difference of ink with respect to age on the paper. His testimony is very lengthy, taking up sixty pages of the report, and is sharply attacked by the plaintiff.

It is urged that, for the purpose of creating confidence in his opinion, he, in the presence of the jury, analyzed specks of ink on the notes in question, and the jury examined by the aid of a compound microscope

furnished by the witness the result of the chemical analysis, and it appears from his examination that all the analysis determined was the kind of ink, and had no tendency to prove that the signatures were not genuine, because all writings upon the note were of the same kind of ink and the witness knew it, because he had previously examined the writings; that many of the peculiarities that he testified to in the disputed signatures were not peculiarities, and a careful comparison of the disputed signatures with the admitted standards shows that the standards had in many instances the same peculiarities that he testified the disputed signatures had, and the finding of which caused him to give his opinion that the signatures were not genuine. That, as one of the reasons for his opinion that they were not genuine signatures, was the positions and measurements of certain letters in the disputed signatures, and that an examination of these letters shows that his statement in reference to them is not true.

We cannot in this opinion go at length into all the details and claims of this witness, or the answer of the plaintiff thereto, but the plaintiff called two handwriting experts who gave it as their opinion that the signatures were genuine, and counsel in their arguments have not called our attention to any statement made by them which can be examined and found untrue.

That the opinions of handwriting experts in some cases are of great assistance cannot be questioned. Their experience and studies have so qualified them that, from a comparison of the disputed writings with admitted standards they can detect peculiarities in the writings that might escape the observation of one with less experience, and their opinions, based upon an examination, are sometimes entitled to great weight; but the fact that they are qualified to testify as experts only qualifies them to give an opinion of the genuineness of the handwriting, and unless they can state reasons for their opinions that may be considered by the jury, their opinions are entitled to but little weight, and if they state to the jury as reasons for their opinion that certain facts exist which do not exist, peculiarities of the handwriting that an examination shows to be untrue, their opinion is entitled to but little, if any, weight. The jury are the judges of the facts and any opinion given by an expert is to be weighed by them, and if an examination of the writings shows that the reasons given by the expert for his opinion are not justified, in weighing his opinion the reasons which he gives for it should be con-

sidered, for "the value of an opinion may be much increased or diminished in the estimation of the jury, by the reasons given for it." *Heald* v. *Thing*, 45 Maine, 397. And, as stated in Forgeries and False Entries, Hingston, page 80, "If the expert has a good case he need ask no favors; he can demonstrate the strength and prove the reasonableness of his deduction in the face of the opposing opinion of one or a dozen," but in this case the witness for the defense has not demonstrated the strength or proved the reasonableness of his deduction, for a careful reading of his testimony and comparison of the disputed signatures, with the admitted handwriting of Geo. E. Trask shows that the differences and peculiarities he points out also exist in the admitted signatures; that the standards differ from each other the same as the disputed signatures differ in some respects from some of the standards; that the differences are only such as can be discovered in the different writing of most people, and convinces us that his opinion is not entitled to credence, that overcomes the proof furnished by the writings themselves; the opinion of the two experts called by the plaintiff, and the testimony of the two subscribing witnesses. That his opinion, with the reasons given for it, is not that clear and convincing proof required by law to establish a defense that necessarily proves two forgeries, participated in by the two subscribing witnesses, and the crime of perjury by the subscribing witnesses.

CONSIDERATION. The plaintiff having introduced the notes signed by Geo. E. Trask containing the words, "value received," until other evidence was introduced, could rely upon the presumption of law as proof of consideration, for the words "value received" are equivalent to proving an admission by Geo. E. Trask in his lifetime that there was an original consideration for the notes. It is prima facie evidence of a consideration, sufficient, if not rebutted, to maintain the plaintiff's case upon this branch, and if the defendant would avoid the effect of such prima facie case he must produce evidence of equal or greater weight to balance or overcome it. *Small* v. *Clewley*, 62 Maine, 156; *Powers* v. *Russell*, 13 Pick., 76. To overcome the presumption of consideration, the defendant offered testimony that, when the plaintiff was asked about the notes, she said it was profit on the Breman lot; at another time she said it was her part of the profits of the Breman lumber operation and from logs they bought; and that the Breman operations were not finished when the notes were given. That, at another time, she stated that they represented

profits in the lumber business for about four years, at which time she claimed to have had an interest in the business for the four years. The plaintiff testified that she stated at those interviews that she and Geo. E. Trask settled her claim by the notes in suit. The statements by the plaintiff of the consideration are not inconsistent with her claim. They do not appear to have been full statements, and the witness evidently testified to but a part of the conversation. No evidence was offered of any payment, but the notes, for the services that it is not denied she performed. There is no evidence of any agreement between the plaintiff and Geo. E. Trask for her to share in the profits, except as it may be gathered from her statements and the giving of the notes, but if she was not to share in the profits, she was entitled to what her services were reasonably worth, and by the notes it appears they agreed she was entitled to the amount stated in the notes and no legal inference can be properly drawn from the parts of her statements as testified to by the witness strong enough to overcome the prima facie case made by the admission in the notes of a consideration. Further, the jury having found that the signatures of Geo. E. Trask to the notes were not his genuine signatures, necessarily had to find that there was no consideration for the notes; that is, the jury having found the signatures to be forgeries, would base their finding of no consideration upon that finding, and as the first finding was wrong the second finding, based upon the first, of no consideration, was unauthorized.

ALTERATION. The defendant claims that the words "Trask Bros." upon both notes were written more than one year after the signature of Geo. E. Trask, and if true, it would be a material alteration that would defeat a recovery upon the notes. This claim is supported only by the opinion of the handwriting expert who testified that the signatures of Geo. E. Trask were not genuine.

The same examination and comparison of the writings and of the testimony of this expert, upon this branch of the case that we gave to his testimony upon the genuineness of the signature of Geo. E. Trask, leads us to the same conclusion, that his opinion is not that clear and convincing proof required by law to establish a defense that in effect fastens upon the plaintiff and the subscribing witnesses the commission of a felonious crime.

CHANGED DATE. The note dated April 4, 1908, shows that where the figure "8" now is something has been erased and the figure "8"

made over it, and the plaintiff claims that was a material alteration, and that the burden is upon the plaintiff to show what the alteration was, and, if material, to show that it was not made after the note was delivered, or made without the consent of the maker. The rule is stated in *Simpson* v. *Davis*, 119 Mass., 269: "Proof or admission of the signature of a party to an instrument is prima facie evidence that the instrument written over it is the act of the party; and this prima facie evidence will stand as binding proof, unless the defendant can rebut it by showing, from the appearance of the instrument itself, or otherwise, that it has been altered." Quoted with approval in *Bank* v. *Harriman*, 68 Maine, 523. "Where the plaintiff declares upon a note and offers it in evidence against the maker, there is a burden upon him to satisfy the jury that an apparent alteration of the note was made before delivery. This arises from the general burden of proof, which the plaintiff has to sustain, to show that the note declared upon is the genuine, valid promise of the defendant, therefore, if there is evidence each way, upon a question of alteration, the preponderance must be in favor of the plaintiff. . . . . But the paper itself, unaided by other evidence may satisfy the jury, or it may not. All depends upon circumstances. Alterations are rarely alike. The alteration may be immaterial or comparatively so, or beneficial to the maker, or made with the same pen and ink as the body of the instrument. On the other hand, the alteration may present indications of fraud and forgery. Whether or not is a question of fact and not of law. . . . . It is said that alterations prima facie indicate fraud. It is sure it does not in all cases. What alterations or degree or kind of alterations may exist without being suspicious enough to demand explanation is for the jury to settle. *Dodge* v. *Haskell*, 69 Maine, 429. There is no presumption of law either way. *Crabtree* v. *Clark*, 20 Maine, 337.

It is common knowledge that wrong dates of instruments are frequently written, erased and new dates added before the instrument is completed, and there is nothing about this erasure to indicate anything to the contrary.

Gooch v. *Bryant*, 13 Maine, 386, was an action upon a promissory note and the defense was a material alteration, and the court instructed the jury, "that a material alteration of a note by the party holding it after it was made and delivered would be a good defense; that such alteration would be fraud, but as fraud was not to

be presumed but must be proved, it was for the jury to determine from their evidence whether such alteration was made at the time of the delivery of the note, or afterwards, and that the alteration would not vitiate the note, unless they were satisfied from the evidence that it was made after the signing and delivery." The verdict was for the plaintiff, and the court said in the opinion: "There was no other evidence of the alteration of the note, than what arose from inspection, from which it appeared, that one of the figures in the date had been altered. Of the fact there could be no doubt; but the more important inquiry was, when it was done. If altered after the signing and delivery, it would vitiate the note; if before, it would not. As to the time, no evidence was offered by either party. The alteration was not in itself proof that it was done after the signature; it might have been done before. If the alteration was prima facie evidence that it was done after, it must be upon the ground that such is the presumption of laws. But we do not so understand it. It would be a harsh construction; exposing the holder of a note, the date of which had been so altered as to accelerate payment, or to increase the amount of interest, to a conviction of forgery, unless he could prove that it was done before the signature. It would be to establish guilt by a rule of law, when there would be at least an equal probability of innocence." And it was held that the instruction was proper.

The defendant offered as evidence upon this branch of the case the opinion of the same handwriting expert, that the figure "8" was placed on the note after the figure "9" had been erased and some years after the other figures, and the defendant contends that that opinion, together with the appearance of the note, should authorize the jury to find a material alteration in the note after its delivery. If there was no other evidence in the case, we doubt if the jury would have been authorized to find an alteration by erasing one figure and putting over it the figure "8" after the note was signed by Geo. E. Trask. Suspicion is not proof, and the opinion of the expert upon this branch of the case, as upon the others, does not seem to be entitled to sufficient weight to establish forgery, and as opposed to the opinion of the expert there is the positive testimony of the subscribing witness that he signed it as a subscribing witness the day of its date, at the request of Geo. E. Trask, who signed it in his presence, and the argument of counsel attacking the testimony of the subscribing witness is that he is mistaken a month at least in the time when he witnessed it;

but it is immaterial if he did not witness it upon the date it bears; if Geo. E. Trask signed it the day he witnessed it, it was Geo. E. Trask's note, and that testimony is unimpeached and unquestioned, except by the opinion, of doubtful value, of the expert who, it appears to the court, was wrong in his other conclusions, and that opinion was not sufficient, in view of the law and the testimony of the subscribing witness, to authorize the finding that the note was materially changed after its delivery. As there was not evidence that authorized either of the special findings of the jury, necessarily there was not evidence that authorized the general verdict for the defendant, and it is unnecessary to consider the evidence filed in support of the motion for a new trial upon the ground of newly discovered evidence, as the entry upon the general motion must be,

Motion sustained. New trial granted.

CHARLES D. HOLBROOK *vs.* LEON L. LIBBY, et al., Exrs.

Somerset. Opinion June 29, 1915.

Affidavit. Exceptions. Executors and Administrators. Laws of Minnesota. Notary Public. Presentment of Claims against Estates of Deceased Persons.

1. By statute, the presentment of a claim against the estate of a deceased person to the executor or administrator in writing, or the filing of the same in Probate Court, supported by the affidavit of the claimant, or of some person cognizant thereof, is a condition precedent to the right to maintain an action thereon; and such presentment or filing must be alleged and proved.
2. An affidavit made before a notary public in Minnesota in support of a claim against the estate of a deceased person in this State is not sufficient compliance with the statute, unless it be shown that in Minnesota notaries public are authorized to administer oaths.
3. At common law a notary public had no authority to administer oaths.
4. In the absence of proof to the contrary, the law of Minnesota is presumed to be like our common law.

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

Assumpsit to recover for services claimed to have been rendered by plaintiff to defendant's testate in her lifetime. The plaintiff introduced in evidence his claim filed in Probate Court, supported by an affidavit purporting to have been made before a notary public in Minnesota. The defendant excepted to the admission of said claim. The jury returned a verdict for plaintiff and the defendant filed a motion for new trial.

The case is stated in the opinion.

Butler & Butler, for plaintiff.

Manson & Coolidge, for defendants.

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

SAVAGE, C. J. Assumpsit to recover for services rendered to the defendant's testate. The verdict having been for the plaintiff, the case comes up on the defendant's motion for a new trial and exceptions. A single point presented by the exceptions is all that we need to consider.

By R. S., Chap. 89, Sec. 14, it is provided that "all claims against estates of deceased persons . . . . shall be presented to the executor or administrator in writing, or filed in the probate court, supported by the affidavit of the claimant, or of some other person cognizant thereof, etc. . . . . Any claim not so presented or filed shall be forever barred against the estate etc." By this statute, the presentment or filing of a claim is made a condition precedent to the right to maintain an action. Presentment or filing must be alleged and proved. *Eaton* v. *Buswell,* 69 Maine, 552; *Rawson* v. *Knight,* 71 Maine, 99; *Littlefield* v. *Cook,* 112 Maine, 551. Want of filing or presentment may be taken advantage of under the general issue. *Eaton* v. *Buswell,* supra; Story's Pleadings, 2nd Ed., page 131.

In this case, the claim was filed in the Probate Court supported only by an affidavit purporting to have been made before a notary public in Minnesota. No evidence was offered to show that by the laws of Minnesota a notary public is authorized to take affidavits. The sufficiency of this affidavit is challenged by the exceptions.

Assuming that the person who took the affidavit was a notary public, and that the affidavit mentioned in the statute may be made before a magistrate out of the State, the question is this:—Has a notary public in Minnesota authority to administer oaths? It is universally held that a notary public has no such authority at common law. If he has such authority, it must be by statute. In this State we have such a statute. R. S., Chap. 34, Sec. 3, as amended by Chap. 58 of the Public Laws of 1905. But this statute is plainly limited to the authority of notaries public within the State. It does not purport to give effect to the acts of notaries without the State. By the use of the words "notary public," only such a person is intended as is recognized by the laws of the State as such. *Bramhall* v. *Seavey*, 28 Maine, 45.

But the law of Minnesota is not presumed to be the same as our statute. It is presumed to be like our common law. *Carpenter* v. *Grand Trunk Ry.*, 72 Maine, 388; *Jowett* v. *Wallace*, 112 Maine, 389; *Franklin Motor Car Co.* v. *Hamilton*, 113 Maine, 63. Before effect can be given to the statute of another State, it must be proved as a fact. See same cases.

It follows, then, that it is not shown that the notary public in Minnesota had authority to administer the oath. The presumption is that he did not. If he did not, the purported affidavit is not an affidavit at all. And the plaintiff has not proved the performance of the statutory condition precedent to the right to maintain this action.

Exceptions sustained.

O. L. TAPLEY, EXR., *vs.* HATTIE R. DOUGLASS, et als.

Hancock. Opinion June 29, 1915.

Absolute or During Widowhood. Bequest. Bill in Equity. Construction. Executor. Intention. Security. Will.

A testator made the following bequest: "I will and bequeath to Hattie R. Douglass two thousand dollars, $2000 in money, all of the household furniture and housekeeping articles in the house in which I now live, together with all the personal property in the barn, and one-half of all the personal property in the store at the corner which I now occupy to have and to use as long as she shall remain the widow of Jeremiah Douglass." Under this bequest it is,

Held, that Hattie R. Douglass has a life estate in the money and other property mentioned in the bequest to her, determinable upon her remarriage, and that it is the duty of the executor to pay the money and deliver the other property to her upon her giving such security for the benefit of the remainder-men, as may be approved by the Judge of Probate who makes the order of distribution.

On report. Decree in accordance with the opinion.

Bill in equity by Oscar L. Tapley, executor of the last will and testament of James S. Douglass, late of Brooksville, in the County of Hancock, against Hattie R. Douglass, et als., in which he asks the Court to construe the said will and particularly determine whether Hattie R. Douglass is entitled to the legacy of $2000 in money absolutely, and also to determine her precise interest in the remaining personal property. Answer by all defendants, admitting all the allegations in bill, was filed. At the hearing, the cause was reported to the Law Court by agreement of parties: The Law Court to decide all questions involved.

The case is stated in the opinion.

Hale & Hamlin, for complainant.

Fulton J. Redman, for respondents.

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

SAVAGE, C. J. Bill in equity, brought by the executor, to obtain a construction of the will of James S. Douglass, deceased.

The doubtful paragraph is as follows:—"First, I will and bequeath to Hattie R. Douglass Two thousand dollars, $2000. in money, all of the household furniture and housekeeping articles in the house in which I now live together with all the personal property in the barn, and one half of all the personal property in the store at the corner which I now occupy to have and to use as long as she shall remain the widow of Jeremiah Douglass." He then gave to Edgar L. Douglass "Two thousand $2000. dollars in money and one half of the personal property in the store at the corner." He then gave certain specific pecuniary legacies to several legatees, and gave the residue "to the persons hereinbefore named as beneficiaries in the proportion as the amounts specifically named bears to the amount remaining."

We are asked to determine whether Hattie R. Douglass is entitled by the first paragraph to two thousand dollars in money absolutely; also her precise interest in the remaining personal property mentioned in that paragraph. And the debatable question is whether the limitation "as long as she shall remain the widow of Jeremiah Douglass," which no doubt was intended to apply to the personal property in the store, applies also to the earlier gift of money, household furniture, housekeeping articles, and personal property in the barn.

An executor cannot maintain a bill for the construction of a will when he has no personal interest which may be affected by a construction. He may be advised, when necessary to aid him in the performance of his duties as executor, and for his protection. But he can properly be advised only so far as is necessary for the proper performance of his duties. His duties are to conserve, administer and distribute the estate in accordance with the will. He has no interest in the quality of the title of the legatees after a proper distribution. *Burgess* v. *Shepherd*, 97 Maine, 522.

In this case, the legatee is entitled to the possession of the property given to her, whether given absolutely, or for the period of widowhood. The only concern the executor can have is whether security ought to be exacted before the money is paid, or the other property delivered. And that involves the question whether the gift is absolute, or for widowhood. If the limitation applies to the money, and articles in the house and barn, as well as to the property in the store, the legatee was to "have and use" them during her widowhood. And where the use of money is given, the gift is of the interest only,

and the general rule is that the legatee must give some reasonable security to preserve safely the funds for the remainder-man. *Whittemore* v. *Russell*, 80 Maine, 297.

We think it cannot be said with entire certainty what the intention of the testator was. If it was intended that the legatee was to have the use, only during widowhood, of the money, for example, a skilful scrivener would have been likely to phrase the paragraph differently. We would have expected such a one to have expressed the gift as a gift of income, and to have provided specifically for the remainder. On the other hand, if the gift of the money was intended to be absolute, we would have expected the distinction between the gift of the money and the gift of the property in the store to have been more clearly marked. For the gift of the use of the latter was unquestionably limited to the period of widowhood.

There are three gifts expressed in one sentence, money, articles in house and barn, *and* property in store. The first and second gifts are separated by a comma, and the second and third by a comma and the conjunctive "and." Punctuation and even capitalization are uncertain guides, and may be disregarded, when they serve to obscure the true meaning when gathered from all parts of the instrument. But it is noticeable that if the intention was to embody all three gifts in one class, that intention was expressed so far with grammatical nicety. It was a gift of one thing, of another *and* of a third, all in one sentence. And then the sentence concluded without the intervention of any punctuation mark, with the words "to have and to use as long as she shall remain the widow" etc.

If it had been intended that the first and second gifts were to be absolute, and the third not; or the first to be absolute, and the second and third, not, we should expect to find the line of demarcation marked by something more than a comma, and that the mark would indicate whether the line came between the first and second, or between the second and third, gifts. It would have been natural to make a new sentence, in which the gift, differing in quality from the former ones, was to be expressed. Such was the case in *Mace* v. *Mace*, 95 Maine, 283, cited by counsel.

In construing a will, it is proper to read it in the light of surrounding conditions, the relations between the testator and his intended beneficiaries, the amount and nature of his estate, and other relevant circumstances which legitimately tend, in cases of doubt, to show

the probabilities of his intentions, one way rather than another. The record before us is barren of all extraneous facts. We have only the language of the testator. And we do not find in other parts of the will sufficient to control or modify the natural grammatical construction of the clause under consideration. It may be that we shall not give effect to the testator's actual intention. But, if so, it will be because he failed, unfortunately, to express his intention.

We conclude that Hattie R. Douglass has a life estate in the money and other property mentioned in the bequest to her, determinable upon her remarriage. She is entitled to the possession of all. And it is the duty of the executor, upon her giving such security as may be approved by the Judge of Probate who makes the order of distribution, to pay the money and deliver the property to her.

No other questions are open on the executor's bill.

Decree in accordance with the opinion.

THE NORTHWESTERN INVESTMENT COMPANY

vs.

FRANCIS PALMER, et al., and Trustee.

York. Opinion June 29, 1915.

Assignment. Distribution. Distributive Share. Findings of Facts by Justice Hearing Case. Legacy. Residuum. Trust.

1. The findings of facts made by a Justice hearing a case without a jury are conclusive, if supported by any evidence.
2. The findings of facts made by the Justice who heard the case are supported by evidence.
3. A suit for the recovery of a distributive share of the residue of an estate is not maintainable by a legatee while the estate is still in the process of settlement, nor, until the amount to be distributed has been ascertained and determined by the Probate Court.

On exceptions by plaintiff. Exceptions overruled.

An action of assumpsit by the plaintiff as assignee of Bartlett Palmer and Clinton C. Palmer, sons of Elizabeth C. Palmer, to recover from the executors of the will of said Elizabeth C. Palmer their distributive shares in the residuum of said estate. Plea, general issue with brief statement.

At the conclusion of the hearing, the Court ordered judgment for the defendant, on the ground that the estate was still in process of settlement in the Probate Court for York County, that the executors were acting in good faith and were proceeding with due and reasonable diligence. The plaintiff excepted to said ruling and his exceptions were allowed.

The case is stated in the opinion.

Clinton C. Palmer, for plaintiff.

Cleaves, Waterhouse & Emery, and James O. Bradbury, for defendants.

N. B. & T. B. Walker, for trustee.

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

SAVAGE, C. J. Elizabeth C. Palmer died, testate, September 30, 1907. By her will, after making sundry specific bequests, the testatrix disposed of the residue of her estate as follows: "I give and bequeath all the rest and remainder of my estate to such of my children who may outlive me share and share alike, but I will that the portion which would fall to my son Clinton shall be held in trust for him by my son Francis to be used for his comfort and necessities, according to the discretion of said son." The plaintiff, as assignee of Bartlett Palmer and Clinton C. Palmer, two of Mrs. Palmer's sons, seeks in this suit to recover from the executors their distributive shares in the residuum. No distribution has been ordered by the Probate Court.

The case was heard at nisi prius by the Court without a jury. The Court ordered judgment for the defendants "on the ground that the estate was still in the process of settlement in the Probate Court for York County, that the executors were acting in good faith and were proceeding to settle the same with due and reasonable diligence." To this order, the plaintiff excepted.

The plaintiff's contention is that as a matter of fact the estate of Mrs. Palmer is in effect settled, and that as a matter of law, it is entitled to maintain this suit by virtue of R. S., Chap. 67, Sec. 24. By that section it is provided that "any legatee of a residuary or specific legacy under a will may sue for and recover the same of the executor, in an action of debt at common law, or other appropriate action."

As to the facts, the plaintiff is concluded by the findings of the Justice who heard the case. It is a settled rule of procedure that findings of facts by the Justice hearing a case without a jury, if there is any evidence to support them, are conclusive, and exceptions do not lie. It is only when there is no evidence to support the findings, or when only one inference can be drawn from the facts, and that inference does not support the judgment, that the findings constitute exceptionable error. *Chabot & Richard Co.* v. *Chabot*, 109 Maine, 403. An examination of this case shows sufficient evidence to warrant the findings of the Justice. We must assume then that the estate of Mrs. Palmer is still in process of settlement, in the Probate Court, and that the executors are acting in good faith, and are proceeding to settle the estate with due and reasonable diligence. Under such circumstances can this action be maintained? We think not.

Whether in all cases there must be a decree of distribution by the Probate Court before suit for a distributive share can be maintained, is not now the question. The court in *Smith* v. *Lambert*, 30 Maine, 137, indicated that such a decree is not necessarily a condition precedent to a suit. But notwithstanding the general character of the language in the statute, it has been repeatedly held that a suit for the recovery of distributive share of a residue is not maintainable by a legatee until the amount of the residue to be distributed has been ascertained and finally determined by the Probate Court. It must necessarily be so. *Hanscom* v. *Marston*, 82 Maine, 288; *Graffam* v. *Ray*, 91 Maine, 234; *Hawes* v. *Williams*, 92 Maine, 483; *Palmer* v. *Palmer*, 112 Maine, 156. If there be anything in *Smith* v. *Lambert* inconsistent with the doctrine of these cases, it must be regarded as having been so far overruled.

In the case of *Palmer* v. *Palmer* there were two bills in equity, heard together. In one Clinton C. Palmer as assignee sought to establish a lien on Bartlett Palmer's share in this same residue; and in the other this present plaintiff as assignee sought to establish a

like lien upon Clinton C. Palmer's share. The court dismissed the bills saying:—"The estate of Elizabeth C. Palmer remains unsettled. It is in process of such speedy settlement as continuous and protracted litigation will permit. The final account cannot be rendered nor the decree of distribution made until the controverted claims are determined, and the proper tribunal for the determination of those claims is the Probate Court which has full jurisdiction of the subject matter and of the parties. An action at law does not lie to recover a distributive share of an estate before the amount to be distributed has been ascertained by the Probate Court." The doctrine of that case applies to this one, and is decisive against the plaintiff.

And we may add that the attempt by bills in equity and suits at law to try in this court issues properly cognizable only by the Probate Court tends, not to expedite, but to retard the process of the settlement of the estate.

During the hearing, the plaintiff took an exception to the admission of a petition by the executors now pending in the Probate Court, to amend or correct an alleged error in their second account. Such a petition is in effect a petition to open the account. The petition was properly admitted as tending, among other things, to show that the estate is still unsettled. With the merits of the petition we have nothing to do here. The decision of the merits is within the jurisdiction of the Probate Court, and that court is the only one that has authority to decide, in the first instance.

The plaintiff is not without remedy. Nor need it be subject to any unnecessary delay. By pursuing the orderly procedure in Probate Court as established by law, it may compel the executors, if hereafter dilatory, to complete the final settlement of the estate with due diligence. And then it may invoke its statutory remedy by suit.

Exceptions overruled.

ARLENA M. PERRY, Otherwise LINNIE MAUD PERRY

vs.

CHARLES R. BUSWELL.

Penobscot. Opinion June 29, 1915.

Construction. Description. Intention. Purposes of References to Prior Conveyances. Real Estate. Reference to Other Deeds. Title. Trover.

A person owning a homestead situated partly in Exeter and partly in Garland, conveyed "all my right, title and interest to certain real estate situated in the town of Exeter . . . . being my homestead place and the same real estate described in a mortgage given by me to J. A. B. under date of August 17, 1909, and recorded in Penobscot Registry of Deeds in Vol. 795, Page 471, to which mortgage reference may be had for a full and particular description." The description in the mortgage referred to was, "a certain lot or parcel of land known as the homestead of said J. A. B., lying a part in said town of Exeter and part in Garland," etc.

1. *Held,* that the deed conveyed that part of the homestead which lay in Garland as well as the part in Exeter.
2. The cardinal rule for the interpretation of deeds is the expressed intention of the parties gathered from all parts of the instrument giving each word its due force, and read in the light of existing conditions.
3. A reference in a deed to other deeds, when it appears that it was so intended, makes them a part of the description, as much as if their language had been incorporated and copied as a part of it.

On report. Judgment for defendant.

This is an action of trover for the conversion of certain goods and chattels, described in plaintiff's writ. The question involved is the title to certain real estate in Garland, Maine. Plea, general issue, with brief statement, claiming title to the land on which the logs were cut to be in defendant and not in plaintiff.

At the conclusion of the evidence, by agreement of parties, the case was reported to the Law Court. Upon so much of the evidence as is legally admissible, the Law Court shall render such judgment as the law and the evidence require.

The case is stated in the opinion.

Louis C. Stearns, and George H. Worster, for plaintiff.

Hudson & Hudson, for defendant.

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

SAVAGE, C. J. This case comes up on report. The question involved is the title to certain real estate in Garland. The facts are not in dispute. In 1869, George S. Hill was the owner of "a homestead farm" situated partly in Garland and partly in Exeter. He took title to the part in Garland and to the part in Exeter by separate deeds, at different times. Hill conveyed the whole to one Brown, and Brown to one Gould. Gould mortgaged back to Brown, August 17, 1909. The description in the mortgage was "a certain lot or parcel of land known as the homestead of said James A. Brown, lying a part in said town of Exeter and part in Garland in said county of Penobscot and being the same premises" described in certain title deeds referred to. In 1913 Gould conveyed to the defendant, "all my right title and interest to certain real estate situate in the town of Exeter, county of Penobscot, and State of Maine, being my homestead place and the same real estate described in a mortgage given by me to James A. Brown under date of August 17, 1909, and recorded in Penobscot Registry of Deeds, in Vol. 795, Page 471, to which mortgage reference may be had for a full and particular description." Subsequently Gould gave a deed of that part of the homestead which lies in Garland to one Appleby, through whom the plaintiff claims title.

The defendant contends that the entire homestead farm, the part in Garland, as well as the part in Exeter, came to him by Gould's deed. The plaintiff claims that the Gould deed conveyed only land in Exeter. The first phrase in the description in the Gould deed, "certain real estate situate in the town of Exeter," standing alone, certainly limits the grant to land in Exeter. Can the grant be enlarged by the phrase "being my homestead place," without words of limitation, and by the reference to the Brown mortgage, which describes the homestead farm as being in both Exeter and Garland, and which is referred to for "a full and particular description?" And if it can be, should it be so enlarged? These are the questions.

The cardinal rule for the interpretation of deeds and other written instruments is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. This rule controls all others. Technical rules of construction of deeds may be resorted to as an aid in getting at the intention. And technical rules may be controlling, when nothing to the contrary is shown by the deed. The ancient rigidity of technical rules has given way in modern times to the more sensible and practical rule of actual expressed intention. *Child* v. *Fickett*, 4 Maine, 471; *Pike* v. *Monroe*, 36 Maine, 309; *Hathorn* v. *Hinds*, 69 Maine, 326; *Proctor* v. *M. C. R. R. Co.*, 96 Maine, 458; *Whitmore* v. *Brown*, 100 Maine, 410; *Morse* v. *Phillips*, 108 Maine, 63.

Of all rules of construction none is more rigid than the one that where the language describing the grant is specific and definite, as for instance, by metes and bounds, the grant cannot be enlarged or diminished by a later general description, or by mere reference to deeds through which title was obtained. And this rule holds because the specific description is necessarily more indicative of intention than the general one. *Jones* v. *Webster Woolen Co.*, 85 Maine, 210; *Brown* v. *Heard*, 85 Maine, 294; *Reed* v. *Knight*, 87 Maine, 181; *Smith* v. *Sweat*, 90 Maine, 528; *Crabtree* v. *Miller*, 194 Mass., 123.

So, it is true that a general description may be made more certain, and be controlled by a later particular one, or by reference to prior deeds. In *Allen* v. *Allen*, 14 Maine, 387, "my homestead farm, being lot No. 13," was held to pass only so much of the homestead farm as lay within lot 13. In *Thorndike* v. *Richards*, 13 Maine, 430, "all that tract of land called and known by the name of Pitts or Beauchamp Neck," followed by metes and bounds, conveyed only so much of the Neck as lay within the specific boundaries. In *Haynes* v. *Young*, 36 Maine, 557, "lot No. 170," followed by metes and bounds the grant was restricted to land within the boundaries described. In *Stewart* v. *Davis*, 63 Maine, 539, "the farm on which I now live being lot 9," conveyed only so much of the farm as was within lot 9. See also, *Bates* v. *Foster*, 59 Maine, 157; *Hamlin* v. *Attorney General*, 195 Mass., 309.

In a few cases, a description in general terms followed by a more particular description, or by reference, for description, to a prior

deed, the language of the whole deed has led the court to give effect to the general description. Such cases are *Keith* v. *Reynolds*, 3 Maine, 393; *Willard* v. *Moulton*, 4 Maine, 14; *Childs* v. *Fickett*, 4 Maine, 471; *Field* v. *Huston*, 21 Maine, 69. See also, *Lovejoy* v. *Lovett*, 124 Mass., 270.

References to prior conveyances are made for varying purposes. They are made sometimes for the purpose of showing the source of title; sometimes to show the identity of the land conveyed; sometimes, and generally by way of caution, to afford a more definite description. It is probably true that in the larger number of cases the reference is made to show the source of title. For illustrations, see *Hathorn* v. *Hinds*, supra; *Shaw* v. *Bisbee*, 83 Maine, 400; *Jones* v. *Webster Woolen Co.*, supra; *Brown* v. *Heard*, supra; *Smith* v. *Sweat*, supra. In *Shaw* v. *Bisbee*, supra, the court said that "reference to prior deeds, unless expressly appearing otherwise, is only intended to help identify the premises conveyed, and not to determine the quality or quantity of title." But a reference to other deeds, when it appears that it was so intended, makes them a part of the description, as much as if their language had been copied as a part of it. *Field* v. *Huston*, supra.

The cases cited are enough to illustrate the application of the rule of construction by expressed intention to the ever varying phraseology of deeds. And construing the deed before us in the light of judicial authority we think it is reasonably certain that the parties intended it as a grant of the "homestead place," both in Exeter and in Garland. We do not mean to say that it is absolutely certain. The omission of the word "Garland" in conjunction with the word Exeter in the first descriptive clause is not, of itself, without considerable significance. If not supplied by later description or reference, the omission would be fatal. But on the other hand, the expression "my homestead place," without words of limitation, has much significance. The grantor does not say "being a part of my homestead place," nor "being that part of my homestead place that lies in said Exeter." Some such expression we think would naturally be expected if a man were dividing up his "homestead place" and conveying part of it. The expression "homestead place," unqualified, means, of course, the entire homestead place. But besides saying that the land granted was his "homestead place," without designation of locality, the grantor adds to this description the words

"and the same real estate described in a mortgage," etc., "to which mortgage reference may be had for a full and particular description." The use of the phrase "certain real estate situated in the town of Exeter" had not located the land on the face of the earth. Nor had the expression "my homestead place," of itself, located it in any town. Then the grantor added the reference "for a full and particular description." It may be that the words "my homestead place," or the reference, either, alone, ought not to overcome the limitation in the first phrase to "real estate in Exeter." But the use of both combined lends so much weight to the claim that the intention was to convey the entire homestead, that we think it should be regarded as decisive.

The cases relied upon by the plaintiff are not inconsistent with this conclusion. Indeed, they all are good illustrations of the rule of expressed intention. In *Peasley* v. *Drisko*, 100 Maine, 17, the grant was of "a lot of meadow land, the same deeded to me by John Burns, meaning and intending to convey all my right in fresh meadow lands." The deed of Burns referred to included both upland and meadow. This was a case of a general description followed, by reference, by a more particular one. The plaintiff invoked the rule that when a general description is followed by a specific one, the latter controls. The court said:—"The reference to another deed does not necessarily make the boundaries named in that deed the boundaries of the lot named in the first deed. The language may show that the reference was only to state the source of title, or to identify the lot, and not for statement of boundaries. Again, the rule invoked is limited to the evident subject matter of the conveyance." And the court concluded, considering all the language of the deed, that the subject matter of the conveyance in that case was meadow land only, and that the reference to the Burns deed was not to fix boundaries, but to identify the land.

In *Brunswick Savings Inst.* v. *Crossman*, 76 Maine, 577, the Court said that a general reference to a prior deed, whether as indicating the source of title, or as a matter of description, did not necessarily control a prior specific description by metes and bounds, much less, enlarge it. We say so now. But that is not this case.

The case of *King* v. *Little*, 1 Cush., 436, is in some aspects more like the case at bar. In that case a grantor conveyed all his interest in a tract of land in Great Barrington, "being the same that was

devised" etc. The devise included lands in both Great Barrington and Sheffield. This was a case of one general description followed by another, even more general, so far as any expression in the deed was concerned. Under these conditions the court said: "We do not feel authorized to give effect to the conveyance as a deed of lands in Sheffield.

In *Lovejoy* v. *Lovett,* 124 Mass., 270, also cited by the plaintiff, the grant was by metes and bounds, "being the same premises conveyed" etc. The deed referred to included more land than that described in the grant. The court said that the reference was entitled to some weight, but that it was not enough to overcome the inferences to be drawn from the other parts of the deed. And it was held that the particular description showed with reasonable certainty that only the smaller area was intended to be conveyed, and that the reference to the prior deed was made for the purpose of showing the chain of title, and not for fixing the metes and bounds.

Accordingly the certificate must be,

Judgment for the defendant.

ANNIE S. HATCH *vs.* CHESTER F. DUTCH, Admr.

York. Opinion June 30, 1915.

Administration. Appeal. Claim. Contract. Gratuitous Services. Implied Promise. Insolvency. Presentation of Claim. Probate Court.

1. It was incumbent upon the plaintiff in this case to satisfy the jury that the services sued for were rendered by her to her father under circumstances consistent with contract relations between them and that her father either expressly agreed to pay for the services, or that they were rendered by her in the expectation and belief, at the time, that they were to be paid for, and that the circumstances of the case and the conduct of her father justified such expectation, and that he so understood it, or that he had sufficient reason to believe that she expected to make him her debtor for the services.
2. That the application by the administrator for commissioners to be appointed to determine the claim is an admission or waiver of the presentation of the claim to him in writing as required by statute.
3. When valuable services are rendered by one person at the request, or with the knowledge and consent of the other, under circumstances not inconsistent with the relation of debtor and creditor between the parties, a promise to pay is ordinarily said to be implied between the parties.
4. A promise to pay is ordinarily said to be implied by law on the part of him who knowingly receives the benefit of the services.
5. If in a particular instance there is evidence arising from the situation, conduct, or family relation of the parties tending to show that the service was rendered without expectation of pecuniary payment, it cannot be said as a matter of law that a contract is implied on the part of him to whom the service is rendered to pay for it.
6. When the relations of the parties are such as to warrant the inference that the services were rendered gratuitously, by way of hospitality, or by reason of any obligation, legal or moral, it becomes a question of fact for the jury to determine whether it was in reality gratuitous or rendered upon the basis of contract.

On motion for new trial by the defendant. Motion overruled.

An action of assumpsit upon an account annexed to recover for services rendered by plaintiff to her father in his house from April 6, 1904 to July 29, 1908, amounting to $1507.13, to which is added

interest amounting to $467.20. Plea—General issue, with brief statement alleging that plaintiff did not present her claim to the administrator of said estate, nor file same in Probate Court. The jury rendered a verdict for plaintiff for $529.39, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

Robert B. Seidel, for plaintiff.

E. P. Spinney, for defendant.

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

KING, J. The plaintiff recovered a verdict of $529.39 against the estate of her father, Lincoln Hatch, for services rendered by her in his home from April 6, 1904 to July 29, 1908, and the case comes to this Court on the defendant's motion to have the verdict set aside as against the evidence.

The case shows that in April, 1904, Lincoln Hatch with his wife was living on his small farm in Wells, Maine. He was a carpenter by trade and worked chiefly at that occupation, nevertheless, he did some farming on his place, and kept a horse, three or four cows, and some hens. His six children, consisting of two daughters, Etta and Annie, and four sons, were grown up. Etta was then married and lived in Attleboro, Massachusetts, and Annie, the plaintiff, then 22 years of age, was also in Attleboro employed in a jewelry factory. Mrs. Hatch, the wife and mother, was sick of consumption from which she died January 5, 1905.

The plaintiff introduced evidence tending to show that on April 6, 1904, she left Attleboro and came to her father's home in Wells to do the housework and care for and nurse her mother, which she did until her mother's death on January 5 following; that thereafter she continued to live with her father in his house as his only housekeeper until July 29, 1908, when on account of illness she went to her sister's home in Attleboro; that during the time she so lived at her father's home she did the housework and such other labor as the only woman in such a home customarily does, including such chores about the place as were necessary to be done by her in her father's absences from home while working at his trade.

Her father died intestate January 10, 1910, and administration on his estate was granted to George S. Hatch July 19, 1910. An inven-

tory of the estate was accepted and filed May 2, 1911, showing real estate valued at $1600, but no personal property. December 19, 1911, upon the application of the administrator alleging that Annie S. Hatch had presented to him a claim against the estate which he deemed "exhorbitant, unjust or illegal," commissioners were appointed by the Probate Court under the statute to determine, what amount, if any, should be allowed on said claim. On January 16, 1912, the commissioners made their report allowing (including interest) $1620.77, which report was ordered accepted and recorded.

September 13, 1912, two of the sons of Lincoln Hatch petitioned the Probate Court to have its decree accepting the report of the commissioners annulled and reversed on the alleged grounds, that the claimant had neither presented her claim to the administrator in writing nor filed it in the Probate Court, supported by affidavit as required by the statute, and that the claim had been allowed by connivance and fraud between the administrator and the claimant, and without notice to the other heirs. Thereupon, after notice and hearing, the Probate Court revoked its previous order accepting the report, and ordered a new commission issued to the same persons "for a full hearing of the parties interested in said claim and in said estate, in order that said petitioners and all others interested in said estate may be given the opportunity to be heard before said commissioners." Such new commission was issued and on September 2, 1913, the commissioners made their report allowing on said claim (including interest) $1885.57. which report was ordered accepted and recorded. From that decision of the commissioners an appeal was taken by the administrator de bonis non of said estate, and this action was commenced by the claimant November 4, 1913.

1. At the trial it was claimed as a defense to the action that the plaintiff did not present her claim to the administrator in writing, or file it in the Probate Court, supported by affidavit as required by statute, before the administrator applied for the appointment of commissioners to determine the validity of her claim. But this Court held in *Whittier* v. *Woodward*, 71 Maine, 161, that the application of the administrator for the appointment of commissioners to determine the validity of a claim against the estate is an admission or waiver of the presentation of the claim to him. Moreover, in the case at bar, there was evidence sufficient to justify the jury in finding that the plaintiff did in fact so present her claim to the administrator. She so

testified, and produced in evidence what she identified as a copy of her claim in writing, subscribed and sworn to by her on May first 1911, and she testified that immediately thereafter she gave the original of that copy to the administrator.

2. It is beyond doubt that the evidence fully justified the jury in finding that the plaintiff served her father as his only housekeeper for a period of more than four years, and that her labor in that service was of substantial value to him, for which she received no material pecuniary compensation.

When valuable services are rendered by one person at the request, or with the knowledge and consent of the other, under circumstances not inconsistent with the relation of debtor and creditor between the parties, a promise to pay is ordinarily said to be implied by law on the part of him who knowingly receives the benefit of the services. But if in a particular instance there is evidence arising from the situation, conduct or family relation of the parties tending to show that the service was rendered without expectation of pecuniary payment, it cannot be said as a matter of law that a contract is implied on the part of him to whom the service is rendered to pay for it. And when the relations of the parties are such as to warrant the inference that the service was rendered gratuitously, by way of hospitality, or by reason of any obligation, legal or moral, it becomes a question of fact for the jury to determine whether it was in reality gratuitous or rendered upon the basis of contract. *Saunders* v. *Saunders*, 90 Maine, 284, and cases cited.

It was incumbent upon the plaintiff in this case to satisfy the jury that the services sued for were rendered by her to her father under circumstances consistent with contract relations between them, and that her father either expressly agreed to pay for the services, or that they were rendered by her in the expectation and belief at the time that they were to be paid for, and that the circumstances of the case and the conduct of her father justified such expectation, and that he so understood it, or that he had sufficient reason to believe that she expected to make him her debtor for the services. That was the real issue involved in the trial. And in the absence of any exceptions to the charge of the presiding Justice it is to be assumed that full and adequate instructions were given the jury to enable them to understand that issue and to appreciate the kind and degree of proof required to establish the plaintiff's claim against her father's estate.

Upon that issue the jury found in the plaintiff's favor, and their finding should not be set aside unless it is so clearly wrong as to compel the conclusion that it was the result of prejudice or bias, or a failure to comprehend the facts and the legitimate inferences to be drawn therefrom.

The plaintiff was a witness in her own behalf, without objection, to matters relating to her claim happening before her father's death. She testified that she left Attleboro and went to her father's home in April, 1904, in response to his request contained in a letter from him to her, which had been destroyed, in which he asked her to come home and care for her mother and do the work, and "that I should be paid for it if I came down." Her sister Etta testified that she saw the letter and that the father therein requested the plaintiff to come home and take care of her mother. Etta also testified, that on the 4th of July of the year the plaintiff went home, when the witness was visiting her parents, her father in conversation with her about Annie said "that she should have her pay for coming home and taking care of them." That in another conversation with her father, around Christmas time of the same year, "He said she should have her pay for it." John W. Shuler, husband of Etta, testified that in July, 1904, when he was at the Hatch homestead on his vacation, Mr. Hatch in a conversation with him said, "that Annie should be well paid for her work and all her duties down there and that he couldn't afford to hire anybody else outside of her, and the way she went down there and undertook to do it all, and he told me distinctly himself that she should be well paid for it." He testified that Mr. Hatch said substantially the same to him "The second year after that, I believe, during the 4th of July week."

On the other hand, it was contended in behalf of the defendant, that the plaintiff returned to her father's home in 1904 at her own suggestion and for her own benefit, and that she remained there with no expectation that she was to receive any other compensation than that of having the benefit of a home with her father and such money as he might give her from time to time or allow her to retain from the proceeds of the small farm. And in support of that contention there was testimony to the effect that the plaintiff stated at her brother's home in Lynn, when she was on the way home in 1904, that "she was sort of run down and that her work was slack and she thought she would take a trip home to recruit up," and that after

she came home she made similar statements to her brother. She denied the making of such statements. There was also testimony in behalf of the defendant that the plaintiff's father gave her small sums of money, and that she had more or less of the "egg money."

The plaintiff left her father's home a year and a half before his death and she admits that she never asked him for money "for myself." And there was evidence on the part of the defendant that immediately after the father's death a conference between all the heirs was had in which it was agreed that two of the brothers should sell and dispose of "all the hay, apples, potatoes, vinegar, hens, horse, cows belonging to the personal estate of said Lincoln Hatch" and with the proceeds thereof pay the expenses of his "last sickness and burial." And an agreement to that effect was introduced in evidence signed by the other four heirs, including the plaintiff.

There was also testimony in behalf of the defendant to the effect, that at that conference the plaintiff joined with the other heirs in the understanding that no administration on the father's estate was necessary, that his real estate would be divided equally among the heirs, and that she did not then intimate that she had any personal claim against the estate. And it was strongly urged at the trial that such conduct on her part indicates clearly that at that time she did not consider that she was a creditor of her father's estate for the services sued for. Such would undoubtedly be a fair inference from such conduct. But we find a sharp conflict in the testimony as to what the plaintiff did and said at that time. She admitted that, after her father's funeral, the paper authorizing the immediate sale of the personal property therein specified was sent to her in Massachusetts and signed by her, but she denied that she took any such part in the alleged conference as would indicate that she did not then have in mind her claim for services against the estate. Concerning the conference, and the written agreement which she signed, she testified on cross examination:

Q. You never authorized it? A. Can I say a word?

Q. Just answer my question. That doesn't answer all the questions you have asked me. Q. Was there some talk about that?

A. Among the rest of them. Q. You knew about it? A. They wouldn't let me say anything. Q. You didn't make any claim at that time before one of them that you had a claim against the estate did you? A. I said something was coming to me. Q. You said something was coming to you? A. Yes, sir.

The testimony of her brother-in-law tends to corroborate her contention that she took no material part in the talk as to an equal division of the estate among the heirs. On the other hand three of her brothers testified that she took part in the conference and made no suggestion that she expected compensation for services rendered her father. And there was other evidence which the defendant claimed tended to disprove her testimony on this point.

It is thus seen, that there was a sharp conflict between the testimony of the plaintiff and her witnesses, and that presented in behalf of the defendant. The jury, evidently, was more impressed by the former. The credibility of witnesses and the weight to be given to their testimony is peculiarly within the province of the jury; and although, if we were sitting as jurors, we might reach a different conclusion from that of the jury, yet we should not set their finding aside unless manifest error is shown, or it appears that the verdict was the result of bias or prejudice. The amount of the verdict does not indicate such bias or prejudice, for it is less than one-third of the smallest amount reported by the commissioners.

From a painstaking examination and consideration of all the evidence in the case we are not persuaded to the conviction that the verdict is so clearly wrong as to require the court to set it aside,

Motion overruled.

WILLIAM R. PATTANGALL *vs.* JOHN A. MOOERS.

Kennebec. Opinion July 6, 1915.

Candidates for Office. Criticism. Defamatory Language. False Statements. Good Faith. Justification. Malice. Privileged Statements. Public Men. Reputation as an Attorney at Law. Rumors. Slander.

1. If slanderous words, whether written or oral, directly tend to the prejudice or injury of one in his profession, trade or business, they are actionable.
2. When the defamatory words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of the business great confidence must necessarily be reposed, they are actionable, although not applied directly by the speaker to the profession or occupation of the plaintiff.
3. It is the law that when a person becomes a candidate for a public office, his qualifications and fitness for that office may be freely and fully discussed, commented on and criticised by any member of the community having an interest in the matter.
4. The conduct and actions of such candidate may be canvassed, discussed and boldly criticised. Even his faults and vices, in so far as they necessarily affect his fitness for the office, may be investigated and commented on.
5. His private character, however, is only put in issue so far as his qualifications and fitness for the office may be affected by it. He does not, by becoming a candidate for office, surrender his private character to false accusations. It would not serve the public good to have falsehoods concerning him disseminated among the people.
6. Such comment and criticism may be harsh, severe and unnecessarily acrimonious, but so long as it is made in good faith, without express malice, it is privileged in law, and therefore not actionable.
7. The law tolerates such comment and criticism of public men and candidates for public office upon the theory that it is for the public good to do so, to the end that the people may learn the truth as to the qualifications and fitness of candidates for office, and become informed of the manner those in office are discharging the duties of the office, thereby being better qualified to intelligently exercise the elective franchise.
8. The law does not justify, under the guise of qualified privilege, a false, defamatory statement of specific acts of misconduct concerning a candidate for office. While the publication of the truth respecting him may be justified, the publication of defamatory falsehoods will not be.

On exceptions by the defendant. Exceptions overruled.

This is an action on the case to recover for slander for certain oral statements by the defendant, of and concerning the plaintiff, intending thereby to injure him in his reputation and good name as an attorney at law. The defendant plead the general issue, and in addition thereto filed a brief statement in which he says, that whatever words may have been spoken of the plaintiff by defendant were not spoken of the plaintiff concerning his business or profession as an attorney at law.

The jury rendered a verdict for plaintiff for $279.25, and the defendant excepted to the exclusion of certain testimony offered by him, to the refusal of the court to give certain instructions to the jury and to certain portions of the charge to the jury, all of which are fully considered in the opinion.

The case is stated in the opinion.

George W. Heselton, and Pattangall & Plumstead, for plaintiff.

Fred E. Lawrence, for defendant.

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

KING, J. This is an action for slander for certain oral statements by the defendant, alleged to be false and defamatory, and to have been made maliciously concerning the plaintiff, with intent to injure him in his good name and reputation as an attorney at law, and likely to so injure him. The alleged slanderous statements were made on the 12th day of August 1913 at Skowhegan, Maine, first to one Fisher, and afterwards on the same day repeated to one Adams. At that time the plaintiff was one of three candidates, nominees of three political parties, for the office of Representative to Congress from the Third Maine Congressional District, the election to which office was to be held about a month later. The defendant and both Fisher and Adams were electors in that District. Mr. Fisher's version of what the defendant said to him concerning the plaintiff is this: "Why, he went on to tell me about the bill that the labor unions was trying to get passed through the Legislature so if they got injured in any corporation or firm, was the way I understood it, that they should have compensation, if they got hurt in any way, and they went to Mr. Pattangall and asked him what he would put the bill

through for and he said $500. And then the corporations goes to Mr. Pattangall and asked him what he would defeat it for and he said $500. So he gets $1000 and defeats the bill."

Mr. Adams' version of the defendant's statement to him is substantially the same as that of Fisher, except that he adds that the defendant said, "and that is your Mr. Pattangall." And the defendant testified: "I told Mr. Fisher that, as I understood it, there was a bill, one of the worthiest bills, as I said to him, that was before the last Legislature. And I explained to him somewhat the nature of the bill, and I said to him that as I heard it Mr. Pattangall was engaged upon one side or the other, and that later he took a retainer from the opposite side, whatever it was I didn't know, and received money from both sides, and I told him that was just how I heard it."

His version of what he later said to Mr. Adams is: "I repeated to him, as near as I could tell you now, the exact words, substantially the words that I told Mr. Fisher. Mr. Adams said to me, 'John, you wouldn't say that about Mr. Pattangall if it was not so?' or something to that effect. I said, 'I hope you don't think I am that kind of a man.' I think that is all there was said that I remember."

It appears from the foregoing testimony that there was no material controversy as to that part of the defendant's statement which is claimed to be defamatory of the plaintiff. He admits saying that the plaintiff, having accepted money for his services and influence in securing the passage through the Legislature of the Workmen's Compensation Act, also accepted a retainer from the opponents of the Act. There appears to be some difference between the testimony of the plaintiff's witnesses and that of the defendant as to whether he made the defamatory statement concerning the plaintiff as a fact of his own knowledge, or as a rumor that he had heard. He claimed the latter. But on cross-examination, Mr. Fisher was asked, "You understood that he told it to you as something he knew personally?" And he answered, "yes sir, he didn't explain anything about anybody to me." Mr. Adams' testimony on that point was to the same effect. And the defendant does not claim that at the time he made the statement complained of he gave the name of his informant of the rumor, if such it was. The plaintiff recovered a verdict of $279.25, and the case comes up on defendant's exceptions to the exclusion of certain testimony, to the refusal of certain instructions, and to the giving of certain other instructions.

No attempt was made to justify the defendant's statement concerning the plaintiff by proving its truth, and accordingly it must be regarded as false. If it was but the repetition of something he had heard about the plaintiff, he did not give the name of his informant; but the evidence was sufficient to justify the jury in finding that the defendant made the statement as a fact within his own knowledge, and not as a rumor. What was the statement? How was it to be interpreted as applied to the plaintiff? The evidence shows that the plaintiff had been a qualified attorney at law for about twenty years, commanding an extensive practice throughout the State. He had frequently been employed professionally to appear before committees of the Legislature to present and advocate, or to oppose, proposed legislation. He had served as Attorney General for the State, had been a member of the Legislature during four of its sessions, and had been mayor of the City of Waterville for three terms, ending in March, 1914. Defamatory language is to be interpreted as it would naturally be understood by the hearers of it, taking into consideration accompanying explanations and the surrounding circumstances known to the hearers. It cannot be reasonably questioned that Fisher and Adams, to whom the defendant made the slanderous statement complained of, understood from it that the plaintiff had been employed and paid as an attorney for the labor unions to advocate the enactment of the Workmen's Compensation Act, and that he was guilty of most culpable dishonesty towards his employers, and had basely betrayed their trust and confidence in him by accepting a retainer from the opponents of the Act and using his influence to defeat it. If slanderous words, whether written or oral, directly tend to the prejudice or injury of one in his profession, trade or business they are actionable. And when the defamatory words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of the business great confidence must necessarily be reposed, they are actionable, although not applied directly by the speaker to the profession or occupation of the plaintiff. 25 Cyc., 328. The slanderous statement complained of directly tended to injure the plaintiff in respect to his profession and occupation. If believed it could have no other effect than to destroy all trust and confidence in him as an attorney. We

entertain no doubt, therefore, that the defendant's false statement concerning the plaintiff was actionable per se, independent of the question of privilege.

But the defendant claimed and undertook to maintain at the trial that his statement to Fisher and Adams concerning the plaintiff was within the qualified privilege accorded to voters in discussing the qualifications and fitness of a candidate for an elective public office. Therein is involved the important and fundamental question raised by the exceptions.

It is the law everywhere that when a person becomes a candidate for a public office his qualifications and fitness for that office may be freely and fully discussed, commented on and criticised by any member of the community having an interest in the matter. Such comment and criticism may be harsh, severe and unnecessarily acrimonious, but so long as it is made in good faith, without express malice, it is privileged in law, and therefore not actionable. The law tolerates such comment and criticism of public men and candidates for public office upon the theory that it is for the public good to do so, to the end that the people may learn the truth as to the qualifications and fitness of candidates for office, and become informed of the manner those in office are discharging the duties of the office, thereby being better qualified to intelligently exercise the elective franchise.

But the authorities are not in accord on the question, whether this privilege to make fair comment and criticism of public men and candidates for public office includes the right to make false defamatory statements concerning them.

One view or rule is to the effect that while fair comment and criticism respecting the qualifications and fitness of candidates for office may be privileged, false defamatory statements of fact concerning them are not within the privilege. This limited rule may be more fully expressed as follows: One who becomes a candidate for election to an office in the gift of the people thereby puts in issue before them his abilities, qualifications and fitness for that office. And any voter or other person having an interest in that election may fully and freely comment on and criticise his talents and qualifications, mentally and physically, for the office he seeks. The conduct and actions of such candidate may be canvassed, discussed and boldly criticised. Even his faults and vices, in so far as they necessarily affect his fitness for the office, may be investigated and commented on. His private

character, however, is only put in issue so far as his qualifications and fitness for the office may be affected by it. He does not by becoming a candidate for office surrender his private character to false accusation. The public have an interest to know the truth respecting the qualifications and fitness of a candidate for office. But it would not serve the public good to have falsehoods concerning him disseminated among the people. And, therefore, the law does not justify, under the guise of qualified privilege, a false defamatory statement of specific acts of misconduct concerning a candidate for office. While the publication of the truth respecting him may be justified, the publication of defamatory falsehoods will not be. More than a century ago Parson, C. J., in *Com.* v. *Clap*, 4 Mass., 163, 169, said that, "the publication of falsehood and calumny against public officers, or candidates for public office, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be the loss of their liberties." In Newell on Slander and Libel, page 568, the author says: "It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. To state matters that are libelous is not comment or criticism." Speaking on this subject, Mr. Cooley says: "A candidate for public office does not surrender his private character to the public, and he has the same remedy for defamation as before; and the publication of false and defamatory statements concerning him, whether relating to his private character or public acts, is not privileged."

This limited rule, which excludes from the doctrine of qualified privilege false defamatory statements concerning candidates for public office, is supported by the great weight of authority. See 25 Cyc., 403. We also call particular attention to a note to *Black* v. *State Co.*, reported in Ann. Cas. 1914C., page 997, where numerous cases are cited in many jurisdictions supporting the limited rule. The following are but a few of those citations, but they show how extensively this rule is recognized. *Post Pub. Co.* v. *Hallam*, 59 Fed., 530, 16 U. S., App. 613; *Dauphiny* v. *Buhne*, 153 Cal., 757, 96 Pac., 880; *Star Pub. Co.* v. *Donahue*, (Del.) 58 Atl., 513; *Jones* v. *Townsend's Adm'x*, 21 Fla., 431, 58 Am. Rep., 676; *Rearick* v. *Wilcox*, 81 Ill., 77; *Burt* v. *Advertiser Newspaper Co.*, 154 Mass., 238; *Hubbard* v.

Allyn, 200 Mass., 167; *Com.* v. *Pratt*, 208 Mass., 553; *Belknap* v. *Ball*, 83 Mich., 538, 47 N. W., 674, 11 L. R. A. 72; *Smith* v. *Burns*, 106 Mo., 94, 13 L. R. A., 59; *Hamilton* v. *Eno*, 81 N. Y., 116; *Post Pub. Co.* v. *Maloney*, 50 Ohio St., 71, 33 N. E., 921; *Upton* v. *Hume*, 24 Ore., 420, 33 Pac., 810; *Tiepke* v. *Times Pub. Co.*, 20 R. I., 200; *Brewer* v. *Weakley*, (Tenn.) 2 Overt. 99; *Nichols* v. *Daily Report Co.*, 30 Utah, 74, 83 Pac. 573; *Williams Printing Co.* v. *Saunders*, 113 Va., 156, 73 S. E., 472; *Sweeney* v. *Baker*, 13 W. Va., 158, 31 Am. Rep., 557; *Ingalls* v. *Morrissey*, 154 Wis., 632, 143 N. W., 681.

The other and more liberal view, which has the sanction of considerable authority, holds that a charge made against a candidate for public office is privileged regardless of the fact that the charge is a false statement of fact, provided the person making it acts in good faith, without malice, believing the charge to be true with reasonable and probable ground for such belief. Authorities supporting this rule will also be found cited in 25 Cyc., 403, and in the note to *Black* v. *State Co.*, supra.

It is claimed in behalf of the defendant that the more liberal rule should have been applied to his statement concerning the plaintiff complained of in this case. That although the statement was false and defamatory yet if he made it in good faith, without express malice toward the plaintiff, in an honest belief in its truth, to persons interested in the subject matter of the statement, it was privileged. He contends that there are decisions of this court sustaining his position. We do not think so. In *Bearce* v. *Bass*, 88 Maine, 521, the comment and criticism complained of referred solely to the character of the plaintiffs' work and materials used in constructing a public building. The court there held the language complained of to be well within the general rule of privilege, being only a fair and reasonable criticism upon the work which entered into the construction of a public building, and constituting no attack upon the character of the plaintiffs either as individuals or in their business as contractors. It is true that the court there in commenting on the doctrine of privilege said: "In regard to matters of public interest, all that is necessary to render the words privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds. In such cases, the occasion rebuts the inference

of malice, which the law would otherwise draw from unauthorized communications, and affords a qualified defense depending upon the absence of malice. If fairly warranted by any such occasion or exigency as we have named, and honestly made, upon reasonable grounds, such communications are protected for the common protection and welfare of society." We do not think that statement of the rule of qualified privilege was intended by the learned Justice who wrote that opinion to be interpreted so as to include, as privileged communications, false charges against a candidate for office of crimes, or of specific acts of dishonesty in his business or profession, or false accusations affecting his private character, even where the other elements of privilege are shown. If such is the necessary interpretation of the language there used, then we think it should be modified somewhat. But in that case the only question before the court was whether certain criticism of the work and materials that entered into the construction of a public building was privileged as fair comment. That case is in no sense comparable to the case at bar. There the language complained of was but the opinion of the writer as to the quality of the plaintiffs' work and materials. Here the words spoken constitute an unqualified charge against the plaintiff of specific dishonesty in his profession, and it had a direct tendency also to injure him in his private character.

Of the other decisions of this court to which our attention has been called by defendant we need not here make special comment. It is true that in some of them there are general expressions of much the same import as that above quoted from *Bearce* v. *Bass*. We do not here decide that in no instance may the publication of a false statement concerning a candidate for office be justified under the doctrine of qualified privilege, which would otherwise be actionable. We are not now called upon to determine whether the doctrine of qualified privilege may not be a good defense in an action for oral slander, of a candidate for an elective office, if the spoken words, though false and actionable per se, were but the repetition in good faith of what had been uttered by some other person whose name was given at the time, the other essential elements of privilege being shown. That is not this case. But we are constrained to the conclusion that the law does not justify any one in publishing a false charge of specific acts of culpable dishonesty against a candidate for office which directly tends to injure him in his profession and occupa-

tion, or to defame his reputation for honesty and integrity. That conclusion accords with reason and the great weight of judicial precedent. Its application will promote the public welfare by restricting the spread of falsehood and calumny, always too readily believed, and protecting the reputation and character of individuals from being unjustifiably and wantonly assailed. The law not only protects the person and property of the citizen, but vigorously guards as equally sacred his personal reputation and character. And we hold that the defendant's statement concerning the plaintiff, complained of in this action, being a false and specific charge of dishonesty towards those who had employed him, and which charge necessarily tended to injure his reputation for integrity in his profession, was not within the doctrine of qualified privilege. It was an unauthorized defamatory statement, and the law implies that it was maliciously made and therefore actionable.

The conclusion we have reached renders it unnecessary perhaps to discuss in detail the specific exceptions, for they all chiefly rest upon the defendant's proposition that the alleged slanderous statement was privileged.

1. On cross examination the plaintiff was asked, if during the primary campaign of 1913 he had occasion to remonstrate against a certain editorial in the Independent Reporter at Skowhegan, and he replied that he did for the reason that he conceived it to be an unjust attack upon him. He was then asked the nature of that editorial and was not permitted to answer.

The object of the inquiry, as stated by counsel for defendant, was to show that the editorial was a reflection upon the personal reputation of the plaintiff and to rebut malice upon the part of defendant. It was competent for the defendant to introduce evidence, in mitigation of damages, that the plaintiff's general reputation as a man of moral worth was bad, and also that his general reputation was bad with respect to that feature of character covered by the defamation in question. *Sickra* v. *Small*, 87 Maine, 493. But the rule is too well established to admit of doubt that the general reputation of a person is to be proved by the oaths of witnesses who know what that general reputation is, and not by evidence of specific accusations of misconduct against the person, or of general rumors of ill-repute concerning him. *Powers* v. *Cary*, 64 Maine, 9, 16; *Peterson* v. *Morgan*, 116

Mass., 350; Wigmore on Ev., V. 1, Sec. 74. Whatever may have been the nature of the editorial it was clearly incompetent as evidence on the question of the plaintiff's general reputation. Nor was it admissible to rebut malice.

2. There was no error in the rulings, which are made the subject of exceptions III, IV, and V, excluding inquiries as to specific rumors or reports respecting the plaintiff similar to the slanderous statements complained of. The object of the inquiries was to rebut malice, but the presumption of malice arising from the publication of a false defamatory charge is not rebutted by proof that the publisher had reason to believe the charge was true. Accordingly evidence of similar rumors or reports respecting the plaintiff were inadmissible. It was so expressly held in *Powers* v. *Cary*, 64 Maine, 9, 16.

3. That portion of the charge, which is made the subject of exception VI, was in substance and effect an instruction to the jury that if they found that the defendant's statement concerning the plaintiff was properly understood by those to whom it was made as applying to the plaintiff in his profession and business, then, if it was false, it was actionable per se, because the law implies that there was malice on the part of the defendant in making it. And that is the equivalent of an instruction that it was not a privileged communication, the same conclusion that we have hereinbefore expressed.

4. Exception was taken to the following instruction: "Every man has a right to honestly and truthfully comment, rehearse and recite, privately and publicly, the truth about any man or person. Public interest demands that public affairs should be freely commented upon, and that the qualifications of candidates for office should be fairly, openly and honestly discussed, immunity should be and is granted to comments and discussions of this nature. But this immunity does not extend, either in reason or by law, to protect false statements maliciously made, untruthful accusations wilfully uttered, for the purpose of character injury, or false charges of dishonesty in a man's profession or business, or made with a total and reckless indifference as to its truth or falsity, with a desire and a design to injure him."

The defendant has no reasonable ground for his exception to that instruction. It was as favorable to the defense, we think, as the law would allow.

5. The defendant complains that three of his requested instructions were not given as requested. We will here consider all his requests and the rulings thereon in the order as presented and disposed of at the trial.

No. 1. "It is for the jury to say whether the words spoken by the defendant were spoken of and concerning his profession as an attorney at law." As to this the court said: "I think I have covered that point. You are to construe the words spoken at that time as those two witnesses had a right to construe them, taking their every-day, common meaning, and what was the meaning conveyed to their minds and what meaning do the words convey to your mind." This of course, was not excepted to, but we refer to it here because it is important to be considered in connection with the rulings on the other requests. There can be no doubt that the jury understood from this request of the defendant, and the instruction given thereunder, that it was an important question in the case for them to decide, whether the words spoken by the defendant were spoken of and concerning the plaintiff in his profession as an attorney at law.

No. 2. "It is not sufficient to establish the foregoing contention that the effect of the words spoken would be to injure a professional reputation; it must also appear that the words were spoken with direct reference to the profession." This request was properly refused. Defamatory words may be such and so spoken that they naturally convey to the hearers a meaning applicable to the profession of the person of whom they are spoken, although no such reference thereto is directly made by the speaker. And we have already pointed out that when defamatory words directly tend to injure the profession or occupation of him of whom they are spoken they are actionable although not directly applied by the speaker to the profession or occupation of the plaintiff.

No. 3. "The fact that the plaintiff was a candidate for Congress renders the communication, if made with reference to such candidacy, qualifiedly privileged; and the plaintiff can only recover by showing actual malice." No. 4. "The plaintiff can not recover if the defendant spoke the words in question in good faith, with reference to the plaintiff's said candidacy, in an honest belief of their truth based upon reasonable and probable cause." We have quoted these two requests together because they convey substantially the same idea. As to the last one quoted the court said: "And you have heard the testimony,

and the arguments of counsel upon that request. It is for you to say, gentlemen, under the instructions I have given you, how those words and for what purpose they were spoken." This statement of the court again emphasized to the jury that the vital question in the case was, whether the words as spoken naturally conveyed to the hearers thereof the meaning that they were spoken concerning the plaintiff in respect to his profession, and that the determination of that question was solely for the jury to decide. And we think the jury must have clearly understood that if they did not find that the words were spoken of the plaintiff in respect to his professional conduct, then he could not recover. Accordingly we are of opinion that there was no reversible error in the refusal of those requests in view of the other instructions already given and the added qualification and explanation made in connection with the refusal.

No. 5. "Actual malice implies a desire and intention to injure." This was given. "And a mere desire to defeat a man's candidacy for public office is not a desire and intention to injure him within the rule stated." As to this the court said: "I cannot give you the last part of that instruction as requested. As I said before, if you find that there was actual malice, and that those words were spoken of him and were an injury to him in his business, then the plaintiff may recover." Earlier in the charge the court instructed the jury as to actual malice, and pointed out to them that it was evidenced by the acts or words of the party chargeable with malice, and he particularly called their attention to the respective contentions of the parties as to the evidence in the case bearing on the issue of actual malice of the defendant in speaking the slanderous words. We think there was no error in the ruling as to this requested instruction.

6. That instruction which is made the subject of exception XII was entirely in harmony with the law applicable to this case as we have hereinabove stated it.

Finding no reversible error in any of the rulings complained of, the entry will be,

Exceptions overruled.

O. P. MERRILL *vs.* JOSEPH E. ODIORNE.

Kennebec. Opinion July 12, 1915.

Duty of Patient. Insurer. Medical Science. Negligence. Ordinary Care. Ordinary Skill. Physician's Responsibility.

An action against a surgeon for malpractice in the reduction and treatment of a fractured thigh bone.

Held:

1. The physician contracts with his patient that he has the ordinary skill of the members of his profession in like situation, that he will exercise ordinary or reasonable care and diligence in his treatment of the case and that he will use his best judgment in the application of his skill to the case.
2. The physician is not an insurer. He does not warrant favorable results. If he possesses ordinary skill, uses ordinary care, and applies his best judgment, he is not liable even for mistakes in judgment.
3. In cases of this nature, a duty devolves upon the patient. It is his duty to follow the reasonable instructions and submit to the reasonable treatment prescribed by his physician or surgeon.
4. If the patient fails in his duty and his negligence directly contributes to the injury, he cannot maintain an action for malpractice against the physician or surgeon, who may also be negligent in treating the case.

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

This is an action on the case against a physician for malpractice in setting and treating a fracture of plaintiff's thigh bone. Plea, the general issue. The jury rendered a verdict for plaintiff for $2000. Defendant filed general motion for a new trial.

The case is stated in the opinion.

George W. Heselton, E. H. Maxcy and E. L. Goodspeed, for plaintiff.

C. A. Knight and A. S. Littlefield, for defendant.

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

PHILBROOK, J. This is an action against a surgeon to recover damages resulting from alleged negligence on his part in the reduc-

tion and treatment of a fractured limb. The verdict was in favor of the plaintiff and the defendant asks that the verdict be set aside and a new trial granted.

"The measure of a physician's legal responsibility has been stated many times by this court. He contracts with his patient that he has the ordinary skill of members of his profession in like situation, that he will exercise ordinary or reasonable care and diligence in his treatment of the case, and that he will use his best judgment in the application of his skill to the case. The physician is not an insurer. He does not warrant favorable results. If he possesses ordinary skill, uses ordinary care, and applies his best judgment, he is not liable even for mistakes in judgment. Medical science is not yet, and probably never can be, in many respects, an exact, certain science." *Coombs* v. *King*, 107 Maine, 376.

But in cases of this nature a duty devolves upon the patient. In an extensive note to be found in the case of *Gillette* v. *Tucker*, 93 Am. St. Rep., at page 662, upon the authority of cases there cited, it is held that it is the duty of a patient to follow the reasonable instructions and submit to the reasonable treatment prescribed by his physician or surgeon. If he fails in his duty, and his negligence directly contributes to the injury, he cannot maintain an action for malpractice against his physician or surgeon, who is also negligent in treating the case.

In the absence of any exceptions to the instructions of the presiding Justice, we must assume that these principles of law were correctly stated to the jury. It is the opinion of the court, however, upon a careful examination of the evidence, that the jury did not give due consideration to that part of the testimony which related to the conduct of the plaintiff and its effect in producing the unfortunate results from which he now suffers. Hence the verdict was so erroneous as to demand an affirmative finding upon the motion of the defendant.

Motion sustained.
New trial granted.

JOSEPH E. POOLER *vs.* SARGENT LUMBER CO.

Penobscot. Opinion July 12, 1915.

Damages. Employee. Independent Contractor. Mutuality of Interest. Negligence. Servant. Volunteer.

An action to recover damages for injuries sustained by plaintiff while upon the premises of the defendant.

Held:

1. One may be an independent contractor, although not paid a round sum for his work, as when paid by the day, or the cost of the work, and a per cent.
2. If the owner of premises under his control employs an independent contractor to work upon them, which from its nature is likely to render the premises dangerous to persons who may come upon them by the owner's invitation, the owner, by reason of the contract, is not relieved from obligation of seeing that due care is used to protect such persons.
3. Mutuality of interest does not justify a consignee or his agent in his claim to absolute protection while going back of the point of delivery, along the line of transportation, or to the place of transportation, to intervene at the request of a consignor's servant or otherwise, without the consignor's knowledge and consent.
4. To open such an avenue of interference would tend to disturb the settled rules governing commercial and other contract relations, and would be manifestly against public policy and the dictates of reason and common sense.
5. In this instance the passage of cars to and from the mill, the means of transportation, and all the attendant dangers were well known to the plaintiff as well as to the defendant, and being well known to both, there is no rule of law holding the defendant liable under the facts found in this case.
6. The plaintiff can have no greater right than the servant who requested his assistance, and it is not claimed that his co-worker on the car can maintain an action against any person for his injuries.

On report. Judgment for defendant.

This is an action on the case to recover damages for injuries sustained by plaintiff, an employee of the Eastern Manufacturing Company, while upon the premises of defendant. Plea, the general issue.

At the conclusion of the evidence, the case was reported to the Law Court to determine the rights of the parties upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

Bartlett Brooks, for plaintiff.

Frank A. Floyd, and Edgar M. Simpson, for defendant.

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

HANSON, J. An action on the case to recover damages for injuries sustained by the plaintiff while upon the premises of the defendant, reported for the determination of this court.

The defendant is owner of a saw mill, dam and piling ground at South Brewer. There is a pond between the mill and piling ground. The dam extends from the mill to the piling place, and refuse from the mill is carried to the piling place on a tramway built across the dam. The plant of the Eastern Manufacturing Company is eight hundred feet west of the westerly end of the defendant's dam. The tramway over the dam extends to the mill of the Eastern Manufacturing Company.

The logs in process of manufacture at the time of the injury complained of, belonged to the Bangor Lumber Company, and the waste therefrom belonged to that company. By agreement of the three companies the waste was to be hauled in box cars by the defendant or its agents across the dam, where the cars were to be taken by the Eastern Manufacturing Company's men and hauled on the defendant's land and tracks to the Eastern Manufacturing Company's mill. The part of the mill where the cars in question were loaded is elevated several feet above the top of the dam. The custom pursued for many years was to start the car from the end of the mill and allow it to run down the grade under the control of an operator who controlled the car over the incline by the use of a brake and then set it free to run across the top of the dam to the point of delivery at the end of the dam.

The plaintiff was a servant of the Eastern Manufacturing Company and for nearly two months had hauled the cars from the end of the dam to its mill, and was so employed on the day of the injury.

When the plaintiff reached the dam at the time in question the cars were not ready, and he sat down to await their arrival. His

load would be made up of two cars, the first of which in reaching a point two rods from the westerly end of the dam, left the rails and stopped. What then occurred is shown by the record:—

Q. Mr. Pooler, coming to the morning of the accident, you were accustomed to wait for the cars to be brought across the dam?

A. Yes, sir.

Q. Were you waiting there on the morning of the accident?

A. Yes, I drove along and stood there, sat there, a few minutes.

Q. Whether or not you saw a car coming across the bridge or across the dam, the track?

A. Yes, sir.

Q. Who was in charge of the car?

A. Mr. Theal.

Q. How was he bringing the car across the track?

A. He was shoving the car across. He was on the back side shoving it over towards me.

Q. What happened to the car?

A. The car run as far as that switch and run off. I was settin' there, when he says: "Joe, come over and give us a lift;" and I says "Sure thing!" So I walked over and got hold of the car.

Q. You say that you agreed and took hold of the car with Mr. Theal?

A. Yes, sir. We were lifting the car up; took hold of the car so fashion (indicating) and lifted it up.

Q. Where did Mr. Theal stand?

A. On the left side of me, that corner (indicating). The car run off on the left side of the track. That brought me about in the middle, along there (indicating) a little mite more on the side, but inside the tracks. I got hold of this car so fashion (indicating) and pulled on that end. We started to lift and we thought we had the car on.

Q. You moved the car, did you, when you first lifted?

A. We lifted, but it didn't come on to the track. We thought we had it—I thought we did have it. I stood up so fashion (indicating) and I felt a kind of jar—the dam was just back of us—and I kind of whirled around, and when I did the car was right on me.

Mr. Theal, at whose request the plaintiff entered the defendant's premises to assist in replacing the car upon the track, was employed

and paid by one Davis, who for several years had removed the refuse from defendant's mill at a stipulated sum per day, and a like amount if the work was performed at night.

Much space has been devoted by counsel to a discussion of the status of Mr. Davis,—the plaintiff asserting that he was the servant of the defendant merely and that the defendant was in all respects liable to the plaintiff for the negligence of that servant as well as for its own negligence, while the defendant asserts that Mr. Davis was an independent contractor, and that if the plaintiff was injured through the negligence of Davis he alone was liable therefor.

But, the plaintiff says that if Mr. Davis was an independent contractor, the defendant is still liable because 1, the injury claimed resulted from the negligence of the defendant in maintaining the track, and cars, so used, and 2, that the injury was such as might have been anticipated by him, as the probable consequence of the work and he failed to take proper precaution to prevent it. Finally, that defendant having duties it could not delegate was therefore liable.

We think the record sufficiently established the claim that Davis was in fact an independent contractor, but we do not hold that such finding necessarily affects the plaintiff's rights in this case.

The fact that the owner of the premises on which work is to be done by an employee retains control thereof does not prevent the employee being an independent contractor. 26 Cyc., 1551.d. *Boomer* v. *Wilbur*, 176 Mass., 482.

One may be an independent contractor, although not to be paid a round sum for his work, as when paid by the day, or the cost of the work, and a per cent. 26 Cyc., 1551, and cases cited. In *Weilbacker* v. *J. W. Putts Co.*, Md. Court of Appeals, Apl. 1914. 91 Atlantic, 343, the owner of a building contracted with a painter to paint it, he to furnish the appliances and employ the labor therefor, the owner not retaining any supervision of the work or any control of the men. The contractor used a loose guy line which allowed the stage to slip and the contractor fell therefrom and struck the plaintiff as she was passing on the sidewalk below. *Held*, that the negligence was the negligence of an independent contractor for which the owner was not liable,—and further, the conditions were not such that the injury might have been anticipated by the owner as the probable consequence of the work if he failed to take the proper precaution to pre-

vent it, and hence the owner is not liable, although if the injury had been such that he should have anticipated it, he would have been liable.

We are in full accord with the rule invoked by the plaintiff that if the owner of premises under his control employs an independent contractor to do work upon them, which from its nature is likely to render the premises dangerous to persons who may come upon them by the owner's invitation, the owner, by reason of the contract, is not relieved from the obligation of seeing that due care is used to protect such persons. *Curtis* v. *Kilby et al.*, 153 Mass., 123, and cases cited. But in that case there was evidence that the premises on which the injury occurred were under the general control of the defendant. And the finding therein was based upon the fact that "the owner continued to hold out the invitation to enter, and was therefore bound to exercise due care in keeping the premises reasonably safe for use according to the invitation." See *Woodman* v. *Railroad*, 149 Mass., 149.

The plaintiff's counsel relies largely upon the claim of mutuality of interest between the plaintiff and defendant, and urges that the plaintiff had an interest in facilitating his own work and that of his master, in securing an earlier delivery of the refuse from the mill for which the master had contracted. But the evidence does not support the claim sufficiently to bring the case within the rule laid down in *Welch* v. *M. C. Railroad*, 86 Maine, 552, cited and relied upon by the plaintiff, or the cases cited therein in support of the conclusions in that case. In the cases therein cited there were no such circumstances as appear here. The case so far as the briefs of counsel throw any light, and we may add so far as a careful examination of the cases shows, is one of novel impression. The reports cited, state cases in each instance where the point of delivery of the goods of the consignee had been reached without untoward incident or accident, or cases where the consignee or consignor accompanied the articles transported, and from careful examination of the same we do not perceive that the conclusions therein are in conflict with our finding in the case at bar.

Mutuality of interest as recognized in *Welch* v. *M. C. R. R.*, supra, does not justify a consignee or his agent in his claim to absolute protection while going back of the point of delivery, along the line

of transportation, or to the place of transportation, to intervene at the request of a consignor's servant or otherwise without the consignor's knowledge and consent as in this case.

To open such an avenue of interference would tend to disturb the settled rules governing commercial and other contract relations, and, would be manifestly against public policy and the dictates of reason and common sense.

In *Welch* v. *Maine Central R. R. Co.*, supra, action was brought by Thomas Welch and after his death prosecuted by his administrator, to recover damages for injuries received by said Welch, through the negligence of the defendant in using and improperly loading a defective dump car, which said Welch, at the request and by permission of the defendant, it was alleged, attempted to dump, and was injured while so doing. Welch was the servant of one Shannahan, a contractor, engaged in filling and grading land for one Jose, who had arranged with the defendant to deliver earth for that purpose. After the first day, at the request of one Dolan, conductor of defendant's work train, this work of dumping the cars was all done by Shannahan's men, and this fact was well known to the chief engineer of defendant company, who had supervision of the work. The case shows, 1.—The request on the part of the defendant's servants, and knowledge on the part of the defendant, that the delivery of the earth was actually being made by the servants of the Shannahans. 2.—That a defective car was used by the defendant's servants without the knowledge or consent of the plaintiff. 3.—That the plaintiff was acting in furtherance of the interest of his employer, and consequently in his own interest.

These reasons were found to be sufficient to support the plaintiff's claim, the decision, however, goes no farther than to hold "that the persons having charge of freight may allow the servants of the consignee to remove it from the cars, and the latter while so engaged, have a right to be protected against the negligence of the former. In other words, that, in such cases the rule of *respondeat superior* applies." It will be noticed that, while that rule was affirmed, the decision was reached, and then not unanimously, after recognizing the distinction between a mere volunteer, and one who has an interest in the work to be performed, and establishing beyond question the distinction between the rights of one sent to receive delivery of goods or mer-

chandise and one as in this case, who assists by request of a servant of a consignor and without the knowledge or consent of the latter, or voluntarily, in the act or process of delivery of such shipment.

In *Wischam* v. *Rickards*, 136 Pa. St., 109, 20 Atl. Rep., 502, cited in *Welch* v. *M. C. R. R.*, supra, the defendant was delivering a large fly wheel at the factory of B., plaintiff's employer, and the servants of both defendant and B, were jointly engaged in unloading the wheel. Defendant's foreman called for help as the wheel was being lowered, and B's foreman ordered the plaintiff to assist, and while executing the order the plaintiff was caught under the wheel and injured, and it was held that the plaintiff assumed the relation of servant to the defendant, even though ordered to assist by his employer's foreman, at the request for help from the defendant's foreman, and that he could not recover for the negligence of the other servants of the defendant.

In the case at bar it may be said as the court said in *Wischam* v. *Rickards*, supra, "the case is an exceedingly close one, highly exceptional in its facts and apparently without a precedent among the authorities," but the conclusion therein is in harmony with the decision in *Welch* v. *Me. Central R. R.*, supra, and is based upon the doctrine enunciated in *Potter* v. *Faulkner*, 101 E. C. L., 800. In that case the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his wagon. The plaintiff, who was waiting with a wagon to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and in consequence of the negligence of the defendant's porters, a bale of cotton fell and injured him. It was held that the defendant was not liable to an action.

The court say, "it will be perceived that the court considered the plaintiff to be a volunteer, notwithstanding he only intervened at the request of the defendant's servant. Now, while it may seem a little strained to call such a person a mere volunteer, the reason given for the non-liability of the master is more substantial, to wit, that the plaintiff's act of associating himself with the defendant's servant in the performance of the work was done without the knowledge or consent of the master, and therefore he could acquire no better position than that of the servant with whom he associated himself."

The duty and liability of the plaintiff in the circumstances is well settled. Before he may recover it must appear that he was himself

without fault, that he was in the exercise of ordinary care, and that no act or omission to act on his part, contributed to his injury.

In these essential duties the plaintiff falls far short of satisfying the plain requirements of law. The record discloses an entire absence of ordinary care on his part. While the work was dangerous as is usual in all mills, there was no concealed danger. An ordinary accident had occurred. A tram car had left the track. Such accident is not only likely to occur, but in railway work and tramway service sure to occur. In this instance the passage of cars to and from the mill, the means of transportation, and all the attendant dangers were known to the plaintiff as well as to the defendant, and being well known to both there is no rule of law holding the defendant liable under the facts as found in this case.

It has been seen that the plaintiff can have no greater right than the servant who requested his assistance, and it is not claimed that his co-worker on the car can maintain an action against any person for his injuries. At best, the law confines the plaintiff to a class. In this instance if not a volunteer he was in the class with the servant of the defendant or Mr. Davis for the time being, and for the purposes of this case it matters not which. He was entitled to protection as they were and at the same time was subject to the duty of using ordinary care. In this important particular he fails signally on his own showing. With his knowledge of the business, its requirements and dangers, it was negligence for him to stand with his back to an approaching car,—the car for which he was waiting, and toward which he did not look until he was run down by it. By his own conduct he placed himself outside the protection assured to those who, while themselves in the exercise of ordinary care, are injured through the negligence of others.

The entry will be,

Judgment for the defendant.

CHESTER L. BAILEY *vs.* SIDNEY M. WEBBER.

Waldo. Opinion July 14, 1915.

Contract. Copartnership. Damages. Dissolution. Evidence. Fraudulent Representations. Recoupment. Sale.

In an action of assumpsit brought by one partner to recover a fractional part of the net proceeds of debts due to the firm collected by his copartner under an agreement of dissolution,

Held:

1. That the agreement of dissolution is an entirety.
2. That the defendant in this action therefore has the legal right to recoup any damages sustained by him by reason of the fraudulent concealment by the plaintiff, at the time when the agreement was made, of various items which the plaintiff had received from the firm without the knowledge of the defendant and had not accounted for.

On exceptions by defendant. Exceptions sustained.

An action of assumpsit to recover a fractional part of the net proceeds of debts due the firm and collected by his copartners under an agreement of dissolution. Defendant pleaded the general issue with brief statement, claiming to recoup against plaintiff damages arising out of the contract of dissolution. The presiding Justice ruled that those damages could not be recouped in this action and directed the jury to render a verdict for plaintiff. To this ruling, defendant excepted and his exceptions were allowed.

The case is stated in the opinion.

H. C. Buzzell, and H. E. Bangs, for plaintiff.

Dunton & Morse, for defendant.

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

CORNISH, J. On March 25, 1913, the plaintiff and defendant formed a copartnership under the name of Chester L. Bailey & Company. On January 7, 1914, this partnership was dissolved

by written agreement by the terms of which the plaintiff sold to the defendant all his interest in the partnership, goods and stock, for the sum of $792.50, and further was to receive three-fourteenths of the net amount realized from the debts due the firm, not exceeding $300. The defendant was to collect these debts in the name of the firm.

This suit is brought to recover the three-fourteenths of the amount so collected. The amount collected was admitted, but the defendant claimed, under his pleadings, the right to recoup the damages sustained by him by reason of the fraudulent concealment by the plaintiff at the time of making the contract of dissolution, of various items aggregating $151.69, which the plaintiff had received from the firm without the knowledge of the defendant and had not accounted for. The presiding Justice excluded this testimony and directed a verdict for the full three-fourteenths of the amount collected.

The evidence was clearly admissible. The transaction between the parties when the firm was dissolved was virtually a sale of his interest in partnership property and credits by the plaintiff and its purchase by the defendant. The price agreed upon was $792.50 for his interest in the property and three-fourteenths of the net amount collected, not exceeding $300, for his interest in the credits. The contract of sale was a unit, though for the sake of convenience a separate price was agreed upon for the visible property and the book accounts. Having received his full pay for the first the plaintiff now seeks to recover the second, but in this suit it is clear that the defendant has the right to set up by way of recoupment any damages sustained by him because of the fraud and deceit practiced by the plaintiff in making the contract itself.

It is familiar law that if a buyer of goods is induced to make a purchase by the fraudulent representations of the seller, he may abide by the contract and have the damages occasioned by the fraud deducted from the contract price. *Rogers* v. *Humphrey*, 39 Maine, 382; *Sharp* v. *Ponce*, 76 Maine, 350.

The damages claimed by the defendant here, grow out of the very contract that is the subject of litigation. They arise out of the same transaction and are therefore recoverable by way of recoupment.

Exceptions sustained.

GEORGE L. ROGERS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion July 15, 1915.

Agent. Attachment. Bulky Articles. Exceptions. Keeper. Preservation of Attachment.

Action by a deputy sheriff to recover damages for alleged unlawful removal of personal property on which plaintiff claimed to have a valid attachment. On exceptions to the ruling in the court below directing verdict for defendant.

Held:

1. The attachment was perfected by the officer as he was in view of the property which he sought to attach, with power to control and take same into possession, even though he did not actually lay hands upon it.
2. There was no record of attachment made under the provisions for recording attachment of bulky property but a keeper was appointed by the officer. It is well settled law, that in case of an attempt of another to interpose or take possession of personal property which has been attached by an officer, the latter should take such measures as to prevent it, unless resisted.
3. It necessarily follows that what could or should have been done by the officer could or should have been done by his agent, the keeper. The utter neglect of the keeper to interpose any opposition or protest, although present when the cars were about to be moved by the train crew, resulted in a failure of the officer, or his agent the keeper, to lawfully preserve the attachment.

On exceptions by plaintiff. Exceptions overruled.

This is an action of trover by plaintiff, a former deputy sheriff, to recover for the conversion of twelve hundred bushels of potatoes, which the plaintiff, as deputy sheriff, had attached on a writ against the Maine Produce Company. Plea, general issue. At the close of the evidence, the presiding Justice directed the jury to return a verdict for the defendant, to which ruling the plaintiff excepted. Pleadings and evidence are made a part of the exceptions.

The case is stated in the opinion.

Manson & Coolidge, for plaintiff.

Johnson & Perkins, for defendant.

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

PHILBROOK, J. The plaintiff, formerly a deputy sheriff, having a writ in which a produce company was defendant, claims that he attached certain potatoes, as the property of the produce company, then in this defendant's cars, and that notwithstanding such alleged attachment this defendant shipped the cars and the potatoes contained therein to some point beyond the jurisdiction of the officer, whereby he was unlawfully deprived of the potatoes and could not sell them to satisfy the judgment when judgment and execution were obtained.

The railroad company, by way of defense, denied that the potatoes were the property of the produce company and also claimed that no valid attachment was ever made, or if so made was not lawfully maintained. After the testimony was concluded the presiding Justice ordered a verdict for the defendant and to such order the plaintiff seasonably took exceptions. In argument before this court, the railroad company abandoned the defense relating to the title to the potatoes and said that the whole question involved is whether the potatoes were under attachment when they were moved by the defendant's employees. This involves the elements both of attachment and preservation of attachment of personal property.

The plaintiff testified that he attached the potatoes, left them in the cars and appointed a keeper. We quote his own language, "I went up there and went to Mr. French (the plaintiff for whom the attachment was intended) and looked in the cars and saw the potatoes, opened the door and looked in and said, 'I attach these potatoes,' and he closed the cars again and left them in shape, and went down to Mr. French's and got Mr. Bartlett and asked him if he would act as keeper, and I said, 'I appoint you as keeper to look out for the cars.' " He does not claim to have made any record of the attachment in the office of the town clerk under the provisions of statute for preservation of attachment of bulky articles of personal property. Apparently he considered his duty done as the testimony fails to disclose any further act on his part to exercise dominion or control over the potatoes except that he attempted to notify the defendant railroad company that he claimed an attachment on the potatoes but failed to do so as the agent to whom he telephoned was out at the time the attempt was made.

From the evidence in the case it is clear that the officer made a legal attachment, as he was in view of the property which he sought to attach, with power to control and take the same into possession, even though he did not actually lay hands upon it. *Kelley* v. *Tarbox*, 102 Maine, 119; *Nichols* v. *Patten*, 18 Maine, 231.

But the preservation of an attachment once made forms as important an element in this case as the attachment itself. As we have already seen, the plaintiff, after making the attachment and an unsuccessful attempt to notify the railroad company thereof, left the entire situation in the hands of a keeper, but this arrangement was made upon his own sole responsibility. *Kelley* v. *Tarbox*, supra. In other words the keeper was simply an agent of the plaintiff, for the convenience of the latter, and by that agent's conduct the plaintiff is bound.

This keeper lived about eight rods from the railroad siding on which stood the cars containing the attached potatoes. After being appointed keeper at night he went to the cars and noted in a book the numbers on the cars. He slept in the house where he lived, in a room from which the cars might be plainly seen. The attachment and appointment of Bartlett as keeper having occurred Saturday night, the latter opened the cars Sunday morning to prevent the potatoes from sweating, closed the same Sunday night and did the same duty on the morning and evening of Monday. On Tuesday morning having heard that the railroad company was intending to bill out the cars, he sent a message by French to the station agent at Hartland, who had charge of billing cars from the siding referred to, forbidding the shipment of the cars and their contents. Nevertheless, about eleven thirty o'clock in the forenoon, on the same Tuesday the regular train crew of this defendant, came to the siding and took away the cars with the potatoes therein contained. On being asked what he said to the train crew, Bartlett replied that he said nothing, that he did not tell them he was the keeper but relied on what he had told the station agent. He further said that he did not forbid the train crew to move the cars nor tell them that he was a lawfully appointed keeper. In short, although present when the cars were about to be moved, he did nothing apparently to exercise control or dominion over the property entrusted to his care by an officer of law. For the defendant the conductor of the freight train testified that when he went for the cars there was nothing to indicate that they

were attached, that neither Bartlett, nor any one else forbad his moving the cars and that in fact he did not know until several weeks later an attachment upon the cars and contents was claimed. The testimony of the conductor was corroborated by both brakemen.

It is well settled law, early decided in this State in *Nichols* v. *Patten*, supra, that in case of an attempt of another to interpose or take possession of personal property which has been attached by an officer, the latter should take such measures as to prevent it, unless resisted. It necessarily follows that what could or should have been done by the officer could or should have been done by his agent, the keeper. It is the opinion of the court that the utter neglect of the keeper to interpose any opposition or protest, when the cars were about to be moved by the train crew, resulted in a failure of the officer, or his agent the keeper, to lawfully preserve the attachment and that the mandate must be,

Exceptions overruled.

WILLIAM G. HORTON *vs.* LEROY WRIGHT.

Penobscot. Opinion July 19, 1915.

Contract. Mortgage. Possession. Record. Replevin. Sale. Title.

In an action to recover damages for false representations as to title in the exchange of horses, the horse which the plaintiff received having been subsequently taken from him on a replevin writ by virtue of a mortgage,

Held:

1. That the burden of proof rested on the plaintiff to show that the title under the mortgage was superior to his own by purchase.
2. That under R. S., Chap. 93, Sec. 1, possession of personal property mortgaged shall be delivered to and retained by the mortgagee, or the mortgage shall be recorded in the town where the mortgagor resides.
3. That in the absence of evidence, showing one or the other of these facts, the validity of the mortgage, although recorded, is not established as against a bona fide purchaser for value without notice.

4. That the record of the mortgage in the town of Waite did not establish its validity as against the plaintiff, because it was not shown that the mortgagor resided in that town and the mortgage itself is silent on the point.
5. That the defendant in this suit is not bound by the judgment in the replevin suit as he was not a party thereto and was not notified of its pendency, so that he could appear and defend.
6. That the defendant is not estopped from setting up this defense by any word or act or silence on his part.
7. That the evidence does not establish a failure of title.

On motion for new trial by the defendant. Motion sustained. New trial granted.

This is an action for false representations in the exchange of horses. Plea, general issue. The jury rendered a verdict for plaintiff for $125 and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

W. I. Butterfield, and A. L. Blanchard, for plaintiff.

Morse & Cook, for defendant.

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

CORNISH, J. On August 20, 1912, the plaintiff exchanged horses with the defendant, the defendant delivering to the plaintiff a horse known as Moscow to which he claimed to have title.

A year later, when the plaintiff was at the Springfield Fair, one White appeared and claimed the right to take the horse from him by virtue of a mortgage existing prior to the sale, whereupon the plaintiff suggested that they see the defendant, who was also at the Fair, and lay the case before him. They found the defendant and the plaintiff explained the situation. At first the defendant "said that it was a bogus affair and he guessed anyway it wouldn't amount to anything;" whereupon the plaintiff said to the defendant, "Well, they are going to take the horse, they claim this to be good anyway, and now is the time for you to settle. If they have got a bill of sale on that horse, I bought the horse from you, and you better fix it up here." To which the defendant simply replied that they couldn't do anything with him anyway as he had been through bankruptcy. All this took place in the presence of Mr. White and his attorney who

thereupon proceeded to make out a replevin writ in the name of one J. B. Mercier as plaintiff, and took the horse away. Judgment was subsequently obtained against Horton in the replevin suit, and this action for false representations followed against Wright.

The defendant introduced no testimony and claims that the plaintiff has failed upon his own evidence to show legal liability on the defendant's part. The burden of proof rested upon the plaintiff in the first instance to show a failure of title, that is, that the horse was taken from him by one having a title under the mortgage superior to the title of his vendor Wright. The plaintiff introduced the certified copy from the records of the town of Waite, of a certain mortgage covering the horse Moscow with carriage and harness, given by Stanley Fenlason to J. B. Mercier on June 17, 1910, but there is no evidence that the mortgagor, Fenlason, resided in Waite, and the mortgage itself is silent on that point. The statute requires either that possession of personal property mortgaged shall be delivered to and retained by the mortgagee or that the mortgage shall be recorded in the town where the mortgagor resides. R. S., Chap. 93, Sec. 1. In the absence of affirmative evidence showing one or the other of these facts, the validity of the mortgage, although recorded, is not established as against a bona fide purchaser without notice. *Bither* v. *Buswell*, 51 Maine, 601; *Stirk* v. *Hamilton*, 83 Maine, 524.

True, judgment in the replevin suit was rendered for the plaintiff Mercier, who was the mortgagor, but that judgment is not binding upon Wright, as he was not a party thereto, unless he was notified of its pendency and was given an opportunity to appear and take upon himself the defense. *Davis* v. *Smith*, 79 Maine, 351. This was not done.

The plaintiff replies that the defendant is estopped from setting up this defense because of his declarations and conduct at the inception of the suit when the horse was taken away, and this is a vital issue in the case. "The doctrine of equitable estoppel is founded upon the principles of equity and justice and is applied so as to conclude a party, who by his acts or omissions intended to influence the conduct of another, when in good conscience and honest dealings he ought not to be permitted to gainsay them." *Rogers* v. *Street Railway*, 100 Maine, 86. Are the necessary elements present here? We are constrained to say that they are not. There is no evidence that Wright ever had any knowledge of the existence of this mortgage until

the interview at the Fair Grounds. So far as appears, he did not see it even then, and was ignorant as to its contents. The plaintiff testifies that a mortgage was shown to him by Waite, but whether it was the original of which the copy was introduced in evidence he is unable to state. There is no pretense that it was shown to Wright. So far as Wright's declarations are concerned, they are two; first, he guessed it was a bogus affair and wouldn't amount to anything, and second, that they couldn't do anything with him as he had been through bankruptcy. The tendency of the first remark was not to influence Horton to submit to the proceeding but on the contrary to resist it, and the second was simply the shirking of all personal responsibility by a man who thought himself immune. It is impossible to gather from what Wright said or did or failed to say or do, any attempt on his part to lead Horton into any course of conduct whatever. No advice was given and no suggestions were made. A fair interpretation of the conversation is that the plaintiff was endeavoring to persuade the defendant "to fix" the matter up,—to settle it,—which the defendant was not inclined to do. Nor is another essential element present, namely, that Horton was in fact induced to change his conduct or to place himself in a position of substantial injury by any word or act or silence of the defendant. He took his own course in his own way, and for that course he himself is responsible and not the defendant.

It is apparent therefore that the evidence at this trial failed to show that the defendant did not in fact have title at the time of the exchange, which was the very basis of the plaintiff's action and therefore the entry must be,

Motion sustained.
New trial granted.

AMASA CLARK *vs.* JOHN E. GRAY.

Piscataquis. Opinion July 19, 1915.

Arrest. Delinquent Taxpayers. Demand. Municipal Officers. Notice. R. S., Chap. 10, Secs. 20-28. R. S., Chap. 88, Secs. 67-73. Tax Collector. Trespass.

R. S., Chap. 10, Sec. 20, provides as follows: "If a person so assessed, for twelve days after demand, refuses or neglects to pay his tax and to show the constable or collector sufficient goods and chattels to pay it, such officer may arrest and commit him to jail until he pays it or is discharged by law."

Held:

That a demand in person is contemplated by this section and that a notice in writing sent through the mail, stating the amount of the tax and demanding payment thereof, is insufficient.

On exceptions by plaintiff. Exceptions sustained. Judgment for plaintiff for $50.

This is an action of trespass against the defendant, a tax collector of Corinna, for arresting him for a poll tax assessed against him by the assessors of said Corinna for the year 1913. The defendant, more than twelve days prior to said arrest, sent to plaintiff by mail a tax bill, in which he stated that it was a legal demand for the tax.

At the hearing of the case before the presiding Justice, without a jury, the presiding Justice ruled that said demand was sufficient and gave judgment for the defendant. To this ruling the plaintiff excepted.

The case is stated in the opinion.

C. W. Hayes, for plaintiff.

Hudson & Hudson, for defendant.

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

CORNISH, J. This is an action of trespass against a tax collector for an alleged illegal arrest. The defendant sent to the plaintiff by mail, postage paid, a written notice in the following form:

"Corinna, Maine, Oct. 13, 1913.

AMASA CLARK

Your County, town and State tax in said town for the year 1913 as committed to me to collect, and which you are requested to pay, is $3.

The delivery of this bill is considered a legal demand.

J. E. GRAY,
Collector."

On the margin of the notice were the dates on which the installments of tax on real and personal property if any would be due and, on the back, attention was called to the statute requiring municipal officers to publish in the town reports the names and amounts of delinquent taxpayers. It is admitted that the plaintiff received this notice more than twelve days prior to his arrest and the single question reserved to this court is whether this was a sufficient preliminary demand to justify the subsequent arrest under the statute which is as follows: "If a person so assessed, for twelve days after demand refuses or neglects to pay his tax and to show the constable or collector sufficient goods and chattels to pay it, such officer may arrest and commit him to jail until he pays it or is discharged by law;" R. S., Chap. 10, Sec. 20. The plaintiff claims that this means a demand in person, while the defendant contends that it is merely such a notification as will give the taxpayer knowledge that a tax is assessed against him, the amount thereof and a request to pay.

It is the opinion of the court that a demand in person is contemplated. The word demand has a twofold meaning. It is often used in the sense of request. Thus a request either oral or by letter, for the payment of a bill is sufficient to fix the time from which interest shall accrue, *Chadbourne* v. *Hanscom*, 56 Maine, 554; and if money is payable on demand the commencement of a suit is sufficient, *Hunter* v. *Peaks*, 74 Maine, 363. It is in this sense that the word demand is placed upon the tax bill. It is merely a request to pay. The blank used is the ordinary form sent to every taxpayer in town, to the financially responsible as well as to the financially irresponsible, as the first step towards collection. It is neither sent by the collector as the statutory demand preliminary to arrest,

nor is it so considered by the recipient. Otherwise, after the lapse of twelve days every taxpayer would be liable to immediate arrest unless he pay his tax or show the collector sufficient goods and chattels to pay it. Moreover the notice itself disproves such a claim. Had the plaintiff's tax been assessed upon real or personal property, the third installment would not have fallen due until November 1, 1913, and the fourth on December 30, 1913, as the notice specifies, while the twelve days from the date of the notice expired on October 25, 1913. It can hardly be claimed that the taxpayer who has paid the first two installments can be subject to arrest before the others are due.

The word demand in its second sense denotes a request in person and implies personal presence. When used in connection with or as a part of an official act it is as a general rule employed with this meaning. In other words when an officer is required to demand anything by virtue of a warrant or execution, in the absence of words prescribing a different method, the demand must usually be made in person. Such is the character of the demand made by an attaching officer upon a receiptor, so far as the cases show, *Hapgood* v. *Hill*, 20 Maine, 372; *Gilmore* v. *McNeil*, 45 Maine, 599; *Same* v. *Same*, 46 Maine, 532; *Bicknell* v. *Lewis*, 49 Maine, 91; *Bangs* v. *Beacham*, 68 Maine, 425; *Foss* v. *Norris*, 70 Maine, 117; *Moore* v. *Fargo*, 112 Mass., 254, and in *Phillips* v. *Gilchrist*, 28 N. H., 266, and *Sanborn* v. *Buswell*, 51 N. H., 573, a personal demand was deemed indispensable. And the same holds true in case of a demand by an officer, holding an execution, upon a person adjudged a trustee, preliminary to bringing a writ of scire facias, R. S., Chap. 88, Sec. 67; and of the dissolution of the attachment by trustee process unless the goods, effects or credits are demanded by virtue of the execution within thirty days after final judgment. R. S., Chap. 88, Sec. 73. A personal demand is here implied: *Franklin Bank* v. *Bachelder*, 23 Maine, 60; *Bachelder* v. *Merriam*, 34 Maine, 69; *Cheney* v. *Whitely*, 9 Cush., 289; *Thompson* v. *King*, 173 Mass., 439.

If it is the intention that an official demand shall be made in any other manner or by any other method than in person then that manner or that method is definitely specified. To illustrate again by the statute relating to trustee attachments. If the officer holding the execution cannot find the trustee in the State, it is expressly provided that a copy may be left at his dwelling house or last and

usual place of abode, either within or without the State with notice to the trustee endorsed thereon, "And such notice in either case is a sufficient demand." R. S., Chap. 88, Sec. 74.

Other illustrations of the same rule may be found in the tax statute itself. As preliminary to enforcing a lien upon real estate the collector is specifically directed to give to the taxpayer or leave at this last and usual place of abode a statement in writing, demanding payment within ten days after the service of such notice, R. S., Chap. 10, Sec. 28; and when a collector issues his warrant to a sheriff, deputy sheriff or constable directing him to distrain the person or property of delinquent taxpayers, before such officer shall serve any such warrant he shall deliver to the delinquent, or leave at his last and usual place of abode, a summons from the collector stating the amount of tax due and that it must be paid within ten days from the time of leaving such summons, Chap. 10, Secs. 67-69; and ten days written notice is required for owners of real estate advertised for sale. Sec. 75.

These illustrations mark the distinction between an official demand and a notice and emphasize the fact that when the legislature intends that such a demand shall be made by any other method than in person it specifies the method. No substitute is provided for the personal demand required in Sec. 20, and it is evident that such a personal demand remains necessary. This view is confirmed by Sec. 21 which provides that if the assessors think there are just grounds to fear that the taxpayer may abscond before the end of said twelve days, the collector may demand immediate payment and on refusal may arrest and commit; and by Sec. 26 which authorizes a collector to demand of a taxpayer who has removed from town, his tax in any part of the State and on refusal to commit him to jail in the county where he is found. Immediate demand and refusal imply personal presence and in all these Secs., 20, 21 and 26, the word is used in the selfsame sense.

In *Miller* v. *Davis*, 88 Maine, 454, an action for false arrest, the demand was evidently made in person and the only question at issue was the adequacy of the language employed. The court held that the presence of the collector in his official capacity, armed with his warrant and coupled with a request for payment in whatever language conveyed constituted a sufficient demand.

R. S., Chap. 10, Sec. 27, in its original form authorized a collector to bring suit in his own name for a tax "After due notice." These

words are less forceful than demand and might well give rise to doubt as to their scope and meaning. But it has been held that even this provision requires a demand so formal and explicit that the taxpayer may know that a suit might follow his noncompliance, and a written request mailed to the taxpayer is insufficient. *Parks* v. *Cressey*, 77 Maine, 54. The revision of 1903 has substituted the words "after demand for payment" for "after due notice," in line with this decision and apparently in order to remove any possible doubt. The rule in *Parks* v. *Cressey* applies with far greater force to the case at bar where the remedy sought is not the mere bringing of a civil action but arrest and imprisonment, the most drastic weapon placed in the hands of a collector.

In this connection a study of the Massachusetts statutes is of value because our original statute of 1821, Chap. 116, Sec. 26, is an exact transcription of Mass. Stat., 1785, Chap. 70, Sec. 2. The statute in Massachusetts has been changed, in Maine it has not. "Demand" as used in the original Massachusetts statute has been construed to mean personal demand. "The levying and collecting of taxes is a purely statutory matter and persons arrested for the non-payment of taxes have a right to require that the provisions of the statute shall be strictly followed. The law requires as the foundation for an arrest for non-payment of taxes or for the distraint of personal property or for the sale of real estate a demand for their payment. Formerly this demand had to be made upon the taxpayer in person. Stat. 1785, Chap. 70, Sec. 2-5." *Hunt* v. *Holston*, 185 Mass., 137. This case is direct authority for a similar construction of the same words in our own statute.

Another fact is most significant. Since 1877 the collector has been required to send by mail a tax bill or notice to all taxpayers resident and non-resident as soon as possible after receiving the tax list or warrant. Mass. Stat., 1877, Chap. 235; Stat. 1889, Chap. 334; Rev. Laws, Chap. 13, Sec. 3. The form of demand preliminary to arrest has also been changed so that now a written notice containing a statement of the amount of the tax with a request for its payment may be served upon or sent by mail to the delinquent. Mass. Stat., 1889, Chap. 334; Rev. Laws, Chap. 13, Secs. 14 and 15; *Hunt* v. *Holston*, supra. But these two notices are entirely distinct. The first is sent to all taxpayers to notify them of the amount of their

tax. They are not at the time delinquents. The second is sent to delinquents as a foundation for specific action, and the first is not regarded as a substitute for the second.

In this State, general tax bills, like the one in this case, are sent out not by requirement of statute but by common practice and obviously one mailed under such a practice here can no more constitute a compliance with the statutory official demand required as the foundation for arrest, than can such a notice sent by direction of statute in Massachusetts supply the place of a preliminary written demand there.

Our conclusion therefore is that upon both reason and authority the written notice in this case was an inadequate demand, and the arrest was illegal. Under the stipulation of the parties the case need not be remanded for trial but the entry may be,

Exceptions sustained.
Judgment for plaintiff for $50.

JOHN W. MATHEWS *vs.* BOSTON & MAINE RAILROAD.

York. Opinion July 21, 1915.

Collision. Damages. Expectation of Life. Injury. Lessened Capacity. Negligence.

The presiding Justice in the course of his charge instructed the jury, that if upon all the evidence in the case you find there is a reasonable certainty that, from this time on he would engage in a similar business and would, were it not for this accident, do with his own hands what he has in the past done, then upon the evidence in the case, you may award such sum as you find is warranted as a compensation for impairment of that capacity to labor with his hands.

Held:

That this rule was not only stated correctly, but that it was stated in terms which must have been clear and comprehensible by the jury.

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

This is an action on the case to recover for injuries received by plaintiff while a passenger on one of defendant's trains, by reason of a collision of said train with another, October 22, 1910.

Plea, general issue. The jury rendered a verdict for the plaintiff for five thousand dollars. The defendant excepted to certain instructions to the jury, and filed a motion for a new trial.

The case is stated in the opinion.

Mathews & Stevens, and James O. Bradbury, for plaintiff.

George C. Yeaton, Leslie P. Snow, and Cleaves, Waterhouse & Emery, for defendant.

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

HANSON, J. The plaintiff, while riding upon the defendant's railway as a passenger for hire, was injured by reason of a collision between the train on which he was riding and another train moving in the opposite direction. He recovered a general verdict of five

thousand dollars, and as a special finding the jury awarded two thousand dollars, included in the larger sum, "as damages for his lessened capacity to labor, both past and future."

The defendant admits liability but comes before this court on exceptions, and motion to set aside the verdict on the ground that the damages awarded are excessive.

THE EXCEPTIONS. The exception reserved at the trial was then stated by counsel to be "the usual and comprehensive one to any instruction of the court which would permit any estimate of his personal capacity for manual labor impaired hereafter or since the accident." In the bill of exceptions presented to us counsel specifies the following language, used by the presiding Justice in his charge, as particular ground of exception, under the comprehensive exception before stated. "Now as to future earnings and lack of capacity to earn. The question of profits, those flowing from contracts, is not your province; there is nothing upon which you can base either a reasonable certainty that he will engage in those things hereafter or upon a reasonable certainty how much he would gain in those vocations hereafter. If, however, upon all the evidence in the case you find there is a reasonable certainty that from this time on he would engage in a similar business and would, were it not for this accident, do with his own hands what he has in the past done, then upon the evidence in the case you may award such sum as you find is warranted as a compensation for the impairment of that capacity to labor with his hands. But I must call your attention to the fact that as men approach his age and mine the physical capacity to labor weakens; the energy which men have to engage in physical labor, the ambition, the greed for money all pall before advancing years, and in determining the reasonable certainty of the existence of those things hereafter you must take into account this fact that he is of an age which will surely in the future affect, if it does not now, the capacity to perform that class of labor.

"There is also another thing which you must take into consideration as to these future damages upon all the evidence, and that is this: that he cannot live forever; that there is an expectation of life and you are restricted at least to that expectation of life. It is a matter for you to determine, how long he may live. There has been put in here the expectation of life as found in some actuary's table. That is not binding and conclusive upon you. As I recollect it, a

man of the age of fifty-six years has an expectation of life of 16.72 years, but, as I say, that is not conclusive upon you, gentlemen. It is a matter for you to determine, what the expectation of life of this plaintiff would be and to consider, should he live the whole span, what would be in the few last years of his life his capacity for labor as compared with his capacity on the day of your verdict."

Defendant claims that the part of the charge of the presiding Justice which permitted the jury to include in its verdict any damages for alleged impairment of plaintiff's ability to perform manual labor was erroneous upon two grounds: first, that plaintiff neither was at the time of the injury, nor in any recent years prior to that time, in any just sense, had been a manual laborer; second that there is in the case no evidence to warrant finding any impairment of such faculty or capacity, even though it could be found that he was such a laborer.

The plaintiff testified that since he was twenty-one years of age he had done more or less lumber business and contracting, and at the time of the trial was holding the office of postmaster at Berwick, a position which he had then occupied for nearly two years. There is evidence in the case which would tend to show that in his work as a contractor he did considerable manual labor, and that his capacity to perform such labor had been impaired. The weight and credibility of this evidence were passed upon by the jury and their verdict negatives the grounds depended upon by the defendant in his bill of exceptions.

But the defendant further urges that no well recognized authority can be cited in support of enlarging a plaintiff's title to damages for future impairment of such as is expressed by the usual terms "capacity for labor" or "earning capacity," so generally employed, to the special, single and limited loss of but one kind of labor, namely, "manual labor," except in cases where this alone had been his ordinary employment and chief, if not sole, means of revenue, and was not also reasonably certain in future to remain so.

It is true that the courts generally employ somewhat broader phraseology, in cases of this kind, such as "earning capacity," or "loss of capacity to labor," but the term "manual labor" is also quite comprehensive. In his charge to the jury at one point the presiding Justice used the words "impairment of that capacity to labor with his hands," but even in the portion of the charge specifically embraced in the bill of exceptions the Justice also used the

expression "capacity for labor" which the defendant claims to be the more strictly correct statement. Moreover, and examination of the entire charge makes it plain that the rule was not only stated correctly when the charge is considered as an entirety, but that it was stated in terms which must have been clear and comprehensible by the jury.

THE MOTION. As already stated, the only ground upon which the motion is based is that the damages are excessive. We have carefully read and weighed the evidence. There is not much conflict except in the medical evidence which is a matter of frequent occurrence in cases of this kind. The jury heard and saw the parties and witnesses, and we are not prepared to say that they were so far influenced by bias or prejudice, or were so lacking in ability to understand and weigh evidence that their judgment and conclusion are to be questioned.

Exceptions overruled.
Motion overruled.

JOSEPHINE MAYO *vs.* FRANK H. PURINGTON.

Cumberland. Opinion July 21, 1915.

Attorney. Breach of Duty. Collection of Money. Duress. Fraud. Implied Promise. Injury. Receipts. Release.

1. When one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained.
2. This form of action is comprehensive in its reach and scope and, though the form of the procedure is in law, it is equitable in spirit and purpose, and the substantial justice which it promotes renders it favored by the courts.
3. It lies for money paid under protest or obtained through fraud, duress, extortion, imposition or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid.

4. When the defendant is proved to have in his hands the money of the plaintiff, which in equity and good conscience he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly; and after verdict, the promise is presumed to have been actually proved.
5. The law requires the highest degree of honor and good faith from its own ministers. It insists that the confidence of the suitor in the faithfulness and disinterestedness of his attorney and counsellor shall be fully deserved.

On motion by defendant. Motion overruled. Judgment on the verdict.

An action of assumpsit to recover of defendant for money had and received. Plea, the general issue. The jury returned a verdict for plaintiff for $104.13. The defendant filed a general motion for a new trial.

The husband of the plaintiff while in service of the American Express Company received an injury. Subsequent to his apparent recovery, he gave his release to that company. His death occurring some months later, the company voted his widow a gratuity of $500. Desiring an increase of the amount she employed defendant, an attorney-at-law, to negotiate with the company to that end. After correspondence with the company and an interview with one of its officials in Boston, Mass., the company undertook the payment of a further sum of $500 and a check for the amount of $1000, to order of plaintiff, was sent to the company's agent at Portland for delivery to her. Notice of the sending of the check was given by the company to plaintiff as well as to defendant, who in turn gave notice to plaintiff and she repaired on the afternoon of its receipt to defendant's office. Both then went to the office of the company and the check was given plaintiff upon her signing a receipt or release to the company. Returning to defendant's office, plaintiff, at his direction or suggestion endorsed the check which she left with defendant undertaking to return to his office at a stated hour in the morning. Plaintiff states that at this time defendant suggested a fee of $200. He alleges, she denies that she then agreed to it. At his office the next morning, she found the check had been cashed. She testifies that he produced $800 and he that $1000 was produced. She testifies that he proferred her $800, and, on her demurring to the charge of $200, he indulged in acts and language that alarmed her; that she said to him that she intended to consult an official of the company about the charge and would like a paper, that she could show him, disclosing the

amount of the charge and that she was not "through with this yet," and that he advised, if she was going to a lawyer, that she go to a good one. She then signed a receipt for $800 and he gave her one for $200 and she departed with the $800 and his receipt for $200. His evidence of the circumstances attending the exchange of receipts is conflicting in practically all particulars. He declares she left his office stating that she was fully satisfied. Almost immediately after leaving his office, she consulted an attorney-at-law and the present suit followed.

The receipts, which were interchanged, are as follows:

Portland, Maine, March 18th, A. D. 1913.

Received from Josephine Mayo,

Two hundred ($200.00) Dollars for Professional Services in collecting One Thousand ($1000.00) from the American Express Company and work, in connection therewith.

$200. FRANK H. PURINGTON, Atty."

"Portland, Maine, March 18th, A. D. 1913.

Received from Frank H. Purington,

Eight Hundred ($800.00) Dollars Balance of One Thousand ($1000.00) Dollars, collected by him from the American Express Company, as a gift to me on account of the death of my husband as claimed by said Co., which settles in *full* with the said Frank H. Purington for Professional Services in securing this said sum.

$800.00 JOSEPHINE MARY MAYO."

Frank H. Haskell, for plaintiff.
Symonds, Snow, Cook & Hutchinson, for defendant.

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

BIRD, J. An action of assumpsit brought by plaintiff to recover of defendant $200 retained by him from the sum of $1000 claimed to have been collected for her by him, as an attorney-at-law. The

case was submitted to a jury which returned a verdict for $104.13. The case is before us upon the usual motion for a new trial presented by defendant.

The parties had exchanged receipts, the plaintiff's acknowledging the receipt of $800 as a balance of the sum collected and in full settlement with defendant for professional services in the premises, the defendant's being for $200 for such services. It was urged that the receipt of plaintiff was obtained by duress. The evidence, however, fails to sustain the claim. Nor is any actual fraud shown.

The plaintiff testified that she objected to the amount of the charge and before signing the receipt, stated to defendant that she "was not through with the matter yet." Immediately, or shortly, after leaving defendant's office, she consulted an attorney-at-law as to the reasonableness of the charge of defendant and her rights in the premises.

The principles of law involved are familiar but their rehearsal may not be untimely. When one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained; *Pease* v. *Bamford*, 96 Maine, 23, 25. This form of action is comprehensive in its reach and scope and, though the form of the procedure is in law, it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored by the courts. *Dresser* v. *Kronberg*, 108 Maine, 423, 424; *Dow* v. *Bradley*, 110 Maine, 249, 251. It lies for money paid under protest, *Whitlock Co.* v. *Holway*, 92 Maine, 414, 416; or obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid; II Green. Ev., Sec. 117, Sec. 121; *Pritchard* v. *Sweeney*, 109 Ala., 651, 654, 657; *Gordon* v. *Camp*, 2 Fla., 422, 427, 429: See also *Humbird* v. *Davis*, 210 Pa. St., 311, 319. And where defendant has any legal or equitable lien on the money, or any right of cross action upon the same transaction, the plaintiff can recover only the balance, after satisfying such counter demand. II Green. Ev., Sec. 117: *Bartlett* v. *Bramhall*, 3 Gray, 257, 260. It is recognized as an appropriate form of procedure against attorneys and solicitors for neglect or breach of duty; *Stimpson* v. *Sprague*, 6 Maine, 470, 472.

Where the defendant is proved to have in his hands the money of the plaintiff, which *ex aequo et bono*, he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly; and, after verdict, the promise is presumed to have been actually proved: II Green. Ev., Sec. 102. *Humbird* v. *Davis*, ubi supra.

When the parties to a contract are upon equal footing, each dealing for himself, without any relation of trust or confidence between them, the law will not permit any misleading, any deception of one party by the other. But in such cases, the law will not presume fraud. Such transactions are presumed to be valid, until proved to be invalid. *Burnham* v. *Heselton*, 82 Maine, 495, 500; 9 L. R. A., 90, and note.

When, however, the parties are not upon an equal footing, each acting for himself, but some relation of trust or confidence exists between them, touching the subject matter of the contract, the law is not so considerate or trustful.

"Especially does the law require the highest degree of honor and good faith from its own ministers. It insists that the confidence of the suitor in the faithfulness and disinterestedness of his attorney and counsellor, shall be fully deserved. It deprecates any purchase of any matter of litigation by an attorney from his client. It greatly desires that the attorney should be satisfied with a reasonable compensation, without seeking to obtain speculative bargains from his client. As said by one writer, such a transaction may be valid, but it is presumptively invalid. Where any such bargain is made, the burden of sustaining it is on the attorney. No presumption will avail him. He cannot get behind the presumption of innocence, and await the coming of hostile evidence. He must be aggressive, and advance against the presumption of invalidity, and overcome it, if he can, by evidence of 'the perfect fairness, adequacy and equity of the transaction,' and particularly must he show that his client was informed of all material facts known to himself." *Burnham* v. *Heselton*, (EMERY, J.) supra. See *Baker* v. *Humphrey*, 101 U. S., 494, 502.

Such is the scrutiny with which the law regards all transactions between attorney and client after the relation commences and while it exists. And while contracts and dealings between them made before the business is undertaken or such as are made after the relation wholly ceases, are regarded as valid and unobjectionable as if

made between other parties not occupying fiduciary relations, and who are, in all respects, competent to contract with each other, all dealings between them while the relation exists are subject to the same rigorous investigation and rules which obtain between trustees and their beneficiaries. Usually great confidence is reposed in the attorney, and he is in an attitude to exert a strong influence over the actions and interests of the client. *Waterbury* v. *Leredo*, 68 Texas, 565.

It can, we conceive, require neither argument nor citation of authorities to establish the proposition that, while money collected for a client remains in the hands of the attorney, the fiduciary relation continues. If any question there be, it is resolved by the provisions of statute regarding the payment of money collected; R. S., 81, Secs. 32-36.

In the case at bar the jury has found that defendant had in his hands money of the plaintiff, which *ex aequo et bono*, he ought to refund and, now, after verdict, his promise to refund it is presumed to have been actually made. The only inquiry, therefore, open upon the motion is whether or not the jury was warranted upon the evidence in finding that defendant had in his hands money of plaintiff which, in equity and good conscience, he ought to refund. The receipts were open to explanation by the parties. The burden upon the issue was with defendant, as is now the burden of showing that the verdict is clearly wrong. We are forced to conclude that there was sufficient evidence, if believed by the jury, to sustain its finding. See *Kidd* v. *Williams*, 132 Ala., 140; 56 L. R. A., 879. *Shirk* v. *Neible*, 156 Ind., 66; 83 Am. St., Reps. 150, 154, 160.

The motion for new trial must, therefore, be overruled.

Motion overruled.
Judgment on the verdict.

STATE OF MAINE *vs.* CHESTER SAWYER.

Hancock. Opinion July 21, 1915.

Close Time. Congress of United States. Federal Constitution. Game Laws. Jurisdiction. Migratory Game Birds. Regulations.

1. The fish in the waters of the State and the game in the forests belong to the people of the State in their sovereign capacity, who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking.
2. The power to legislate respecting the protection and preservation of wild game within the States was not conferred upon Congress through the commerce clause of the Constitution.
3. The ownership of wild game, so far as it is capable of ownership, is in the States for the benefit of all their people in common.
4. Congress therefore acquired no power under the general welfare clause of the Constitution to make regulations concerning wild game, because wild game is not "property belonging" to the United States.
5. The power of the State of Maine to enact laws and regulations for the protection and preservation of wild game within her borders, including migratory game birds, was in no way suspended or abridged by the Act of Congress of March 4, 1913.
6. The provision of the game laws of the State of Maine, which the respondent violated, was operative and enforceable against him.

On report. Judgment of lower court affirmed.

This is a criminal prosecution upon complaint and warrant issued by the Bar Harbor Municipal Court against the respondent for shooting two migratory game birds on Sunday, October 4, 1914. The respondent pleaded that he was not guilty. The court found him guilty and sentenced him to pay a fine of fifteen dollars and costs of prosecution. From this sentence, the respondent appealed to the Supreme Judicial Court for Hancock County. The case was reported to the Law Court upon an agreed statement of facts, by agreement of parties, for determination.

The case is stated in the opinion.

Herbert L. Graham, County Attorney, for the State.

George R. Hadlock, for respondent.

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

KING, J. The respondent was tried before the Bar Harbor Municipal Court and found guilty of shooting two migratory game birds or wild ducks on Sunday, October 4, 1914, in violation of a provision of the fish and game laws of the State of Maine. He appealed and the case is reported to this court on an agreed statement of facts. The alleged offense was committed while the respondent was in a boat on the open sea one-fourth of a mile from Baker's Island which forms a part of the town of Cranberry Isles, Hancock County, Maine.

It is not contended that the respondent did not violate a law of the State prohibiting the killing of wild ducks, for Sunday is a closed time when it is unlawful to hunt, kill or destroy game or birds of any kind, under the penalties imposed therefor during other closed seasons, Chap. 206, P. L., 1913, Sec. 50, and there is an annual closed season on all varieties of ducks from January 1 to August 31 of each year, with a specified penalty for its violation, Sec. 43, Chap. 206, supra. Nor is it contended, as we understand the agreed statement, that the place where the act was committed is not within the State of Maine, for it was only one-fourth of a mile from an island "within its jurisdiction." It is claimed, however, that any power which the States had to make and enforce laws and regulations concerning the killing of migratory game birds became suspended and inoperative by reason of the Act of Congress of March 4, 1913, and the regulations thereunder. That Act contains the following provisions:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate

suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons, and any person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than $100 or imprisoned not more than 90 days, or both, in the discretion of the court.

The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of three months in which said regulations may be examined and considered before final adoption, permitting, when deemed proper, public hearings thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval: Provided, however, That nothing herein contained shall be deemed to affect or interfere with the local laws of the States and Territories for the protection of non-migratory game or other birds resident and breeding within their borders, nor to prevent the States and Territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute."

In pursuance of the authority of the Act the Department of Agriculture adopted suitable regulations which have been approved by the President, one of which fixes a closed season on wild ducks in Maine between December 16 and September 1 next following.

If Congress had the power to control and regulate the killing of migratory game birds within the State, and if in the exercise of that power it has made regulations that are exclusive of, or in conflict with, the State regulations, then the federal regulations must be regarded as supreme, and to have suspended the power of the State to make and enforce regulations respecting the same subject matter.

The federal Act provides that wild ducks and other specified migratory game birds "shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed contrary to the regulations hereinafter provided for." This language indicates a legislative purpose that the federal regulations were to be exclusive. And this idea seems to be further indicated in the provision, "That nothing herein contained shall be deemed to affect or interfere with the local laws of the States and Territories for the protection of non-migratory game or other birds

resident and breeding within their borders, nor to prevent the States and Territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute." We do not, therefore, feel inclined to hold in this case that the federal regulations as to migratory game birds, *if valid,* are not to be regarded as exclusive of and in conflict with the State regulations which the respondent violated. Accordingly it becomes necessary we think to consider, whether the Act of Congress of March 4, 1913 and the regulations thereunder adopted are valid as against the State regulations for the preservation of wild ducks within its borders.

Notwithstanding the well recognized principle, that the authority to make a final and controlling determination of the question of the constitutionality of an Act of Congress is in the Supreme Court of the United States, and for that reason a State court does not ordinarily assume the consideration of such question, nevertheless, if, as in this case, before that question is finally decided by the Supreme Court, the enforcement of a State law depends upon whether Congress had power under the Constitution to pass an Act the effect of which is to suspend the State law, then it becomes the duty of the State court to act in accordance with its own decision of that question until such time at least as it may be otherwise finally determined by the supreme tribunal.

In considering this question, these fundamental and universally admitted principles should be kept in mind, that the federal government is one of enumerated powers, possessing such powers only as have been actually granted to it, and that all other powers of legislation, though not enumerated and defined because it was unnecessary and perhaps inexpedient that they should be, were retained by the States and remained in the States after the adoption of the federal Constitution as before, except so far as they were abridged by it. It must also be admitted as fundamental, that before the federal government was created the States had the right to exercise almost every legislative power, and among them, undoubtedly, that of establishing laws and regulations for the preservation of the wild game within their borders for the common good of their people, a doctrine which seems never to have been questioned in any jurisdiction.

In *State* v. *Snowman*, 94 Maine, 99, 111, our court said: "The fish in the waters of the State and the game in the forests belong to the people of the State in their sovereign capacity who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking." This doctrine is recognized by all the American courts and has had the uniform approval of the Supreme Court of the United States whenever the question has been considered by it. In *Geer* v. *Connecticut*, 161 U. S., 519, the leading case perhaps on the subject, Mr. Justice White (now the Chief Justice) learnedly analyzed the principles upon which this doctrine rests and exhaustively reviewed the precedents in which it is securely established. And it would be needless indeed to cite here the many authorities supporting this unquestioned principle, that the States, prior to the formation of the national legislature, had the power to make laws and regulations for the protection and preservation of the wild game within their borders.

Has that power been granted to the federal government? If so it must be found in either what is called the commerce clause, or the general welfare clause, of the federal Constitution.

The commerce clause authorizes Congress, "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Certainly the passage of wild birds in their flight from one State to another is not commerce between the States. However difficult it may be to define with precision the term commerce as used in that clause of the national Constitution, it is undoubtedly limited to the acts of man, and does not include the natural and uncontrolled movements of wild game. Nor can we perceive any reasonable ground for a contention that the commerce clause confers on Congress power to regulate the taking of wild game within the States. Indeed it would seem that all possible contention on this score has been already held untenable by the Supreme Court of the United States in several cases where the question has been exhaustively considered. In the case of *Geer* v. *Connecticut*, supra, the validity of a statute of that State, which prohibited the transportation of game out of the State, was involved. The case was carried to the Supreme Court of the United States on the sole ground that as the game in question was killed in the State lawfully, the statute prohibiting its transportation out of the State was in violation of the commerce clause of the national Constitution. But the Court

decided otherwise, holding that the wild animal and bird life within a State belongs to the State in trust for the people of the State, and that the State has the authority to legislate for its protection and preservation for the common good, and that such power of legislation embraces game that has been reduced to the possession of an individual by lawfully killing it in the State; or, in other words, that in view of the peculiar nature of such property and its ownership by the State for the benefit of all its citizens, the State may prohibit its transportation out of the State although lawfully killed within the State, because such a prohibition may tend to restrict its lawful killing within the State, and the better preserve it for its own people. And it was there held that while game, taken lawfully, might be considered a subject of commerce within the State where taken, it did not become the subject of interstate commerce within the commerce clause of the federal Constitution. See also *New York Ex Rel. Silz* v. *Hesterberg*, 211 U. S., 34, where it is held that a statute of New York prohibiting the possession of certain game during closed time did not violate the commerce clause of the federal Constitution. In Judson on Interstate Commerce, Sec. 11, the author says: "Thus the wild game within a State, at common law, belongs to the sovereign, and in this country to the people in their collective capacity, and the state, therefore, has a right to say that it shall not become the subject of commerce." Our conclusion therefore is that the power to legislate respecting the protection and preservation of wild game within the States was not conferred upon Congress through the commerce clause of the Constitution.

Nor do we find such power in the general welfare clause, which reads as follows: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims of the United States, or of any particular state."

We have already hereinbefore pointed out as the universally accepted doctrine, that the ownership of wild game, so far as it is capable of ownership, is in the States for the benefit of all their people in common. It follows, therefore, that Congress acquired no power under the general welfare clause to make regulations concerning wild game, because wild game is not "property belonging" to the United States. And we need here only repeat what has been before said in

substance, that the basic principle on which all the decisions of both the State and Federal Courts upholding the State game laws rest is, that the State is the owner of the wild game within its borders, and that principle has been consistently adhered to.

The question of the constitutionality of the Act of March 4, 1913 and the regulations thereunder, has been directly considered in two recent cases in the Federal Courts, viz: *United States* v. *Shauver*, 214 Fed., 154, decided by the District Court for the Eastern District of Arkansas, and *United States* v. *M'Cullagh*, 221 Fed., 288, decided by the District Court for the District of Kansas. In each of those cases, in an exhaustive opinion, the court reaches the same conclusion here reached, that Congress has not the power to regulate the taking of migratory game birds within the States, and that therefore the Act of March 4, 1913, is unconstitutional. In each of those cases the respondent was prosecuted in the Federal Court for a specific violation of the federal regulations.

Our conclusion therefore is, that the power of the State of Maine to enact laws and regulations for the protection and preservation of wild game within her borders, including migratory game birds, was in no way suspended or abridged by the Act of Congress of March 4, 1913, and the regulations adopted thereunder, and that the provision of the game laws of the State of Maine which the respondent violated was operative and enforceable against him.

There is no merit in the respondent's suggestion that because the warrant against him in this case was directed to a fish warden and served by him the proceedings were defective. Fish wardens are empowered by statute to "enforce all laws and the rules and regulations relating to sea and shore fisheries, arrest all violators thereof, and prosecute all offenses against the same; they shall have the same power to serve criminal processes against such offenders, and shall be allowed the same fees, as sheriffs for like services; they shall have the same right as sheriffs to require aid in executing the duties of their office."

Sec. 45, of Chap. 206, Public Laws, 1913, reads as follows:

"The general supervision of the department of sea and shore fisheries as heretofore fixed by law is hereby extended to embrace all the islands in the sea within the jurisdiction of the state, the deer and other game and birds found thereon, and said department shall have charge of the enforcement of the laws relating to all ducks, shore and

other birds on the sea-coast of the state one mile inland, including all bays and inlets so far as the tide ebbs and flows, except the Kennebec river above the city of Bath."

We entertain no doubt that the fish warden to whom the warrant against the respondent was directed and by whom it was served had ample authority conferred upon him by statute to act in the premises.

Judgment of lower court affirmed.

MAINE CENTRAL RAILROAD COMPANY

vs.

NATIONAL SURETY COMPANY.

Cumberland. Opinion July 21, 1915.

Alteration. Bond. Contract. Contractor. Damages. Insolvency. Possession. Surety. Waiver.

1. The principle is elementary that any material alteration in the terms of a contract for the performance of which a surety is bound, if made without the surety's consent, releases him from liability.
2. It is also an established rule that a surety for the faithful performance of a building contract is entitled to have the consideration for the contractor's performance of his undertakings retained by the creditor in accordance with the terms of the contract.
3. The great weight of authority is to the effect that if the creditor in such a contract makes advance payments to the contractor, in violation of the terms of the contract, without the surety's consent, such payments operate to release the surety to some extent.
4. An advancement of money by an owner to his contractor before a payment becomes due under a building contract does not necessarily operate as an alteration of the contract itself; that depends upon the amount of the payment and the conditions and circumstances under which it was made, considered in connection with the rights and obligations of the surety under his contract of suretyship.

5. In the case at bar, the advance payments made by plaintiff to the contractor, under the circumstances and conditions disclosed, did not constitute an alteration of the contract so as to release the surety from all liability.
6. To the extent of the advance payment of five thousand dollars the surety is released, and is not to be charged with that as a part of the cost of the work.
7. Where in an action for a breach of a contract the plaintiff has recovered a judgment, that judgment is presumed to include all the damages he sustained by reason of the breach. In such an action the plaintiff is not permitted, without the defendant's consent, to withdraw a part of his alleged damages and reserve that as the subject of another action.
8. The liability of a surety cannot exceed that of his principal. And where a contractee has brought an action against his contractor for damages on account of a breach of the contract, that judgment fixes the amount of the damages for the breach so far as the plaintiff is concerned; and in a subsequent action by the same plaintiff against the surety for the contractor the plaintiff cannot recover more damages for the breach than the amount of his judgment against the contractor.
9. The plaintiff having taken possession of the contractor's plant and other property in the exercise of its right under the contract to take and hold the same as security for any damage it might sustain by reason of a breach of the contract, must be regarded as holding the property so taken for the benefit of the surety as well as itself.

On report. The cases are remanded to nisi prius to be disposed of in accordance with the stipulation and this opinion.

Two actions against defendant as surety in the bonds given by a contractor to secure the performance of his contracts with the plaintiff for construction work. They are reported to the Law Court on an agreed statement of facts and are to be argued together.

The cases are stated in the opinion.

Symonds, Snow, Cook & Hutchinson, for plaintiff.

Hinckley & Hinckley, for defendant.

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

KING, J. These actions are against the defendant as surety in the bonds given by a contractor to secure his contracts for construction work. They are reported on an agreed statement.

June 16, 1909, William J. McHale entered into two contracts with the plaintiff, one for the construction of masonry work, and the other for the doing of grading and formation work, in revising the line and

grade and double tracking a portion of the plaintiff's railroad. The defendant became the surety in each bond given by McHale to secure his performance of the respective contracts. Each bond contained the following condition: "The condition of this obligation is that if the party designated as contractor in the foregoing contract shall faithfully furnish, and do everything required therein of said party, this obligation shall become of no effect, otherwise shall continue in full force." They contained no other provisions.

The masonry work was to be completed by November 1, 1909, and the other work by November 16, 1909. The following is the provision for payment in the grading contract: "And the Company agrees to pay the Contractor at the rates aforesaid, monthly, on or about the fifteenth of each month, for all work done and materials furnished and delivered on the work, up to and including the last day of the preceding month, certified to by the Company's Chief Engineer to be in accordance with this contract, less fifteen per centum of such amount, which percentage shall be withheld by the company until the final completion and acceptance of the work, under the terms and agreements of this contract, when the percentage so retained together with the balance due on the Final Estimate, shall be paid by the Company upon the certificate of the Company's Chief Engineer that the whole work provided for in this contract is completed and acceptably finished within the time specified." The provision for payment in the masonry contract was to the same effect, providing for the payment on or about the fifteenth of each month "of eighty-five per cent (85%) of the value of the work done and materials furnished in their final position in the work during the preceding month, as shown by estimate of the Chief Engineer of the said Railroad."

In each contract it was provided that in case the contractor made default in any of his undertakings, or failed to carry on the work with such efficiency as to insure its completion within the time provided, the Company could take over the work and complete it at the contractor's expense; and in the grading contract it was provided that the Company could take possession of the said work, or any part thereof, "with the tools, materials, plant, appliances, houses, machinery, and other appurtenances thereon, and hold the same as security for any or all damages or liabilities that may arise by reason of the nonfulfilment of the Contract within the time herein stipulated, and furthermore, may employ the said tools and other appurten-

ances, and such other means as said Company may deem proper to complete the work at the expense of the Contractor, and may deduct the costs of same from any payments then due or thereafter falling due to the contractor; and in case the contractor shall not complete the said work within the time herein specified, and the Company shall, notwithstanding such failure, permit the contractor to proceed with and complete the said work as if such time had not elapsed, such permission shall not be deemed a waiver in any respect by the Company of any forfeiture or liability for damages or expenses arising from such non-completion of said work within the time specified, but such liability shall still continue in full force against the Contractor as if such permission had not been granted. And it is further distinctly understood and agreed that "time" whenever mentioned in this Agreement, is of the essence of this Agreement."

Mr. McHale, the contractor, died September 3, 1909, while the work was in progress. Previous to his death, on August 25, 1909, an advance payment of $5000 was made to him by the plaintiff without the knowledge of the surety. This payment was not due under the terms of the contracts until September 15, 1909. On the date when the payment was made no estimate of the work was made by the engineer, but, according to the agreed statement, "it was believed that the work done was in excess of this amount and the August estimate for the work done for that month showed this to be the fact." As the work progressed, other advance payments were made to subcontractors before they were due, but only after estimates had been made showing that the amount of work done was in excess of the advance payments.

Administration on the estate of Mr. McHale was taken out in Penobscot County, Maine, and his widow, Evelyn F. McHale was appointed administratrix thereof, and she undertook to complete said contracts. On September 30, 1909, after previous notice to her as provided for in the contract, the plaintiff notified her "that the Maine Central Railroad Company does hereby take possession of the said work with the tools, materials, plant, appliances, houses, machinery and other appurtenances thereon, and hold the same as security for any and all damages or liabilities that may arise by reason of the nonfulfilment of said contract, and will employ said tools and other appliances as it may be deemed proper to complete the work at your expense and will deduct the cost of the same from

any payments now due or hereafter falling due to you." On November 16, 1909, the plaintiff notified the defendant that the work had not been completed in accordance with the terms of either contract and demanded damages to the full penalty of the bonds. Prior to November 16, 1909, the defendant had no knowledge of Mr. McHale's death, or of the failure of either the contractor or the administratrix to perform the contracts according to their terms. The plaintiff completed the work provided for in each contract, that under the masonry contract at a profit of $832.51, and that under the other contract at a loss of $6,782.44; but the work was not completed within the time specified in either contract, and it is not shown at what time it was finished.

In August, 1910, the estate of Mr. McHale was represented insolvent and the plaintiff was named as a creditor to the amount of $6,840. In the warrant to the commissioners, however, it was not named as a creditor, and in March, 1911, it petitioned the Probate Court for an extension of time to file its claim, which was granted and an additional warrant was issued to commissioners in which the plaintiff was named as a creditor to the amount of $22,070.13. Its claim was disallowed by the Commissioners, whereupon an appeal was taken to the Supreme Judicial Court and an action was brought thereunder by the plaintiff claiming therein to recover $6,782.44, its direct loss under the grading contract, and $16,120 as consequential damages resulting to it from the failure of the contractor to complete the work under the contracts within the times provided therefor, less the $832.51 profit on the masonry contract, leaving a balance as claimed of $22,070.13. The plaintiff also filed in Penobscot County, Maine, a bill in equity against the administratrix. The administratrix, on the other hand, brought against the plaintiff an action of trover in the County of Suffolk, Massachusetts, to recover the value of the plant and other property which the plaintiff had taken possession of as above stated, and she also brought another action against it under the contracts. Subsequently a compromise was made between the plaintiff and the estate of McHale by which the administratrix was to have judgment for $7,299.50 and costs in her action of trover, judgment was to be entered for the defendant without costs in her other action against the plaintiff, the bill in equity was to be dismissed without costs, and the plaintiff was to take judgment for $5950.13 in its suit pending in Maine on its claim against the estate. That com-

promise was carried out. The plaintiff paid the administratrix the said sum of $7299.50 and costs and retained possession of the plant. In the action pending in Maine on the plaintiff's claim the auditor, therein previously appointed, in accordance with the compromise agreement and by consent, reported that the amount due the plaintiff was $5950.13, whereupon judgment was rendered by said court for that amount and a certificate of the judgment was filed in the Probate Court. In his report the auditor states, "The question of consequential damages was not considered by me." It is stated in the agreed statement that "Owing to the fact that the contracts were not completed within the specified time, the Maine Central Railroad Company was compelled to continue to operate its trains over the old grade at Damascus between Etna and Hermon Pond, and in so doing incurred an additional operating cost, which cost is claimed in these cases as consequential damages."

It is stipulated that if the court shall find that the defendant is liable the cases shall be referred to an auditor to ascertain and report the amount of damages according to such rules as the Law Court shall determine.

1. The defendant complains that it was not notified by the plaintiff as to the progress of the work in the contractor's lifetime, or of his death and what was done thereafter in respect to the completion of the work. But there was no provision in the contract of suretyship for any such notice. In the absence of such provision there was no duty on the plaintiff to keep the surety constantly informed as to the state of the work under the contracts. In such case the surety must protect his own interest to the extent of ascertaining that his principal is performing his duty under the contract which he has guaranteed. *Wakefield* v. *American Surety Co.*, 209 Mass., 173, 177. *Watertown Fire Ins. Co.* v. *Simmons*, 131 Mass., 85.

2. It is claimed in behalf of the defendant that it was released from all liability as surety on the bonds in suit by reason of the payments made by the plaintiff to the contractor in advance of the time they would have become due under the terms of the contracts, and without its consent.

The principle is elementary that any material alteration in the terms of a contract for the performance of which a surety is bound, if made without the surety's consent, releases him from liability. It is also an established rule that a surety for the faithful performance of

a building contract is entitled to have the consideration for the contractor's performance of his undertakings retained by the creditor in accordance with the terms of the contract, for the reason that it affords protection to the surety against possible defaults of his principal, and also serves as an incentive to the contractor to promptly and faithfully perform his undertakings which the surety has guaranteed. And undoubtedly the great weight of authority is to the effect, that if the creditor in such a contract makes advance payments to the contractor in violation of the terms of the contract, without the surety's consent, the making of such payments operates to release the surety to some extent at least. But the authorities do not agree on the question, whether the surety will be released from all liability under a building contract, which provides for payments by installments to the contractor at specified times as the work progresses, according to estimates thereof as provided for, if the creditor, without the surety's consent, makes payment to the contractor in advance of its becoming payable, or without such estimate. There are authorities which hold that any payment made to the contractor in such a contract in advance of its becoming due under the terms thereof, necessarily operates to release the non-consenting surety from all liability regardless of whether the payment results to his advantage or disadvantage. That ruling is predicated on the theory that the creditor should not depart from a strict observance of the letter of the contract which the surety has guaranteed, otherwise he does so at the peril of releasing the surety from all liability. That is a very strict construction of the rule above stated for the protection of the surety, and in its application will often include cases that fall well without the very reason for the rule. We do not think that extreme doctrine is sustained by convincing reasons, or will be found supported by satisfying authorities.

There is a long line of cases, following the ruling in *Calvert* v. *London Dock Co.*, 2 Keen, 538, wherein the sureties for the faithful performance of building contracts have been held released from liability on account of payments having been made by the creditor to the contractor in advance of their becoming due under the terms of the contract. It is believed, however, that a careful examination of those cases will show that they are based on the holding that the advance payment was a plain violation of the spirit as well as the letter of the contract, being a payment that either encroached upon

the amount to be reserved until the work was fully completed free of liens or other incumbrances, or a payment so much in excess of the work performed at the time that it was clearly antagonistic and prejudicial to the rights and interests of the surety under the terms of the contract. For example: In *Calvert* v. *London Dock Co.*, supra, the contract provided that three-fourths of the work as finished should be paid for every two months and the remaining one-fourth upon the completion of the whole work. But payments exceeding three-fourths of the cost of the work were made before the completion of the entire work. In *Kiessig* v. *Allspaugh*, 91 Cal. 231, 27 Pac. 655, the contract required the owner to retain 25% of the price until the completion of the work, but it was all paid over before the work was finished. In *Glenn Co.* v. *Jones*, 146 Cal. 518, 80 Pac. 695, the contract price was $5580 payable in three installments of $1860 each, the first payment to be made when all the material was on the site. But the first payment was made when less than two-fifths of the materials was on the site, and then the contractor abandoned the work and "pocketed" the money paid. In *Welch* v. *Hubschmitt Building & Woodworking Co.* 61 N. J. L. 57, 38 Atl. 824, a part of the second payment was made before it was due and the court said: "So far as appears in the certificate, the work to be done before the second payment was earned never was done by the contractor." In *Wehrung* v. *Denham*, 42 Or. 386, 71 Pac. 133, the contract provided for payment to be made of 75% of the value of the labor performed and materials used, the balance of 25% of the total contract price to be retained until after the whole work was finished and accepted by the architect, but the contractor was paid in full as the work progressed. So in *Cowdery* v. *Hahn*, 103 Wis. 455, 81 N. W. 882, where the contract provided for payments as the work progressed of 85% of the value of the work done and materials furnished, the entire contract price was paid before the work was completed. In *James Black Masonry & Contracting Co.* v. *National Surety Co.* (Wash.) 112 Pac. 517, the contract provided for the payment of 85% of the work finished on the first day of each month and the balance on the completion of the whole work, but $3500 was paid before any work was done, $6632.46 before any material was delivered, and $9571.19 before any payment was due. In *Fidelity & Deposit Co.* v. *Agnew*, 152 Fed. 955, payments were to be made of 90% of the amount of the material delivered on the ground during the preceding month according to

the certificate of the architect, the remaining 10% to be paid 30 days after the architect accepted all the materials, etc. The court there said: "And when it is considered that, out of a total contract price of $110.000 . . . . . bills of some $105.000 were approved and paid . . . . and overpayment of $32,000 . . . . The prejudice of this to the surety is manifest, the overpayment made being substantially the amount above the contract price, which is now demanded." In *Board of Com'rs* v. *Branham*, 57 Fed. 179, a payment was to be made when the work was half completed of 85% of the cost of the completed work, but not to exceed $7480, and the balance when the work was fully completed. But a payment of $10,046.68 was made when the work was not more than one-third done, and the contractor then abandoned the work. In *Morgan* v. *Salmon*, (N. M.) L. R. A. N. S. 1915 B. (Vol. 54) page 407, the contract provided that the obligee should retain not less than 15% of the value of all work performed and materials furnished until the complete performance of all the terms of the contract. At the time the contractor was discharged for defective work, all work performed and materials furnished were paid for in full. Although the foregoing are but a few of the many cases in which it is held that the surety is released because of payments to his principal, without his consent, in advance of their becoming due under the terms of the contract, yet they will suffice to show, we think, that those cases, for the most part at least, are not precedents for holding that any advance payment by the creditor to his contractor in a building contract without the surety's consent, must necessarily be held to release the surety from all liability, although it amounts to nothing more than a mere non-observance of the letter of the contract as to the time or manner of payment.

An advancement of money by an owner to his contractor before a payment becomes due under the building contract does not necessarily operate as an alteration of the contract itself. Whether it has that effect depends, we think, upon the amount of the payment and the conditions and circumstances under which it was made, considered in connection with the rights and obligations of the surety under his contract of suretyship. Instead of weakening the contractor's incentive to carry on the work to a prompt completion, it may strengthen his capacity to do so. It may be found to be in effect only an advancement at the owner's risk, which is not to be

taken into account as a part of the cost of the work as against the surety in case of subsequent default of his principal. Whether in any particular case the terms of a building contract have been materially altered by advance payments to the contractor, should be determined from a consideration of the facts and circumstances of that case.

In the quite recent case of *St. John's College* v. *Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994, the owner paid the contractor, after the fifth payment and before the sixth was due, $1000 to save him from failing and to enable him to pay his men, and thereafter paid $1226.05 more to laborers to avoid labor troubles. At the time of those payments about $3000 worth of work had been performed subsequent to the fifth payment. The court there held that those payments did not release the surety from all liability. But it did hold that the payments, under the circumstances disclosed, were made at the risk of the plaintiff and that they should not be considered a part of the cost of the work to the plaintiff, as against the surety. Numerous other cases might be cited where it has been held that the surety in a building contract was released only pro tanto as the effect of advance payments to the contractor, or payments made without a strict compliance with some other provisions of the contract as to the manner of payment; and there are other cases where it is held that such payments do not release the surety at all.

In the case at bar we are of the opinion that the advance payments made by the plaintiff to the contractor, under the circumstances and conditions disclosed, did not constitute an alteration of the contract so as to release the surety from all liability. When the advances were made work in excess of the amounts had been performed. The contractor died nine days after the $5000 advance was made, and the administratrix of his estate was permitted to and did carry on the work until the plaintiff took it over under the terms of the contracts. Under these facts and circumstances it does not seem reasonable to conclude that the making of the advances had any effect to remove or diminish to any degree the contractor's incentive to complete the work. Nor do we think they affected in any way the protection of the surety against the subsequent default of its principal. Indeed it is difficult to perceive that those advancements, under the facts disclosed, concern the surety. They would have been payable to the contractor in a few days for work then performed in excess of

the amounts. It is not suggested that they encroached upon the amount reserved till the work was fully completed. The plaintiff, however, had no right to make them out of the contract price, without the surety's consent. It saw fit to make the advancements in anticipation of their subsequently becoming payable to the contractor, as any other party might have done, and in so doing it acted at its own risk.

It is not shown that the contractor used the $5000 payment in liquidation of expenses of the work. It is perhaps entirely immaterial, so far as the surety is concerned, whether it was so used or not. Certainly if it was not so used the surety is not to be held liable for it. And it is our opinion that to the extent of that payment of $5000 the surety is released. Or, what seems to be the more logical statement, the surety is not to be charged with that as a part of the cost of the work. Such a holding is in accord with the great weight of authority. And in *St. John's College* v. *Aetna Indemnity Co.*, supra, it was so held notwithstanding it affirmatively appeared that the payments were used in paying for labor employed in the work.

3. As noted above, the agreed statement shows that the plaintiff brought suit against the estate of the contractor for the damages to it resulting from his breach of the contracts and recovered judgment therein for $5950.13. Is the plaintiff estopped in this action against the surety from claiming damages in excess of that sum? That question involves the primary inquiry, whether, as between the parties to that action, that judgment is conclusive as to the amount of the damages for the breach of the contracts. The learned counsel for plaintiff in their brief, in speaking of that judgment, say: "It must not be forgotten that it only covers the actual damages and that the auditor did not determine the amount of consequential damages and that he so expressly states in his report . . . . so that the allowance and amount of such damages are still open for consideration." The plaintiff's contention, that the matter of consequential damages for the breach of the contracts is still open to it as against the estate of McHale, is not sustainable we think.

Four actions were pending between the plaintiff and the contractor's estate—two in favor of the plaintiff in this jurisdiction, and two against it in Massachusetts. The parties entered into a compromise agreement for the final disposition of all those actions. The

administratrix petitioned the Probate Court for Suffolk County, Massachusetts, for authority to carry out the agreement of compromise, stating therein how each action was to be disposed of. Among other recitals in her petition is the following: "Said railroad is to be permitted, without further opposition by this petitioner, to prove its claim in the State of Maine in the sum of $5950.13." Her petition was granted. The auditor in his report says: "Forrest Goodwin, Esq., appeared for the plaintiff, and there was no appearance for the defendant, it having been agreed between the attorney for the plaintiff and the attorney for the defendant that the auditor should find and report to the court, the actual loss or damage to the plaintiff by reason of its carrying out the contract with the defendant to be Five Thousand Nine Hundred Fifty Dollars and thirteen cents ($5,950.13), for which amount I herewith return my findings. The question of consequential damages was not considered by me." The conclusion is inevitable, that the administratrix did not agree that a judgment in the plaintiff's favor against the estate was to be entered in the suit in Maine for a part only of the damages therein sued for, and the rest of the claim for damages (amounting to $16,120) be left undetermined—a subject for further litigation. The court did not grant her authority to agree to that, and such authority, if requested, would undoubtedly have been refused. What she did agree to was that the plaintiff could prove its claim for damages against the estate for the breach of the contracts, without opposition, to the amount of $5950.13. It follows, then, as a necessary conclusion that the matter of consequential damages was not withdrawn from the plaintiff's suit against the contractor's estate for breach of the contracts, *and reserved for subsequent consideration*, with the administratrix's consent.

But the plaintiff contends that inasmuch as the auditor's report shows that he did not consider the matter of consequential damages, such damages are still open for consideration. We think not. The plaintiff's cause of action against the contractor's estate was for a breach of the contracts. For that breach but one action under each contract was maintainable, and the plaintiff was entitled therein to recover all the damages it sustained by the breach both direct and consequential. A plaintiff is not permitted to have several successive actions for one breach of a contract, simply by limiting his claim for damages in his earlier actions to less than full damages. A fortiori,

where a plaintiff has sued for all his damages for a breach of contract, he cannot be permitted to withdraw his claim for part of the damages and reserve that for the subject of another action, without the defendant's consent. *Alie* v. *Nadeau*, 93 Maine, 282, seems to be an authority directly in point on the question now being considered. There the plaintiff had a contract with the defendant for six months employment at weekly wages. He was discharged within the period and brought suit for his wages unpaid up to the date of his writ and recovered. After the expiration of the six months he brought another action for wages from the date of his first writ. It was held that there was but one breach of the contract, for which but one action could be maintained, in which the plaintiff would be entitled to recover all his damages sustained by the breach, both present and prospective; and that he was not entitled to recover in the second action, notwithstanding he had not included in his first action the damages claimed in the second. He should have done so, and accordingly the law presumes that he did allege and recover in that action all the damages that he sustained. In the case at bar the plaintiff brought suit against the estate of the contractor, and alleged therein all the damages which it then claimed or now claims resulted to it from the breach of the contracts. It was entitled to make proof in that action of all its damages, and having taken judgment therein that judgment must be presumed to represent all the damages it sustained.

That judgment, however, is not a bar to this action against the surety, because it has not been satisfied. But is it not an adjudication as to the amount of the damages that the plaintiff sustained by the contractor's breach of the contracts, which the plaintiff is not permitted to question in this action against the surety for the same breach? That the surety may question it we have no doubt, but we are constrained to the opinion that the plaintiff cannot be permitted in this action to do so. The case, *United States* v. *Allsbury*, 4 Wallace, 186, is directly in point. Allsbury had become bound as a surety on the official bond of one Dashiel, paymaster. Suit was brought against Dashiel and one of his sureties, but not Allsbury, to recover $20,085 as damages, and judgment was rendered therein for $10,318.22. While proceedings were pending to have that judgment reversed on writ of error, an action on the same official bond was brought against the personal representatives of Allsbury, and the

former judgment was pleaded and admitted for the purpose of reducing the recovery to that amount. The Supreme Court, in an opinion by Mr. Justice Nelson, said: "It is unnecessary to refer to authorities to show that the liability of the surety cannot exceed that of his principal; and that amount having been fixed by a judgment at law, it formed the rule to determine the sum to be recovered in this suit. The verdict and judgment were competent evidence on behalf of the surety for this purpose; indeed, the highest evidence of the fact. Other questions would have arisen if this judgment had been offered against the surety."

In the case at bar the plaintiff saw fit to have the question of the damages it sustained by the breach of the contracts, for the performance of which the surety was bound, determined in an action against the contractor in a court having jurisdiction to determine that question. We think the judgment recovered in that action fixes the amount of the damages for the breach of the contracts, so far as the plaintiff's rights are concerned.

Under the terms of the grading contract the plaintiff had the right to take possession of "the tools, materials, plant, appliances, houses, machinery, and other appurtenances thereon, and hold the same as security for any and all damages or liabilities that may arise by reason of the nonfullfilment of this contract within the time herein stipulated." The plaintiff having taken possession of the contractor's plant in the exercise of its right under the contract held the property so taken, for the benefit of the surety as well as itself, as security for any damage it sustained by reason of the contractor's breach of the contracts. *Springer* v. *Toothaker*, 43 Maine, 381. And notwithstanding the action of trover against the plaintiff for the value of the property so taken, and its settlement of that action by payment to the contractor's estate of $7299.50, which was done without the surety's consent, it must still be regarded, so far as the surety is concerned, as holding the plant and property as security.

The foregoing conclusions of the court may be summarized thus: (1) that the defendant has not been released from all its liability as surety under the bonds in suit; (2) that the payment of August 25, 1909, does not form a part of the damages for the breach of the contracts, so far as the defendant is concerned; (3) that the judgment recovered in the plaintiff's action against the contractor's estate for

breach of the contracts fixes the amount of the damages for such breach so far as the plaintiff is concerned, and the matter of consequential damages is not now open for consideration; (4) that the plaintiff holds the plant and other property of the contractor which it took possession of under the terms of the contract, as security for the damages it may be entitled to recover against this defendant in these actions, the value of that plant and property to be fairly and impartially ascertained and so applied.

The cases will, therefore, be remanded to nisi prius to be disposed of in accordance with the stipulation and this opinion.

So ordered.

STATE OF MAINE *vs.* JOHN H. GRONDIN.

Cumberland. Opinion July 24, 1915.

Assault with an intent to kill. Discretion. Exceptions. Hearsay Evidence. Indictment.

1. The denial of a motion to strike from the record, testimony on the ground that it is subsequently shown to be hearsay, is usually a matter of discretion.
2. When the evidence in support of a criminal prosecution is so defective or weak that a verdict based upon it could not be allowed to stand, it would undoubtedly be the duty of the court to instruct the jury to return a verdict of not guilty, and the refusal to so instruct would be valid ground of exceptions.
3. Evidence held sufficient to warrant the jury in finding the respondent guilty as charged in the indictment.

On exceptions by respondent. Exceptions overruled.

This was an indictment against respondent for an assault with intent to murder, and was tried before a jury at the September term, 1914, of the Superior Court for Cumberland County. The verdict was guilty. The respondent excepted to certain rulings, instructions and refusals to instruct, which are fully considered in the opinion.

The case is stated in the opinion.

Jacob H. Berman, for the State.

William C. Eaton, for respondent.

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

KING, J. The respondent was tried before a jury and found guilty, at the September term, 1914, of the Superior Court for Cumberland County, Maine, upon an indictment charging that on the first day of January, 1913, at Portland, Maine, he feloniously made an assault on his wife, Zelia Grondin, with intent to kill and murder her, by wilfully and maliciously opening the gas jet and leaving the gas flowing into the room where she was sleeping, thereby partially suffocating her. The case is before this court on two exceptions by the respondent.

FIRST EXCEPTION.

As tending to show that the respondent had a motive to get rid of his wife the State introduced testimony to the effect that he was infatuated with a Mrs. Derocher with whom he had improper and illicit relations. It appeared that after the alleged crime the respondent and his wife went to California, where she died in October, 1913. Mrs. Martin Haas, a witness for the State, testified that Mrs. Derocher received written communications from the respondent from Los Angeles, California, and that she went to California in December following the death of Mrs. Grondin in October.

Counsel for the respondent claimed that it was made to appear by the cross examination of Mrs. Haas that she did not know of her own knowledge that Mrs. Derocher went to California, and he moved to have her testimony in reference to that stricken from the record on the ground that it was hearsay, which motion was denied and an exception taken to that ruling.

The denial of a motion to strike from the record testimony on the ground that it is subsequently shown to be hearsay, is usually a matter of discretion. And if it had appeared in this case that the only knowledge Mrs. Haas had that Mrs. Derocher went to California was that some one had told her so, the motion might have been properly granted. But the cross examination developed not only that she had been so told, but that she had seen written communications in the handwriting of Mrs. Derocher, and signed by her, which came through the mails from California. That was the statement of facts within the personal knowledge of the witness from which the reasonable and natural conclusion was that Mrs. Derocher

went to California as the witness testified. There was, therefore, no reversible error in this ruling denying the motion to strike out.

SECOND EXCEPTION.

At the close of the evidence the respondent's counsel requested the presiding Judge to instruct the jury to return a verdict of not guilty, and to the refusal of that request an exception was taken.

Where the evidence in support of a criminal prosecution is so defective or weak that a verdict based upon it could not be allowed to stand, it would undoubtedly be the duty of the court to instruct the jury to return a verdict of not guilty, and the refusal to so instruct would be a valid ground of exceptions. But the case now before us is not one, we think, where such an instruction should have been given.

The fact was unquestioned that a gas jet in the room where the respondent's wife and child were sleeping, and also another gas jet in an adjoining room, were opened by some one and both Mrs. Grondin and the child were rendered unconscious by the escaping gas. There can be no doubt from the evidence that the respondent opened those gas jets. Indeed, the learned counsel for the respondent so states in his brief, saying: "We do not deny for a moment that the jury might have been warranted in finding, even beyond a reasonable doubt, that the respondent was responsible for the escaping gas, that he did turn on these two jets." But it is contended that the evidence was not sufficient to warrant the jury in finding that the respondent opened the gas jets with intent to take the life of his wife. We think this contention is not sustainable. No explanation, by or in behalf of the respondent, was made of the indisputable fact that he opened the gas jets; on the other hand, the State showed that he made absurd suggestions as to how the jets might have become opened, and told unreasonable and contradictory stories as to where he was in the house and what he was doing during the time his wife and child were being suffocated to unconsciousness by the escaping gas. Moreover, it was shown that previous to the time in question he had made eager efforts to discover if possible some evidence of misconduct on the part of his wife, resorting in the last extremity to the carrying out of a diabolical scheme whereby he had a so called detective in the guise of a priest visit and question his wife as her confessor while she was desperately ill from drugs he had administered

to her for the purpose. It will serve no useful purpose to recite or summarize the evidence presented against the respondent. Suffice it to say, that after a careful examination and consideration of all the evidence the court is of the opinion that it was amply sufficient to warrant the jury in finding the respondent guilty as charged in the indictment.

Exceptions overruled.

JOHN M. HYER

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY COMPANY.

Androscoggin. Opinion July 24, 1915.

Collision. Damages. Injuries. Negligence. Passenger.

No tendency is discovered on the part of the plaintiff to exaggerate either his objective or his subjective symptoms. The evidence, as a whole, leaves no doubt that the verdict, if excessive at all, is not so excessive as to justify the interference of the court.

On motion by defendant for a new trial. Motion overruled.

This is an action to recover damages for injuries received by reason of the negligence of the defendant in so running one of its cars, on which plaintiff was a passenger, that it collided with another car of defendant. Plea was the general issue. The verdict was for plaintiff for $566.00. Defendant filed a motion for a new trial.

The case is stated in the opinion.

W. H. Judkins, for plaintiff.

Newell & Woodside, for defendant.

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

SAVAGE, C. J. Two of the defendant's cars collided, and the plaintiff, a passenger on one, was injured. For his injuries, the

jury awarded him $566. The case is now before the court on a motion for a new trial, and the only ground urged is that the verdict was excessive. The question of liability is not contested.

The physical injury was a sprain of the metatarsal joint of the right foot. The plaintiff wore a plaster cast three or four weeks. Then he returned to his accustomed employment, but continued to use crutches for two weeks after. The plaintiff contended, and the evidence warranted the jury in finding, that the injuries were more serious and continuing than a mere sprain. Being asked at the trial, several months after injury, to explain, the plaintiff said:— "It seems to be drawing this foot over like that all the time, and you let me take it and try to bend it out like that, and it seems as though you was taking a piece of thick heavy cloth and trying to tear it in two. . . . This cord now seems to be pulling up all the time." I walk "on the outside like that, because I can't step down square." He also said: "Nights after I get into bed it will vary in the hours when it starts in, but it pains me. Not what you may call a very severe pain, but pain enough to keep a man kind of awake. Sometimes it will pain me nights so I am awake three or four hours, then I will get into a drowse, and it will pain me and wake me up again, and that is the way I get it nights. Some nights I get a good nights' sleep. . . . . It feels fairly well in the morning, but take it along between two and three o'clock in the afternoon it begins to get weak and I have to kind of favor it from that on every day." The plaintiff's employer testified that "he simply limps around, and doesn't go as readily as he used to." His attending physician testified that when he examined him ten days before the trial, "while the motion in the joints was all perfect, he walked on the outside of his foot. He couldn't seem to flex or extend the toes. By any stimulus I was able to apply it seemed to be impossible to make him do it. I touched the bottom of his foot and around his leg with a pointed instrument, and made pressure over certain points on his legs, in trying to make him flex his toes, and did not succeed. Apparently he tried to flex his toes, and couldn't seem to. Apparently there was a lack of sensation as well as motion." Another physician tested him for sensation, and testifies that "apparently he had no feeling in the sole of his foot. I used a high frequency electric current upon the bottom of the foot; had a spark about an inch and a half long—very powerful spark, and I let that go on the sole of the

foot, and he never moved." The plaintiff has a noticeable enlargement of the right great toe joint, which he says did not exist before the injury. His physician who attended him at the time of the injury says he did not notice it. An eminent surgeon called by the defendant says, "I do not believe the accident had anything to do with it. I think it has been a gradual development." But he says further, "The foot is held in a rigid condition. While I was making my examination I tried to get the foot limbered up, but he held it rigidly, and apparently unconsciously. The toes did not move easily. They are not like the toes of the other foot. I think the accident gave rise to the condition; it was the exciting cause of the condition of this form of paralysis, this variation of paralysis; or, to put it another way, I think if he had not been hurt he would not have had the trouble with his foot. I believe the foot can recover, so far as the nervous element goes, just as soon as his mind gets off that foot, or a very little after."

Having stated the essential evidence, we think comment is unnecessary. We discover no tendency on the part of the plaintiff to exaggerate either his objective or his subjective symptoms. The jury were warranted in accepting his statements. And the evidence as a whole leaves no doubt in our minds that the verdict, if excessive at all, is not so excessive as to justify the interference of the court.

Motion overruled.

WILLIAM H. MURRAY, Pet'r, In Equity, *vs.* ALBERT E. WAITE.

Cumberland. Opinion July 24, 1915.

Ballots. Defective Ballots. Distinguishing Mark. Election. Intention. Marking. Petition. R. S., Chap. 6, Sec. 70.

1. According to the amendment of Chapter 71 of the laws of 1912, all ballots marked with a cross in the square at the head of the column shall be counted, if the intention of the voter can be ascertained, no matter what casual, accidental, mistaken or unnecessary mark the voter may have placed upon the ballot, provided the same does not seem to have been fraudulently made; and the fraudulent intent must appear affirmatively.
2. A ballot having a cross in a marked square, but having a small mark drawn vertically, and apparently not accidentally, through all the names in party column, cannot be counted.
3. A ballot having a cross in the party square and in the square below the cross, a sticker, bearing the name of that party candidate for mayor, and having also two stickers not completely separated bearing the same name, placed nearly over the name of the same candidate, is counted.
4. A ballot having a cross in the party square and two stickers not completely separated over the name of the candidate for alderman, is counted.
5. A ballot having a cross in the party square and two stickers not completely separated over the name of the candidate for alderman, is counted.
6. A ballot having a cross in the party square and another beneath it, across the party designation, is counted.
7. A ballot having a cross in the party square with an extra line entering into it, showing an evident attempt to make and erase the previous cross, in which erasure the paper was broken, is not a mutilated ballot and is counted.
8. A ballot having for a cross in the party square, a peculiar figure, each arm of the cross being made of practically parallel lines with the ends crossed, is counted.
9. A ballot having for a cross in the party square lines which are broad and dull as if made with the rubber end of a pencil is counted.
10. A ballot containing a cross in the party square, around which a circle is drawn, is not counted.

11. A ballot having a cross in the party square and below a small cross beneath the residence of the candidate for mayor and a mark that looks like a T opposite the name of the candidate for ward clerk, whose name begins with T, is counted.
12. A ballot having a cross in the party square and a sticker not placed on or over the name of the candidate for alderman in the column, but under it so that both names appear, is not counted.
13. A ballot having a cross in the party square where the voter filled in his name of choice for party alderman, but failed to erase the name of the candidate not voted for, so that both names appear, is not counted.
14. A ballot cast by one admittedly never a resident of the ward cannot be counted.

On appeal by petitioner. Petition dismissed with costs.

This is a petition brought under R. S., Chap. 6, Sec. 70, to determine whether the petitioner or the respondent was elected Alderman from Ward 1 in the City of Portland at the annual election held on the first Monday of December, 1914. From the findings of the sitting Justice, who heard the case, the respondent appealed and the case was transmitted to the Chief Justice.

The case is stated in the opinion.

Guy H. Sturgis, and C. S. Chaplin, for plaintiff.

Eben Winthrop Freeman, for defendant.

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

SAVAGE, C. J. This is a petition brought under Chap. 6, Sec. 70, of the R. S., to determine the election of alderman in Ward 1, Portland at the municipal election in 1914. The certificate of election was given to the respondent. The petitioner seeks to oust him.

After hearing, the sitting Justice made the following findings and decree:—

"It is admitted by the parties and their counsel that in Ward 1 proper the

Number of	uncontested ballots is	1328
" "	defective " "	35
" "	contested " "	15
	Total,	1378

Island Ward 1

Number of uncontested ballots is	93
" " contested " "	1
Total	94

Island Ward 2

Number of uncontested ballots is	166
" " defective " "	5
" " contested " "	9
Total	180

Total number 1652, and of these it is admitted that the petitioner received 784 and the respondent 784. This leaves a total of twenty-five contested ballots to be passed upon by the court. These ballots for the sake of convenience were marked 1 to 25 severally at the hearing and will now be considered and disposed of in the same order.

Ballots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 14, 18, 19, 21, 22, contain crosses more or less irregular in form, but in my opinion should be counted.

Ballot 9 has a cross in the party square, and then a pencil mark drawn vertically through every name in the party column beneath. What the voter's intention was it is difficult to determine. Had he drawn a horizontal line through any or all the names of the candidates, the ballot could not be counted for such candidates. Instead, he has drawn a vertical line through all the names. It does not seem to be accidental. The line is as heavy as those that compose the cross. While it may not be necessary to consider this as a distinguishing mark of such a character as to invalidate the ballot, yet the voter certainly has failed to indicate his intention. The cross would show his intention to vote for the names below, the erasing line would show a contrary intention. He has left doubtful what he intended to do. Under these circumstances the ballot is rejected.

Ballot 10 has a cross in the party square and below the cross in the same square is a sticker bearing the name of that party candidate for mayor. I do not regard this as an invalidating distinguishing mark. It also has a double sticker, that is two stickers bearing

the same name, and separated except at the left hand end. This was placed nearly over the name of the same candidate for alderman, a rather senseless performance, but only one name was voted for alderman, and the expressed intention of the voter is clear. This ballot is counted.

Ballot 11 has a cross in the party column and the same sort of a double sticker over the name of the candidate for Alderman underneath. The fact that the stickers were not completely separated, so that the voter put on two of the same name instead of one, should not invalidate the ballot. This ballot is counted.

Ballot 12 has a cross in the party square and another beneath it, across the party designation. I do not regard this as an invalidating distinguishing mark. This ballot is counted.

Ballot 13 has a cross with an extra line entering into it, and also shows an attempt to make and erase a previous cross. In the erasure the paper was broken, but this does not make it a mutilated ballot. A mutilated ballot is one where the name of a candidate is cut out. An inspection of this ballot clearly shows what took place, and this ballot is counted.

Ballot 15 has a peculiar figure in the party square, each arm of the cross being made of practically parallel lines with the ends closed. Some doubt arises as to whether this should be counted, but under the provisions of chapter 71 of the laws of 1911, that "no ballot shall be rejected as defective because of any irregularity in the form of the cross in the square at the head of the party column unless such irregularity is deemed to have been intentional and made with a fraudulent purpose," I give the benefit of the doubt to the voter and count the ballot.

Ballot 16 has a cross in the party square the lines of which are broad and dull, as if made with the rubber end of a wide pencil. This, I think, meets the requirements and is counted.

Ballot 17. The party square contains a cross, around which is drawn a circle. This clearly falls within the prohibited symbols and this ballot is rejected.

Ballot 20 has a cross in the party square and below a small cross beneath the residence of the Mayor and a mark that looks like a T opposite the name of the candidate for Ward Clerk, whose name begins with T. I do not regard these as invalidating distinguishing marks and this ballot is counted.

Ballot 23 has a cross in the party name, but the sticker for Alderman is not placed on or over the name of the Alderman on the ticket, but beneath it, so that both names plainly appear. This ballot, so as far as Alderman is concerned must be rejected.

Ballot 24 is of the same character as No. 23. The voter made his cross in the party square and then filled in the name of his choice for Alderman, but failed to erase the candidate's name on the ballot, so that both names plainly appear. This ballot must be rejected.

Ballot 25 was challenged at the polls. It was cast by one who admittedly never resided in this ward and who was permitted to vote by order of the Board of Registration. The confusion arose over similarity of names and it is apparent that the mistake was an honest one on the part of the Board of Registration.

However, R. S., Chap. 5, Sec. 4, provides that "Every person qualified to vote, as hereinbefore provided, shall vote only in the ward of the city and voting precinct thereof, if any, in which he had his residence on the first day of April preceding, or his becoming an inhabitant after said day."

On April 1, 1914, this voter resided in Ward 2, and not in Ward 1, and the attempt of the Registration Board to transfer him to Ward 1, through a mistaken idea of the facts, was ineffectual and invalid. This ballot is rejected.

Of these 25 contested ballots therefore, the result is as follows:

Number counted for petitioner	10
Number counted for respondent	10
Number rejected	5
Total	25

I conclude therefore that there should be counted for the petitioner and the respondent respectively the following ballots:

For William H. Murray (Pet'r) Undisputed ballots,	784
Of the disputed ballots Nos. 5, 6, 7, 8, 10, 11, 12, 13, 14, 22	10
Total	794

For Albert E. Waite (Respondent) Undisputed ballots,	784
Of the disputed ballots, Nos. 1, 2, 3, 4, 15, 16, 18, 19, 20, 21	10
Total	794
Rejected, Nos. 9, 17, 23, 24, 25	5

It is therefore held that neither the petitioner nor the respondent received a plurality of the ballots cast for Alderman at the municipal election in Ward 1 and Island Wards 1 and 2 in the City of Portland held on the first Monday of December, 1914, and that as they received an equal number of ballots for said office neither was elected.

It is also held that since the petitioner has not shown himself entitled to the office his petition cannot be sustained. *Benner* v. *Payson*, 110 Maine, 204; *Libby* v. *English*, 110 Maine, 449.

Petition dismissed without costs."

And from this decision the respondent appealed.

It is unnecessary to give any further description of the ballots in dispute than that contained in the findings of the sitting Justice. Nor will it serve any useful purpose to discuss the ballots separately. The criticisms, in argument, on the one side and the other, of the decision rendered relate mostly to alleged distinguishing marks and defective marking. And upon these subjects our attention has been called to prior decisions of this court. The decisions, however, prior to the enactment of Chap. 71 of the Laws of 1911, can throw very little light upon the questions of distinguishing marks and irregular marking. Those decisions were interpretations of the statute as it existed from time to time prior to 1911. Chapter 71 of the Laws of 1911 was a radical amendment of the statute then existing. By that amendment it was provided that "no ballot, after having been received by the election officers, shall be rejected as defective because of marks, other than those authorized by law, having been placed upon it by the voter, unless with a fraudulent intent, and no ballot shall be rejected as defective because of any irregularity in the form

of the cross in the square at the head of the party column, unless such irregularity is deemed to have been intentional and made with a fraudulent purpose."

In discussing this statute in *Libby* v. *English*, 110 Maine, 449, we said:—"The plain intendment of the statute seems to be that all ballots marked with a cross in the square at the head of the column shall be counted if the intention of the voter can be ascertained, no matter whatever other casual, accidental, mistaken or unnecessary marks the voter may have placed upon the ballot, provided the same are not deemed to have been fraudulently made." And we add now that the fraudulent intent or purpose must appear affirmatively. If it does not so appear, the ballot must be counted. Fraud is not to be surmised, it must clearly appear. A ballot should not be rejected on the ground of fraudulent marking, when its appearance is consistent with any honest action or intention of the voter. The burden to show fraud is on the one that claims it. Doubts should be resolved in favor of the voter, unless the fraudulent purpose clearly appears. When we consider the disadvantages under which many voters mark their ballots, such as poor eyesight, bad light, or unfamiliarity even in the use of a pencil, it is not to be wondered at that there are many, and sometimes curious, irregularities in marking. And yet in most instances it is safe to say the voter had no dishonest purpose. On some ballots too the redundancy of marks suggests that the voter, probably having lived in another State, is more familiar with other methods of marking ballots than he is with ours.

In view of the provisions of the statute of 1911, our conclusion is that the decision of the sitting Justice upon all these ballots was correct, and we affirm it for the reasons stated by him.

In the case of one ballot, it is admitted that the voter did not reside in Ward 1, and never had resided there. He resided in Ward 2. His name was added to the voting list in Ward 1, on election day, upon a certificate of the Board of Registration, and he was allowed, under challenge, to vote. R. S., Chap. 5, Sec. 4, provides that "a person shall vote only in the ward of the city . . . . . in which he had his residence on the first day of April preceding." Not being a resident of Ward 1, at any time, he had no right to vote there, and no act of the board of registration, or of the ward officers, could give him any right to vote there. The vote was unauthorized and unlawful, and was properly rejected by the sitting Justice.

Upon the whole it appears that the petitioner and the respondent each received 794 votes that should be counted, and that the ballot was a tie. It follows that the petitioner was not elected, and not having been elected he cannot maintain this proceeding to oust the respondent. *Benner* v. *Payson*, 110 Maine, 204; *Libby* v. *English*, 110 Maine, 449.

The sitting Justice dismissed the petition "without costs." The statute, R. S., Chap. 6, Sec. 74, says, "the prevailing party shall recover costs." Under that statute the prevailing party is entitled to costs as a matter of law. The question of whether any costs shall be awarded is not left to the discretion of the sitting Justice as in equity. And we think the respondent, so far as this proceeding is concerned, is the prevailing party. To be sure we find that he received no more votes than the petitioner did. But he received the certificate of election, he qualified as Alderman, he is now in possession of the office. He is alderman de facto. The petitioner brought this petition to get himself declared elected, and thereupon to oust the respondent. He has failed to do so. He has not ousted the respondent. The respondent is not affected by the result. He holds the office under the forms of law. Whether he may be ousted in some other form of proceeding is not now the question. For the present, the respondent has prevailed. As the case stands, we think it is fairly within the meaning of the statute as to costs.

The decree of the sitting Justice should be modified in respect to costs, and the certificate will be,

Petition dismissed with costs.

AUGUSTUS G. PERRO, In Error, *vs.* STATE OF MAINE.

JOSEPH G. BLAIS, In Error, *vs.* STATE OF MAINE.

Penobscot. Opinion July 24, 1915.

Adjournment. Appeal. Intoxicating Liquors. Judgment. Jurisdiction. Municipal Court. Private and Special Laws of 1895, Chap. 211, Sec. 10. R. S., Chap. 29, Sec. 51. Writ of Error.

1. It is the design of the law that parties whose causes are pending in court shall have the right and opportunity to be present when any action is taken in their case.
2. The Bangor Municipal Court, as all other inferior courts, has only such powers as are conferred upon it by statute.
3. The Bangor Municipal Court has no stated terms for criminal causes; as to these, it is a temporary court for each case, exercising limited jurisdiction by prescribed methods.
4. It may adjourn an examination before it from time to time, but no more than ten days at a time.
5. The indefinite postponement of a case before it is in effect the indefinite postponement of the court.
6. A magistrate of an inferior court, unless authorized by statute, cannot adjourn the hearing of a criminal case indefinitely.
7. By such an adjournment, the court loses jurisdiction over the parties, and a judgment entered after such adjournment, except by consent, is void.

On report. Judgments reversed.

These are writs of error, in which Augustus G. Perro, of Old Town, in said county, and Joseph G. Blais, of Bangor, in said County, seek to have certain judgments of the Bangor Municipal Court reversed, for certain errors alleged therein. The State, by W. B. Peirce, County Attorney for said State, filed in each case answers to said writs, and the cases were then reported to the Law Court by agreement of the parties, for decision. Certified copies of the records of the Bangor Municipal Court in libels against intoxicating liquors, *State* v. *Intoxicating Liquors*, and claims for same in writing by

Augustus G. Perro and Joseph G. Blais, same to be filed with Clerk of the Supreme Judicial Court for Penobscot County, shall, by agreement, constitute the evidence in the cases.

The cases are stated in the opinion.

E. P. Murray, and Charles J. Hutchings, for plaintiff.

William B. Peirce, for State.

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

HALEY, J. Two writs of error, wherein the plaintiff in each case alleges that in a certain judgment of the Bangor Municipal Court upon libels praying for the forfeiture of certain intoxicating liquors, in which proceedings the plaintiffs had filed claims for the liquors libeled, and had been admitted as parties, as provided by Sec. 51, Chap. 29, R. S., there appears upon the record an error that deprived the court of jurisdiction to give judgment in the causes. The error alleged is that, "during the progress of the hearing in said matter said hearing was indefinitely postponed before the termination thereof and was finally adjourned before any judgment of the matter was rendered by said court, and by said indefinite postponement and by said final adjournment before judgment was rendered, said Bangor Municipal Court lost jurisdiction of said cause."

Both writs assign the same error, and the cases are before this court upon report. The record shows that both cases were heard at the same time by the Judge of the Municipal Court of Bangor, and the record introduced to support the allegation of error reads, as far as material to these cases: "On May 19, A. D. 1914, hearing had. Evidence closed. Arguments of counsel made, and case taken under advisement for a decision, and hearing adjourned without day." May 20, A. D. 1914, decision was rendered as follows: "The liquors ordered forfeited to State. Ralph P. Plaisted, Judge." And it is contended that, by adjourning the hearing May 19, 1914 "without day," the Bangor Municipal Court lost jurisdiction of the causes. Although the proceedings complained of were against the liquors only, the cases were criminal cases and governed by the rules of criminal law, *State* v. *Robinson,* 49 Maine, 285; *State* v. *Intoxicating Liquors,* 80 Maine, 57, and if the proceedings of the Bangor Municipal Court were unauthorized by law, the plaintiffs being parties to the pro-

ceedings can maintain their writs of error. *Barnett* v. *State*, 36 Maine, 198. The Bangor Municipal Court, as all other inferior courts, has only such powers as are conferred upon it by statute. It is provided by Sec. 10, Chap. 211, Private and Special Laws of 1895, "Said court (Bangor municipal court) may adjourn from time to time, but shall be considered in constant session for the trial of criminal cases." The act creating the Skowhegan Municipal Court contains the same provision, and was considered by the court in *Tuttle* v. *Lang*, 100 Maine, 125, as follows: "This municipal court has no stated terms for criminal causes. As to these it is a temporary court for each case, exercising limited jurisdiction by prescribed methods. It has no jurisdiction to suspend and revive at its will a case before it," and it was held the provision that said court may adjourn from time to time, was not in conflict with Sec. 10, Chap. 134, R. S., which provides, "a magistrate may adjourn an examination before him, from time to time, but not more than ten days at a time." In the proceedings the Bangor municipal court had the same jurisdiction that trial justices have in this state in similar cases. The Bangor municipal court was authorized by Sec. 10, Chap. 134, R. S. to adjourn the hearings for not more than ten days, and if the parties requested it might adjourn beyond ten days. *State* v. *Miller*, 48 Maine, 576. It is the design of the law that parties whose causes are pending in court shall have the right and opportunity to be present when any action is taken in their case. It is necessary for them, to protect their rights, to know when any action will be taken that may affect their rights. In the judgments complained of the present plaintiffs were allowed by statute twenty-four hours to appeal from a judgment adverse to them, and also upon the question of cost, and by adjournment without day they could not know when to be present to protect their rights, and the authorities are unanimous that a magistrate of an inferior court, unless authorized by statute, cannot adjourn the hearing of a criminal case indefinitely; that by such an adjournment the court loses jurisdiction over the parties, and that a judgment entered after such adjournment, except by consent, is void.

As said in *Commonwealth* v. *Maloney*, 145 Mass., 211, "When a case is pending in a permanent court of general jurisdiction, with stated terms, in which continuances are from term to term, a defendant may waive the formal entries of continuance, and consent that the case may

remain in court without such entries until asked for by either party. The court then retains its jurisdiction of the case and of the defendant, and has authority at any time to make the entries of continuance from term to term, and bring the case forward upon the docket of the term. A trial Justice is not a permanent court, with stated terms. His court is a court of record, but it is a temporary court for each case, kept alive by continuances, and exercising limited jurisdiction by prescribed methods. The indefinite postponement of a case before it, is in effect the indefinite postponement of the court. He has no jurisdiction to suspend and revive at his will a case and court before him." As said in *Sluga* v. *Walker*, 9 N. Dakota, 108, "So far as we can learn, no judgment rendered and entered by a justice of the peace at a time and place of his own choosing, after an indefinite adjournment, and without notice to the parties, has ever been upheld, where the question has been directly presented, and for very good reason; for such an adjournment deprives the parties of substantial rights and renders it legally impossible for them to be present and protect their interest." And in *Clark* v. *Reed*, 5 N. J., Law, 571, Kirkpatric, C. J., says: "I hold it to be clear that a Justice cannot closet himself up, or perhaps I might say, go about his usual business; then give judgment when and where he pleases, in the absence of the parties and especially at such a distant day. He must, like other judges, give judgment in open court when the parties are present, or had an opportunity of being present."

In *Harrison* v. *Chipp*, 25 Ill., 471, the court said: "In this case the justice of the peace, by the indefinite postponement of the cause, lost jurisdiction of the parties and was unauthorized to proceed to render the judgment. It, being unauthorized, was not binding on the parties and was void." And in *Crandall* v. *Bacon*, 20 Wis., 639, the court said: "The judgment of the justice of the peace enjoined by the Circuit Court was void. The justice adjourned the cause one week, without specifying the hour of the day or the place to which it was adjourned. He thereby lost jurisdiction of the cause."

As the Bangor Municipal Court lost jurisdiction of the causes, by the adjournment without day, the errors are well assigned and the judgments should be reversed.

Judgments reversed.

HARRY L. ILSLEY, et al., *vs.* JOHN F. KELLEY.

ASA M. SEAVEY *vs.* JOHN F. KELLEY.

York. Opinion July 24, 1915.

Check Lines. Deeds. Description. Dividing Line. Heirs. Lots. Plan. Range Line. Seizin. Survey. Title. Trespass Quare Clausum.

1. It is firmly established in this State that the survey must govern when its location can be shown, that where land is conveyed by lot, without further descriptions, that the lot lines determine the boundaries of that lot when they can be located.
2. It is the well known practice of proprietors of townships in this State to have them surveyed and laid out in ranges, without a more particular description, and the purchaser is entitled to his lot according to the original survey, if that can be ascertained.
3. The owners of adjoining lands may agree as to the division line and that agreement be binding upon them and those claiming under them.
4. This agreement is not necessarily conclusive upon other owners whose lands are bounded by the same division line, but it is competent evidence, when the original monument cannot be found, as tending to prove, not a new boundary or corner, but that the line coincides with the original monument referred to in the deed.
5. If the owner of a parcel of land, through inadvertence or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate as a disseizin.

On motion by plaintiff in both cases for a new trial. Motions sustained. New trials granted.

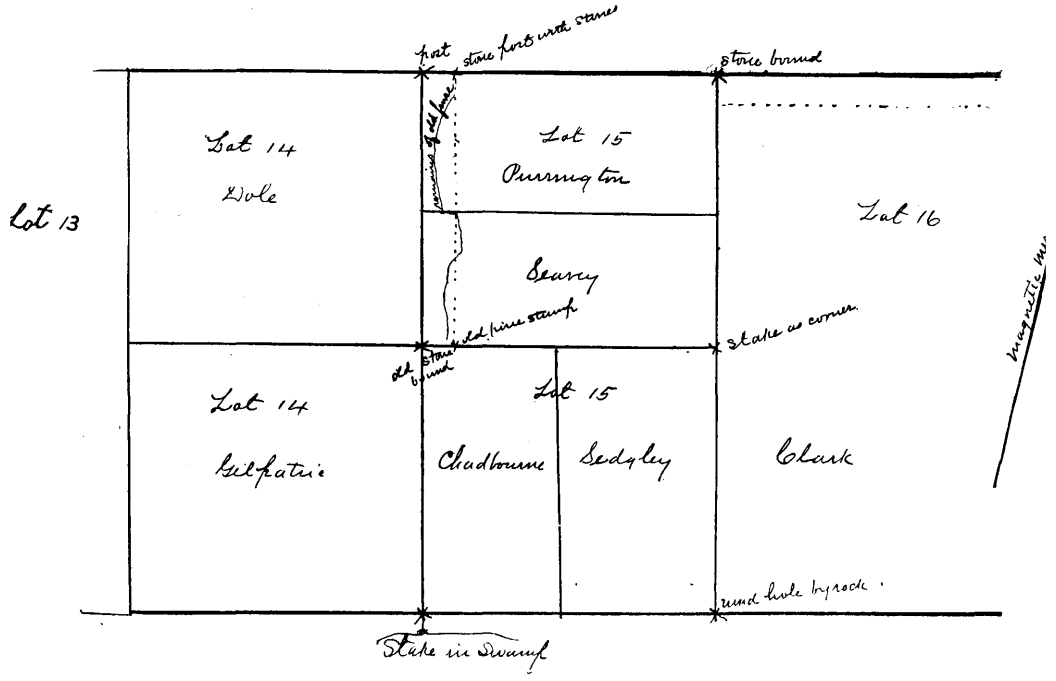
These are two actions of trespass quare clausum for entering, cutting and removing timber from their land situate in Limington, County of York, described in plaintiff's writs. Plea in each case is the general issue. The jury rendered a verdict in each case for the defendant, and the plaintiffs filed a motion for a new trial.

The cases are stated in the opinion.

Elias Smith, and Cleaves, Waterhouse & Emery, for plaintiffs.

Allen & Willard, and J. Merrill Lord, for defendant.

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



HALEY, J. Two actions of trespass quare clausum fregit for cutting and removing timber from a lot in Range D, in the town of Limington. The cases were tried together, the verdicts were for the defendant, and are before this court on motions to set aside the verdicts as against law and evidence.

The cutting and removing of the timber was admitted and sought to be justified by denying that the title to the locus was in the plaintiffs, and by the claim that it was in the heirs of Luther Dole. The record shows that in 1855 there was conveyed to Luther Dole, "the northerly half of lot No. 14, D. Range, containing fifty acres more or less;" that he continued to occupy the land until his death, February 17, 1892; that at the time of the acts complained of some of his heirs had conveyed their interest in the lot to the remaining heirs, who were in possession of the northerly half of lot 14; sold the timber

upon the locus in dispute, and authorized the acts complained of, and who defend these actions, claiming the cutting was upon the northerly half of lot 14, inherited by the heirs of Luther Dole.

Luther Dole's title came from the heirs of Henry Dole by four deeds, each of which described the land as "the northerly half of lot No. 14, Range D, containing 50 acres more or less." Henry Dole obtained title to the property conveyed by his heirs, by warranty deed of Daniel Hodgdon to Henry Dole and Hosea Clark, February 9, 1829, and Hosea Clark to Henry Dole November 12, 1839, in which deeds the land was described as "one half of lot No. 14 on D Range, it being the northerly half of said lot, containing about 50 acres." Daniel Hodgdon obtained title to the premises by warranty deed of Joseph Hodgdon October 20, 1828, the premises being described as, "it being one half of lot No. 14 on D. Range, it being the northerly half of said lot, containing fifty acres except a small piece which I sold to Thomas Beal." Some of the other deeds reserve from the conveyance the piece of land sold to Thomas Beal. There is nothing in the record showing where the Beal land was located, but the plan drawn by the surveyor appointed by the court shows that a small parcel in the northerly corner of the northerly half of lot 14 was apparently taken from that lot, but the evidence does not refer to it, except in the deeds as above, and its location is not material in these cases.

From the above statement of title it is apparent that Luther Dole at his death owned the northerly half of lot 14, Range D, and his predecessors in title had owned the same premises by deed so describing it at least from October, 1828.

The record shows that the plaintiffs in the two actions owned that part of lot 15, Range D, adjoining lot 14 as called in the case the "Dole land," tracing their title back to deed of Robert Cole to Washington Ilsley, December 2, 1856, which deed and all other deeds of the premises, including the deed under which the plaintiffs claim, bound the plaintiffs by land of Luther Dole.

At the trial the original survey or plan was not introduced, but a plan of lots 14, 15 and 16, Range D, made by a surveyor appointed by the court to survey the premises and make a plan of them, was used. The accompanying sketch of the plan shows the claims of the parties.

There is no dispute as to the range lines. It is claimed by the plaintiffs that the dividing line between lot 14, which is owned by the Dole heirs, and lot 15, the northerly part of which is owned by the plaintiffs, is a straight line as shown by the line from the post in the range line on the sand hill to a stone bound, half way across the range, extending further to a stake on the range line in the swamp. The defendant claims the dividing line runs from the stone post in the range line to a stake half way across the range, as shown by the dotted line. Between these two lines is the disputed lot upon which the cutting was done, containing about six acres.

It is objected by the defendant that in the writ of Ilsley, et al., the plaintiff's title in that portion of the northerly part of the disputed lot was obtained by a deed given in pursuance of a decree in a bill in equity brought to reform a deed given by Washington Ilsley in his lifetime to John Purington, and that the Luther Dole heirs were not parties to the suit, and ought not to be bound by it.

The objection is without merit. The defendant, or the Dole heirs or their predecessors in title, were not necessary or proper parties to the bill in equity, and the decree or deed does not include any land owned by the defendant or Dole heirs, or Luther Dole, their predecessor in title, but corrects a mistake in a deed in which neither the defendant nor the Dole heirs or their predecessor in title were parties, so that the plaintiffs have title to land in Range D, lot 15, that adjoins the Dole land in lot 14, and if the disputed lot was owned by Luther Dole no title to it passed to the plaintiffs by the deed, and if the disputed lot was not owned by Luther Dole, then of course they were not injured by the decree. The only question in the case was the location of the division or check line between lots 14 and 15, because Luther Dole owned the northerly half of lot 14, and the plaintiffs' title is of that part of lot 15 which adjoins the land owned by Luther Dole in his lifetime.

The defendant did not prove the location of lot 14 by plan or admitted monuments upon the lot, or by measurements from admitted boundaries of other lots in Range D, but claimed that the plaintiffs had not proved, as they should have done to entitle them to a verdict, that the disputed territory was in lot 15.

The record titles of the plaintiffs and the Dole heirs show that the check line between lots 14 and 15 is the dividing line between their lands, and the burden was upon the plaintiffs to prove the original

location of that line for the line run at the time the range and lots were originally located for the boundaries, are still the boundaries if their location can be found.

It is firmly established in this State that the survey must govern when its location can be shown, that when land is conveyed by lot without further descriptions, that the lot lines determine the boundaries of that lot when they can be located. *Bean* v. *Bachelder,* 78 Maine, 184; *Stetson* v. *Adams,* 91 Maine, 178; *Coleman* v. *Lord,* 96 Maine, 192.

"It is the well known practice of proprietors of townships in this State, to have them surveyed and laid out in ranges and lots, causing both to be numbered in regular sequence. They then sell by the number of the lot and the range, without a more particular description. And the purchaser is entitled to his lot according to its actual location, as made by the survey, if that can be ascertained. . . . Selling, as the proprietors do, by the number of the lot and of the range, the range and lot lines are referred to as monuments." *Warren* v. *Pierce,* 6 Maine, 9.

The southerly half of lot 14 was conveyed to Jeremiah Gilpatric by warranty deed dated February 23, 1810, by Daniel Hodgdon, who was the owner of lot 14, and who conveyed the northerly half of the lot February 8, 1829, to the Dole heirs predecessors in title. The two deeds by Daniel Hodgdon show that lot 14 contained 100 acres, and that the range and check or division lines across the range were the boundaries.

The plaintiffs claim to have proved the location of the check line by monuments testified to, and admitted by adjoining owners. John Gilpatric, who was eighty-six years old at the time of his deposition, and whose father owned the southerly half of lot 14, having inherited it from his father Jeremiah, who purchased it from Daniel Hodgdon in 1810, remembers the corners between the Gilpatric and Dole land for seventy years at least, and testified that the stone bound in the middle of the range was the boundary between the Dole lot and the Gilpatric lot on the check line between lots 14 and 15. He also remembers a stake in the swamp where the evidence shows that a stake now stands, as the corners of lots 14 and 15, and also a pine tree as a monument on the sand hill at the opposite side of the range where there is now a post, and remembers the stone bound between the Dole and Gilpatric land upon the check line for many years. The father of John Gilpatric conveyed the southerly half

of lot 14 in 1883 to James W. Foss, who now owns it. He was a witness for the defendant, and testified that the stone bound in the middle of the range was his corner, but did not think the stake in the swamp was the other corner, but by running the line from the stone bound to the range line in the swamp it is shown he was mistaken.

In October, 1888, Asa Libby, the then owner of the southwest one-quarter of lot 15 now owned by Chadbourne, showed the stone bound in the middle of the range as the corner of his land, (the Gilpatric land), and the corner of the plaintiff Seavey's land, then owned by Robinson, and the Dole land; and Mr. Robinson, who owned the plaintiff Seavey's land for twenty-one years, was shown the stone monument by his predecessor in title, and when he sold it in 1888 to Edgecomb, pointed out the stone bound in the middle of the range as the corner stone between the Gilpatric or Foss lots in lot 14 and the Dole lots in lot 14, the Libby and Chadbourne lot in lot 15 and the plaintiff Seavey's lot in lot 15.

Fourteen years before the trial the Libby lot was purchased by Chadbourne and a stake in the swamp afterwards replaced by a new stake in the same place by Mr. Chadbourne, and the stone bound in the middle of the range, which plaintiffs claim are on the check line, were pointed out to him as the line between lots 14 and 15, and his deed refers to them as the bounds, but Mr. Libby, who it is claimed pointed them out, does not remember that he pointed out the stake in the swamp, but he does not deny it. Several other witnesses identify the stone bound in the middle of the range and stake in the swamp as admitted corners between lots 14 and 15. Some thirty five years before the trial, there being a dispute as to some of the division lines upon the lots, the county commissioners were called upon and went on the premises to establish the lines, and the place where the stone monument stands in the middle of the range was apparently, by agreement, used as the check line between lots 14 and 15.

The defendant admitted at the trial that the stone bound in the middle of the range was upon the check line, as claimed by Mr. Foss the then owner, who testified that the stone represented the boundary of his land, as did all other witnesses, who testified to the corners of the lands in lots 14 and 15 one-half across the range where four different lots had cornered for so long that no one remembered when the bounds were first upon the land. During the examination of a

witness as to the claim made on the lot by Mr. Foss while the owner of the south half of lot 14 adjoining the Dole land, counsel for defendant stated that "the James W. Foss land is not now and has not been in controversy so far as we know."

The owners of adjoining lands may agree as to the division line and that agreement be binding upon them and those claiming under them, but it is not necessarily conclusive upon other owners whose lands are bounded by the same division line, but it is competent evidence, when the original monument cannot be found, as tending to prove, not a new boundary or corner, but that the line coincides with the original monument referred to in the deed. *Gilbert* v. *Curtis*, 37 Maine, 45; *Gove* v. *Richardson*, 4 Maine, 327; *Loring* v. *Norton*, 8 Maine, 61.

As the range lines are not in dispute, if any part of the check line is proved, from that point a line in a straight and most direct course to the range line will be the check line between the lots, *Melcher* v. *Merryman*, 41 Maine, 601, and a straight line so run from the stone bound in the middle of the range to the southerly range line runs to the stake in the swamp and a line from the stone bound in the middle of the range to the northerly range line runs to the stake and stone on the sand hill and shows the line from range line to range line, as claimed by the plaintiffs, and locates all of the disputed tract in that part of lot 15 owned by the plaintiffs.

It is clearly proved that for at least seventy years the monuments now claimed by the plaintiffs, the stake in the swamp and a stone at the corner of the Gilpatric and Dole lands, or others in the same place destroyed by time, have been recognized as the true monuments by all the adjoining owners between lots 14 and 15 extending one-half way at least across the range, which with the admission that the Foss (Gilpatric) corner is as claimed by the plaintiffs, and no evidence that before the seventy years there was ever any dispute as to the line, and the fact that the Dole lot was conveyed as one-half of lot 14 and the line as claimed by the plaintiffs, gives to the Dole lot one-half of the lot, and to accept the defendant's claim, would give to the Dole lot six acres more than the Gilpatric lot, which was conveyed as one-half of the lot, and the fact that the line as shown by the monuments claimed by the plaintiffs runs in a straight course across the range, and the lines as claimed by the defendant makes a jog of 176 feet, and makes the lot conveyed as one-half of lot 15 contain six acres less than

the other part of lot 15, which was conveyed as one-half of the lot, raises a presumption that the line as shown by the monuments claimed by the plaintiffs was the line originally run between the lots sufficient, unless controverted by evidence, to prove the plaintiff's title to the disputed lot.

The defendant claims that the check line between lots 15 and 14 begins at a stone on the north range line 176 feet distant from the post on the sand hill, as claimed by the plaintiffs, and extends half way across the range to a stone post 176 feet from the stone bound claimed by the plaintiffs as on the check line at the corner of the Foss (Gilpatric) and Dole lands, but neither of the corners as claimed by the defendant are admitted by the adjoining owners, past or present, as the corners, and no measurements can be made from admitted corners of lots in 14, 15 or 16 that will even tend to show the lines as claimed by the defendant is the check line between lots 14 and 15, but upon the contrary every measurement from admitted lines and corners in the three lots place the check line between lots 14 and 15 as the line claimed by the plaintiffs that crosses the range from the post on the sand hill by the stone monument known as the Gilpatric corner to the stake in the swamp.

The fact that at some time Luther Dole fenced across the lot in dispute, as shown by the remains of an old fence, does not prove the title was in him. His line was a straight line across the range, and the plan shows that the old fence was not on any line, but was a crooked fence and did not enclose all of the disputed lot, and the evidence clearly shows that it was a fence built to keep the cattle from the swamp and rye field for the convenience of the owners of the cattle, and not under a claim of ownership. There is evidence that Luther Dole claimed to own to the fence, but evidence of a deceased owner making claims of title is not evidence of title, in such cases as these, unless he was upon the land pointing out the monuments at the time of the declaration. There is evidence that he did point out the corners of the fence as the corners of his land; it is testified to by men who helped build the fence and also in the deposition of two of his heirs (sons), but no witness testified he ever claimed to own the land except as a part of lot 14. That Luther Dole never claimed to own any part of lot 15 is the only conclusion that can be drawn from the testimony. Two of his sons, whose depositions have been referred to, testified that he said the corners now claimed by the defendant

were the corners of his land, but that the sons understood him to refer to the corners of the northerly one-half of lot 14 is apparent from their conduct, for, after his death in 1892, they deeded to the other heirs their interest in the land and described it as the northerly one-half of lot 14 range D, and the heirs who defend these cases offer as evidence of their title to the disputed lot deeds in which all the heirs of Luther Dole are grantors or grantees describing the land claimed by them as the northerly one-half of lot 14.

The language of the court in *Brown* v. *Gay*, 3 Maine, 128, by changing the word "he" to plaintiffs and number "3" to "14" would exactly fit this case, where the court says, "He is the owner of number 3, and he claims and defends the premises in dispute as a part of that lot. If they are no part of that lot, his claim is plainly founded in mistake. If the owner of a parcel of land, through inadvertence or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate a disseizin."

To allow the defendant's claim to include a part of lot 15 as in a deed of a part of lot 14, would, as held in *Robinson* v. *Miller*, 37 Maine, 312, "be to contradict or vary the plain and unambiguous stipulations of his deed, and to enlarge his grant in a manner unauthorized by law."

That the check line as claimed by the plaintiffs is the true line is proved by applying the rule stated in *Warren* v. *Pierce*, 6 Maine, 11, as follows: "The burden of proof is doubtless upon the plaintiffs to make out their case; but when they show the range lines between which their lot is bounded, and the side lines of the lot next below and next above theirs in number, they have located their lot, and made out their case; if it be not successfully contróverted by opposing testimony." There is no dispute as to the range lines and the check line between lots 14 and 15 is the issue, and as lots 14 and 15 were originally conveyed as each containing 100 acres more or less, they being adjoining lots, by calling them one lot, and locating the check line between lots 13 and 14, and lots 15 and 16, the land in both lots will be shown as one lot; which, divided by a line, extending through the middle across the range, will locate the check line between lots 14 and 15, and each lot will share, as it should, the surplus acreage. *Whitten* v. *Hanson*, 35 Maine, 435.

The check line between lots 13 and 14 is not disputed, but claimed by all parties to be as shown upon the plan. The check line between

lots 15 and 16 is not disputed, and is admitted by the abutting owners to be as shown upon the plan, and ancient monuments upon the land show the line to be as admitted. The territory between these two lines is lots 14 and 15, and if that territory is divided in the middle by a line across the range, the line will run from the stake in the swamp by the stone bound known as the Gilpatric corner to the stake and stones on the sand hill, on the line as claimed by the plaintiffs, and locates all the disputed lot in that part of lot 15 owned by the plaintiffs, and gives to each lot 112.2 acres, while according to the plan and survey the check line as claimed by the plaintiffs lot 14 contains 112.8 acres, and lot 15, 111.9 acres. The difference of nine-tenths of an acre on a lot more than 3000 feet in length is so trifling in this case, where the land is wild and swampy, that it is immaterial, and that surplus is in lot 14 and therefore the defendant cannot complain.

By each of these two methods the plaintiffs have proved that the disputed lot is located in lot 15, that the title to it is in the plaintiffs, and the defendant has not by evidence successfully controverted their claim of title, and the record does not show evidence that authorized the jury to find that the title was in the Dole heirs, who defend the actions.

Motions sustained.
New trials granted.

JOHN COLBY

vs.

THE INHABITANTS OF THE TOWN OF PITTSFIELD.

ELLEN J. COLBY

vs.

THE INHABITANTS OF THE TOWN OF PITTSFIELD.

Somerset. Opinion August 3, 1915.

Bodily Injury. Defect. Description of Injuries. Highway. Injuries. Mental Suffering. Notice. Physical Injury. R. S., Chap. 23, Sec. 76.

1. Under R. S., Chap. 23, Sec. 76, the notice required must give a specific description of the bodily injuries claimed to have been received.
2. A general description of the bodily injuries is not sufficient, but a specific description of bodily injuries is required as a condition precedent to the right of any action at all.
3. One having a right of action for bodily injuries may have damages for all of the natural consequences, such as loss of earnings, physical pain and mental suffering.
4. Suffering is not the injury for which a recovery may be had under statutory notice, but the consequences of it.
5. This action is based upon the statute and must strictly comply with the requirements of the statute, and the statute allows damages for bodily injuries only and their consequences.

On exceptions by plaintiffs. Exceptions overruled.

These two actions are brought to recover damages for injuries received by reason of an alleged defect in the highway in the defendant town. Both cases depend upon the same facts and were tried together. Plea, the general issue. At the close of the plaintiffs' evidence the presiding Justice directed a non-suit in both cases. To this ruling and direction, the plaintiffs excepted.

The case is stated in the opinion.

T. A. Andrews, Morse & Cook, and H. C. Buzzell, for plaintiffs.

Manson & Coolidge, and H. H. Thurlough, for defendants.

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

SPEAR, J. These cases are to be considered together and involve actions against the defendant town for alleged injuries received from an accident caused by an alleged defect in the highway. Both cases were non-suited at nisi prius for want of a valid fourteen days' notice, and come here on exceptions to this ruling.

The only question raised by the exceptions is the sufficiency of the notice, which reads as follows:

"Pittsfield, Maine, October 23, 1912.

Selectmen of the Town of Pittsfield,
Pittsfield, Maine.

Gentlemen:

I hereby notify you that on the 9th day of October, A. D. 1912 while driving along the road and while near the Waverly Bridge, that John Colby and Ellen J. Colby, both of Montville in the County of Waldo and State of Maine were thrown into the river through lack of proper railing or fence along the road near Waverly Bridge on the west side of the Sebasticook River, and just south of the Waverly Bridge and very near to an electric light pole near said Waverly Bridge, that the said Ellen J. Colby has suffered a great deal both in mind and body on account of the injury which she received by being thrown into the river; that her body was badly bruised and that she claims damages from the Inhabitants of the Town of Pittsfield for the injuries which she has sustained in the sum of two thousand dollars.

That John Colby received injuries by being thrown into the river near Waverly Bridge just south of the bridge on the west side of the Sebasticook River and very near to the electric light pole near said south side of the bridge on the west end of the bridge in that his body was bruised and that he has suffered a great deal in both mind and body from the injuries which he sustained by being thrown into

the river through lack of proper railing along the river near said Waverly Bridge on the west side of the Sebasticook River and by reason of the injuries sustained by him the said John Colby he claims damages from the inhabitants of the town of Pittsfield to the sum of two thousand dollars."

As to the physical injuries alleged to have been sustained the notice contains only this specification, "that her body was badly bruised." Under our decisions it is too well settled to admit of discussion that this specification does not contain such a description of physical injury as the statutory notice requires.

But the plaintiff contends, even admitting this conclusion as to the specification of physical injury, that there is enough of the notice left to meet the requirements of the statute in the further statement "that she has suffered a great deal both in mind and body on account of the injuries which she has received by being thrown into the water." If no bodily injury could be proved, there would be no premise upon which to base a conclusion of mental suffering; on the other hand, when mental suffering flows from physical injury, it may be proved as a basis for damages. *Droscoll* v. *Gaffney*, 207 Mass., 102. A discussion of this question must therefore assume, that although physical injury could not be proved, for the recovery of damages, for the technical want of sufficient notice, it nevertheless could be proved, as a matter of fact.

The real issue, then, is: Can physical injury, being insufficiently described in the notice, be proved as the foundation for admitting evidence of mental injury, under that part of the notice in which the latter is properly described? In other words, can the plaintiff prove the fact of physical injury, without notice, as a basis upon which to prove the fact of mental injury, with notice? To go a step further, would a notice, otherwise valid, describing only mental suffering, be sufficient to authorize proof of physical injury, not as a basis of damages, but as a basis of proof of mental suffering? This feature of the case depends upon the interpretation of the notice required by the statute.

There is no right of action under the statute for anything except a "bodily injury." R. S., Chap. 23, Sec. 76, provides that "whoever receives a bodily injury" may recover, etc. This statute as interpreted by the court requires the notice to give a specific description of the bodily injuries claimed to have been received. A general

description even is not regarded as sufficient. It accordingly follows that notice of "bodily injury" is required as a condition precedent to the right of any action at all. One having a right of action for bodily injuries may have damages for all of the natural consequences, such as loss of earnings, physical pain, and mental suffering. But the suffering is not the injury for which a recovery may be had under the statutory notice, but the consequence of it. It should be noted, however, that this is not a common law action but one based upon the statute, and must strictly comply with the requirements of the statute, and the statute allows damages for "bodily injuries" only and their consequences.

Exceptions overruled.

ANTONINA HALLOWACH, Admrx., *vs.* MAURICE A. PRIEST.

Kennebec. Opinion August 9, 1915.

Administrator. Contract. Negligence. Nominal Party. R. S., Chap. 84, Sec. 112. Tort. Witnesses.

1. At common law, parties were not competent witnesses in their own suits. In this State, by statute, parties in general may be witnesses in their own behalf, but not when at the time of the trial, "the party prosecuting, or the party defending, or any one of them, is an executor or an administrator."
2. An exception to the rule of exclusion exists when "the representative party is nominal only."
3. The statute makes no distinction between actions of contract and actions of tort.
4. The statutory policy that living parties should not be permitted to tell their stories when the lips of adverse parties are sealed by death applies with equal force to torts and contracts.
5. The living party's wife is not a competent witness for him in such case.

On exceptions by plaintiff. Exceptions sustained.

This is an action of tort brought by plaintiff to recover damages for injuries to her intestate by being run over by an automobile driven by the defendant, from which injuries the plaintiff's intestate subsequently died. Plea, general issue.

At the trial, the defendant and his wife were permitted to testify to the circumstances of the accident; to which admission of said testimony, the plaintiff excepted.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

P. A. Smith, for defendant.

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

SAVAGE, C. J. Action on the case for the alleged negligence of the defendant in the operation of an automobile whereby the plaintiff's intestate was run against, thrown down, and otherwise so injured that he subsequently died, after a long period of conscious suffering. At the trial, against the objection of the plaintiff, the defendant and his wife were permitted to testify as to the circumstances of the accident, and the case comes up on the plaintiff's exceptions to the admission of that testimony.

We think the exceptions must be sustained. At common law, parties were not competent witnesses in their own suits. In this State, by statute, parties in general may be witnesses in their own behalf, but not when at the time of the trial, "the party prosecuting, or the party defending, or any one of them, is an executor or an administrator." R. S., Chap 84, Sec. 112. An exception to the rule of exclusion exists when "the representative party is nominal only. Same section. This exception does not apply in this case. This suit, like ordinary suits by executors or administrators, is brought for the benefit of the estate of the deceased.

The statute makes no distinction between actions of contract and actions of tort. Nor do we think there is any distinction in reason. The statutory policy that living parties should not be permitted to tell their stories when the lips of adverse parties are sealed by death applies with equal force to torts and contracts. In torts, as in contracts, all the parties ordinarily are cognizant of the circumstances attending the tort. And if by reason of death some of them cannot

testify, the others should not. That is the policy of the statute. And this policy has been enforced many times by the court. *Farnham* v. *Virgin*, 52 Maine, 576; *Kelton* v. *Hill*, 59 Maine, 259; *Brooks* v. *Goss*, 61 Maine, 307; *McLean* v. *Weeks*, 65 Maine, 411; *Sherman* v. *Hall*, 89 Maine, 411. Nor is the defendant's wife a competent witness for him. *Berry* v. *Stevens*, 69 Maine, 290; *Hubbard* v. *Johnson*, 77 Maine, 139.

Exceptions sustained.

WILSON H. COLE

vs.

NORTH BRITISH MERCANTILE INSURANCE COMPANY.

WILSON H. COLE

vs.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED.

Aroostook. Opinion August 20, 1915.

Burden. Fraudulent Statements as to Quantity. Insurance. Policy. Proof of Loss.

1. To avoid liability on a fire insurance policy on the ground of untrue statements in the proof of loss, it must be shown that the statements were knowingly and intentionally untrue, and the burden of showing it is on the defendant company.
2. The evidence warranted the jury in finding that the plaintiff's proof of loss was not fraudulently made.
3. It is not clearly shown that the verdict was excessive.

On motions for new trials. Motions overruled.

Two cases on insurance policies by the plaintiff, one against the North British Mercantile Insurance Company and the other against the Norwich Union Fire Insurance Society, to recover for potatoes which were destroyed by fire. The plea in both cases was the general issue, with brief statements. The jury returned verdict for plaintiff against the North British Mercantile Insurance Company for $1951.85 and against the Norwich Union Fire Insurance Society for $975.93. The defendant in each case filed a motion for new trial.

The case is stated in the opinion.

Madigan & Pierce, for plaintiff.

Hersey & Barnes, for defendant.

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

SAVAGE, C. J. These two cases, which are actions upon fire insurance policies, relate to the same fire loss, and were tried together. In each, the plaintiff recovered a verdict, and the cases come before this court on motions for new trials. The execution of the policies, October 2, 1913, the destruction by fire, February 22, 1914, the filing of proofs of loss, the offer to arbitrate damages and the refusal on the part of the defendants are all admitted. The property insured consisted chiefly of potatoes in the plaintiff's potato house at Belvedere Siding in the town of Crystal. In his proofs of loss, the plaintiff stated that the potatoes in the potato house at the time of the fire amounted to 6928 barrels. The defendants pleaded, and now contend, that the plaintiff in his proofs of loss made a false and fraudulent statement of the amount of his loss, in that he wilfully and falsely stated the quantity of potatoes which were in the potato house at the time of the fire, and which were destroyed, to be largely in excess of the quantity of potatoes actually there.

The proofs of loss, which are alike in the two cases, appear to have been prepared by some insurance agent or adjuster, after an examination of the plaintiff's books and other papers. But they were signed and sworn to by the plaintiff, and with one exception to be noted hereafter they undoubtedly state his claim correctly. In the proofs, the amount of potatoes in the potato house at the time of the fire was arrived at mathematically in the following form:—

"Potatoes put into warehouse as per assured's books inspected and checked in detail,	12,485 bbls.
Less potatoes sold, as per books and shipping receipts verified,	5,192 bbls.
	7,293 bbls.
Less shrinkage as agreed,	365 bbls.
Potatoes in warehouse at time of fire,	6,928 bbls."

It is now claimed by the plaintiff, and not disputed by the defendant, that the item of "5192 bbls" potatoes sold, included 300 barrels which were shipped by the plaintiff in his own name, but which belonged to another party, and were never in the potato house. The correction of this error would decrease the quantity sold to 4892 barrels, and increase the quantity of potatoes left in the potato house to 7228 barrels.

The law of the case may be briefly stated. If the plaintiff knowingly and intentionally stated in his proofs of loss a larger amount of potatoes than he knew, or had reason to believe, were in the potato house at the time of the fire, it was a fraudulent statement, and avoided the policies. If, on the other hand, he erroneously stated a larger amount of potatoes than were actually there, and the error was honestly made by reason of misinformation, or mistake in judgment or memory, the policies were not avoided thereby, and the defendants are liable for the actual loss. To avoid the policies it must be shown that the statements in the proofs of loss were knowingly and intentionally untrue. *Linscott* v. *Orient Insurance Co.*, 88 Maine, 497; *Atherton* v. *British America Assurance Co.*, 91 Maine, 289; *Hilton* v. *Phoenix Assurance Co.*, 92 Maine, 272. And the burden of proving fraud is on the party that asserts it. *International Harvester Co.* v. *Fleming*, 109 Maine, 104.

The substantial correctness of the statement in the proofs of loss, as to quantity of potatoes in the house at the time of fire, depends upon the correctness of three factors. First, the total amount put into the storehouse, which includes some loaded from the cart directly to the car, through the house, but not stored; secondly, the allowance for shrinkage; and lastly, the total quantity sold and shipped, or otherwise removed, which also includes the potatoes loaded from

cart to car. As to the last factor there is no dispute. The station agent testified that 13,167 bushels, or 4788 barrels,—allowing two and three quarters bushels to the barrel,—had been shipped. In addition to this 65 barrels had been sold, and 40 others had been removed, making a total of 4893 barrels. All this is admitted. The second item states the shrinkage "as agreed," but it does not appear that it was agreed to by anyone representing these defendants. As to them, it must be regarded merely as an estimate. The estimate may not have been large enough. But it must have been understood by them to be an expression of opinion, in regard to a matter of judgment. And under the circumstances we think a jury would be warranted in finding that the statement, though perhaps erroneous, was not fraudulently made.

In support of the first element in the computation, the plaintiff introduced evidence which tended to show that he planted over 70 acres of land with potatoes, that he raised thereon 6410 barrels of merchantable potatoes which were put into the potato house, that the count was kept by his foreman in the field, and by his son at the potato house, and that the counts were compared from time to time and found to be substantially alike. It is in evidence that these counts were reported by the men to the plaintiff who entered them on his books, but it does not appear that the plaintiff had any personal knowledge of the count, nor that he had any knowledge, except as the count was reported to him. There is testimony which seems to be credible that the plaintiff bought during the season 6099 barrels of potatoes, and that these were put into the potato house; or, if some were loaded from cart to car, allowance is made for them in the item of "potatoes sold."

The plaintiff's claim then is that he put into the house, of potatoes raised and bought, 12509 barrels, that he had sold and shipped or removed 4893 barrels, and that there were left at the time of the fire 7616 barrels, less shrinkage. And by shrinkage in this case is meant for the most part the loss by "culls," decayed or worthless potatoes. And the shrinkage was variously estimated by witnesses at from 4% to as high as 10%, the former estimate being that of the plaintiff's witnesses, and the latter that of the defendants'. It also appears that there were some "seconds" which were merchantable potatoes, but salable, as the evidence shows, at about 20 cents a barrel less than first class ones. The estimates as to quantity of "seconds" is

conflicting. The plaintiff testified that he included "seconds" in his estimate of the 4% for shrinkage.

The defendants make two contentions. One is that taking into account the capacity of the bins in the house, and the testimony respecting their condition as to fullness just before the fire it is manifest that not more than about 5500 barrels were burned. The other is that it is capable of mathematical demonstration that the house could not contain the number of barrels that the plaintiff says he put in it. And the defendants say further as to both of these contentions that the plaintiff, as an old and experienced dealer in potatoes, had no reason to believe that his statement was true; in fact, that he must have known it to be untrue.

The plaintiff's potato house measured on the inside 38 by 78 feet. The height from floor to floor above is in dispute, but there is evidence which a jury might reasonably believe that it was fifteen feet. The house was partitioned into bins, three across each end, and three longer ones between, running lengthwise of the house. Between the long bins and the smaller ones at each end was a walk across the building. The dimensions of the bins is not given, but, of course, their cubical capacity was larger or smaller, according to the width of the walks. And that width is in dispute, the estimates varying from 8 to 11 feet. The plaintiff claims that the house at the end of the digging season was filled full, bins, walks and all, bulkheads having been built across the ends of the walks. He also offered evidence tending to show that 400 barrels of potatoes in barrels were placed on the upper floor over the bins, when the bins and walks were full, and that afterwards, as potatoes were shipped away from below, these barrels were emptied onto the piles. But at the time of the fire, what remained were practically all in the bins. And some had been taken out of the bins. The solution of the present question then depends upon the size of the bins, not definitely proved, and upon their condition of fullness, concerning which there is a conflict of testimony. Besides there is no evidence of what are the cubical contents of a barrel of potatoes by measure. There is evidence of the contents when 60 pounds are taken for a bushel, but it is not shown that the contents are the same in both cases. One piece of evidence in the case is that of a witness who stored at one time, as he says, 600 barrels in one of the smaller bins. The witnesses generally called the center bins double ones, but no measurements were shown.

Whether they were exactly double no one appears to know. Here is an element of uncertainty. There are no certain means of verification. But there is one test of bin capacity, more or less satisfactory, that can be applied. An expert witness called by the defendant testified that the government method of measuring potatoes for customs purposes is to call one cubic foot equal to sixty-seven one hundredths of a bushel of sixty pounds. He computed by this method that the plaintiff's entire house, up to a point $12\frac{2}{3}$ feet from the floor, deducting for bulkheads and passage way, but including walks, would contain 8676 barrels. If we assume that the bins were 14 feet high and that the walks between were each 8 feet wide, both of which assumptions the jury were warranted in making, and if we make deductions for the walks, bulkheads and passage way, a computation by the same method shows a bin capacity of 8008 barrels. From this a proper allowance is to be made for shrinkage and potatoes taken out. In view of the contradictory state of the evidence upon both of these matters we do not think it is satisfactorily shown that the plaintiff's statement that there were 6928 barrels in the house, mostly in bins, or 7228 barrels if we include the 300 deducted in the proof by mistake, should be regarded as wilfully and intentionally false, so far as the discussion has now proceeded.

But the defendants attack the foundation of the plaintiff's claim by asserting that it would be a physical impossibility for the plaintiff to put so many potatoes into the house as he says he did. They assume that at the end of October, 1913, the house was full of potatoes, and that the capacity of the house without any deductions computed, according to the method already referred to, could not have exceeded 9147 barrels. In this computation the available height of room was called $12\frac{2}{3}$ feet. From this is to be deducted 471 barrels for space occupied by bulkheads and passage way, leaving an available total of 8676 barrels. It is admitted that after October and before the fire there were shipped away or removed 2479 barrels. Deducting those shipped or removed from the total capacity 6197 barrels would be left. The defendants claim also that shrinkage should be deducted. But since this computation goes only to the capacity of the house, shrinkage by culls or defective potatoes is not to be considered. Now if we assume, as before, that the available height of the room was 14 feet, instead of $12\frac{2}{3}$, the total capacity of the house, less space for bulkheads and passage way, was 9637 barrels.

If we deduct the 2479 barrels shipped, we have left 7158 barrels. This is approximately the quantity claimed by the plaintiff. In both computations, the 400 barrels stored in barrels on the second floor may properly be added. If we add to the 9637 barrels, the number which appear to have been shipped before October, and while potatoes were still being put into the house, the amount is over 12,000 barrels, which might be in the house at one time. This is not as many as the plaintiff says he raised and bought. But as the evidence for the plaintiff tends to show that, if the distance from floor to floor was 15 feet, the potatoes for a time were piled higher even than 14 feet, we cannot say from the evidence that the capacity of the house has been overstated.

Perhaps the two most important questions of fact are those relating to the height of the bins, and those relating to the height to which the potatoes were piled in the bins. Both are in dispute. We are not convinced that the jury decided either question erroneously. If the facts were as claimed by the plaintiff the verdicts are sustainable. There is certainly enough in the case to warrant the jury in finding that there was no fraud in making the proof of loss, even if there was error. And if there was error in the amount of the verdict it has not been so clearly shown as to warrant our interference.

The certificate in each case will be,

Motion for a new trial overruled.

GORDON MCMINN, Pro Ami,

vs.

THE NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Androscoggin. Opinion August 20, 1915.

Attractive Nuisances. Contributory Negligence. Damages. Duty. Negligence. Personal Injuries. Trespasser. Turn-Table Cases.

1. Questions of negligence in cases of personal injuries are always to be considered with reference to the particular injury in the case, and not with reference to other injuries which might have been occasioned in some other manner.
2. A telephone company set one of its poles so that one of the guy wires was anchored in the ground inside a school yard. The guy wire passing through an eye in the anchor was bent back upon itself and tied. In time the end of the wire became untwisted. The rods or steps in the pole were so placed that the lowest one could not be reached from the ground. A boy climbed upon an adjacent hen house roof, then on to a fence and wood pile, where he could reach the lowest rod, then climbed the pole on the steps and slid down the guy wire receiving injuries.

Held: That the question of the defendant's negligence must be weighed not with reference to the liability that boys running or playing in the yard might be injured by the guy wires, but with reference to the liability that a boy might be injured in the manner this plaintiff was; and that in this view, the defendant was not negligent.

Held, also, that the plaintiff was guilty of contributory negligence.

On report. Judgment for defendant.

This is an action brought by Gordon McMinn, a minor, against the New England Telephone and Telegraph Company, to recover damages for injuries received while sliding down a guy wire. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court for final determination upon so much of the foregoing evidence as is legally admissible.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

White & Carter, for defendant.

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

SAVAGE, C. J. Case to recover damages for personal injuries. The case comes before this court on report. The facts are practically undisputed. Many years ago the defendant set one of its poles on the line bounding the rear end of an unfenced school yard, and near the side line between the school yard and abutting owners. A guy wire was fastened to the pole about 25 feet from the ground and extended to an anchor iron in the ground in the yard four or five feet from the bottom of the pole. The wire was run through an eye in the anchor iron and bent back upon itself and fastened with a clamp. About a foot of the wire was left above the clamp, and the end of the wire was $3\frac{1}{2}$ feet above the ground. At the time an arm taken from the pole was tied with wire over the clamp and exposed end of the wire. But this arm seems to have come off, and in time the strands of the wire above the clamp became untwisted and spread out. There were short rods through the pole to serve as steps in climbing, but the lowest rod was so high that it could not be reached by one standing on the ground. Some time after the pole was set, the city of Lewiston, by agreement with the defendant, placed upon it the wires of its fire-alarm service. About two years before the plaintiff was injured, the defendant removed all of its wires from the pole, but left the pole, which the city has since continued to use.

On the day of the accident, the plaintiff, a boy of ten years, was playing with one of his school fellows in the school yard. He was "stumped" by his playmate to climb the pole and slide down the guy wire, which he then proceeded to do. He could not reach the lowest rod or step on the pole. What he did we state in his own language:—"First, I climbed upon the hen house roof, and from there I climbed over on the fence, and I got up on the woodpile and climbed up the woodpile,—climbed up on the woodpile so I could get hold of the spikes on the pole, then I climbed on top of the pole and slid down the wire." In sliding down, his leg caught on the untwisted end of the guy wire, and he was seriously injured. The hen-house and woodpile were on land adjacent to the school yard.

There is no evidence that the defendant had any authority to put the pole where it was in the first place. But the fact that the city was using it makes it apparent that it remained there with the city's assent. Therefore the defendant was not at the time of the injury

a trespasser. The only additional fact relied upon by the plaintiff is that the school boys were accustomed to play around or in the vicinity of the pole.

The plaintiff predicates negligence, and therefore liability, on the part of the defendant on the contention that the exposed end of the wire was a source of danger to boys playing in the yard, and that it was the duty of the defendant to have guarded against it. And it is urged that this contention is all the more forcible because, it is said, "the defendant must have known that that pole in the school yard was a direct challenge to every boy to climb it and slide down the wire."

We need not inquire now whether the condition of the wire was dangerous to boys running about the yard, nor what would have been the liability if the plaintiff had run against the untwisted wire. *McTaggart* v. *M. C. R. P. Co.*, 100 Maine, 223. That is not the question presented by the evidence. Nor are we concerned with the question whether the defendant would have been liable, if the rods or steps in the pole had continued down to the ground. The question here is whether the defendant owed the plaintiff any duty further to safe-guard the pole against the contingency that the plaintiff might attempt to climb the pole and slide down the wire. We think it is clear that it did not. The only way by which the plaintiff could be exposed to the particular danger complained of in this case was by climbing the pole and sliding down the wire. But he could not climb the pole from the ground. He could climb the pole only by first climbing over hen-house, fence and wood-pile on adjacent land. Whatever duty the defendant owed, it did not owe the plaintiff any duty to guard against the consequences of such steps as he took. And we may add that the conduct of the plaintiff was reckless, even for a boy, and constituted contributory negligence.

The plaintiff seeks to bring this case within the doctrine of the so called "turn-table" cases, or the doctrine declaring liability for maintaining structures attractive to children. Structures are sometimes by some courts regarded as nuisances, because their attractiveness makes them dangerous to children. Under the circumstances we do not think the pole and guy wire in this case can be called so in fact. Besides the doctrine of "attractive nuisances" has never been adopted in this state. It is denied by many courts.

Judgment for defendant.

MELVILLE H. REED *vs.* J. BURTON REED.

Lincoln. Opinion August 20, 1915.

Brief Statement of Title in Defendant. Condition. Deed. Delivery of Deed. Forcible Entry and Detainer. Jurisdiction. R. S., Chap. 96, Sec. 6.

1. To constitute an effective delivery of a deed so as to pass the title, the delivery must be with an intent that the title shall thereby pass.
2. The delivery of a deed with intent that the title shall pass only on condition that the grantee perform certain agreements on his part does not vest the title in the grantee.

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

This is an action of Forcible Entry and Detainer, made returnable in the Lincoln County Municipal Court and removed therefrom to the Supreme Judicial Court on the claim that the title to the described premises was in the defendant. At the close of the evidence, the presiding Justice directed the jury to return a verdict for the plaintiff. To this ruling, defendant excepted and filed motion for new trial on the ground of newly discovered evidence.

The case is stated in the opinion.

Carl M. P. Larrabee, and C. R. Tupper, for plaintiff.

Charles L. Macurda, and A. S. Littlefield, for defendant.

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

SAVAGE, C. J. Action of forcible entry and detainer, brought in the Lincoln Municipal Court. The defendant pleaded the general issue, and filed a brief statement of title in himself, the plaintiff, and two others, as tenants in common. Thereupon, the case was removed to the Supreme Judicial Court, R. S., Chap. 96, Sec. 6. The only issue open to the defendant in the latter court is the one of title. The court below had exclusive jurisdiction, subject to appeal, of all other issues. By pleading title and securing a removal of the case all other issues are waived. *Abbott* v. *Norton,* 53 Maine, 158; *Cushing* v. *Danforth,* 76 Maine, 114.

The statute referred to provides for removal of a case of forcible entry and detainer only when the defendant files a brief statement of title in himself or in another person under whom he claims. It does not provide for removal when the defendant merely denies the plaintiff's title. It would seem that the statute contemplates a removal only when there is a conflict of titles. In all other cases the lower court has jurisdiction of all issues. The plaintiff, as in all other cases, must prove his title or right to maintain the action. And upon removal only the title set up by the defendant is in issue. If, however, the defendant succeeds in establishing title in himself, or in one under whom he claims, it necessarily defeats the plaintiff's title.

In this case, it was admitted that the property in question was at one time owned by the father of both these parties, and that he died intestate leaving the plaintiff, the defendant and two others as his heirs. This was prima facie proof of the defendants' title as claimed in his brief statement, The plaintiff then introduced a deed from his father to the plaintiff's wife, and another from the wife to himself. Both deeds were a part of the same transaction, and both were executed at the same time. Neither was recorded until after the death of the father. The failure to record was due, the plaintiff says, to an agreement to that effect between him and his father. But the crucial question of fact is whether the deeds were ever delivered as effective deeds, that is, with intent that they should pass the title, and be beyond the dominion and control of the grantor. If they were so delivered, the defendant has no title, and the plaintiff has one, and can maintain this action. If they were not so delivered, the defendant has title, and must prevail. To be more precise, we are concerned only with the question of delivery of the deed of the father to plaintiff's wife. If there was a valid delivery of that deed, the father was divested of his title, and no title came to the defendant by inheritance. In such case, under the pleadings, as already stated, it is immaterial to the defendant whether the deed from the plaintiff's wife to himself was effectively delivered or not.

The presiding Justice directed a verdict for the plaintiff, and the defendant excepted. The direction of the verdict involved a finding of fact by the court that the deed was delivered with intent to pass title. If no other inference could reasonably be drawn from the evidence, the ruling was correct; otherwise, it was wrong. *Horigan* v. *Chalmers Motor Co.*, 111 Maine, 114; *Johnson* v. *N. Y., N. H. &*

H. R. R., 111 Maine, 263. The plaintiff and his wife both testified that the deed was in fact delivered. The scrivener testified that he had no recollection whether it was delivered or not. There was no other direct evidence on that question. The defendant attacks the credibility of the plaintiff, and contends that a jury would be warranted by the plaintiff's conduct and after statements in finding that there was no delivery, or if there was one, that it was upon a certain condition. We shall not discuss the evidence. We need only to say that a careful study of it leads us to the conclusion that a verdict based on non-delivery of the deed could not be sustained. The exceptions therefore must be overruled.

The defendant, after the trial, filed motions for a new trial on the ground of newly discovered evidence. We have examined the evidence taken under those motions. Some of it comes under the rule which excludes the consideration of evidence which is not in fact newly discovered, or which might have been discovered by the exercise of reasonable diligence. There is, however, the record of the testimony of the plaintiff on the question of delivery of the deed in question, given in the trial of a suit in Massachusetts, which we think fairly comes within the rule for consideration. And this evidence is of a character which, taken in connection with the evidence given at the original trial, makes it probable, in our judgment, that a jury might find that the deed, if delivered at all, was delivered on condition,—to pass title only in case the plaintiff performed certain agreements on his own part. Such a delivery does not vest title in the grantee. *Porter* v. *Read*, 19 Maine, 363. We think justice requires that the issue of valid delivery be submitted to a jury.

Exceptions overruled.

Motion for a new trial sustained.

GEORGE W. GILBERT *vs.* FRANK CUSHMAN.

Knox. Opinion August 20, 1915.

Demurrer. Exceptions. R. S., Chap. 79, Sec. 56. R. S., Chap. 84, Sec. 35. Waiver.

Where the demurrer of defendant to the declaration of plaintiff is overruled and the parties proceed to trial upon the merits of the case, the defendant will, under the circumstances of this case, be held to have waived the right to exceptions to the overruling of the demurrer.

On exceptions by defendant. Exceptions overruled.

This is an action on the case against the defendant for taking and carrying away the certificate of enrollment of the Steamer "Herman Reesing." The defendant demurred both generally and specially to plaintiff's declaration, and the presiding Justice overruled the demurrer. To this ruling, the defendant excepted.

The case is stated in the opinion.

Gerry L. Brooks, for plaintiff.

Rodney I. Thompson, for defendant.

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

BIRD, J. In this case are presented for consideration the exceptions of defendant to the overruling of his demurrer to plaintiff's declaration. At the argument of the case, it was stated by counsel for plaintiff and admitted by defendant's counsel that upon the overruling of the demurrer, the case proceeded to a trial upon the merits which resulted in a verdict for the plaintiff. We are of the opinion that the exceptions can not be considered. The record consists of the declaration and bill of exceptions. The day of the allowance of the latter does not appear, but we think it can be safely assumed that no bill of exceptions was filed and allowed until after defendant's failure to secure a verdict. Nor is it to be conceived that the cause

was submitted to the jury without the filing and joinder of the general issue and leave obtained by defendant to plead anew. This is not the case of a dilatory plea overruled with exceptions where the cause proceeds to a close of the trial and then comes forward, R. S., Chap. 79, Sec. 56, but is controlled by R. S., Chap. 84, Sec. 35; see also Id., Chap. 79, Sec. 46; *Copeland* v. *Hewett*, 93 Maine, 554, 557. See also *Furbish* v. *Robertson*, 67 Maine, 35, 38; *Mayberry* v. *Brackett*, 72 Maine, 102. Under the circumstances of this case, the defendant must be regarded as having waived his exceptions. *True* v. *Plumley*, 36 Maine, 466, 477.

The exceptions must therefore be overruled.

Exceptions overruled.

ELLA F. DALY *vs.* THE LEWISTON & AUBURN CHILDREN'S HOME, et al.

Androscoggin. Opinion August 20, 1915.

Non-User. Occupation. Payment of Taxes. Possession. Real Action. Seizin. Tenants. Title.

In order to gain title by adverse possession, it must be not only open and notorious, but also continuous.

The payment of taxes is not possession nor evidence of possession.

The Statutes, R. S., Chap. 106, Sec. 4, provide that the demandant in a writ of entry need not prove an actual entry under his title, but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein is sufficient proof of seizin. This right of entry can be defeated by adverse possession only by showing such possession for some requisite period prior to the date of the writ.

A title, otherwise good, is not defeated by mere non-user.

On motion by defendants for new trial. Motion overruled.

This is a real action to recover a certain lot of land, described in writ as lot numbered eighty (80) according to plan of William Garcelon, November 20, 1863, situate in Lewiston in the County of

Androscoggin. Plea, the general issue. The jury returned verdict for plaintiff. Defendants filed a motion for new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

W. H. Judkins, for defendant.

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

BIRD, J. This is a writ of entry brought for the recovery of a lot of land in Lewiston. It is admitted that title to the tract of land, in which the lot in question is included, was in the grandfather of plaintiff from whom it descended to her father; that by the last will and testament of the latter, who died in 1872, the plaintiff and her brother were the joint devisees of all his real estate and that upon the decease of the brother, during his minority, the title to the entire property was in plaintiff. There was evidence tending to prove that plaintiff was without knowledge of, or uncertain as to, her title until a few years before suit brought and also that plaintiff paid none of the taxes assessed upon the locus but that they were paid for many years by the predecessors in title of defendants in the adjoining lot. The locus is substantially in its natural state, ungraded, and has never been enclosed by fences. At one time a fence extended across its rear line, erected by the owner of the land then adjoining it, but this fence has not been in existence for twenty-five or thirty years.

The lot of land adjoining the locus was owned by one Dennett as early as 1874 when he built a house upon it which, during his lifetime, was in occupation of his tenants. After his decease, his heirs in the year 1906 conveyed both lots by warranty deed to one Whittier under whose will, executed in 1911, defendants claim title. There was evidence tending to prove that sundry of the tenants of the predecessors in title of defendants occupied the lot, or part of it, the recovery of which is sought, in various years either as a vegetable or flower garden or for games and sports. The plea was the general issue. The verdict below was for the plaintiff and the case is now here upon defendants' motion for new trial.

We think the verdict must stand. While such possession of the locus as was had by the tenants of the predecessors in title of the defendants in the adjoining, or Dennett, lot was apparently open and notorious, the jury was warranted in finding upon the evidence

that it was not continuous. *Smith* v. *Booth Brothers*, 112 Maine, 297, 306; See *Little* v. *Megquier*, 2 Maine, 176, 178. It is probably true that Dennett and his devisees told their tenants, or some of them, that they might occupy the locus and that for part of the time, some did, the whole in some years and part in others, yet the testimony falls far short of showing occupation in each year and does show intervals of one, two and more years, when the tenants were not in occupation of any part of it. See *Brackett* v. *Persons unknown*, 53 Maine, 228, 232.

The payment of taxes is not possession nor evidence of possession. "The payment of taxes may be admissible as tending to show that the party paying claimed the property, as in cases of alleged adverse possession; or if the party is in occupation, as tending to show the character of the occupation. But it is not evidence of possession." *Smith* v. *Booth Brothers*, 112 Maine, 297, 308.

The suggestion that there was a deed from Nash to Dennett, is not supported by any direct evidence. See *Day* v. *Philbrook*, 89 Maine, 462, 467; See also *Liberty* v. *Haines*, 103 Maine, 182, 192. Nor upon the evidence of adverse possession in this case, can a deed or release be presumed. *Adams* v. *Hodgkins*, 109 Maine, 361, 367.

It is the urgent contention of the defendants that the plaintiff shows no seizin. By Sec. 4, Chap. 106, R. S., it is provided, however, that the demandant in a writ of entry need not prove an actual entry under his title, but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein is sufficient proof of seizin. The defendants have failed to show loss of plaintiff's right of entry by adverse possession for any period of twenty years prior to the date of her writ. See R. S., Chap. 75, Sec. 1; *Austin* v. *Stevens*, 24 Maine, 520, 526-7; *Morse* v. *Sleeper*, 58 Maine, 329, 335; *Mitchell* v. *Persons unknown*, 59 Maine, 448, 450; *Hewes* v. *Coombs*, 84 Maine, 434, 435, 436.

The title of plaintiff is not affected by mere non-user, and unless there is shown against her some adverse possession or loss of title in some of the ways recognized by law, she may rely on the existence of her property with full assurance that when occasion arises for its use and enjoyment she will find her rights therein absolute and unimpaired. *Adams* v. *Hodgkins*, 109 Maine, 361, 366.

The motion must therefore be overruled.

Motion overruled.

GEORGE C. NICHOLS *vs.* JOHN SONIA.

Sagadahoc. Opinion August 20, 1915.

Declaration. Exceptions. License. Non-suit. Trespasser.

Exceptions to an order of non-suit in an action of trespass quare clausum.

The plaintiff entered without force about half past ten in the evening, the place of business of defendant, a dentist, upon some business in which both parties were interested, and while there, indulged in improper language and declined to withdraw when ordered so to do by plaintiff.

Held: That defendant was not a trespasser ab initio; that although the distinction between trespass and trespass on the case has been abolished, the declaration cannot be regarded as one in case and plaintiff allowed to recover under it for damages for acts committed by defendant after his entry, the allegation of breaking and entering being of substance, and not of form merely.

On exceptions by plaintiff. Exceptions overruled.

This was an action of trespass quare clausum for breaking and entering the dental rooms of plaintiff, situated in Bath, in the County of Sagadahoc. Plea, general issue. At close of testimony of plaintiff, the presiding Justice directed a non-suit. To this ruling, plaintiff excepted.

The case is stated in the opinion.

F. P. Sprague, for plaintiff.

E. W. Bridgham, for defendant.

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

BIRD, J. The plaintiff excepts to the ruling of the presiding Justice ordering a non-suit. The declaration, which is in a plea of trespass, alleges that the defendant on the second day of December, 1914, at Bath, with force and arms broke and entered the dental office of said Nichols, situated at number 81 Front Street and thereby

greatly disturbed plaintiff in the quiet possession of his office and then and there remained after he had been ordered to leave and vacate the office by the plaintiff and concludes with allegations of insulting language, threatened violence and slanderous words on the part of defendant while he remained in the office.

The evidence discloses that plaintiff shortly before half past ten o'clock in the evening of the day alleged was in the operating room of the suite of rooms occupied by him as an office; that the rooms were lighted; that plaintiff was there in the transaction of his business; that at the hour last named the defendant, a policeman of the city of Bath, opened in the usual manner the door giving entrance to the suite of plaintiff and entered one of the rooms, the door being latched but not locked. In this room was the wife of plaintiff. The defendant then made inquiries as to the future disposition of a cause in court which had recently been decided in his favor against plaintiff and, upon receiving a reply, indulged in profane language, opprobrious epithets and charges of perjury, declining to leave the apartment when ordered to do so by plaintiff. A non-suit was ordered upon the close of the testimony adduced by plaintiff and we think properly.

The contention of the plaintiff that the defendant by his conduct became a trespasser *ab initio*, cannot be entertained. Defendant did not enter in the discharge of any of his duties as policeman. His entrance was not by authority of law, as is the case of an officer lawfully entering upon property in execution of legal process or of a guest entering an inn. The office was alight, the hour not unreasonable, the place improper, nor the inquiry impertinent. His errand was one of business and we must find upon the evidence that, if not an invitee, he was in by license of the occupant. *Bradley* v. *Davis*, 14 Maine, 44, 47; *Perry* v. *Bailey*, 94 Maine, 50, 58.

Nor is plaintiff more forturate in his suggestion that, the distinction between trespass and trespass on the case having been abolished by statute, the declaration is to be regarded as one in case and that he is entitled to recover under it for acts of defendant committed after his entry. The allegation of breaking and entering into land, is of substance and not of form merely; *Sawyer* v. *Goodwin*, 34 Maine, 419, 421; and the evidence offered must sustain the allegation; *Kelley* v. *Bragg*, 76 Maine, 207, 209. In cases where the

distinction is really of substance, the provision of statute abolishing it is inapplicable; *Place* v. *Brann*, 77 Maine, 342, 343. The declaration was not appropriate in case, leaving out the allegation of breaking and entering, as in *Kelley* v. *Bragg*, supra.

The exceptions to the order of non-suit must therefore be overruled.

Exceptions overruled.

WILLIAM CRAUGHWELL, et als.

vs.

MOUSAM RIVER TRUST COMPANY.

York. Opinion August 23, 1915.

Bank Commissioner. Corporations. Injunction. Insolvency. Jurisdiction. Laws of 1905, Chap. 85. Laws of 1907, Chap. 137. Public Institutions. Receiver. Stockholders.

1. Chapter 85 of the Laws of 1905 was enacted as a substitute for Sec. 78 of Chap. 47 of the R. S., and is not in any way applicable to trust companies.
2. A bill by stockholders, praying for the appointment of a receiver, and for the winding up of a trust company on the ground that it is in imminent danger of insolvency through the fraud, neglect and gross mismanagement of its officers, is not maintainable under Chap. 85 of the Laws of 1905.
3. The bank commissioner, and he alone, is authorized by statute to begin proceedings for the winding up of a trust company, when it is insolvent, or its condition such as to render its further proceedings hazardous to the public, or to those having funds in its custody.

On exceptions by plaintiffs. Exceptions overruled.

This is a bill in equity, brought by the plaintiffs as stockholders of the defendant corporation in behalf of themselves and all other stockholders who might wish to join, alleging that through fraud, neglect and gross mismanagement of its officers, the corporation is insolvent,

and praying for the appointment of a receiver. At the hearing of this cause, upon motion of defendant, the bill was dismissed for want of jurisdiction. To this decree ordering said bill dismissed, the plaintiffs excepted.

The case is stated in the opinion.

Hinckley & Hinckley, for plaintiffs.

Woodman & Whitehouse, for defendant.

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

SAVAGE, C. J. Bill in equity brought by several stockholders against the Mousam River Trust Company, alleging in substance that through the fraud, neglect and gross mismanagement of its officers the corporation is insolvent or in imminent danger of insolvency, and praying for the appointment of a receiver, the winding up of the affairs of the corporation, and so forth. On motion the bill was dismissed for want of jurisdiction, and the plaintiffs excepted. The bill was brought under the provisions of Chap. 85 of the laws of 1905, as amended by Chap. 137 of the Laws of 1907.

The statute of 1905 provided that "whenever any corporation shall become insolvent, or be in imminent danger of insolvency, or whenever through fraud, neglect or gross mismanagement of its affairs its estate and effects are in danger of being wasted or lost, ... upon application of any creditor or stockholder by bill in equity" the court may issue an injunction restraining the corporation from doing business, appoint a receiver, and wind up its affairs. Prior to the amendment of 1907, the original statute, which declared that all claims not presented to the receiver as provided should "be forever barred," was held by the court to be a statute of bankruptcy, *Moody* v. *Development Co.*, 102 Maine, 374, and, hence, under the federal constitution, Art. I, Sec. VIII, inoperative during the existence of the federal bankrupt law. *Damon's Appeal,* 70 Maine, 153. Since the amendment of 1907, many proceedings have been brought under the statute, but in none has the constitutionality of the statute been questioned before the court. And for the purposes of this case, we assume that the statute in its present form is operative.

In support of the decree of dismissal it is contended by the defendant that the statute of 1905 does not apply to trust companies, but that the power to bring proceedings of this character is vested solely

in the bank commissioner. And this presents the precise question now to be considered and determined.

By R. S., Chap. 48, Sec. 42, the bank examiner, (now called the bank commissioner, Laws of 1909, Chap. 12) is given very broad powers of visitation and examination of savings banks, having free access to all their vaults, books and papers, being empowered to inspect and examine all of their affairs and make such inquiries as are necessary to ascertain their condition. And such inquiries the bank officers are bound, under penalty, to answer upon oath, if so required. By section 44, the bank commissioner is authorized, in case he is of opinion that a bank is "insolvent, or that its condition is such as to render its further proceedings hazardous to the public or to those having funds in its custody" to apply to the court for an injunction, appointment of a receiver, sequestration of assets and so forth. By section 75, the bank commissioner is charged with the same duties and invested with the same powers with respect to loan and building associations, as to savings banks.

In 1899, in the case of *Ulmer* v. *Loan and Building Association*, 93 Maine, 302, a bill for injunction against ultra vires acts, brought by a stockholder, we had occasion to consider the various statutory provisions now embraced in R. S., Chap. 48, and referred to above, and were clearly of opinion that the power of invoking the interference of the court in cases of savings banks and loan and building associations was intended by the legislature to be vested in the bank examiner alone. And, inasmuch as by Public Laws 1905, Chap. 12, the bank examiner is vested with the same authority over trust and banking companies as he has over savings banks, and is charged with the performance of the same duties in the one case as in the other, there can be no question that, but for the provisions of chapter 85 of the laws of the same year, the bank commissioner, and he alone, is authorized to bring receivership proceedings against a trust company.

But, say these plaintiffs, the Law of 1905, enacted since the decision of the Ulmer case, is very comprehensive in terms, and expressly includes "any" and, therefore, all corporations. If this contention is sound, all savings banks and all loan and building associations, as well as all trust companies, may be proceeded against under the Law of 1905, at the suit of any creditor or stockholder. If there were any considerable doubt respecting the legislative intent in this regard, the consequences of such a construction as is claimed by the plaintiffs

must arrest attention, and may be properly considered. For, unless compelled to such a conclusion, we would be slow to think that the legislature, contrary to all previous state policy, intended to subject all savings banks, and loan and building associations, and trust companies to the uncontrolled attack of every creditor and every dissatisfied stockholder, and to subject them to receivership suits and winding up proceedings at the suit of those who may not know, and may not have the means of knowing the condition of the institution, as the bank commissioner is bound to know it. Banking is necessarily a delicate business. To be successful it must retain public confidence. It must be managed with caution. Needless alarm must be prevented. If a bank is even charged with insolvency or mismanagement, the charge itself may start it on the road to financial ruin. The alarm caused by a causeless suit may break a strong bank. A slight and causeless alarm may result in a disastrous run upon a solvent savings bank. It has been the policy of the state hitherto to protect banks against such consequences. If a bank were a private institution, and the consequences which we have referred to were to visit only those who have chosen to associate together as stockholders, those consequences would be lamentable, but endurable. But a bank is not merely a private institution. It is in a very important sense a public institution, in that the public are deeply concerned in its well being. Its welfare affects not only its stockholders, but also its depositors. And besides stockholders and depositors, the business public itself is concerned. The general well being of the public is affected by the success or the downfall of the banks which feed the arteries of business.

Because banking institutions have a public character, and because the public is so affected by their management, good or bad, the state has ever found it expedient closely to supervise their operations, to throw around them safeguards on the one hand, and limitations of power on the other, all for the purpose of protecting the public. They are not legislated for or against like other corporations, R. S., Chap. 47; but are put into a class by themselves, R. S., Chap. 48. We may well repeat what we said in the Ulmer case: "These institutions possess a public character, and it is for the interest of the public, not only that they shall be subjected to judicial investigation when they ought to be, but also that they shall not be so subjected when they ought not to be. . . . . If one share holder may

maintain a bill, so may every other. There is no limit. To subject loan and building associations to vexatious, harassing and expensive litigation caused by suits of possibly multitudinous shareholders who may be dissatisfied, with or without reason, would greatly impair their usefulness, if not imperil their existence." Whatever force there may be in this reasoning applies as well now to trust companies as it did then to loan and building associations.

But we do not think there can be any real doubt as to the legislative intention in this case. It is a trite observation that the legislative intent is the law, and that a thing within the letter is not within the statute, if contrary to intention. *Carrigan* v. *Stilwell*, 99 Maine, 434. And that means the intent as expressed. It means the intent gathered from the whole statute, text and context. It means the intent as expressed, but interpreted with reference to the apparent purpose and subject matter of the legislation. It thus happens that a statute may be construed in direct contravention of its literal terms. *Holmes* v. *Paris*, 75 Maine, 559; *Landers* v. *Smith*, 78 Maine, 212; *Gray* v. *County Commissioners*, 83 Maine, 429; *Lyon* v. *Lyon*, 88 Maine, 395. *In re Penobscot Lumb. Asso.*, 93 Maine, 391.

And aside from the reasons of public policy already suggested, we think it is quite evident from the statute itself that it was not the intention of the legislature by the use of the words "any corporation" in the Law of 1905, to include all corporations of all classes. This statute repeals section 78, and refers to section 79, of chapter 47 of the Revised Statutes. It makes no reference to any other statute. A comparison of some of the provisions of this statute with the provisions referred to in chapter 47 will, we think, make clear the legislative intent.

By way of premise it may be said that under its general chancery powers the court has jurisdiction at the suit of creditors or minority stockholders to appoint receivers for a business corporation, and afford other redress when through fraud or breach of trust of the managers its property is exposed to imminent peril, or is in danger of future injury and waste. *Pride* v. *Henderson*, 109 Maine, 452. But the court will not, under its common law jurisdiction, assume to wind up such a corporation, at the suit of minority stockholders, unless possibly when the corporate objects are not attainable. *Benedict* v. *Columbus Construction Co.*, 49 N. J., Eq., 23. Such a power, if it exists, must be found in the statute.

By section 78 of chapter 47 of the R. S., the court was given jurisdiction at the suit of a creditor or stockholder of a corporation to appoint trustees, sequestrate its assets and wind up its affairs, when its charter "expires or is terminated." Section 79 provides for the payment of debts and the distribution of any balance among stockholders. Chapter 85 of the Laws of 1905 repealed section 78 just referred to, and conferred like jurisdiction upon the court, at the suit of a creditor or stockholder, "whenever any corporation shall become insolvent, or be in imminent danger of insolvency, or whenever through fraud, neglect or gross mismanagement of its affairs, or through attachment, litigation or otherwise, its estate and effects are in danger of being wasted or lost, or whenever it has ceased to do business, or its charter has expired or been forfeited." This statute further provides that the assets shall be distributed as provided in section 79 of chapter 47; and that the court may decree a dissolution. It will be noticed that the new statute retains the ground of jurisdiction expressed in the old statute, namely, the expiration or termination of the charter, and adds several additional grounds, as fraud, neglect, gross mismanagement, danger of waste, ceasing to do business, and so forth; and further that the new statute may apply to living corporations as well as to those whose charters have expired. Both statutes, the old and the new, have the same purpose, to protect the interests of creditors and stockholders by winding up corporations.

We cannot resist the conclusion that the new enactment in 1905 was intended by the legislature as a substitute for the old statute, section 78. It is a substitute giving enlarged jurisdiction, but serving the same general purpose. It repealed the old statute and it was itself enacted in lieu thereof, as effectually as if it had been so expressed. We think therefore that it now applies to the same corporations, and only to those, to which section 78 was applicable.

But the provisions of section 78 of chapter 47 did not apply to savings banks, nor loan and building associations nor trust companies. Section 1 of chapter 47 provides that the chapter is applicable "to all corporations . . . except so far as it is inconsistent with such special acts or with public statutes, concerning particular classes of corporations." Savings banks, loan and building associations and trust companies form a particular class of corporations. The statutory provisions for their organization, regulation, dissolution and

winding up are found in chapter 48 of the R. S. And those provisions which authorize sequestration and winding up at the suit of the bank commissioner only, are inconsistent with the provisions of the Law of 1905 which authorizes such action at the suit of a creditor or stockholder. Therefore it must be held that chapter 85 of the Laws of 1905 is not applicable to trust companies, and that a bill for the appointment of receivers and the winding up of such a company, brought by stockholders under that chapter cannot be maintained.

Exceptions overruled.

JAMES SIDELINGER *vs.* FRED W. TROWBRIDGE.

Lincoln. Opinion August 23, 1915.

Malicious Prosecution. Nol Prossed. Non-suit. Probable Cause. Wilful Trespass.

1. Conviction in the lower court is conclusive upon the question of probable cause, and it necessarily follows that the plaintiff cannot maintain an action for malicious prosecution.
2. To support this action, there must be proof of turpitude on the part of the defendant.
3. There must be both malice and the want of probable cause. The arrest complained of must have been wholly groundless and that known to the defendant.

On exceptions by plaintiff. Exceptions overruled.

This is an action on the case for malicious prosecution of the plaintiff by the defendant. The plea was the general issue, with brief statement alleging settlement. At the April term, 1915, of the Supreme Judicial Court the case was heard, and at the conclusion of the plaintiff's testimony, the presiding Justice directed a non-suit; to which ruling, the plaintiff excepted.

The case is stated in the opinion.

Rodney I. Thompson, for plaintiff.

E. B. Burpee, for defendant.

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

HANSON, J. This is an action for malicious prosecution, and is before the court on the plaintiff's exceptions to an order of non-suit. The action grew out of a controversy over real estate.

The plaintiff had been twice arrested, and says that for such damages as he may have sustained, settlement between the parties had been made, but he was again arrested for trespass, and this last arrest is the basis of the present suit.

The record shows that on September 25, 1912, the plaintiff was arrested on a warrant issued by the recorder of the Police Court of the City of Rockland; that on October 5th following he was adjudged guilty of wilfull trespass in said court, and thereupon appealed from said judgment to the Supreme Judicial Court for the County of Knox, then next to be holden at Rockland in said county on the first Tuesday of January, 1913. It further appears that at said term of the Supreme Judicial Court the case was nol prossed with the plaintiff's consent. Such being the undisputed fact, it is clear that the plaintiff cannot maintain this action, and the non-suit was therefore properly ordered. *Garing* v. *Fraser*, 76 Maine, 37; 26 Cyc., 60, and cases cited.

Conviction in the lower court is conclusive upon the question of probable cause, and it necessarily follows that the plaintiff cannot maintain an action for malicious prosecution. *Ulmer* v. *Leland*, 1 Greenl. 135, 138; *Payson* v. *Caswell*, 22 Maine, 212; *Severance* v. *Judkins*, 73 Maine, 376; 26 Cyc., 20.

The record fails to show the essential elements to sustain the action, and the doctrine announced in *McLellan* v. *Cumberland Bank*, 24 Maine 566, applies here,—that "to support this action there must be proof of turpitude on the part of the defendants. There must be both malice and the want of probable cause. The arrest complained of, must have been wholly groundless, and that known to the defendants."

There was no evidence in the case to justify its submission to a jury. *White* v. *Bradley*, 66 Maine, 254.

Exceptions overruled.

JOHN BOUTOTTE *vs.* DOMINIQUE DAIGLE, JR.

AND

LURGIE BOUTOTTE, Pro Ami, *vs.* SAME.

Aroostook. Opinion August 23, 1915.

Assumption of Risk. Contract for Hire. Instructions. Minor. Negligence. Safe Place.

1. The work contracted for, as the plaintiff asserts, was one not attended with unusual or peculiar dangers, while the work assigned of following the mowing machine, as alleged, was hazardous.
2. There was conflict as to the terms of the contract, and being an oral contract, it was for the jury to say what the contract really was.
3. Ordering the plaintiff to do a more dangerous work than that for which the contract provided, without proper instruction, was negligence.
4. Allowing the plaintiff to grasp the clearing bar in the manner admitted, without instantly stopping his mowing machine, was culpable negligence.
5. A boy of the plaintiff's age cannot be held to know and appreciate the dangers in such circumstances as are disclosed in this case.

On motions for new trial by defendant. Motions overruled.

These are two actions on the case for negligence; one brought by a minor against defendant for loss of his left thumb; the other action is by the father of minor, to recover for loss of his minor son's services and for expenses incurred for medical treatment of the son. Plea in both cases was the general issue. The jury returned verdicts in both cases for the plaintiffs, and defendant filed general motions for new trials.

The cases are stated in the opinion.

Hersey & Barnes, and A. G. Fenlason, for plaintiffs.

J. A. Laliberte, and A. S. Crawford, for defendant.

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

HANSON, J. Actions on the case for negligence, tried together. Lurgie Boutotte, a minor, sues to recover damages for the loss of his left thumb; his father, John Boutotte, to recover for expenses incurred for medical treatment and loss of service of his son Lurgie Boutotte. The jury returned a verdict for the plaintiff in both cases,—in the first for $70.83, in the last named for $675.00. The defendant filed a general motion for a new trial in each case. The declarations were substantially as follows:

"And the plaintiff avers that on said first day of August, 1914, he made a contract with said defendant whereby he permitted and allowed his said minor son, Lurgie, to work and labor for said defendant for hire in the employment and work of driving, using and operating the hay rake of said defendant on the farm of said defendant at said New Canada Plantation; and said minor son was to be used and put to no other employment by said defendant without the knowledge and consent of said plaintiff.

"And the plaintiff further avers that it then and there became the duty of said defendant in the employment of said minor son as aforesaid not to expose said minor son to dangers and perils outside of said employment as aforesaid, and not to direct, command and instruct said minor son to work on or about the mowing machine of said defendant or to take away and remove the hay and grass from said mowing machine while in operation without the knowledge and consent of the plaintiff, and without due notice, instructions and warning to said minor as aforesaid.

"And the plaintiff further avers that then and there said defendant, well knowing the premises, carelessly and negligently, and without the knowledge of the plaintiff and without any warning or instruction to said minor son as aforesaid, commanded, instructed and directed said minor son to remove and take away the hay and grass from the teeth, scythes and cutter of said mowing machine of said defendant while being operated and used by said defendant as aforesaid.

"And the plaintiff further avers that said defendant regardless of his duty as aforesaid, carelessly and negligently allowed and permitted said minor son to remove with his hands said hay and grass from the teeth, scythes and cutter of said mowing machine as afore-

said while the same was in operation as aforesaid, without any warning or instruction, and while said minor son did not have any notice of said dangers and perils as aforesaid, and while said minor son because of his age and inexperience did not appreciate said dangers and perils as aforesaid; and said minor son, by reason of said carelessness and negligence of said defendant as aforesaid, and without any fault on his part, was caught by the left hand in the cutter, scythes and teeth of said mower as aforesaid, and the thumb of his left hand was mangled, cut and severed by said mowing machine as aforesaid, so that said thumb had to be completely amputated from said left hand."

The defendant contends (1) The evidence effectually disproves the claim that the defendant directed the plaintiff to take away and remove with his hands the hay and grass clogged around the scythe, teeth and cutter of the defendant's mowing machine, while it was in operation. (2) If the defendant did so direct the plaintiff, the plaintiff assumed the risk of the injury received.

The plaintiffs urge that the defendant is liable because:

1. The work assigned was hazardous and not contemplated in the contract for service, and was ordered and conducted without the knowledge and consent of the father.

2. That assuming that the minor was hired as the defendant claims, he is still liable because he failed to provide a reasonably safe place in which the minor would perform his work.

3. That the presence of a large rock in the path of the machine, causing a violent upward movement of the scythe and consequent stumbling of the minor, was due to the negligence of the defendant, and renders him liable.

The questions involved were peculiarly for the jury. The first was upon the terms of the contract between the plaintiff, John Boutotte, and the defendant. The plaintiff alleges that the agreement was to hire his son and a horse to rake hay. The defendant says he hired the son to rake hay, or to do such other work as he required. There was conflict as to the terms of the contract, and being an oral contract it was for the jury to say what the contract really was. The remaining questions of fact as to the time, place and circumstances attending the injury were for the jury alone, and having been submitted under appropriate instruction as we must assume, we find no justifiable reason to disturb the finding of the jury. The

work contracted for as the plaintiff asserts was one not attended with unusual or peculiar danger, while the work assigned of following the mowing machine as alleged, was hazardous, a more dangerous work than raking hay. There was some conflict as to the manner of performing the work for one and one-half hours, but the parties are in substantial agreement in respect to the immediate circumstances attending the accident. Both parties say that the plaintiff in doing the work assigned had grasped the clearing bar attached to the scythe with his left hand, and was removing the hay with his right hand. The defendant saw the plaintiff so holding the clearing bar, and did not stop his mowing machine. The plaintiff says he went around a side hill three or four times so holding the clearing bar. The defendant in his examination states as follows:

"Q.—How far did he go after he had hold of the stick?

A.—Not more than two or three steps.

Q. —When did you stop?

A.—I stopped when he fell into the scythe. He made an outcry."

A careful examination of the record satisfies us that the jury were justified in finding for the plaintiffs in both actions.

Ordering the plaintiff to do a more dangerous work than that for which the contract provided, without proper instruction, was negligence, and allowing the plaintiff to grasp the clearing bar in the manner admitted, without instantly stopping his mowing machine, was culpable negligence.

Labbatt on Master and Servant, Vol. 1, Sec. 21, cited by the defendant, supports the plaintiff, John Boutotte in his several contentions, as follows:

"The controlling principle then is that a person who hires an unemancipated minor, and puts him at hazardous work, is accountable to the non-assenting parent for all the consequences following directly from the employment, in so far as they entail a loss of the minor's services by the parent. . . . . In such cases the wrong consists essentially in the employment of the minor servant without the permission or against the wishes of the parent. The parent is therefore entitled to recover, irrespective of whether the master was negligent or not."

As to the remaining question of assumption of risk, we are of the opinion that a boy of the plaintiff's age cannot be held to know and appreciate the dangers in such circumstances as are disclosed in this case.

Motions overruled.

INHABITANTS OF RUMFORD *vs.* INHABITANTS OF UPTON.

Oxford. Opinion August 28, 1915.

Assessments. Derivative Settlement. Intention. List of Voters. Public Records. Tax.

Action to recover from defendant expense of pauper supplies furnished by plaintiff to one Annie Campbell, who, at the time the supplies were furnished, was the wife of one whose pauper settlement was then, as plaintiff claimed, in defendant town.

The intention with which one performs an act may be testified to by such party.

The selectmen of towns when performing the duties of a registration board are public officers. When so employed, they are in no sense agents of the municipality.

Lists of voters made up by the municipal officers, acting as a registration board, are not admissible to show the residence of a pauper, in the absence of proof that the pauper voted at the election in anticipation of which they were made.

The treasurer of a town is a public officer and his records are public records. He is not, however, the town's financial agent.

The records or accounts of a town treasurer are required to be kept by law and are evidence of the facts contained therein which it is made his duty by law to enter.

Where a public record is in existence, entries therein may be proved by the production of the record, or by a certified copy, or by examined copy, and not otherwise.

On motion and exceptions by the plaintiff. Exceptions sustained. New trial granted.

This is an action of assumpsit by the Inhabitants of Rumford to recover of the Inhabitants of Upton for pauper supplies furnished by the plaintiffs to one Annie Campbell, who was the wife of one George R. Campbell. Plea, the general issue. The jury returned a verdict for the defendant. The plaintiff filed a motion for new trial and also filed exceptions to the exclusion and admission of evidence, which exceptions are fully considered in the opinion.

The case is stated in the opinion.

James B. Stevenson, and Aretas E. Stearns, for plaintiff.

James S. Wright, and Alton C. Wheeler, for defendant.

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

BIRD, J. This is an action brought to recover from defendant the expenses of pauper supplies furnished by plaintiff to one Annie Campbell who, at the time the supplies were furnished in January, 1913, was the wife of one George R. Campbell whose pauper settlement was then, as plaintiff claimed, in defendant town. At the trial the admissions of the parties were such that there was but a single issue presented to the jury. "Did the pauper have a pauper settlement in defendant town?" The verdict of the jury was in favor of defendant and the case is before this court upon motion of plaintiff for new trial and upon exceptions of plaintiff to the exclusion of evidence offered by it and to the admission of evidence offered by defendant.

It appears from the evidence that George R. Campbell, upon attaining his majority, had no derivative settlement in defendant town, although he had resided there during the larger part of his minority. After attaining his majority, July 9, 1892, he continued to live in defendant town until September, 1910, but with periods of absence occurring subsequently to the last of March or first of April, 1897. It is as to the character of these periods of absence from defendant town that the contention of the parties arises; the defendant town claiming that George R. Campbell left it with intent to abandon his home and to acquire a residence elsewhere.

It will be necessary to consider the exceptions only.

The pauper's husband, George R. Campbell, being called as a witness for plaintiff, was inquired of by plaintiff's attorney as follows:

"What was your intention from the time you became twenty-one years of age, in regard to maintaining a home in any place?"

Also, the witness having stated that he had paid a school tax to the state, while living in Andover surplus, "What was your intention in regard to your home during all this time?" And again "Whether or not at that time you intended to make your home in Andover Surplus?" All these questions were excluded. Despite the indefiniteness of the first of the questions, the exceptions to their exclusion must be sustained. The intention with which one performs an act may be testified to by such party. 1 Gr. Ev., Sec. 51a. note a.; *Edwards* v. *Currier*, 43 Maine, 474, 483, 484; *Wheelden* v. *Wilson*, 44 Maine, 11, 19; See *Knox* v. *Montville*, 98 Maine, 493, 495, where the distinction between direct testimony of the pauper himself and declarations of the pauper is indicated: also see *Holyoke* v. *Holyoke*, 110 Maine, 469, 479, which cites *Knox* v. *Montville*, supra, with approval. The exception is sustained.

The plaintiff produced and offered in evidence copies of the list of voters prepared by the selectmen of the town of Upton, and by them returned into the office of the clerk of that town, for sundry years, between the year 1897 and the year 1909 and offered to prove by the several clerks of the town, who made the copies that they were true copies of the original lists, "and that the name of George R. Campbell appeared in each of said lists for each of said years." Plaintiff admitted its inability to prove that George R. Campbell ever voted in Upton. The court assuming the lists to be proved true copies, excluded them subject to exceptions.

The court has held that, in actions for pauper supplies, the assessors' records of assessments of taxes showing the assessment or non-assessment of the pauper, without showing payment of the tax assessed, when an assessment has been made, are not admissible as showing the residence of the pauper. *Rockland* v. *Union*, 100 Maine, 67, 68; see also *Monroe* v. *Hampden*, 95 Maine, 111, 113. The assessors of taxes are public officers and no element of principal and agent exists in their relations to the municipality. "It is not liable to an action for their omissions or mistakes, unless made so by statute. No statute imposes a liability upon the municipality for an omission to assess a particular person or property. . . . . The acts of the assessors, as shown by their records, were inadmissible upon the question at issue. . . . . They were not admissions of the City of Rockland,

nor of its agents, and were not entitled to any weight as evidence for or against either party. . . . . The assessors' acts reflected their opinion, founded perhaps upon erroneous information, or resulting from inadvertence or neglect of duty." *Rockland* v. *Farnsworth*, 93 Maine, 178, 183-4. In *Rockland* v. *Union*, 100 Maine, 67, 68, after quoting from the case last cited, it is said, "Standing alone neither the act or omission of the assessors in the assessment or non-assessment of a tax on an individual can be evidence for or against a town on the question of the residence of such individual. The doings of its assessors in the assessment of taxes are not the acts or admissions of the town for they are not its agents. The assessment of a tax is no admission on the part of the pauper, unless coupled with its payment or his recognition of it in some manner as an existing liability. At the most the assessment of a tax but represents the opinion of the assessors upon the question of residence or non residence of the pauper at the time, and cannot be evidence of the fact itself before another tribunal whose duty it is to determine that question, not by the opinion of others, but as they themselves find the fact."

The selectmen of towns when performing the duties of a registration board, R. S., Chap. 5, Secs. 34-46, like assessors of taxes, are public officers. Their duties are imposed and clearly defined by statute. In the performance of their duties they are not subject to the control of the municipality and it has neither power to correct their errors nor liability therefor. They are in no sense the agents of the municipality. Standing alone, that is without proof that George R. Campbell voted, the lists of voters offered in evidence were rightly excluded. The registration of a voter alone like the mere assessment of a tax is not binding upon, nor evidence against, a municipality as to the residence of the voter. The vote of a person thus registered, however, shows, or has a tendency to show, the intention of such party when his residence is the subject of inquiry. See *Belmont* v. *Vinalhaven*, 82 Maine, 524, 531; *Monroe* v. *Hampden*, supra, and cases cited. The exception is overruled.

It further appears from the bill of exceptions that "The defendant called as a witness the former wife of George R. Campbell, and for the purpose of showing that George R. Campbell had abandoned his home in Upton, the defendant's attorney asked the following question:

"Q. What did he say to you about remaining in Dallas and living there with you if you were married?

"For the same purpose the defendant's attorney asked the same witness the following question:

"Q. Did you hear any conversation between Mr. Campbell and your father about his staying and living there with you and working for him?"

Both questions were admitted subject to the objections and exceptions of plaintiff.

If offered specifically for the purpose alleged to have been expressed by defendant's attorney in the bill of exceptions, we should regard both questions as inadmissible. See *Bangor* v. *Brunswick*, 27 Maine, 351; *Corinth* v. *Lincoln*, 34 Maine, 310, 312; *Deer Isle* v. *Winterport*, 87 Maine, 37, 43; *Knox* v. *Montville*, supra. The declarations do not appear to have accompanied any act material to the issue. Reference however, to the evidence, which is made part of the bill of exceptions, indicates clearly that the offer of evidence was not accompanied by any avowal of its purpose. The plaintiff objected but disclosed no grounds of objection. If admissible for any purpose, the admission was not error. It certainly tended to contradict the testimony of one of plaintiff's witnesses. *Hovey* v. *Hobson*, 55 Maine, 256; *McLaughlin* v. *Joy*, supra; see also *Dennen* v. *Haskell*, 45 Maine, 430; *Lausier* v. *Hooper*, 112 Maine, 333, 335. The exception is not sustained.

The plaintiff called its treasurer who produced his record, or account, of receipts, and was asked the following questions:

"Q. I will ask you if your record shows the receipt of any money by you from the town of Upton under date February 18th, 1912?

"Q. During that year did you receive any check from the treasurer of the town of Upton on account of Annie Campbell?

"Q. Does your account as treasurer of the town of Rumford show the receipt of any payment by you from the town of Upton on account of pauper supplies furnished Annie Campbell?

Each of these questions was objected to by counsel for defendant, without stating the grounds of objection, and were excluded subject to exceptions.

It is the opinion of the court that the first and third questions should have been admitted. The treasurer of a town is a public officer and his records are public records; R. S., Chap. 4, Sec. 22;

Monticello v. *Lowell*, 70 Maine, 437. He is not the town's financial agent; *Lovejoy* v. *Foxcroft*, 91 Maine, 367, 372; *Baldwin* v. *Prentiss*, 105 Maine, 469, 470. His records or accounts are required to be kept by law and are sufficient evidence of the facts contained therein which it is made his duty by law to enter: *Thorn* v. *Case*, 21 Maine, 393, 398; 1 Gr. Ev., Secs. 483, 493. The questions were properly preliminary to the introduction of the entries. The second question apparently calls for the personal knowledge of the witness of the payment and should have been admitted, subject to explanation or inquiry as to the source of knowledge: see *Keene* v. *Meade*, 3 Pet. 1, 7. The exceptions are sustained.

Upon cross-examination of one Judkins, called by defendant, he was asked:

"In this matter relating to the liability of the town of Upton for pauper supplies furnished the wife of Robert Campbell, whether or not you have been employed as an agent to investigate this matter?" The question was excluded. It appears to be a question preliminary in nature but not, in strictness, material. The exception is overruled.

The same witness was asked upon cross-examination "You [as an agent of the Town of Upton] have discussed the liability [of the town of Upton] with the officers of the town of Rumford?" Again the question is in character preliminary and it is not thought that plaintiff has shown itself aggrieved by its exclusion.

The same witness was asked "Refreshing your recollection, whether or not you knew as a matter of fact, that the Town of Upton has paid the town of Rumford for pauper supplies to the wife of Robert Campbell?" The plaintiff excepts to its exclusion. The question was limited to the possession of knowledge by witness. While preliminary undoubtedly to another question, we think it admissible and the exception is sustained.

Again upon cross-examination there were addressed to the same witness, four other questions which were excluded. The exceptions to these exclusions will be considered in their order.

"Q. Whether or not you have admitted such knowledge on your part to the representatives of the town of Rumford?" This question immediately followed that last quoted.

In the form in which it was propounded, we think the question properly excluded.

"Whether or not you have examined the books of the Treasurer of the Town of Upton and know that they show a payment to the Town of Rumford for supplies furnished this woman?"

As already observed, the town treasurer is a public officer and his records public records. Where a public record is in existence, entries therein may be proved by the production of the record itself, or by a certified copy, or by an examined copy: *Owen* v. *Boyle,* 15 Maine, 147, 152; *State* v. *Gorham,* 65 Maine, 270, 272; *State* v. *Lynde,* 77 Maine, 561; *State* v. *Howard,* 103 Maine, 63; 1 Gr. Ev., Sec. 485. Here attempt was made to prove the contents of the record in neither of the modes authorized: see *Owen* v. *Boyle,* supra: *McGuire* v. *Sayward,* 22 Maine, 230, 233, where certificates of the officer in custody of the records containing a statement of what he says will appear by an inspection of the records, were excluded. The exception must be overruled.

"Q. Whether or not this matter has ever been dealt with in your town meeting?"

The records of the town are the best evidence and no substitute recognized by law was called for.

"Whether or not you have ever seen a check drawn by the Treasurer of the Town of Upton to the Treasurer of the Town of Rumford paying a certain sum of money for pauper supplies furnished the wife of Robert Campbell?" This inquiry was obviously inadmissible. The exceptions to the exclusion of the four questions last considered are overruled.

As the entry must be exceptions sustained, the motion is not discussed.

Exceptions sustained.
New trial granted.

PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, In Equity,

vs.

NORBERT LACHANCE AND HELEN A. LASANTE.

Cumberland. Opinion August 28, 1915.

Assignment. Beneficiary. Equity. Insurance. Interpleader. Policy. Proofs of Death.

The policy in this case was assigned by Joseph W. LaSante to Norbert LaChance to secure a loan of $2500, as claimed by Helen A. LaSante, the beneficiary under said policy. The assignee, Norbert LaChance, claimed the full amount of the policy.

Held:

1. That mere inadequacy of price will not render a contract void when both parties are in a condition to form an independent judgment concerning the transaction and intentionally make the contract, and there are no inequitable incidents connected with the transaction.
2. Equity does refuse to enforce a contract, even though legal, in which the party seeking the redress has so far overreached his adversary that the contract is unconscionable.
3. It is wisely established in the courts of Chancery, to prevent taking surreptitious advantage of the weakness or necessities of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance.
4. There may be such an unconscionableness or inadequacy in the bargain as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud.
5. Although the actual cases in which a contract or conveyance has been cancelled on account of gross inadequacy merely, without other inequitable incidents, are very few, yet the doctrine is settled by a consensus of decisions that, even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for cancelling a conveyance or contract whether executed or executory.

On report. Decree according to the opinion.

This is a bill of interpleader filed by the Prudential Life Insurance Company, the plaintiff in equity, asking the court to direct it as to

which party claimant shall receive the proceeds of a certain policy issued upon the life of one Joseph W. LaSante. At the hearing of said cause, by agreement of the parties, this case was reported to the Law Court for decision upon bill, answer and so much of the evidence as is legally admissible, the court to render such judgment as the rights of the parties require.

The case is stated in the opinion.

Charles J. Nichols, for complainant.

Joseph R. Paquin, and Emery & Waterhouse, for LaChance.

J. J. McAnarney, and Augustus F. Moulton, for LaSante.

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

HALEY, J. This is a bill of interpleader, filed by the Prudential Life Insurance Company of America against Norbert LaChance and Helen A. LaSante, alleging that on the 28th day of November, 1911, the company issued its policy of insurance upon the life of Joseph M. LaSante for the sum of $5000, and which afterwards was corrected by the company so that the name in the policy was Joseph W. LaSante, payable in case of death to Helen LaSante, the wife of the insured, if the beneficiary survived the insured, otherwise to the executors, administrators or assigns of the insured; that, at the time the company corrected the error in the name of the insured it also corrected an error in the name of the beneficiary, so that the policy was payable to Helen A. LaSante; that, on the 29th day of May, 1913, said Joseph LaSante died at Quincy, in the Commonwealth of Massachusetts; that proofs of his death, upon blanks furnished by the company, had been filed with the company; that said Norbert LaChance claimed the amount payable, according to the terms of the policy, by virtue of an assignment dated May 16, 1913, from Joseph W. LaSante and said Helen A. LaSante to said Norbert LaChance, and had brought suit at law against the insurance company for the full amount of said insurance policy; that the insurance company had received a notice in writing, signed by the said Helen A. LaSante, stating that the assignment of the policy above mentioned to said Norbert LaChance was made as security for a loan of $2500, and demanded payment, as beneficiary under said policy, of the difference between the face value of the policy and the amount of the loan, plus the interest thereon. The insurance company prayed that said Helen

A. LaSante and said Norbert LaChance be decreed to interplead touching their several claims; that said action at law be enjoined, and that it be relieved from liability upon paying into court the sum of money due by the terms of the policy.

The defendants appeared; filed their answers to the bill of interpleader, and upon hearing it was ordered that the insurance company be discharged from all liability to either of the defendants, Norbert LaChance or Helen A. LaSante, by depositing with the clerk $4986.05, and that the defendants interplead touching their claims to said fund.

The money was paid into court, the defendants' answers to the bill were by agreement taken as their pleadings, the testimony was taken by the court, and the case reported to this court for final decision.

Mr. LaSante was a resident of Quincy, Mass., engaged in the grocery and provision business in that city, and on the first day of November, 1912, began treatment with his family physician, Dr. Burke, at which time he was suffering from a stroke of paralysis and arteriosclerosis, and soon developed Bright's disease, from which he afterwards died. At that time his family consisted of his wife and two small children. In November he was unable to attend to his business, and it was sold out before the first of January, 1913, before which time his disease had progressed so far that his mind was somewhat affected, and his eyesight much affected. From November, 1912, to the time of his death, he suffered from intense headaches and grew rapidly worse. In April, 1913, his disease had progressed to such an extent that his physicians were expecting convulsions; he was discharging a large amount of albumen, and his eyesight was very much affected, so that on May 16th, 1913, when the assignment was executed, he could not raise himself in bed and was practically blind, and to sign the papers he was raised up in bed, and held by the agent of the insurance company that issued the policy, the pen placed in his hand and upon the assignment for him to sign. After signing the assignment Mr. LaSante did not leave his bed, and in three days became unconscious and remained so until his death on May 29th. The doctor testified: "The man was incompetent to do business, in my estimation, at any time, in any way, shape, form or manner. His judgment was of no value whatever. His talk was incoherent." The above testimony refers to a period of two weeks before Mr. LaSante's death.

Norbert LaChance resided at Biddeford, Maine, and his wife was a sister to Mr. LaSante, and Mr. LaChance must have known the condition of Mr. LaSante, because he claimed that he called upon Mr. LaSante in December, 1912, and in March, 1913, Mrs. LaSante wrote to Mrs. LaChance, returning an insurance policy that Mr. LaChance had taken from her to show to his brother, beginning her letter with these words: "Very Dear Brother and Sister-in-law, ... I send you your life insurance policies. They are good policies if you can keep them. Do everything in your power to retain them, but if you cannot continue to pay them, Norbert tells me that he will pay the premiums for you," and the letter closed with these words, "Your sister and Brother-in-law, who love you. Norbert and Marie." Norbert LaChance claimed that he called upon the LaSantes with his wife in March, at which time Mr. LaSante's condition was such that Mrs. LaChance wrote her father that Joseph was dying and to come at once. In April Mr. LaChance again called upon the LaSantes, and he claims that when he was there previously Mr. LaSante desired to borrow $150 of him, but that he did not loan it to him, but that at the call in April he loaned him $500 and insisted upon a condition that in the event of the death of Mr. LaSante he should be paid $500 for the use of the money. At this time a neighbor was called in by Mrs. LaSante, whose testimony corroborates the testimony of Mrs. LaSante, who said that Mr. LaChance desired to loan them $500, for which he wanted an insurance policy as security and it was talked there in the presence of the parties that Mr. LaChance should loan them $500 with the condition that if Mr. LaSante lived he would repay the money with six per cent. interest, that if he died Mr. LaChance was to take $1000. To this the neighbor strenuously objected, and a note was prepared for the $500, bearing interest at eight per cent., without any provision for a thousand dollars in case of the death of Mr. LaSante, and the policy was taken as collateral, although not assigned; but at the time of this loan Mrs. LaSante protested against it and stated that they did not need the money, that they had money in the house and rents coming in, and she turned the money over for safe keeping to the agent of the insurance company, who afterwards paid her what she called for, and after the death of Mr. LaSante paid her the balance.

The next week, May 7th, Mr. LaChance again called and stated the collateral was not good without an assignment, and had other

talk with Mr. LaSante, who was at that time confined to his bed. And it is claimed that, at that time, Mr. LaSante and his wife agreed to sell to Mr. LaChance the $5000 policy for $2500, and, at his dictation, Mrs. LaSante wrote a letter to the insurance company, stating they wished to assign the policy and asked for the proper blanks. In a few days the blanks arrived, and Mr. LaChance again came to Mr. LaSante's took the blank assignments and left the house. In about an hour he returned, accompanied by the agent of the insurance company, and turned over a $2000 check and the $500 note above mentioned as the $2500 consideration for the assignment of the policy, the assignment blank having been filled out while in Mr. LaChance's possession. The agent of the insurance company raised Mr. LaSante up in bed and held him, the pen was placed in his hand and upon the assignment and Mr. LaSante wrote his name, and Mrs. LaSante afterwards signed it and the insurance agent witnessed their signatures. The assignment was forwarded to the insurance company by Mr. LaChance, who at once returned to his home in Biddeford. The LaSantes had no use for the $2000, not having then used up the $500 previously loaned them and left by them in the insurance agent's hands. The check for $2000 was then endorsed and turned over to the agent of the insurance company, who had assisted Mr. LaSante in executing the so-called assignment as above stated, and deposited in the bank to his own credit, and, after the death of Mr. LaSante, upon the request of the widow of Mr. LaSante, he turned over to her the proceeds of said check.

The real issue is the validity of the assignment of May 16th. We think it is void as an unconscionable contract for constructive fraud in the procuring of it. "Equity does refuse to enforce a contract, even though legal, in which the party seeking the redress has so far overreached his adversary that the contract is unconscionable." *Brick* v. *Gas Co.*, 82 Kan., 752. Pomroy's Eq. Juris., Sec. 922. In the celebrated case of *Chesterfield* v. *Jansen*, 2 Ves. Sr., 155, decided in 1750, Lord Hardwicke arranged all the forms of frauds that courts of equity had jurisdiction to relieve against in four classes, the first three of which are as follows: "First, fraud, which is *dolus malus* may be actual, arising from facts and circumstances of imposition, which is the plainest case. Second, it may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no

honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and such that even the common law has taken notice. Third, fraud, which may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the courts of chancery, to prevent taking surreptitious advantage of the weakness or necessities of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance. Fourth, fraud, which may be collected and inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement." Included in the above are frauds in what are called catching bargains with heirs, reversioners, or expectants in the life of the parent.

This statement has been approved, unchanged, by the courts and text writers to the present day. Story's Eq. Juris., Sec. 188; Pomroy's Eq. Juris., Sec. 924; *Hume* v. *U. S.*, 132 U. S., 406.

Mere inadequacy of price will not render a contract void when both parties are in a condition to form an independent judgment concerning the transaction and intentionally make the contract, and there are no inequitable incidents connected with the transaction. "Still, however, there may be such an unconscionableness or inadequacy in the bargain, as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness for such inadequacy should be made out, as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud." Story's Eq., Sec. 246.

"Hence it is, that, even if there be no proof of fraud or imposition; yet, if upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of equity will sometimes interfere and grant relief, although they certainly are very cautious of interfering, unless upon very strong circumstances." Story's Eq., Sec. 331.

"Although the actual cases in which a contract or conveyance has been cancelled on account of gross inadequacy merely, without other inequitable incidents, are very few; yet the doctrine is settled by a consensus of decisions and *dicta*, that, even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for cancelling a conveyance or contract whether executed or executory." Pomroy's Eq., Sec. 927. Kerr on Fraud and Mistake, 187.

Lord Thurlow in *Gwynne* v. *Heaton*, 1 Brown's Ch. R. 9, in speaking of the inadequacy of consideration that renders contracts void, said: "It must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it."

"Whenever a deed or writing ought not to be used, it is against conscience for the party holding it to retain it." *Wilson* v. *Getty*, 57 Penn., 266; *Howard* v. *Edgell et al.*, 17 Vt., 9.

"The circumstances attending the making of the contract must be such as to excite suspicion of fraud, imposition, misrepresentation, or undue influence, on the one side, and imbecility, credulity or blind confidence, on the other. *Dailey* v. *Jessup*, 72 Mo., 144, and that equity will grant relief where there are such elements as absence of consideration, reliance upon the representation of the other party, surprise, mutual mistake, and unconscionable advantage. *Griffith* v. *Twomley*, 69 Mo., 13; *Faust* v. *Birner*, 30 Mo., 414." *Nelson* v. *Betts*, 21 Mo., App., 219.

The monstrous disproportion between the benefit which the plaintiff received and the right with which she parted. . . . . cannot fail to arrest attention and is, to say the least, strong evidence of fraud and imposition on the part of the defendant. *Nelson* v. *Betts*, supra.

An examination of the authorities show that equity protects the weak, the feeble, the inexperienced and the oppressed, from the strong, the shrewd and crafty, by refusing to uphold contracts or conveyances, when the relation or condition of the parties at the time of the making of the contract, or the gross inadequacy of the consideration, or the circumstances surrounding the transaction, are such as lead to the presumption of fraud, imposition or undue influence. In this case many of the elements which separately are sufficient to authorize the

court to relieve a party from a contract or conveyance are present. The intrinsic nature and subject of the bargain itself, the gross inadequacy of the consideration, the relationship of the parties—brothers-in-law and sister-in-law—, the circumstances of making the loan of $500, the negotiations for the execution of the assignment with a man in the physical and mental condition of Mr. LaSante, the condition of Mrs. LaSante when the contract was executed, worn and distracted by grief and the care and nursing of her dying husband, and the prospects of the future for herself and minor children, the fact that the assignors had no use for the money paid for the assignment, and that both husband and wife were without disinterested advice or counsel, compels the court to pronounce the assignment unconscionable and void.

In arriving at the above conclusion we have duly considered the argument for Mr. LaChance, that, at the time the assignment was executed, the insurance agent asked the assignors if they understood what they were doing, and stated that if Mr. LaSante died they could get nothing from the policy, and they both said "Yes." Mrs. LaSante admits that she said "yes," but states that her husband was "too far gone to answer," and that she supposed she was merely making the loan that Mr. LaSante had negotiated for. But, even if it were possible that both understood the transaction, the assignment ought not to be enforced, for, as said in *Pope Mfg. Co.* v. *Gormully*, 34 Fed., 877, where the same claim was urged in regard to a contract that had been executed; "This contract seems to be so oppressive and so unjust and inequitable in its terms, and so contrary to sound public policy, that it ought not to be enforced in a court of equity, even if the defendant fully understood and comprehended the force and import of every paragraph of it."

As the assignment is without validity, the parties are entitled to be placed in *statu quo*. Mr. LaChance, having advanced $2500, which the assignors received, is entitled to a return of his money as a loan, with interest at six per cent. to the date that the money was paid into court by the insurance company, plus $13.95 for one premium that he paid upon the insurance policy. The balance of the fund should be paid to Mrs. LaSante, together with her taxable costs to be deducted from the sum due Mr. LaChance.

Decree according to the opinion.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

DAVID S. WILLETT

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin County. Decided January 21, 1915. A motion by defendant for new trial upon the usual grounds. The plaintiff brought suit against defendant for the recovery of damages sustained by him through the alleged negligence of defendant by reason of which the plaintiff was thrown from one of the cars of defendant while riding thereon as a passenger.

A careful reading of the evidence fails to reveal sufficient to sustain a finding that defendant was negligent. It, also, is clear in the opinion of the court that the accident which caused the injury was due to the contributory negligence of the plaintiff and that the jury was not warranted in finding the contrary to be the fact. Manifestly, the jury either misapprehended the evidence or was moved by sympathy or bias in reaching its verdict. Motion sustained; Verdict set aside. New trial ordered. *Robert J. Curran, and Connellan & Connellan,* for plaintiff. *Andrews & Nelson,* for defendant.

MARION M. RUSSELL

vs.

THE FRATERNITIES HEALTH AND ACCIDENT ASSOCIATION.

Franklin County. Decided January 22, 1915. An action brought on a health and accident insurance policy.

The policy contained the provision that "Benefits shall not be allowed for sickness or disease not common to both sexes." The plaintiff was afflicted with a cystic tumor on one of her ovaries. The only question is whether such tumor was a sickness or disease not common to both sexes. Three medical witnesses testified that it was common to both sexes. The medical director of the defendant testified it was not common to both sexes, but admitted that the male sex did have cystic tumors. The jury found, as they were authorized to do from the evidence, that the disease was one common to both sexes. Motion overruled. *White & Carter*, for plaintiff. *Harry Manser*, for defendant.

JOSHUA T. HEMENWAY, In Equity, *vs.* HENRY P. CUNNINGHAM.

Lincoln County. Decided February 2, 1915. These facts are alleged and not denied:—the plaintiff, then a man of advanced age, on the first day of December, 1904, conveyed his farm by deed of warranty to his daughter, the wife of defendant, and the daughter upon the same day reconveyed the same to plaintiff in mortgage conditioned that the mortgagor support "the said Joshua T. Hemenway during his natural life in a pleasant manner upon said premises from the day of the date hereof." Both warranty deed and mortgage after the delivery were given the daughter, who undertook to have both recorded. On the following day the daughter mortgaged the farm to one Kennedy to secure payment of a loan of $500, her hus-

band, defendant, joining in executing this mortgage as well as that to plaintiff in relinquishment of his rights in the premises. The warranty deed and the mortgage to Kennedy were recorded in Lincoln Registry of Deeds on the third day of December, 1904, while the mortgage to plaintiff was not recorded until a year later.

The daughter of plaintiff died on the fifth day of December, 1908, testate. By her will, the defendant was made sole beneficiary of her estate and was duly appointed her executor. At her death she was the owner of the equity of redemption of the farm. Alleging the estate to be insufficient to pay more than the expenses of funeral and of administration and debts of the first four classes, the executor settled his account without representation of insolvency as provided by Sec. 2, Chap. 68, R. S.

On the fifth of January, 1909, a discharge of the mortgage of Dec. 2, 1904,—Cunningham to Kennedy—was offered for record, said discharge bearing the date of Dec. 26, 1908. On the second day of February, 1909, an undated discharge of the mortgage of Meda Cunningham to plaintiff was presented for record.

Plaintiff claims that the discharge of the latter mortgage was obtained from him by defendant upon the false representation, made on, or subsequent to, the twenty-sixth day of December, 1908, that the Kennedy mortgage was still outstanding and undischarged and that, unless the plaintiff discharged his mortgage, defendant would allow the holder of the Kennedy mortgage to foreclose but, if plaintiff would discharge his mortgage, defendant would support him in pleasant manner upon the premises for the remainder of his life.

Alleging such fraud and misrepresentation, the plaintiff brings this bill in equity, praying 1, that defendant be declared estopped from setting up any adverse claim under the discharge of the Kennedy mortgage, 2. that the court declare the discharge given by plaintiff fraudulent and void and order the cancellation of the discharge and its record and 3. that a foreclosure of plaintiff's mortgage be declared, that defendant be both individually and as executor barred from setting up any claim to the premises and be ordered to deliver possession to the plaintiff.

The case was heard by the sitting Justice upon bill, answer and proofs. Upon the issues raised the evidence was conflicting.

The sitting Justice found

1. That the bill be sustained with costs.

2. I find as a fact that the discharge by Joshua T. Hemenway of the mortgage given by Meda Cunningham to him dated December 1, 1904, said discharge being recorded on February 2, 1909, was obtained by false and fraudulent representations on the part of the defendant Henry P. Cunningham, and is therefore void. I therefore find that said mortgage is valid and binding.

3. I further find as a fact that the defendant has broken the conditions of said mortgage in that he has failed to support the plaintiff upon said premises in a pleasant manner as required by said mortgage, and therefore the plaintiff is entitled to a decree of foreclosure and to immediate possession of said premises.

4. Considering all the facts and circumstances of the case I find that a present equivalent for full performance of the conditions of said mortgage is six hundred dollars, upon payment of which sum with interest to time of payment, and with costs of this suit, said defendant is entitled to redeem said premises and to have the same free and clear of said mortgage.

From the decree filed pursuant to these findings respondent appealed.

It has been repeatedly held that the findings of a single Justice upon matters of fact in an equity case are not to be reversed upon appeal unless clearly wrong, the burden being upon the appellant to prove the error. *Haggett* v. *Jones*, 111 Maine, 348; *Sposedo* v. *Merriman*, 111 Maine, 530, 538. This court is of the opinion that the appellant has not sustained the burden imposed upon him and that he has not made it to appear that the findings of the sitting Justice are clearly wrong.

The defendant claims in his brief that defendant should be subrogated to the rights of the mortgagee under the Kennedy mortgage. We fail to find any indication that this claim was urged or made before the sitting Justice. Nor does the defendant make any claim to right of subrogation in his answer.

It has been held, and we think with reason, that one who, as defendant, claims the right of subrogation must set up the claim in his answer. *Barton* v. *Moore*, 45 Minn., 98; *Ball* v. *Callahan*, 95 Ill., App., 615; see *Callahan* v. *Ball*, 97 Ill., 318; see also *McMaken* v.

Noyes, 61 Iowa, 628, 632. And in *McMaken* v. *Noyes*, ubi supra, it is held that the question of the right of subrogation cannot be raised for the first time on appeal.

It may be added that the court is decidedly of the impression that, if the question were properly before it, the circumstances of the present case are such that the claim would be denied.

The decree appealed from must be affirmed. Bill sustained. Decree in accordance with this rescript. *Charles L. Macurda*, for plaintiff. *Arthur S. Littlefield*, for defendant.

ADA PIERCE *vs.* JAMES SMITH.

Hancock County. Decided February 3, 1915. An action for trespass for an assault upon plaintiff on the 22d day of March, 1913. Plea, general issue. Verdict for plaintiff for $295.03. Defendant filed general motion for new trial. Motion overruled. *A. L. Blanchard*, for plaintiff. *George E. Thompson*, for defendant.

JOHN W. BARRETT

vs.

LEWISTON, BRUNSWICK & BATH STREET RAILWAY COMPANY.

Sagadahoc County. Decided February 11, 1915. This is an action to recover damages for injuries received by the plaintiff while riding upon defendant's car as a passenger for hire. Three verdicts for the plaintiff have been set aside by this court; and another having been obtained by him, upon substantially the identical evidence offered in the other three cases, the defendant moves that this verdict also be set aside. No exceptions are presented. After a careful

examination of all the evidence in the case, and after giving thoughtful consideration to the able argument of counsel for the plaintiff, we still adhere to our former findings. Verdict set aside. Motion for new trial granted. *Oakes, Pulsifer & Ludden,* for plaintiff. *Newell & Skelton,* for defendant.

CHARLES LOON *vs.* E. R. JONES, Admr.

Kennebec County. Decided February 20, 1915. An action of assumpsit upon an account annexed, against defendant as administrator of the estate of Simeon G. Davis, deceased, for labor performed for latter during six years next prior to his decease, which occurred April 24, 1913. Plea, general issue. The jury returned a verdict for plaintiff of $484.67. Defendant filed general motion for a new trial. Motion overruled. *L. T. Carleton,* for plaintiff. *H. E. Foster, and G. W. Heselton,* for defendant.

WILLIAM E. DYER, Guardian, Appellant from Decree of Judge of Probate, *vs.* FRED BROWN.

Penobscot County. Decided February 23, 1915. At hearing in Supreme Court of Probate, the presiding Judge of said Court allowed the will of Electa Howes, who died in Bangor, in said County, on the 24th day of September, 1913. The appellant filed and had allowed exceptions to the allowance of said will. Exceptions overruled. *U. G. Mudgett,* for appellant. *Mayo & Snare,* for defendant.

NICHOLAS W. MURPHY *vs.* DIRIGO MUTUAL FIRE INSURANCE CO.

Somerset County. Decided March 1, 1915. At the December Law Term, 1914, the following entry was made in the above cause: "Argued in writing sixty days or exceptions overruled."

Neither the briefs nor the printed case have been received by the court and the specified time has elapsed.

It is therefore held, that in accordance with the above stipulation the entry must be exceptions overruled for want of prosecution. *Merrill & Merrill,* for plaintiff. *S. W. Gould,* for defendant.

ROBERT H. GRAY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided March 1, 1915. Action to recover damages for personal injuries caused by the alleged negligence of defendant. Plaintiff was in the employ of the Jordan Lumber Company and with three other men was engaged in loading box shooks from a storehouse into a box car standing on a side track by the storehouse. It became necessary for the defendant to move that box car temporarily to facilitate the shifting and placing of other cars in that immediate vicinity. The box car was at the time partly loaded with the shooks, and the plaintiff with his co-laborers remained in the car to keep the shooks in place while the car was being moved. As the car was being so moved, and was passing between two coal pockets or sheds constructed beside the track, its side door struck a post or beam standing beside and leaning toward the track whereby the door was suddenly closed and the plaintiff's head was caught between the door and the jamb, as he stood at the door looking out, causing him the injuries complained of. Plea, general issue. The presiding Justice directed a verdict for the defendant, and the plaintiff excepted to such direction. Exceptions sustained. *Morse & Cook,* for plaintiff. *Fellows & Fellows,* for defendant.

R. CHASE GOODWIN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland County. Decided March 10, 1915. An action to recover damages for personal injuries resulting from an alleged negligent collision by a train of cars belonging to the defendant with a team which the plaintiff was driving, on the 7th day of August, 1913, in the town of Yarmouth, in the County of Cumberland. Plea, the general issue. At the close of plaintiff's evidence, the presiding Justice ordered a nonsuit, and the plaintiff excepted to said order of a nonsuit. Exceptions overruled. *Reynolds & Sanborn*, for plaintiff. *Symonds, Snow, Cook & Hutchinson*, for defendant.

JOSHUA DAVIS *vs.* SAMUEL W. HERRICK.

Somerset County. Decided March 20, 1915. Action of trespass to recover damages for an assault and battery tried at the January term, 1914, of the Supreme Judicial Court for the County of Somerset.

The jury returned a verdict for the plaintiff in the sum of $5 and the case is before the Law Court upon plaintiff's motion to set aside the verdict and grant a new trial, because the damages assessed are inadequate.

A careful examination of the evidence satisfies us that the testimony justifies the finding of the jury. The question of liability and the amount, if liable, were for the jury, and finding nothing in the case to warrant setting aside the verdict for the cause assigned, the entry will be motion overruled. *Hudson & Hudson*, for plaintiff. *Merrill & Merrill*, for defendant.

REUEL J. NOYES *vs.* CUSHNOC PAPER COMPANY.

Kennebec County. Decided March 20, 1915. Action of assumpsit to recover for the use of a stationary engine and boiler. The

plaintiff claimed that the agreed price for the use of the engine and boiler was $2.50 per day until the defendant returned the same. The defendant contended that the price agreed upon was $3.00 per day for the days in which the defendant used the property.

The issue thus presented was passed upon by the jury and a verdict was returned for the plaintiff for $1,839.91.

The case is before the Law Court on defendant's motion for a new trial on the ground that the verdict is against evidence, and the weight of evidence in the case.

The record discloses but a single issue,—what was the agreement between the parties? The agreement admittedly made was an oral agreement. There was dispute as to its terms. In such case it was for the jury to determine what the terms of the agreement were.

The testimony was conflicting,—the jury heard it all, saw the witnesses and judged between the parties.

We are unable to say that the jury erred. There is no suggestion of bias or prejudice, and the testimony does not satisfy us that the verdict is clearly wrong. The entry will be motion overruled. *F. G. Farrington,* for plaintiff. *M. S. Holway,* for defendant.

MAURICE L. STRICKLAND *vs.* PEERLESS CASUALTY COMPANY.

Kennebec County. Decided March 22, 1915. This is an action of assumpsit to recover sick benefits under a policy of insurance. The jury rendered a verdict in favor of plaintiff for the sum of one hundred and fifty-five dollars and twenty-five cents, the full amount claimed for sickness between April 20, 1912 and July 27, 1912. The defendant brings the case before us upon bill of exceptions and the usual motion for new trial.

The defendant does not press its exceptions, but relies wholly upon its motion. Exceptions and motion overruled. *Williamson, Burleigh & McLean,* for plaintiff. *F. W. Clair, and Charles G. Keene,* for defendant.

GOFF M. BLACKDEN *vs.* ERNEST D. BLAISDELL.

Penobscot County. Decided March 22, 1915. An action on the case to recover damages for the alleged negligence of the defendant's chauffeur in operating defendant's automobile on a public highway in Newburg, in the county of Penobscot, by reason whereof the plaintiff's horse became frightened, unmanageable and ran away. Plea, general issue. The case was tried at the January term, 1914, in Penobscot County, and the verdict was for the plaintiff for $1170.07 The defendant filed a general motion for a new trial. Motion overruled. *F. W. Halliday,* for plaintiff. *Hudson & Hudson, and P. A. Hasty,* for defendant.

WILLIAM B. LITTLEFIELD *vs.* BOSTON & MAINE RAILROAD.

York County. Decided April 1, 1915. This is an action on the case to recover damages by fire to property caused by the defendant's locomotive engine July 27, 1913. Verdict for plaintiff for $762.50. Defendant filed motion for new trial. Motion overruled. *E. P. Spinney,* for plaintiff. *G. C. Yeaton, and Cleaves, Waterhouse & Emery,* for defendant.

ELLEN CROCKER *vs.* THE INHABITANTS OF THE TOWN OF ORONO.

Penobscot County. Decided June 28, 1915. This is an action against defendant town for the recovery of damages alleged to have been sustained by reason of a defect in a highway. The case has been twice tried. The verdict for plaintiff rendered in the first trial was set aside upon motion of defendant upon the ground that upon the

evidence a finding that defendant had failed to keep the highway, at the place of the alleged accident, reasonably safe and convenient as by statute required, was not warranted and also upon the ground of the contributory negligence of plaintiff. *Crocker* v. *Orono*, 112 Maine, 116. The second trial also resulted in a verdict for plaintiff which defendant moves may be set aside upon the usual grounds. The evidence at the second trial does not materially differ from that adduced at the first trial, save in an attempt to set up a different defect from that described in the "fourteen days" notice and that described by plaintiff's witnesses in the first trial. We discover nothing from a careful reading of the evidence to warrant a different conclusion from that reached in *Crocker* v. *Orono*, 112 Maine, 116, upon either point. If plaintiff was injured by the defect now alleged to have existed, it is sufficient to say that the great weight of the evidence denies its existence and moreover it is not the defect described with considerable particularity in the notice. As to the contributory negligence of plaintiff we find no occasion to alter the conclusion reached upon the first motion. 112 Maine, 116. Motion for new trial granted. *A. G. Averill, and G. E. Thompson*, for plaintiff. *C. J. Dunn*, for defendant.

CLIFFORD E. PENDELTON *vs.* ALFRED K. TOLMAN.

Waldo County. Decided July 2, 1915. An action of replevin for boat. Plea, general issue with brief statement claiming title in defendant. The jury rendered a verdict for the plaintiff and defendant filed motion for new trial. Motion for new trial overruled. *Dunton & Morse*, for plaintiff. *Montgomery & Emery*, for defendant.

STATE OF MAINE *vs.* DANIEL J. CROWLEY, Aplt.

Penobscot County. Decided July 12, 1915. The respondent was tried and found guilty by the Judge of the Bangor Municipal Court

upon the charge of intoxication and was sentenced to pay a fine of three dollars and costs of prosecution. From this sentence, the respondent appealed to the Supreme Judicial Court and was tried at the September term of said court, 1914, and the jury returned a verdict of guilty. The respondent excepted to the admission of certain evidence. Exceptions overruled. *Donald F. Snow*, County Attorney for the State. *A. L. Blanchard*, for appellant.

MICHAEL J. COLLINS, Pet'r for Review, *vs.* OTHILIE L. LAWSON.

Cumberland County. Decided July 24, 1915. This is a petition for review of an action entered at the October term, 1912, and continued to the January term, 1913, when judgment was rendered for the defendant. This petition for review was heard by a single Justice, who denied said petition; to which ruling the plaintiff excepted. Exceptions overruled. *Frederick H. Cobb*, for petitioner. *W. K. & A. E. Neal*, for respondent.

CLIFFORD C. WOOD *vs.* MAINE CENTRAL RAILROAD COMPANY.

Somerset County. Decided July 24, 1915. An action to recover damages for injuries sustained by plaintiff while working in the yard of defendant company, July 15, 1913. Defendant pleaded the general issue. The jury rendered a verdict for defendant, and plaintiff filed a motion for new trial. Motion overruled. *Manson & Coolidge*, for plaintiff. *Johnson & Perkins*, for defendant.

LOUIS F. MARQUIS *vs.* ROBAIN ARSENAULT.

Androscoggin County. Decided July 24, 1915. An action of assumpsit on account annexed to recover a balance of $228.80 for

55000 feet of logs sold to defendant at $10 per thousand. Plea, the general issue. The jury returned a verdict for the plaintiff for $147.37. Defendant filed general motion for a new trial. Motion overruled. *R. W. Crockett,* for plaintiff. *McGillicuddy & Morey,* for defendant.

E. T. Foster *vs.* E. C. Irish.

Kennebec County. Decided July 24, 1915. This is an action of assumpsit, in which plaintiff seeks to recover for labor performed in hauling logs and pulp wood and also for a pine log sold and delivered to the defendant, tried before the Superior Court for Kennebec County at June term, 1914. The plea was the general issue. The jury returned a verdict for the plaintiff for $109.77. Defendant filed a motion for new trial. Motion sustained. *Johnson & Perkins,* for plaintiff. *F. R. Dyer,* for defendant.

Mabel V. Sweeney

vs.

Cumberland County Power and Light Company.

Cumberland County. Decided August 20, 1915. The plaintiff, a passenger upon defendant's trolley car, claims that she was hit in the eye by a wad of paper thrown or tossed by the conductor at another passenger. Liability is admitted.

A careful study of the evidence is convincing that the plaintiff has grossly exaggerated her injuries, and that the verdict of $400 is unwarrantably large. The overwhelming weight of the evidence shows that the physical injury to the plaintiff was very slight. For

this, and for the conductor's act of indignity, so far as it affected her sensibilities, she is entitled to recover, and for no more. If the plaintiff within 30 days after mandate is received remits all of the verdict in excess of $50, motion overruled; otherwise motion sustained. *Connellan & Connellan*, for plaintiff. *Libby, Robinson & Ives*, for defendant.

SILAS M. GRANT *vs.* BOSTON & MAINE RAILROAD.

GEORGE A. TILTON *vs.* BOSTON & MAINE RAILROAD.

STEPHEN J. HATCH *vs.* BOSTON & MAINE RAILROAD.

FREEMAN H. PENNEY *vs.* BOSTON & MAINE RAILROAD.

York County. Decided August 30, 1915. At the Portland term, 1915, of the Law Court, the following entry was made on the docket in each of the above named cases; "Transcript of evidence to be filed within 30 days, or motion for a new trial overruled for want of prosecution."

It having been made to appear that no transcript was filed within said thirty days, the entry will be, in each case, motion overruled for want of prosecution. *E. P. Spinney*, for plaintiffs. *G. C. Yeaton, and Emery & Waterhouse*, for defendant.

SEWALL C. STROUT

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JULY 20, 1915, IN MEMORY OF THE

HONORABLE SEWALL C. STROUT,

A FORMER JUSTICE OF THE SUPREME JUDICIAL COURT OF MAINE.

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

In the absence of the President the exercises were opened by HARRY R. VIRGIN, Esq., Vice-President of the Cumberland Bar Association, who spoke as follows: —

MAY IT PLEASE THE COURT:

We have met at this hour especially set apart by the court to pay our tribute of respect to the memory of Hon. SEWALL C. STROUT, who for many years was one of the leaders while in active practice, and was also the Nestor of Cumberland Bar. He was also for two official terms an Honored Justice of this Court.

A committee consisting of Hon. LUCILLIUS A. EMERY and Hon. WILLIAM PENN WHITEHOUSE, both former Chief Justices of this Court, and Hon. JOSEPH W. SYMONDS, formerly an Associate Justice of the Court, has been selected to address the court upon the life and services of the late Justice STROUT.

The following Resolutions were presented:—

Resolved: That the members of the Cumberland Bar desire to express their appreciation of the character and services of SEWALL C. STROUT, long a member of this Bar and of this court, and to place upon the records of this Court their tribute to his memory;

Resolved: That we admired him as a man, trusted him as a counsellor, and honored him as a judge; he was kindly to all and loyal to his friends; he loved justice and fair dealing; he knew the law and he tempered it with equity; he was courteous and painstaking as a judge and wise and impartial in his judgments. We rejoice in his useful life, in his strength of character, in his courage, justice, learning, fairness, worldly honors, and in the sense of security which he gave to the community in which he lived;

Resolved: That these resolutions be presented to the Supreme Judicial Court, with the request that they be entered upon its records and that the Secretary of this Bar transmit a copy thereof to the family of the deceased.

Ex-Judge SYMONDS addressed the Court as follows:

MAY IT PLEASE THE COURT:

When I began reading law, immediately after graduating from Bowdoin in 1860, there were many interesting traditions connected with the Portland Bar.

Some mention of men and events that made the setting, or background, of the life we commemorate today may not be wholly out of place in this memorial service.

In speaking of traditions of the Bar in Portland, I do not refer to the long period preceding the foundation of the State of Maine, illustrated, as the pages of Willis amply attest, by many eminent names; among them, Theophilus Parsons and Isaac Parker, each, later, a Chief Justice of Massachusetts, and Salmon Chase, a distinguished lawyer himself and the uncle of Salmon Portland Chase, appointed by President Lincoln in 1864 to be Chief Justice of the United States, whose name included his uncle's name and his uncle's place of residence.

During the forty years that had succeeded the separation of Maine from Massachusetts, there were several citizens of Portland who had won a distinguished place among the lawyers of Maine.

At the grave of Prentiss Mellen was already standing the monument, erected in our Western Cemetery by the Bar of the State, in honor of its first Chief Justice; whose term of office as United States

Senator from Massachusetts was closed by the Act of Separation. The beautiful tribute to his memory by Professor Greenleaf illumined the closing pages of the seventeenth volume of our Maine Reports.

There were in the city many memorials of William Pitt Preble, one of the earliest Associate Justices of this court;—who, after his resignation in 1828, was distinguished as our minister plenipotentiary to the Hague, as counsel for the United States in the controversy about the North Eastern boundary, and, with John A. Poor, as projector of the Atlantic and St. Lawrence Railroad.

Albion K. Parris and Samuel Wells each had been governor of the State as well as Justice of this court and the remarkable official career of the former included member of congress and of our State Constitutional Convention, Judge of the Federal District Court, United States Senator, Second Comptroller of the Treasury of the United States and finally the office of mayor of Portland, where he died on the morning of February 11, 1857. Ex-Governor Wells removed to Boston soon after his term of office expired.

The house where Ezekiel Whitman lived, another Chief Justice of Maine, remained then as when he left it to return to his early home in Massachusetts—where he was still living.

Ether Shepley, who in 1836 had resigned his place in the United States Senate to become Associate Justice of this court, and who in 1848 had been appointed its Chief Justice, was still living in the serenity and dignity of an old age to which all reverence was due and was paid.

Nicholas Emery, who had left the Supreme Bench as early as 1841, died in 1861—his later life somewhat withdrawn from professional affairs.

Simon Greenleaf lived in Portland from 1818 to 1833, during which time he edited the first nine volumes of our Reports. He resigned from his professorship at Cambridge in 1848, and died October 6, 1853.

Stephen Longfellow died August 3, 1849.

Nathan Clifford had taken his place, in then recent years, upon the Bench of the Supreme Court at Washington. Judge WARE, with great learning, presided in the United States District Court.

George Evans, returning from his high career in the United States Senate, had resumed the practice of his profession in Portland.

Samuel Fessenden, a giant of intellectual power and courage, somewhat withdrawn from active life by the infirmities of age, was still a familiar figure. His son, William Pitt Fessenden, had already won commanding influence in the Senate. The tremendous problems of the treasury and of reconstruction were yet before him.

Thomas Amory DeBlois, a man of great dignity of presence and of character, and an able lawyer, was long associated in law practice with General Fessenden.

Josiah H. Drummond, then just appointed Attorney General, had removed his office to Portland.

L. D. M. Sweat and Edward H. Daveis were already drawing away from professional paths, into business or public life.

George F. Shepley, the most brilliant advocate of his time at our Bar, leaving to the charge of his partner, John W. Dana, the most lucrative law practice in the city, was soon to go to the war.

Among the leading practitioners in the city were Samuel J. Anderson, Phinehas Barnes, Moses M. Butler, the Deanes, Edward and Frederick Fox, Elbridge Gerry, James T. McCobb, Charles B. Merrill, John Rand, Francis O. J. Smith, Thomas H. Talbot, Judge Williams and Jabez C. Woodman. Bion Bradbury and George F. Talbot had not yet removed to Portland. James O'Donnell often enlivened the court by his genuine Irish wit and eloquence. John Neal and Nathaniel Deering had always devoted themselves more to literature than to law and, as age approached, the same was true, I think, of Charles Stewart Daveis and William Willis.

Among the younger men were William Henry Clifford, James and Francis Fessenden, George E. B. Jackson, Lewis Pierce, William L. Putnam, Edward M. Rand, Byron D. Verrill and Nathan Webb. Nathan and Henry B. Cleaves and A. A. Strout were not yet residents of the city.

In mentioning the men who were for many years associates and rivals at the Bar of the learned Judge, to pay respect to whose memory we are assembled today, for purposes of brevity I omit all reference to those who were my immediate contemporaries—who began legal study with me or at a later date. Otherwise, Mr. Libby, General Mattocks, Mr. Reed, and many others should be named.

. . . . . .

Several of those to whom I have referred among the younger men, in active practice while I was a law student, are still at their work. Judge PUTNAM (associated in so many ways with Judge STROUT during his life) with intellectual vigor unabated, with enthusiasm unchilled and with enlarged experience and learning, still responds to the severe demands of judicial labor.

I have left to be named by itself the firm of Howard and Strout, either of the members of which might well be mentioned among the most distinguished. Judge HOWARD retired from the Bench in 1855 while his death did not occur till 1877. He had rendered distinguished service, and won affection and honor, in both fields. There was something fine and noble about him in all the relations of the Bench and the Bar, in all his relations with men. What was said by Professor Greenleaf of Chief Justice MELLEN might well be repeated of Judge HOWARD, that he was distinguished for "that graceful liberality and good taste which were exhibited by gentlemen of what we now with melancholy truth denominate, the old school."

I have only delightful memories of Judge HOWARD. One of the last times I met him was in London in 1874. He was tired of travel abroad and longed to return home. I do not remember that I often had the privilege of seeing him afterwards. A few years later, he visited his old homestead in Brownfield in midwinter and returning from a long sauntering in the woods with a branch of evergreen in his hand he fell lifeless by the doorstep.

At the close of the sixty-seventh volume of Maine Reports appears the exquisite tribute to his memory from the Bar, speaking through his old friends, N. S. Littlefield and George F. Talbot, and his former law partner whose memory we would honor today; Judge BARROWS replying for the court.

Judge HOWARD'S partner during the earlier and more active period of his practice after leaving the Bench, was a young man accustomed to conduct a large part of the heavy business of the firm, and recognized as a most able and accomplished lawyer. By natural gifts, as well as by training, he seemed peculiarly fitted for the law. He was absorbed in his profession. His mind was singularly versatile and flexible, intensely practical, methodical, effective; his imagination played no tricks with him. He saw things in the clear light of fact, with no halo round them. He had energy and nerve, was calm and adroit in

doubt or strife, moved easily under heavy responsibilities, and accepted results. The motion of every faculty was perfect within its own range, and there was no tendency to wander.

After a long career at the Bar, during which he was associated with Hanno W. Gage and, later, with his own son, Charles A. Strout, he was appointed to the Bench in 1894. He had two full terms as Judge of this court, leaving the Bench in 1908. His opinions are the lasting monument to his excellent judgment and learning. But the written page can only faintly record, what we remember so well, a certain charm of personal presence and an unfailing and invariable courtesy, partly a native trait or tendency and possibly in part, too, a legacy from his long association with Judge HOWARD.

A wide margin of life still awaited him after his judicial career had closed, his mind clear, free from pain, fine tastes gratified, every wish anticipated by his wife and daughters, his distinguished son following in his own footsteps in the high paths of professional and public life.

It was a beautiful lingering of life at the last and, when the end came, it was but the closing of heavy eyelids to sleep, at night. For him there was.

"Another morn than ours."

Ex-Chief Justice WHITEHOUSE then addressed the court as follows:

MAY IT PLEASE THE COURT:

On the 21st day of April, 1894, Hon. SEWALL CUSHING STROUT took his seat on the bench of the Supreme Judicial Court of Maine, with the unanimous voice of approbation and confidence from the bar and the people of the State, and a cordial greeting from every member of the court. But no formal testimonials to his eminent qualifications for the office were deemed necessary. His high character and honorable life for nearly half a century in the city of Portland, and his eminent service at the Bar of the State for 45 years, were a more potent commendation than the most eloquent voice of eulogy.

After fourteen years of efficient and honorable judicial service, he retired from the Bench at the expiration of his second term, at the

great age of 81 years, with universal tributes of respect and affection from his associates and members of the Bar, and fervent benedictions throughout the State from all who had ever known him.

Judge STROUT was born in the year 1827 in the town of Wales, which was then within the limits of Kennebec county, but in 1854 became one of the towns constituting the new county of Androscoggin.

The tranquility and repose of the rural scenes in the immediate vicinity of his early home, with the woodlands, lakes and streams near the place of his nativity, and the distant views of the White Mountains range to which he had been accustomed in his childhood days, appear to have made a lasting impression upon his temperament and tastes. In after years he ever found contentment and peace when the air of the ripening summer was filled with the music of the birds and perfumed with the flowering fields and blossoming hilltops. He loved the primeval forest, where, in all its paths, the silent things of nature were "breathing the deep beauty of the world."

An unconscious reflection of his own temperament and tastes is observable in his affectionate tribute to the memory of Hon. JOSEPH HOWARD, in whose office he read law, who was for nine years his law partner, and afterwards, served one term as Associate Justice of the Supreme Judicial Court. In his memorial address in 1878, he said of Judge HOWARD: "His temperament led him to the fields, the forests, the mountains and the streams for recreation. A fine landscape or a delicate wild flower, modestly blossoming in some unfrequented nook, afforded him keen delight. Each flower of the wild wood seemed to catch a brighter hue at his coming and each tree of the forest was to him as a familiar friend. His greatest delight was to spend his leisure hours amid these favorite scenes; and in this pursuit, he gained that mental and physical vigor which largely sustained and nourished his benignant spirit."

Judge STROUT descended from an honorable English ancestry, and inherited from them those sterling moral qualities and enlightened public principles which have not only developed the finest types of individual character but exerted a potent influence in moulding our free institutions. Without a college training, he was yet "liberally educated" by untiring self-culture and rigid self-discipline, and by experience with men of affairs in the school of actual life. He had intellectual endowments of a high order, and in early life manifestly acquired habits of correct observation and consecutive thought, for

he always possessed in a high degree that clearness of apprehension which makes knowledge useful, and the simplicity and force of statement which give it power.

MR. EMERSON says: "If a man know that he can do anything—that he can do it better than anyone else—he has a pledge of the acknowledgement of that fact by all persons. The world is full of judgment days, and into every assembly that a man enters, in every action he attempts, he is gauged and stamped." At the age of 17 or 18, young Strout had a consuming ambition to become a lawyer. He had an abiding conviction that he could make a better lawyer than many that he had seen and heard; and with a serene and splendid courage of his conviction, he undertook to master the most imperial and exacting of all the learned professions. He became an indefatigable but thoughtful and judicious student of the law. With a zeal of industry which literally "ran before the day and lingered after it" he acquired the kinds of knowledge which make for power and efficiency in action and achievement.

He had all the qualities of mind requisite for grasping the philosophy as well as the history of the law, and the high ethical standards and legal atmosphere in the office of Howard and Shepley were an inspiration for him to make good his faculties.

He was admitted to the Bar at the age of 21 years and was engaged in the practice of the law at Bridgton for five years, when he made a permanent settlement in the city of Portland. During his previous residence here he had impressed himself upon the community as a young man of more than ordinary natural endowments, and of unquestionable integrity and honor, and upon his return to the city in 1854, he was at once recognized as a lawyer of excellent abilities and superior promise. But in the study and practice of the law he realized the necessity, as well as the "perennial nobleness" of work, and applied himself to the practice of his profession with the steadfast devotion and singleness of purpose which command success. In his subsequent career at the Bar he continually added to the public estimate of his learning and strength as a lawyer. He had no taste for political activities and never sought official preferment. For him the practice of his chosen profession brought with it its own abundant and satisfying rewards. He belonged to the noble and as I believe, ever-increasing company of honorable lawyers and conscientious legal advisers who believe that the law is the minister of justice, and

that justice is the application of truth to the affairs of men; that the lawyers and the courts are the ministers of the law, and that judicial inquiries are instituted for the purpose of discovering and declaring the truth, and are clothed with orderly forms for the sole purpose of rendering them more effective. He cherished high ideals respecting the ethical character and service of the legal profession, and uniformly exemplified them in the 45 years of his active labor and experience as a practicing lawyer.

It is said that Baron Pollock refused a judgeship because he deemed the functions of an advocate more agreeable and more honorable than those of a magistrate. The triumphs of the popular orator however and sometimes of the advocate at the Bar soon become a fleeting memory and tradition, and often pass with the generation that witnessed them. But a "good book" said John Milton, "is the precious life blood of a master spirit imbalmed and treasured up to a Life beyond Life." So the books of law reports constitute an imperishable record of the products of judicial minds.

Judge STROUT cherished with reverence the proud traditions of the Judicial Courts and eminent jurists of New England and in accepting a position on the Bench, he brought with him not only high conceptions of the judicial character and functions, but also the capacity and disposition for arduous labor both in the trial court and in the examination of the law of the preparation of the opinions of the law court.

In the discharge of his duties in the trial court, he realized that he was presiding over a tribunal in which the dearest interests of the people are constantly at stake, and all the faculties of his mind, the ripe fruits of his experience, and the best qualities of an honest and kindly heart, were constantly employed in the furtherance of that justice which is the "queen of all the moral virtues" and the chief end of human society. He uniformly evinced a deep sense of the responsibilities of his position, but never sought to magnify the importance of the office. He never forgot the distinction pointed out by Chief Justice MARSHALL, that "judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law." When presiding at the trial of causes before the jury, he never forgot that he was once an inexperienced young lawyer himself, and constantly showed his appreciation of the rights of counsel as well as their duties and respon-

sibilities. By his gentle courtesy, gracious manners and kindly consideration and forbearance, the younger members of the Bar were relieved of their nervous sensibility and embarrassment, and enabled to retain command of themselves and make their best efforts to do justice to the cause of their respective clients.

But his judicial opinions as a member of the Law Court found in the 15 volumes of the Maine Reports from the 89th to the 104th illustrate the extent and variety of his professional learning his accurate knowledge of the common law, and his faculty of adapting its flexible principles to new enterprises and new conditions in industrial and social life. These opinions are the products of a broad and vigorous mind with legal common sense as one of its strongest attributes, and they afford abundant evidence that he never lightly permitted the substance of right to be sacrificed to the science of statement and shadow of form, or willingly allowed the trammels of technicality to hamper and impede his efforts to reach the result demanded by the manifest truth and justice of the cause.

He was an upright, honored and successful magistrate who maintained the best traditions of his great office. He was a just and good man of genial temperament and gracious demeanor with that "vigilant moral sense which never fails to consider the rights, the interests and the sensibilities of others." He retired from the Bench in the fullness of labor and of fame, and after six remaining years of comfort and happiness, cheered by the memories of his stainless life of usefulness and honor.

"At last
Life's blessings all enjoyed, life's labor done
Serenely to his final rest has passed."

But, "That best portion of a good man's life
His little nameless unremembered acts of
kindness and of love,"

cannot be recounted here. They are recorded elsewhere, and are embalmed in the hearts of those who tread the sacred ground of their private grief; and those who can see "the stars shine through their cypress trees," have learned

"In hours of faith
The truth to flesh and sense unknown
That life is ever lord of death
And love can never lose its own."

Ex-Chief Justice LUCILIUS A. EMERY then addressed the court:

YOUR HONORS AND MY BRETHREN OF THE BAR:—

I have willingly come from my retirement and home in a distant part of the State to take a small part with you in these due exercises in memory of our deceased friend and associate, Justice STROUT. My presence here should speak for me more eloquently than any words I can say.

I can add nothing to what has been said and will be said of him as a friend, a citizen and for so many years an honored and honorable member of our professional guild. I must content myself with a few words to express my estimate of his distinctive character and influence as a member of this court where I had the honor and pleasure to be associated with him during his whole term of judicial service.

Jurisprudence is not an exact science. Few of its doctrines are indisputable. In the application of even its accepted doctrines to human affairs few should be carried to their logical extreme. Hence a court of last resort, which not only decides particular cases but enunciates general doctrines and principles as a basis for decision and seeks to apply them to ever varying conditions and circumstances, should be composed of men somewhat different in temperament, in experience, in lines of study, in mental characteristics and processes. The resultant of such diversity tends to prevent the court from carrying any doctrines to an impracticable extreme, tends to make the court conservative yet not stationary, progressive yet not unstable, just yet not severe. It is the resultant of contending forces that keeps the planets in their orbits. It is the thrust and counter thrust in Gothic architecture that produce the stability and beauty of the Gothic cathedral.

I should say the direction of Justice STROUT'S influence as a member of the court was away from severity, angularity, rigidity, and toward making liberal allowances for the imperfections of our common human nature. Though he went upon the judicial Bench comparatively late in life, he at once showed that he was not hardened but was even mellowed by age. On every question he was amenable to argument, yet, of course, in his case as in the case of every judge of

positive character, opinions formed during his long professional career affected the bent of his mind. An old school democrat, he believed in the old time tenets of that party; that the reserved rights of the States and the people as against the federal government, and the reserved rights of the individual as against the State, should be preserved inviolate. He believed that the guaranties of the Bill of Rights should receive a broad, liberal construction. He inclined against the validity of such legislation as seemed to him to offend against the spirit even if not against the letter of the constitution. He finally acquiesced, however, though reluctantly, in the now dominant doctrine that a legislative act not forbidden by the constitution expressly or by necessary implication must be given effect however oppressive or even unjust the courts may think it to be.

He showed a somewhat similar bent of mind in dealing with other than constitutional questions. He often said to me that his long experience at the Bar had not destroyed his faith in the innate goodness of human nature, however much over-laid with selfishness. He claimed that evil conduct was after all more due to ignorance and weakness than to natural depravity. With this faith he, as a judge, needed weighty evidence to convince him of wilful fraud or other wilful turpitude. He was not swift to believe accusations of even milder wrong doing. Still, notwithstanding this predilection, he could and did readily yield to evidence and valid argument.

He also carried with him to his place on the court those lovable human qualities that won him so many and such warm friends, his courtesy, his patience, his kindness of heart, his faith in manhood and womanhood, his tenderness for the unfortunate, the weak and the erring. These made him careful to protect all the rights of the accused and even to shield him when unduly pressed by what seemed to him an over zealous prosecution. After conviction he sought to mitigate the severity of the punishment. He believed with Portia that justice should be seasoned with mercy.

In the great hall of the Palace of Justice in Brussels is a beautiful group of statuary which arrests the attention of every visitor. The central figure is the robed magistrate seated in the curule chair. Standing at his right is the figure of a sorrowing woman holding a little child both with arms outstretched toward the Judge with pleading look and gesture that make moist the eyes of the beholder. On the left is the figure of another woman, erect, serene in counten-

ance and figure, holding the book of the law, to an open page of which she silently points as she looks upon the Judge. The genius of the sculptor, however, most appears in the attitude and countenance of magistrate, so sad, so troubled, so longing to show mercy, yet conscious of the demands of the law. As I recall to mind that wonderful central figure of the group, I seem to see the spirit of Justice STROUT there portrayed in the enduring marble.

Hon. ALBERT R. SAVAGE, Chief Justice, responded for the Court as follows:

The court have listened with feelings of deep sympathy to the resolutions of the Bar, and to the words which have been so fitly spoken in commemoration of the life and virtues of the late Justice STROUT. On such an occasion as this, it is usually expected that the response from the Bench will touch upon the character of a departed jurist whose memory we honor rather from the point of view of judicial associates, who have known and loved and appreciated him as a judge. But today we have been exceptionally favored in having with us some, now gracefully wearing the laurels they have won, who served with him on the Bench longer than any present member of the court, whose words of affectionate remembrance, of keen, candid and impartial analysis, have chiseled, as by master artists' hands, the graceful and the sturdy figure of the Judge, the lawyer, the citizen and the man. It is little or nothing that we can add to the sentiments that have been spoken so aptly and so beautifully. But we join with you in appreciation of all that has been said.

Judge STROUT came to the Bench in the ripened and mellowed maturity of his powers, at an age when most men begin to think of laying down the heavier burdens, and of enjoying such rewards as life may have brought to them. For fourteen years, and until he had considerably passed the eightieth milestone, he carried on the high responsibilities of his office, and assumed all the burdens of unending labor which his duties imposed upon him, with undimmed intellect, and unflagging spirit.

He came to his work with an unusual degree of preparedness. He had been in the active practice of the law for nearly half a century.

His practice had covered practically the whole area of professional experience. He had been engaged in many cases of prime importance, both here in Portland and elsewhere. He had for more than a generation stood in the first rank of lawyers. He was a leader among leaders. He was a student, as all good lawyers must be, of the law. He was a student, as all good lawyers ought to be, of men. He knew, and could read, human nature. He knew how, as an advocate, to make effective use of that knowledge. With a splendidly equipped and well trained mind, he was able to handle all the weapons of legal controversy, of offense and of defense, with the utmost skill, and precision. He was, in short, a successful lawyer.

Besides strength and health of mind and body, nature had given him more than an even share of physical and mental graces. He was tall and lithe in figure. His eye was quick and bright and kind. He was suave in manner, kindly in appearance and in spirit. He was cordial in greeting. His good nature was contagious. He loved children. He was deeply sympathetic with suffering. He hated injustice. He was impatient of shams and strait-laced hypocrisy.

Such a man as this, Judge STROUT came to the Bench. His appointment met the approval of the Bar and the people, without any dissent. Nor did he disappoint the expectations of any. His long and varied experience at the Bar made him an admirable trial judge. Thoroughly familiar with the rules of practice, thoroughly versed in the fundamental principles of jurisprudence, he easily held the scales of justice in equal poise. His demeanor was kindly. His deportment was dignified. He was quick to see and prompt to rule. He was firm, but not arbitrary. He was an exemplification of the best traditions of the Bench. He was in a way a connecting link between the old court and the new one. Under the old court he had long practiced. Under the old court he had acquired his conception of the proper judicial attitude towards men and matters in court. We are fain to believe,—and a historical study of decided cases confirms the belief,—that the court of modern days feels itself less trammeled by technicalities and hair splitting logic, and more responsive to the more essential merits of litigation, than the old courts did. The spirit of the times has reached the court, and has very much modernized its methods, in its endeavors to do impartial justice between man and man. And it has done this without in any way breaking over the essential rules by which the rights of men in person and

property are declared, regulated and limited. To the newer court Judge STROUT came, and came in perfect harmony with existing judicial environments. He was young in spirit, and he was in perfect accord with all that is good in modern procedure.

Judge STROUT did not conceive it to be his duty merely to preside in court. He had a deep and pervading sense of justice. He loved justice. He lent his weight to the side of justice, as he conceived it to be. He did not regard a trial as a game to be played by more or less skilful players, where a false move might check the unwary; nor as a battle to be won by superior strategy. It was his endeavor to have the forces meet upon level, or, at least, equal ground, and that the victory should be won by the heaviest battalions of truth.

Of Judge STROUT'S work as a jurist the most enduring evidence exists, of course, in his published opinions, the first being that in *State* v. *Hamlin*, 86 Maine, and the last, *Phillips Village Corporation* v. *Phillips Water Company*, 104 Maine. His opinions, scattered through nineteen volumes of the Maine Reports, were about two hundred and twenty in number. As a rule, they are noticeable for their brevity and conciseness. He used no unnecessary language, but he did not sacrifice clearness to brevity. He possessed in an unusual degree the power of condensation. He attempted no especial show of learning. He cited comparatively few authorities. But his opinions are replete with the results of his studies, fortified by his experience. More than many judges, he spoke ex cathedra. He spoke out of a fullness of knowledge, the sources of which he felt needed not to be labelled. His opinions were sensible, practical, easy of understanding, and helpful to Bench and Bar.

As good examples of his juristic work, one may look to *State* v. *Hamlin*, his first opinion, in which he declared the constitutionality of the collateral inheritance tax statute; or to *Adams* v. *Ulmer*, 91 Maine, in which he treated exhaustively of the uses and the limitations of the writ of mandamus, and, also, the powers of the state with reference to navigable tide waters; or to *State* v. *Water Company*, 98 Maine, touching quo warranto proceedings, and usurpation of powers, or failure to exercise powers, by corporations, as a basis for judgment of ouster; or to *Tuttle* v. *Lang*, 100 Maine, respecting the powers and jurisdiction of municipal courts in criminal proceedings. These are a few examples taken almost at random, and they well illustrate his mental habit and judicial temper.

Notwithstanding his long practice before he came to the Bench, in which he had necessarily taken the side of his client heavily, for a lawyer cannot be otherwise than partial, Judge STROUT'S temperament was eminently judicial, open, fair minded, even. In all these respects he made the ideal judge. He was moreover independent in judgment, and fearless in expression. He was tenacious of opinion, but not unwisely so.

After having served with full mental capacity many years after the period of time which some think is the proper limit of judicial usefulness, Judge STROUT laid aside the robe of office, and again took upon himself the burden of professional labor. Of these later years not much need be said now. Though the body weakened, his intellectual clearness of vision seemed undimmed. He was cheerful, calm, courageous. He looked forward to the unknown journey, with an untroubled spirit. And so with weakening physical powers he lingered sweetly on, until

"God's finger touched him and he slept."

He was the eminent, wise counsellor, the learned, independent, just, Judge, the devoted citizen, the delightful friend. He was virile, but he was tender. He could hurl the battle axe, or wield the scimitar, but there was no softer hand than his to bind up the wounds of the suffering.

"His life was gentle; and the elements
So mixed in him, that Nature might stand up
And say to all the world,—This was a man."

The court regard it a privilege to pay this tribute of affection and esteem in memory of the lasting worth of Judge STROUT, as a judge and as a man.

And as a further tribute to his memory, the court will now adjourn.

The response of Mr. Chief Justice SAVAGE, concluded the exercises, and the Law Court adjourned.

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ADVERSE POSSESSION.

In order to gain title by adverse possession, it must be not only open and notorious, but also continuous. *Daly* v. *L. & A. Children's Home*, 526.

The payment of taxes is not possession nor evidence of possession. *Daly* v. *L. & A. Children's Home*, 526.

The Statutes, R. S., Chap. 106, Sec. 4, provide that the demandant in a writ of entry need not prove an actual entry under his title, but proof that he is entitled to such an estate in the premises as he claims and that he has a right of entry therein is sufficient proof of seizin. This right of entry can be defeated by adverse possession only by showing such possession for some requisite period prior to the date of the writ. *Daly* v. *L. & A. Children's Home*, 526.

A title, otherwise good, is not defeated by mere non-user. *Daly* v. *L. & A. Children's Home*, 526.

AMENDMENT.

See TRIAL. DIVORCE.

The law does not allow a clerical error in matter of form to deprive a suitor of a verdict won upon the merits of the case, and the verdict may be amended. *Holt* v. *Elwell*, 236.

The clerical error in a libel for divorce, setting out an impossible date of marriage, is amendable in the discretion of the court. *Cole* v. *Cole*, 358.

ARREST.

A person assessed under R. S., Chap. 10, Sec. 20, who for twelve days after demand refuses or neglects to pay his tax and to show the collector sufficient goods and chattels to pay it, such officer may arrest and commit him to jail until he pays it, or is discharged by law. *Clark* v. *Gray*, 443.

That a demand in person is contemplated by this section and that a notice in writing sent through the mail, stating the amount of the tax and demanding payment thereof, is insufficient. *Clark* v. *Gray*, 443.

ASSAULT AND BATTERY.

In an action to recover damages for an assault and battery, when plaintiff claims punitive damages or damages for injured feelings, the conduct of the plaintiff, or provocation by him, may be inquired into to mitigate the damages, and evidence of whatever is really and clearly part and parcel of the matter is admissible. *Newton* v. *Hawks*, 44.

ASSIGNEE.

See CONTRACT.

As a matter of law, it cannot be contended that the words "as assignee" at the beginning of the agreement exempts the defendant from personal liability. *Edwards* v. *Pinkham*, 4.

ATTACHMENT.

An officer who has attached mortgaged chattels may give written notice thereof to the claimant under the mortgage and if the claimant does not within ten days thereafter deliver to the officer a true statement of the amount due on his claim, he thereby waives the right to hold the property thereon. *Hill* v. *Wiles*, 60.

The officer may give the "written notice" after, as well as before, a sale of the chattels on execution. *Hill* v. *Wiles*, 60.

The delivery by the claimant of a true account to the attaching creditor's attorney is not a delivery to the officer, and is not sufficient. *Hill* v. *Wiles*, 60.

The attachment in this case was perfected by the officer as he was in view of the property which he sought to attach, with power to control and take same into possession, even though he did not actually lay hands upon it. *Rogers* v. *M. C. R. R. Co.*, 436.

There was no record of attachment made under the provisions for recording attachment of bulky property, but a keeper was appointed by the officer. It

is well settled law, that in case of an attempt of another to interpose or take possession of personal property which has been attached by an officer, the latter should take such measures as to prevent it, unless resisted.
Rogers v. *M. C. R. R. Co.*, 436.

It necessarily follows that what could or should have been done by the officer could or should have been done by his agent, the keeper.
Rogers v. *M. C. R. R. Co.*, 436.

The utter neglect of the keeper to interpose any opposition or protest, although present when the cars were about to be moved by the train crew, resulted in a failure of the officer, or his agent, the keeper, to lawfully preserve the attachment. *Rogers* v. *M. C. R. R. Co.*, 436.

ATTORNEY AT LAW.

See MONEY HAD AND RECEIVED.

The law requires the highest degree of honor and good faith from its own ministers. It insists that the confidence of the suitor in the faithfulness and disinterestedness of his attorney and counsellor shall be fully deserved.
Mayo v. *Purington*, 452.

BALLOTS.

According to the amendment of Chapter 71 of the Laws of 1912, all ballots marked with a cross in the square at the head of the column shall be counted, if the intention of the voter can be ascertained, no matter what casual, accidental, mistaken or unnecessary mark the voter may have placed upon the ballot, provided the same does not seem to have been fraudulently made; and the fraudulent intent must appear affirmatively. *Murray* v. *Waite*, 485.

A ballot having a cross in a marked square, but having a small mark drawn vertically, and apparently not accidentally, through all the names in party column, cannot be counted. *Murray* v. *Waite*, 485.

A ballot having a cross in the party square and in the square below the cross, a sticker, bearing the name of that party candidate for mayor, and having also two stickers not completely separated bearing the same name, placed nearly over the name of the same candidate, is counted. *Murray* v. *Waite*, 485.

A ballot having a cross in the party square and two stickers not completely separated over the name of the candidate for alderman is counted.
Murray v. *Waite*, 485.

A ballot having a cross in the party square and another beneath it, across the party designation, is counted. *Murray* v. *Waite*, 485.

A ballot having a cross in the party square with an extra line entering into it, showing an evident attempt to make and erase the previous cross, in which erasure the paper was broken, is not a mutilated ballot and is counted. *Murray* v. *Waite*, 485.

A ballot having for a cross in the party square a peculiar figure, each arm of the cross being made of practically parallel lines with ends crossed, is counted. *Murray* v. *Waite*, 485.

A ballot having for a cross in the party square lines which are broad and dull as if made with the rubber end of a pencil is counted. *Murray* v. *Waite*, 485.

A ballot containing a cross in the party square, around which a circle is drawn, is not counted. *Murray* v. *Waite*, 485.

A ballot having a cross in the party square and below a small cross beneath the residence of the candidate for mayor and a mark that looks like a T opposite the name of the candidate for ward clerk, whose name begins with a T, is counted. *Murray* v. *Waite*, 485.

A ballot having a cross in the party square and a sticker not placed on or over the name of the candidate for alderman in the column, but under it so that both names appear, is not counted. *Murray* v. *Waite*, 485.

A ballot having a cross in the party square where the voter filled in his name of choice for party alderman, but failed to erase the name of the candidate not voted for, so that both names appear, is not counted. *Murray* v. *Waite*, 485.

A ballot cast by one admittedly never a resident of the ward cannot be counted. *Murray* v. *Waite*, 485.

BANK COMMISSIONER.

Chapter 85 of the Laws of 1905 was enacted as a substitute for Sec. 78 of Chap. 47 of the R. S., and is not in any way applicable to trust companies. *Craughwell* v. *Trust Co.*, 531.

A bill by stockholders, praying for the appointment of a receiver, and for the winding up of a trust company on the ground that it is in imminent danger of insolvency through the fraud, neglect and gross mismanagement of its officers, is not maintainable under Chap. 85 of the Laws of 1905. *Craughwell* v. *Trust Co.*, 531.

The bank commissioner, and he alone, is authorized by statute to begin proceedings for the winding up of a trust company, when it is insolvent, or its condition such as to render its further proceedings hazardous to the public, or to those having funds in its custody. *Craughwell* v. *Trust Co.*, 531.

BANKS AND BANKING.

See TRUST.

Where a husband and wife went to a savings bank together when deposits were made, the facts that the deposit was in the name of the husband and that the book was always in his possession, were evidence that the deposit was his property. *Gower* v. *Keene*, 249.

The entry of a savings deposit in the bank and deposit book in the name of a husband could be varied by evidence aliunde to show that he held the legal title as trustee for his wife, but the evidence should be clear and convincing. *Gower* v. *Keene*, 249.

In a wife's action against her husband's bank deposit in the name of the husband, evidence held sufficient to support a finding that the wife was the owner of deposits made prior to an admission by the husband concerning the ownership of the deposit, but insufficient to establish her ownership of deposits subsequently made. *Gower* v. *Keene*, 249.

The decision of a single Justice upon a matter of fact in an equity case will not be reversed, unless the appellate court is clearly convinced of its incorrectness. *Gower* v. *Keene*, 249.

A trust in favor of a wife in a savings bank deposit in her husband's name was not established where no trust was declared when the deposits were made, and the husband's acts and words did not unequivocally imply that he held the deposits in trust for the wife. *Gower* v. *Keene*, 249.

BILLS AND NOTES.

See EXPERT TESTIMONY.

To establish a defense that a note sued on after the death of the maker so that neither party could testify regarding it, was a forgery, the testimony must be clear and convincing, because of the presumption against the commission of a felony. *Palmer* v. *Blanchard*, 380.

Testimony by a handwriting expert, as to the genuineness of a disputed signature, is the expression of an opinion and not binding on the jury, and its weight depends very largely on the cogency of the reasons given by him for his opinion.
Palmer v. *Blanchard*, 380.

Where a note sued on recites "value received," it is prima facie evidence of consideration, sufficient, if not rebutted, to maintain plaintiff's case.
Palmer v. *Blanchard*, 380.

The alteration of a note by adding the signature, as maker, of the firm of which the original maker was a member defeats recovery on the note by the payee.
Palmer v. *Blanchard*, 380.

The fact that one of the figures in the date of a note showed that it was written over an erasure does not create a presumption that the change was made after the execution, so as to be a material alteration which avoids the note.
Palmer v. *Blanchard*, 380.

BOUNDARIES AND LINES.

In trespass quare clausum fregit for cutting and removing timber under the claim that it was located upon a certain numbered lot, the burden was upon plaintiffs to prove the location of the lot line as originally located.
Ilsley v. *Kelley*, 497.

As to disputed boundaries, the survey must govern when its location can be shown, and when land is conveyed by lot, without further description, the lot lines determine the boundaries when they can be located.
Ilsley v. *Kelley*, 497.

The owners of adjoining lands may agree as to the division line, and such agreement is binding on them and those claiming under them, but is not necessarily conclusive upon other owners whose lots are bounded by the same division line, although it is competent evidence, when the original monument cannot be found, as tending to show that the line coincides with the original monument referred to in the deed. *Ilsley* v. *Kelley*, 497.

Where the range lines are not in dispute, if any part of a check line between such range lines is proved, from that point a line in a straight and most direct course to the range line will be the check line between lots bounded thereby.
Ilsley v. *Kelley*, 497.

In trespass for cutting and removing timber from lands the boundaries of which were in dispute, a showing by plaintiffs of range lines between which their lot was bounded and the side lines of the lot next below and next above theirs in number was sufficient to establish their case. *Ilsley* v. *Kelley*, 497.

BROKERS.

See EXCEPTIONS.

A broker has earned his commissions for the sale of goods, when he has produced a customer who is ready and willing to buy on the seller's terms and is able to pay. *Dennis* v. *Waterford Packing Co.*, 159.

BURDEN OF PROOF.

See HUSBAND AND WIFE.

The burden was upon the plaintiff to prove, by a preponderance of evidence, that the wife was compelled to leave her husband because of his ill treatment, amounting in law to cruelty. *Beaudette* v. *Martin*, 310.

CARRIERS.

See CONTRACT.

A common carrier is bound to exercise reasonable care and diligence in transportation and to transport without unnecessary delay.
Young v. *M. C. R. R. Co.*, 113.

The mere fact of a delay in transportation is not sufficient to charge a carrier for resulting losses, unless it appears that such delay was negligent and the proximate cause of the loss. *Young* v. *M. C. R. R. Co.*, 113.

A common carrier cannot be exonerated from liability as such by reason of sudden severity of weather, on the ground that the weather and not the delay was the proximate cause of the damage, for the weather is not an independent, intervening cause, but a natural condition, the chance of the occurrence of which should have been foreseen. *Young* v. *M. C. R. R. Co.*, 113.

Whether the carrier's negligent delay in transportation was the proximate cause of loss was for the jury. *Young* v. *M. C. R. R. Co.*, 113.

A common carrier, in the absence of statute, may by special contract limit its liability against all risks, except negligence or misconduct.
Young v. *M. C. R. R. Co.*, 113.

A common carrier is bound to exercise reasonable care and diligence in transportation, to transport in a reasonable time, without unnecessary delay, and to prevent, so far as reasonable and practicable, any loss or damage which may be occasioned by delays in transit. *Young* v. *M. C. R. R. Co.*, 113.

What is reasonable care and diligence in this class of cases must depend upon the circumstances of each particular case. *Young* v. *M. C. R. R. Co.*, 113.

An antecedent contract or release whereby a carrier exempts itself from liability for injuries to a passenger for hire caused by its negligence, or that of its servants, is against public policy no matter in what way the hire or compensation has been, or is to be, paid. *Buckley* v. *B. & A. R. R. Co.*, 164.

One riding on a so called free pass for which a valuable consideration has been paid, or on a pass issued in connection with business in which the carrier has an interest, is a passenger for hire within the rule forbidding contracts exempting carriers from liability for negligence to a passenger for hire.
Buckley v. *B. & A. R. R. Co.*, 164.

In the absence of an exemption contract, a common carrier of passengers is under the same liability for injuries resulting from its negligence to persons traveling on a free pass or gratuitously as to passengers for hire.
Buckley v. *B. & A. R. R. Co.*, 164.

A carrier may by contract exempt itself from liability to persons carried gratuitously, even for its own negligence. *Buckley* v. *B. & A. R. R. Co.*, 164.

A private carrier may contract for exemptions from liability for its negligence.
Buckley v. *B. & A. R. R. Co.*, 164.

A common carrier may become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its duty or business to carry.
Buckley v. *B. & A. R. R. Co.*, 164.

That the charge for the transportation of the potatoes included the carriage of the plaintiff as caretaker, and that the plaintiff was a passenger for hire.
Buckley v. *B. & A. R. R. Co.*, 164.

CONSTITUTIONAL LAW.

R. S., Chap. 4, Sec. 87, authorizing cities and towns to establish permanent woodyards to sell fuel at cost is not, though the money to purchase the property be raised by taxation, void as working a deprivation of property without due pro-

cess contrary to Constitution of the United States, Amendment 14, Section 1 and Constitution of Maine, Article 1, Section 21. *Jones* v. *Portland*, 123.

CONTRACTS.

See ASSIGNEE. FRAUD. EXCEPTIONS. PAUPERS.

The intention of the parties and the meaning of the instrument is to be discovered by the application of the well known rules of construction, which take into consideration the subject matter of the agreement, motive for procuring it, the probabilities as to conflicting contentions and all other circumstances which may throw light upon the transaction. *Edwards* v. *Pinkham*, 4.

There is no controversy that defendant executed the contract upon which the suit is brought, and by the ordinary rules of law is presumed to know its contents, whether read or not. *G. N. Mfg. Co.* v. *Brown*, 51.

A written contract may be avoided for fraud inducing one to sign it, not knowing its contents. *G. N. Mfg. Co.* v. *Brown*, 51.

If it is shown that the contract itself was procured by fraud, the general rule does not apply. It is universally held that the most sacred instrument may be avoided for fraud. *G. N. Mfg. Co.* v. *Brown*, 51.

In an action for damages for breach of an alleged contract for sale to plaintiff of one-sixth of the capital stock of a lumber company, in which negotiations showed that the plaintiff purchased the stock and was to work for the company, a question to plaintiff, as to whether after he came and was ready to establish his home he was informed that defendant had provided a house for plaintiff to occupy rent free, was properly excluded as not within the issue.
Darling v. *Bradstreet*, 136.

Whether an alleged contract, by which plaintiff was to purchase a portion of the capital stock of a company and was to enter into the employ of the company, was entered into by the parties and whether plaintiff performed the services called for by the contract were questions for the jury.
Darling v. *Bradstreet*, 136.

That the statement in the contract of the quantity of brick and tile required for standard setting of the boiler was an estimate merely and not a representation of an existing and material fact. It formed no material part of the contract itself, and the defendant cannot recoup for any excess of cost.
Iron Works v. *Paper Co.*, 222.

That the delay of three weeks in delivering the boiler did not work a breach, as the contract provided that the time of delivery should be contingent upon late mill deliveries or other hindrances beyond the plaintiff's control, and the evidence shows that late mill deliveries were the cause of the delay.
Iron Works v. *Paper Co.*, 222.

A contract to purchase land cannot be rescinded merely because it is not advantageous to the purchaser, or because he is unable to raise the purchase price.
Clark v. *Stetson*, 276.

Purchaser, who occupied farm for several months and remained in possession for some time after stating he would not carry out the contract, lost his right to rescind for alleged misrepresentations. *Clark* v. *Stetson*, 276.

A contract is against public policy where it contravenes some public Statute, or tends to injure the public health or morals, or to work injustice and oppression to the injury of the public welfare, or to impair the public confidence in the purity of the administration of the law. *Lesieur* v. *Rumford*, 317.

A contract not prohibited by Statute, nor stipulating for anything wrong in itself, or prohibited wrongs, but violative of an established rule of law, or tending to injure the interest of society, is contrary to public policy.
Lesieur v. *Rumford*, 317.

One acting in a fiduciary relation to others must not make any contract with himself binding on the others, and this is true whether he intended to obtain an advantage to himself or not. *Lesieur* v. *Rumford*, 317.

The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result.
Lesieur v. *Rumford*, 317.

A contract between a local board of health and one of its own members, for the care of a person in quarantine with smallpox, is of no binding force as a contract, because in violation of public policy. *Lesieur* v. *Rumford*, 317.

The invalidity of a contract entered into in violation of this rule does not necessarily depend upon whether the fiduciary intended to obtain an advantage to himself, but rather upon whether it affords him the opportunity, and subjects him to the temptation to obtain such advantage. *Lesieur* v. *Rumford*, 317.

Where two persons are by its terms made parties to a contract and one of them executes the contract and acts upon and in performance of it from its date, and the other, with full knowledge of the execution of the contract and acts in performance of its terms by the former, the latter must be held to have adopted it

as of the time it was signed by the former and the contract becomes evidence that the contract was, in point of fact, made by both plaintiffs at the time of the earlier signature. *Forgioni et al.* v. *Burnham et al.*, 382.

One may be an independent contractor, although not paid a round sum for his work as when paid by the day, or the cost of the work and a per cent.
Pooler v. *Sargent Lumber Co.*, 426.

If the owner of premises under his control employs an independent contractor to work upon them, which from its nature is likely to render the premises dangerous to persons who may come upon them by the owner's invitation, the owner, by reason of the contract, is not relieved from obligation of seeing that due care is used to protect such persons. *Pooler* v. *Sargent Lumber Co.*, 426.

Mutuality of interest does not justify a consignee or his agent in his claim to absolute protection while going back to the point of delivery, along the line of transportation, or to the place of transportation, to intervene at the request of a consignor's servant or otherwise, without the consignor's knowledge and consent. *Pooler* v. *Sargent Lumber Co.*, 426.

To open such an avenue of interference would tend to disturb the settled rules governing commercial and other contract relations, and would be manifestly against public policy and the dictates of reason and common sense.
Pooler v. *Sargent Lumber Co.*, 426.

The plaintiff can have no greater right than the servant who requested his assistance, and it is not claimed that his co-worker on the car can maintain an action against any person for his injuries. *Pooler* v. *Sargent Lumber Co.*, 426.

The principle is elementary that any material alteration in the terms of a contract for the performance of which a surety is bound, if made without the surety's consent, releases him from liability.
M. C. R. R. Co. v. *Nat. Surety Co.*, 465.

It is also an established rule that a surety for the faithful performance of a building contract is entitled to have the consideration for the contractor's performance of his undertakings retained by the creditor in accordance with the terms of the contract. *M. C. R. R. Co.* v. *Nat. Surety Co.*, 465.

The great weight of authority is to the effect that if the creditor in such a contract makes advance payments to the contractor, in violation of the terms of the contract, without the surety's consent, such payments operate to release the surety to some extent. *M. C. R. R. Co.* v. *Nat. Surety Co.*, 465.

An advancement of money by an owner to his contractor, before a payment becomes due under a building contract, does not necessarily operate as an

alteration of the contract itself; that depends upon the amount of the payment and the conditions and circumstances under which it was made, considered in connection with the rights and obligations of the surety under his contract of suretyship. *M. C. R. R. Co.* v. *Nat. Surety Co.*, 465.

In the case at bar, the advance payments made by plaintiff to the contractor, under the circumstances, and conditions disclosed, did not constitute an alteration of the contract so as to release the surety from all liability.
M. C. R. R. Co. v. *Nat. Surety Co.*, 465.

To the extent of the advance payment of five thousand dollars the surety is released, and is not to be charged with that as a part of the cost of the work.
M. C. R. R. Co. v. *Nat. Surety Co.*, 465.

Where in an action for a breach of a contract the plaintiff has recovered a judgment, that judgment is presumed to include all the damages he sustained by reason of the breach. In such an action the plaintiff is not permitted, without the defendant's consent, to withdraw a part of his alleged damages and reserve that as the subject of another action.
M. C. R. R. Co. v. *Nat. Surety Co.*, 465.

The liability of a surety cannot exceed that of his principal. And where a contractee has brought an action against his contractor for damages on account of a breach of the contract, that judgment fixes the amount of the damages for the breach so far as the plaintiff is concerned; and in a subsequent action by the same plaintiff against the surety for the contractor, the plaintiff cannot recover more damages for the breach than the amount of his judgment against the contractor. *M. C. R. R. Co.* v. *Nat. Surety Co.* 465.

The plaintiff having taken possession of the contractor's plant and other property in the exercise of its right under the contract to take and hold the same as security for any damages it might sustain, by reason of a breach of the contract, must be regarded as holding the property so taken for the benefit of the surety as well as itself. *M. C. R. R. Co.* v. *Nat. Surety Co.*, 465.

CONTRACTS FOR SERVICES.

When valuable services are rendered by one person at the request, or with the knowledge and consent, of the other, under circumstances not inconsistent with contract relations of debtor and creditor between the parties, a promise to pay is ordinarily said to be implied between the parties. *Hatch* v. *Dutch*, 405.

A promise to pay is ordinarily said to be implied by law on the part of him who knowingly receives the benefit of the services. *Hatch* v. *Dutch*, 405.

When the relations of the parties are such as to warrant the inference that the services were rendered gratuitously, by way of hospitality, or by reason of any obligation, legal or moral, it becomes a question of fact for the jury to determine whether it was in reality gratuitous or rendered upon the basis of contract.
Hatch v. *Dutch*, 405.

CORPORATIONS.

See MORTGAGE.

The officers of a corporation stand to it in a fiduciary relation, but a director is not forbidden, by reason of his office, to contract with his corporation, but when he acts both for himself and the corporation, the contract will be set aside in equity, unless made in entire good faith. *Vermeule* v. *Hover*, 74.

Purchases from a corporation by a director are subject to the same equitable rule as other contracts between such parties, that there must be perfect good faith on the director's part. *Vermeule* v. *Hover*, 74.

Subject to the same principle, directors are not debarred from purchasing the property of the corporation at a judicial or other public sales, nor at private sale, if the same is paid of personal funds of purchasing director.
Vermeule v. *Hover*, 74.

A demand for accounting under the provisions of R. S., Chap. 92, Sec. 15, should call for an accounting for an entirety, not a portion of debt due on mortgage.
Vermeule v. *Hover*, 74.

A corporation which was unable to pay its debts in the regular course of business was insolvent. *Folsom* v. *Smith*, 83.

Directors of insolvent corporations, receiving stock upon sale of its business and retaining it, are guilty of breach of duty, and corporation's receiver might recover as for conversion. *Folsom* v. *Smith*, 83.

A director of a corporation is presumed to know its financial standing, and he cannot set up his ignorance to defend himself from the consequences of his own dereliction of duty. *Folsom* v. *Smith*, 83.

Where money deposited by directors of corporation to a "special" account was applied to reducing an overdraft by the corporation, it was not misappropriated or divested from corporate uses, and as the corporation could not recover it back, the receiver representing it had no greater rights. *Folsom* v. *Smith*, 83.

At common law a corporation, even if insolvent, could lawfully prefer one creditor to another. *Folsom* v. *Smith*, 83.

A company organized as a petroleum company held not authorized to become a mere holding company by a transfer of its assets to another company as against bill by a stockholder to wind up its affairs, under Laws 1905, Chap. 85, as amended by Laws 1907, Chap. 137. *Van Oss* v. *Petroleum Co.*, 180.

A petroleum company by transfer of all assets held to have "ceased to do business" within Laws 1905, Chap. 85, as amended by Laws 1907, Chap. 137, and therefore subject to dissolution without regard to its solvency.
Van Oss v. *Petroleum Co.*, 180.

Evidence held to show that a vote of shareholders to transfer assets to another corporation was with intent to dissolve and that the company was subject to dissolution by such vote and cessation of business.
Van Oss v. *Petroleum Co.*, 180.

Under Laws 1905, Chap. 85, as amended by Laws 1907, Chap. 137, the court held to have authority to appoint a receiver for a corporation whenever it found sufficient cause for injunction. *Van Oss* v. *Petroleum Co.*, 180.

The preferential rights of a preferred stockholder arise from his contract and are enforceable in equity against the corporation and other stockholders in accordance with the terms of his contract. But aside from his special contract, he stands on no better footing than any other stockholder.
Spear v. *Lime Co.*, 285.

A preferred stockholder is not a creditor. He cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts. *Spear* v. *Lime Co.*, 285.

Directors may use profits for the development of the corporate business, so long as they do not abuse their discretionary power, or violate the charter or the contracts made, as to profits, with particular classes of stockholders.
Spear v. *Lime Co.*, 285.

When the certificate of a preferred stockholder provides that "he shall be entitled, out of the net earnings of the company, to a semi-annual, preferential, cumulative dividend, to be paid or provided for before any dividend is set apart or paid on the common stock," he is entitled to have such dividend paid semi-annually, if there are net earnings. *Spear* v. *Lime Co.*, 285.

A case in which it appears that the net earnings of a corporation have been applied to the enlargement of the plant, and in which it also appears that by a sale of all the assets, concerning which there is no allegation of fraud, so small a

sum was realized as to show that the net earnings have all disappeared, and the capital itself has been greatly impaired, and in which it further appears that the corporation has apparently ceased to do business, is not a case which calls for the declaration of a dividend to preferred stockholders. The proper remedy of such stockholders is not dividends, but dissolution.

Spear v. *Lime Co.*, 285.

In a bill brought by one stockholder for the benefit of himself and all other stockholders, to compel the declaration of a dividend, it must be alleged that application has been made to the directors for the declaration of such a dividend, or some reason must be alleged why such an application would be ineffectual. The demand of one stockholder for the payment of the amount claimed to be due to him individually is not an application for the declaration of a general dividend. *Spear* v. *Lime Co.*, 285.

A ratification of the acts of directors by the stockholders in meeting assembled is ineffective when it does not appear that the stockholders generally had any knowledge of the acts claimed to have been ratified.

Hyams v. *Old Dominion Co.*, 294.

Ratification of ultra vires acts of directors, or of acts done in manifest disregard of the duties of the corporation to its stockholders, and of the legal rights of minority stockholders is nugatory. *Hyams* v. *Old Dominion Co.*, 294.

A stockholder seeking a remedy for corporate wrongs must first make application for relief through the corporate channels, or allege and prove sufficient reasons why such application would be futile. But such application is not necessary when it is alleged, and the case shows, that application would be useless. *Hyams* v. *Old Dominion Co.*, 294.

Wrongs begun before a stockholder became such, but continued after, may be redressed at his suit. *Hyams* v. *Old Dominion Co.*, 294.

When it is sought by bill in equity to require a Maine corporation, which owns stock in a New Jersey corporation, the certificates whereof have been transferred in blank, to have the same transferred of record to itself on the books of the New Jersey corporation, the latter corporation is not an indispensable party to the bill. *Hyams* v. *Old Dominion Co.*, 294.

Courts will not undertake to control the discretionary powers of the directors of corporations, or of the majority of the stockholders expressed in stockholder's meeting, as to acts intra vires, except in cases of fraud, or in cases of such acts as are a breach of the trust and confidence which are implied by the very nature of the corporate relations. *Hyams* v. *Old Dominion Co.*, 294.

Courts can and will control corporations with respect to such acts as tend to the destruction of the corporate franchises, and such as are in violation of, or inconsistent with the charter. They may and will prevent the abuse, misuse or misapplication of corporate power prejudicial to the stockholders and amounting to a breach of trust. *Hyams* v. *Old Dominion Co.*, 294.

The relation between a corporation and the stockholders is essentially contractual. The corporate authority is considered to have been conferred by stockholders upon a trust and confidence that it will be exercised to effectuate the purpose of the charter. *Hyams* v. *Old Dominion Co.*, 294.

When a Maine Corporation held majority of stock of a New Jersey Company, minority stockholders of such company could not maintain bill to restrain Maine company from voting its stock at election of directors for New Jersey Company without making latter party defendant.
Hyams v. *Old Dominion Co.*, 337.

The New Jersey corporation is an indispensable party to the proceedings, and being beyond the jurisdiction of this court the bill in equity cannot be maintained. *Hyams* v. *Old Dominion Co.*, 337.

That all the wrongs, done or threatened as set out in the bill, are wrongs against the corporation itself, and, except through the corporation, they have no relation to the plaintiff; therefore, the corporation is an indispensable party.
Hyams v. *Old Dominion Co.*, 337.

Withholding information when good faith and honest dealing require it to be given is as culpable as misrepresentation when good faith and honest dealing require the truth to be spoken. *Cummings Mfg. Co.* v. *Smith*, 347.

Directors of corporation carrying on business in its name after purchasing its property held liable as partners for goods purchased.
Cummings Mfg. Co. v. *Smith*, 347.

The case shows that the plaintiff believed it was giving credit to a going concern, possessed of apparent assets and good will of the business, and acted upon this understanding. It follows as a matter of law, under these circumstances, that the plaintiff cannot be held to have given credit to the F. J. Smith Company, although its account is charged to that company.
Cummings Mfg. Co. v. *Smith*, 347.

Upon the principle of implied contract, those who had the benefit of the credit obtained should be held responsible. *Cummings Mfg. Co.* v. *Smith*, 347.

CRIMINAL LAW.

See EVIDENCE. WAIVER.

Evidence that officers had received complaints from unidentified persons, concerning illegal sales of liquor made by accused, is inadmissible to support an indictment for illegally keeping a tippling house. *State* v. *Butler*, 1.

A verdict should be directed for the accused, where a contrary verdict cannot stand. *State* v. *Simpson*, 27.

The accused had a legal right to except to the refusal to direct a verdict and, by prosecuting such exception, to a review of the sufficiency of the evidence by the Law Court. *State* v. *Simpson*, 27.

Accused held to have waived exception to refusal to direct verdict by moving before the presiding Justice to set aside the verdict as against the law and the evidence. *State* v. *Simpson*, 27.

In a prosecution for being a common seller of intoxicating liquors, a motion to set aside a verdict can only be made at nisi prius. *State* v. *Simpson*, 27.

Motion before presiding Justice to set aside a verdict is discretionary and not subject to exception. *State* v. *Simpson*, 27.

Conviction in the lower court is conclusive upon the question of probable cause, and it necessarily follows that the plaintiff cannot maintain an action for malicious prosecution. *Sidelinger* v. *Trowbridge*, 537.

To support this action, there must be proof of turpitude on the part of the defendant. *Sidelinger* v. *Trowbridge*, 537.

There must be both malice and the want of probable cause. The arrest complained of must have been wholly groundless and that known to the defendant. *Sidelinger* v. *Trowbridge*, 537.

DAMAGES.

See SALES. EVIDENCE. MUNICIPAL CORPORATIONS.

In an action to recover the price of goods sold and delivered, where the purchaser seeks to recoup in damages by showing that the goods delivered were inferior

in quality and value to those contracted for, the measure of damages which may be recouped is the difference between the value of the goods contracted for and the value of those actually delivered.

Keeling-Easter Co. v. *Dunning*, 34.

The measure of damages from raising the street, under R. S., Chap. 23, Sec. 68, is the diminution in market value of the property from the raising, and not to include damages from subsequent injuries by surface water, or defective catch basins. *Sherburne* v. *Sanford*, 67.

This instruction was given to the jury in a case for injuries; "If upon all the evidence in the case, you find there is a reasonable certainty that, from this time on he would engage in a similar business and would, were it not for this accident do with his own hands what he has in the past done, then upon the evidence in the case you may award such sum as you find is warranted as a compensation for impairment of that capacity to labor with his hands." This instruction was held to be correct. *Mathews* v. *B. & M. R. R.*, 449.

DEEDS.

See REAL ACTION.

A deed by a mortgagee not in possession, unaccompanied by a transfer or assignment of the mortgage indebtedness, conveys no title.

Vermeule v. *Vermeule*, 81.

In the absence of evidence, except the resolve of the Legislature of 1845, tending to show that these islands were omitted by mistake, the long lapse of time must be regarded as conclusive against any effort to reform the deed at this late day. *Lazell* v. *Strawbridge*, 362.

The cardinal rule for the interpretation of deeds is the expressed intention of the parties gathered from all parts of the instrument, giving each word its due force and read in the light of existing conditions. *Perry* v. *Buswell*, 399.

A reference in a deed to other deeds, when it appears that it was so intended, makes them a part of the description as much as if their language had been incorporated and copied as a part of it. *Perry* v. *Buswell*, 399.

To constitute an effective delivery of a deed so as to pass the title, the delivery must be with an intent that the title shall thereby pass.

Reed v. *Reed*, 522.

The delivery of a deed with intent that the title shall pass only on condition that the grantee perform certain agreements on his part does not vest the title in the grantee. *Reed* v. *Reed*, 522.

DEMURRER.

See WAIVER.

Where the demurrer of defendant to the declaration of plaintiff is overruled and the parties proceed to trial upon the merits of the case, the defendant will, under the circumstances of this case, be held to have waived the right to exceptions to the overruling of the demurrer. *Gilbert* v. *Cushman*, 525.

DISTRIBUTION OF AN ESTATE.

See EVIDENCE.

A suit for the recovery of a distributive share of the residue of an estate is not maintainable by a legatee while the estate is still in the process of settlement, nor until the amount to be distributed has been ascertained and determined by the Probate Court. *Investment Co.* v. *Palmer*, 395.

DIVORCE.

See EXCEPTIONS. PLEADING.

If the phrase "in a plea of" were a necessary part of the pleading to begin a divorce proceeding, when inserted in a writ of attachment, a plea in abatement would be necessary to take advantage of its absence. *Cole* v. *Cole*, 358.

Under R. S., Chap. 62, Sec. 3, as to divorce, that libelant may file in the clerk's office a libel, or insert it in a writ of attachment, the phrase "in a plea of" is not necessary when the libel is inserted in a writ. *Cole* v. *Cole*, 358.

EMINENT DOMAIN.

See RAILROADS.

Under R. S., Chap. 51, Sec. 33, County Commissioners, in assessing damages for land taken by a railroad company, are not authorized to order construction of underground farm passes 14 feet high and 12 feet wide, costing from $12,000 to $17,000. *True* v. *M. C. R. R. Co.*, 375.

Under R. S., Chap. 51, Sec. 34, County Commissioners can merely order cattle pass, cattle guard or farm crossing in part payment of damages for taking of land, and not in addition to damages, nor if cost exceeds damages.
True v. *M. C. R. R. Co.*, 375.

Under R. S., Chap. 51, Secs. 33-34-36, order of County Commissioners for construction of cattle pass, in assessing damages for taking of land by railroad company, are not applicable. *True* v. *M. C. R. R. Co.*, 375.

EVIDENCE.

See CRIMINAL LAW. SALES. MASTER AND SERVANT. PROMISSORY NOTES. DISTRIBUTION OF ESTATE.

Hearsay is not evidence, especially when it is manifest that better evidence is accessible. *State* v. *Butler*, 1.

There are exceptions to this rule, under which to prevent an entire failure of justice, and when no better evidence exists, it is admitted.
State v. *Butler*, 1.

Letters and telegrams, written by one party to the other in the usual course of business, respecting the subject matter of the controversy, and not specifically to manufacture evidence which, by the character of their contents are naturally calculated to elicit replies and denials, are admissible in evidence, though they were self-serving and were not answered.
Keeling-Easter Co. v. *Dunning*, 34.

A notice to produce an instrument is merely to obtain the introduction in evidence of the instrument, if admissible, or to lay the foundation for secondary evidence of its contents if not produced, but does not make an inadmissible instrument admissible. *Paradis* v. *L. A. & W. St. Ry.*, 125.

Under the express provisions of R. S., Chap. 84, Sec. 112, defendant was disqualified in a suit on notes by an administrator with the will annexed, to depose to facts happening before the death of the testator.
Talbot v. *Hathaway*, 324.

In an action by an administrator with the will annexed to recover sums paid by his testatrix as surety on notes made by defendant, a memorandum on back of each note in handwriting of testatrix, to the effect that she paid the note, was inadmissible as being an entry by a party in support of his own case.
Talbot v. *Hathaway*, 324.

After the lapse of twenty years there is a common law presumption of payment of notes, which presumption is one of fact rebuttable by evidence of other facts and circumstances tending to show nonpayment or sufficiently accounting for the creditor's delay. *Talbot* v. *Hathaway*, 324.

The findings of facts made by a Justice hearing a case without a jury, are conclusive, if supported by any evidence.
Investment Co. v. *Palmer*, 395.

The denial of a motion to strike from the record testimony, on the ground that it is subsequently shown to be hearsay, is usually a matter of discretion.
State v. *Grondin*, 479.

When the evidence in support of a criminal prosecution is so defective or weak that a verdict based upon it could not be allowed to stand, it would undoubtedly be the duty of the court to instruct the jury to return a verdict of not guilty, and the refusal to so instruct would be valid ground of exceptions.
State v. *Grondin*, 479.

EXCEPTIONS.

See SALES. CONTRACTS. BROKER. MOTION. DIVORCE.

Exceptions will not be sustained for the admission of a harmless answer to an irrelevant question; nor when a witness volunteers an inadmissible statement, which is ordered to be stricken from the record.
Keeling-Easter Co. v. *Dunning*, 34.

A bill of exceptions to an extract from the charge, which bill covered more than four pages of the printed record, contained several propositions of law, but only one being urged was not in proper form and did not comply with R. S., Chap. 79, Sec. 55. *Darling* v. *Bradstreet*, 136.

The court is not bound to consider exceptions, unless the bill of exceptions itself states the grounds of exceptions in a summary manner; nor unless it states the evidence, concerning the admission or exclusion of which complaint is made.
Dennis v. *Waterford Packing Co.*, 159.

The bill should contain enough of the contentions or issues in the case to show that it was relevant or irrelevant, material or immaterial, competent or incompetent,

as the case may be, nor unless it contains the requested instructions to the refusal of which exception is taken and sufficient matter to show that the requested instructions were appropriate.
Dennis v. *Waterford Packing Co.*, 159.

Neither the reference in a bill of exceptions, nor the incorporation of the evidence as a part of the bill of exceptions can take the place of a succinct and summary statement of the specific grounds of exception in the body of the bill itself.
Dennis v. *Waterford Packing Co.*, 159.

The office of an "exception" is to preserve a known or supposed right taken on a hostile ruling on a matter of law, or exclusion or admission of testimony, or order imperiling an asserted right, and must be taken in the trial court or to the decree or order of the court sitting as a court of last resort.
Moore, Applt., 195.

A ground of exception not stated in the trial court cannot be stated on appeal.
Moore, Applt., 195.

The right of exception is conferred by statute and is based on some opinion, direction or judgment of the court which is erroneous and adverse and prejudicial to the party excepting. *Moore, Applt.*, 195.

A party taking exceptions to the ruling of the presiding Justice must show affirmatively that there was error in the rulings and that he is aggrieved thereby. *Moore, Applt.*, 195.

When a defendant in trespass takes no exception to the denial of his motion to dismiss for the unauthorized joinder of plaintiffs, who make no objection to their joinder, he cannot set up the same objection by brief statement filed with the general issue. *Richardson* v. *Wood*, 328.

Exceptions presenting rulings indiscriminately, instead of separately and clearly, will not be considered. *Richardson* v. *Wood*, 328.

Exceptions to instructions will be overruled, where on examination of the charge appearing in the record the court is unable to find that the party complaining was prejudiced thereby. *Richardson* v. *Wood*, 328.

No exception lies to the court's finding that there was an agreement, within Rule 3, as to the term at which a contested libel for divorce may be heard by agreement. *Cole* v. *Cole*, 358.

Exceptions do not lie to the allowance of an amendment in the discretion of the trial court. *Cole* v. *Cole*, 358.

EXECUTORS AND ADMINISTRATORS.

See NOTARIES PUBLIC.

An executor de son tort is one deriving no authority from the decedent, with whose estate he wrongfully interferes, by demanding payment of debts, paying them, or carrying on decedent's business, although merely asserting title to the decedent's goods would not do so. *Walker* v. *Savings Bank*, 353.

One who has assumed without right to act as an executor may ratify and validate by relation, after his appointment as administrator, all done in a representative capacity, which would have been valid had he been the rightful representative. *Walker* v. *Savings Bank*, 353.

That payment to one who seeks it, not as a representative of the estate, but as a individual with pretended rights against the estate, which induce the payment, is not legalized as to the party making the payment by a subsequent appointment of the wrongdoer as administrator. *Walker* v. *Savings Bank*, 353.

While it may be true that the administrator de bonis non is bound by the acts of his predecessors lawfully performed within the scope of his duties, it has never been held that he is affected or prejudiced by such as are fraudulent or illegal. *Walker* v. *Savings Bank*, 353.

At common law, a notary public had no authority to administer oaths. *Holbrook* v. *Libby*, 389.

In the absence of proof to the contrary, the law of Minnesota is presumed to be like our common law. *Holbrook* v. *Libby*, 389.

By statute, the presentment of a claim against the estate of a deceased person, to the executor or administrator in writing, or the filing of the same in Probate Court, supported by the affidavit of the claimant, or of some person cognizant thereof, is a condition precedent to the right to maintain an action thereon; and such presentment and filing must be alleged and proved. *Holbrook* v. *Libby*, 389.

An affidavit made before a notary public in Minnesota in support of a claim against the estate of a deceased person in this State is not sufficient compliance with the statute, unless it be shown that in Minnesota, notaries public are authorized to administer oaths. *Holbrook* v. *Libby*, 389.

EXPERT TESTIMONY.

See BILLS AND NOTES.

Testimony by a handwriting expert as to the genuineness of a disputed signature is the expression of an opinion and not binding on the jury, and its weight depends very largely on the cogency of the reasons given by him for his opinion. *Palmer* v. *Blanchard*, 380.

A material alteration of a note by a party holding it after it was made and delivered would be a good defense. *Palmer* v. *Blanchard*, 380.

FORFEITURE.

See LANDLORD AND TENANT.

It is well settled that equity will relieve against forfeiture for non-payment of rent, when, under the circumstances, it would be inequitable, and full compensation can be made for the tenant's default by payment of the rent due and damages. *Shriro* v. *Paganucci*, 213.

FRAUD.

See NEW TRIAL. PRINCIPAL AND AGENT.

A purchaser of land may rely on the representations of a vendor pointing out the boundaries and may recover for the false representations of the vendor. *Leavitt* v. *Seaney*, 119.

Where the seller of a stock of goods falsely represented to the buyer that the goods as they showed upon the shelves in front were of the same quality and condition as those behind, and the buyer believed such representation, he was not bound to examine the goods, except as they showed in front, but could rely upon the seller's representations. *Harlow* v. *Perry*, 239.

The well settled rule is that if one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so, he cannot afterwards excuse himself by saying that the one trusting him was negligent in not investigating and learning that the assertion was untrue. *Harlow* v. *Perry*, 239.

GUARDIAN.

A finding by the presiding Justice that the person for whom it is sought to appoint a guardian was incompetent to manage her estate and protect her rights is a finding of fact and conclusive when supported by evidence.
Gower, Applt., 156.

There is no statute or rule authorizing a motion for a new trial in cases of appeal from a decree of a Judge of Probate, or of a single Justice in matters heard by him without a jury. *Gower, Applt.*, 156.

HIGHWAYS.

Under R. S., Chap. 23, Sec. 76, the notice required must give a specific description of the bodily injuries claimed to have been received.
Colby v. *Pittsfield*, 507.

A general description of the bodily injuries is not sufficient, but a specific description of bodily injuries is required as a condition precedent to the right of any action at all. *Colby* v. *Pittsfield*, 507.

One having a right of action for bodily injuries may have damages for all of the natural consequences, such as loss of earnings, physical pain and mental suffering. *Colby* v. *Pittsfield*, 507.

Suffering is not the injury for which a recovery may be had under statutory notice, but the consequences of it. *Colby* v. *Pittsfield*, 507.

This action is based upon the statute and must strictly comply with the requirements of the statute, and the statute allows damages for bodily injuries only and their consequences. *Colby* v. *Pittsfield*, 507.

HUSBAND AND WIFE.

See BURDEN OF PROOF.

Neither husband nor wife can sue the other at common law while the marriage relation exists, which disability has not been removed by statute.
Greenwood v. *Greenwood*, 226.

Under Public Laws, 1913, Chap. 48, Sec. 2, a husband can maintain a bill in equity for reconveyance of property conveyed to his wife under a separation agreement, the consideration for which had failed.
Greenwood v. *Greenwood*, 226.

Agreement between husband and wife contemplating separation and wife's support of the children, when the husband remained and supported his wife and children is invalid, since the consideration, resting upon separation, had failed.
Greenwood v. *Greenwood*, 226.

The condition on which the validity of a post nuptial agreement for support rests is, either that separation has already taken place, or that the agreement is made in contemplation of an immediate separation which takes place as contemplated. *Greenwood* v. *Greenwood*, 226.

The burden was upon the plaintiffs to prove by a preponderance of evidence that the wife was compelled to leave her husband because of his treatment, amounting in law to cruelty. *Beaudette* v. *Martin*, 310.

It is immaterial in such cases to whom the articles were charged.
Beaudette v. *Martin*, 310.

It is well settled that if the husband abandons the wife, or by his ill treatment compels her to leave his house, he is liable for her necessaries and gives her a general credit to that extent. *Beaudette* v. *Martin*, 310.

When the wife is justified in living apart from her husband, he is not discharged from liability by showing that the contract was in fact made without his authority and contrary to his wishes, nor will his general advertisement or particular notice effect the case. *Beaudette* v. *Martin*, 310.

INDEBITATUS ASSUMPSIT.

See NEW TRIAL.

Where special contract is terminated by the defendant's unjustifiable act, plaintiff, who has performed labor or furnished material, may recover their value in indebitatus assumpsit upon a count for quantum meruit.
Horne v. *Richards*, 210.

In indebitatus assumpsit for labor and materials furnished under special contract, that contract and its terms were admissible on issue whether contract had been unjustifiably terminated by defendant without plaintiff's fault.
Horne v. *Richards*, 210.

INDICTMENT.

It is not essential to employ, in an indictment, the words of the statute defining the offense, when equivalent words are used and all the elements of the crime are set forth. *State* v. *Cavalluzzi*, 41.

The word "prostitution" in Public Laws, 1913, Chap. 97, Sec. 3, punishing any person accepting the proceeds of the earnings of any woman engaged in prostitution, when considered with the other provisions of the Chapter and in connection with R. S., Chap. 125, Secs. 9 and 10 is limited to a specified form of sexual immorality, and the use of the word in an indictment is sufficient. *State* v. *Cavalluzzi*, 41.

Penal statutes, though strictly construed, must not be construed so strictly as to defeat the legislative intent. *State* v. *Cavalluzzi*, 41.

INSOLVENCY.

After a creditor instituted suit, the debtor filed his voluntary petition in insolvency scheduling the claim. The claim was allowed, and the creditor became entitled to his proportionate dividend. Thereafter the claim was reduced to judgment in the suit already begun; held, that the debtor's discharge in insolvency did not discharge the claim. *Jordan* v. *McKenzie*, 57.

That the taking of judgment by the plaintiff was a waiver of his claim against the estate, that the account sued was merged in the judgment and assumed a new form of indebtedness; and having been acquired after the commission of insolvency was issued was not provable against the estate, but became the personal debt of the insolvent. *Jordan* v. *McKenzie*, 57.

INSURANCE.

Although gasoline was conceded to be included in the prohibited list, it was not "kept or used" by plaintiff under the facts of this case within the inhibition of the contract. These words imply something more than possession for a temporary purpose. *Bouchard* v. *Ins. Co.*, 17.

The use of a gasoline engine in an insured barn, to drive a threshing machine, does not avoid the policy under the clause, prohibiting an alteration of the situation, so as to increase the risk. *Bouchard* v. *Ins. Co.*, 17.

A fire insurance policy will, if possible, be construed not to prohibit the customary use of a gasoline engine to drive threshing machinery. *Bouchard* v. *Ins. Co.*, 17.

The policy is not avoided when the use made of prohibited articles or the general use and operation of the property is necessarily incident to the business of the insured, and therefore, presumed to be recognized and impliedly permitted by the insurer. *Bouchard* v. *Ins. Co.*, 17.

To avoid liability on a fire insurance policy on the ground of untrue statements in the proof of loss, it must be shown that the statements were knowingly and intentionally untrue, and the burden of showing it is on the defendant company. *Cole* v. *Insurance Co.*, 512.

That mere inadequacy of price will not render a contract void when both parties are in a condition to form an independent judgment concerning the transaction and intentionally make the contract, and there are no inequitable incidents connected with the transaction. *Ins. Co.* v. *LaChance*, 550.

Equity does refuse to enforce a contract, even though legal, in which the party seeking the redress has so far overreached his adversary that the contract is unconscionable. *Ins. Co.* v. *LaChance*, 550.

It is wisely established in the courts of Chancery to prevent taking surreptitious advantage of the weakness or necessities of another, which knowingly to do is equally against conscience as to take advantage of his ignorance. *Ins. Co.* v. *LaChance*, 550.

There may be such an unconscionableness or inadequacy in the bargain as to demonstrate some gross imposition or some undue influence; and in such cases, courts of equity ought to interfere, upon the satisfactory ground of fraud. *Ins. Co.* v. *LaChance*, 550.

Although the actual cases in which a contract or conveyance has been cancelled on account of gross inadequacy merely, without other inequitable incidents, are very few, yet the doctrine is settled by a consensus of decisions that, even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for cancelling a conveyance or contract, whether executed or executory. *Ins. Co.* v. *LaChance*, 550.

INTOXICATING LIQUORS.

See OFFICER.

In all cases where an officer may seize intoxicating liquors, or the vessels containing them, upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure a warrant. *State* v. *Schoppe*, 10.

Intoxicating liquors kept in violation of law are none the less liable to forfeiture, because the possession thereof was wrongfully or illegally obtained by an officer.
State v. *Schoppe*, 10.

The description of the place where the liquors were found is merely preliminary and does not constitute a description of the offense alleged to have been committed. *State* v. *Schoppe*, 10.

Even if the seizure was illegal, that is no defense for the defendant's violation of the law. If the officer has violated the law, he is responsible for the same, but that will not constitute any justification or excuse for the defendant.
State v. *Schoppe*, 10.

A magistrate or court has no jurisdiction to issue a warrant to search a dwelling house for intoxicating liquors, except upon complaint that it, or some part of it, is used as an inn or shop or for purposes of traffic, or when the magistrate or court is satisfied by evidence, and so states in the warrant, that intoxicating liquor is kept in the house, intended for unlawful sale in the State; and these jurisdictional facts must appear on the face of the warrant.
Faloon v. *O'Connell*, 30.

An officer is not liable for false imprisonment if there is no defect or want of jurisdiction on the face of the warrant, under which he acts, though in fact it may have been issued without authority or may be voidable.
Faloon v. *O'Connell*, 30.

JURISDICTION OF INFERIOR COURTS.

It is the design of the law that parties whose causes are pending in court shall have the right and opportunity to be present when any action is taken in their case. *Perro* v. *State*, 493.

The Bangor Municipal Court, as all other inferior courts, has only such powers as are conferred upon it by statute. *Perro* v. *State*, 493.

The Bangor Municipal Court has no stated terms for criminal causes; as to these, it is a temporary court for each case, exercising limited jurisdiction by prescribed methods. *Perro* v. *State*, 493.

It may adjourn an examination before it from time to time, but no more than ten days at a time. *Perro* v. *State*, 493.

The indefinite postponement of a case before it is in effect the indefinite postponement of the court. *Perro* v. *State*, 493.

A magistrate of an inferior court, unless authorized by statute, cannot adjourn the hearing of a criminal case indefinitely. *Perro* v. *State*, 493.

By such an adjournment, the court loses jurisdiction over the parties, and a judgment entered after such adjournment, except by consent, is void. *Perro* v. *State*, 493.

LANDLORD AND TENANT.

See FORFEITURE.

The construction of a lease is for the court. *Nat. Furn. Co.* v. *Cumberland Co.*, 175.

Under a lease of a county jail workshop, entry to make repairs is not an eviction authorizing an action for breach of covenant for quiet enjoyment. *Nat. Furn. Co.* v. *Cumberland Co.*, 175.

To constitute an eviction, one must be actually dispossessed by one having the real title, or one under a permanent title. *Nat. Furn. Co.* v. *Cumberland Co.*, 175.

Eviction may be accomplished by the wrongful acts of the lessor depriving the lessee of the beneficial enjoyment and the lessee's consequent abandonment. *Nat. Furn. Co.* v. *Cumberland Co.*, 175.

An eviction is not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord for the purpose and with the intention of depriving the tenant of the demised premises. *Nat. Furn. Co.* v. *Cumberland Co.*, 175.

A lease, like any other contract, is to be construed with reference to the intent of the parties. *Shriro* v. *Paganucci*, 213.

Where a lease provided that lessor might expel the lessee upon failure to pay the rent, whether demanded or not, and the lessee, who had never before defaulted, delayed a day or two in payment of rent, equity will relieve him from the forfeiture; the purpose of the covenant being to protect the lessor in collection of his rent. *Shriro* v. *Paganucci*, 213.

In forcible entry and detainer to acquire possession of the demised premises, the lessee may set up the equitable defense that he should be relieved of a forfeiture, occasioned by a few days' delay in payment of an instalment of rent. *Shriro* v. *Paganucci*, 213.

That this court, as a court of law, has power in the case at bar, and like cases, to grant relief, is sanctioned by unchallenged authority.
Shriro v. *Paganucci*, 213.

MANDAMUS.

Mandamus will not lie to compel mayor and aldermen of a city to grant hearing on complaint filed against a police officer. *Nichols* v. *Dunton*, 282.

When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is ministerial in character and performance may be compelled by mandamus, if there is no other remedy. *Nichols* v. *Dunton*, 282.

When the law requires a judicial determination to be made, such as the decision of a question of fact, or the exercise of judgment in deciding whether the act shall be done or not, the duty is regarded as judicial and mandamus will not lie to compel performance. *Nichols* v. *Dunton*, 282.

MASTER AND SERVANT.

See EVIDENCE.

A motorman operating as an employe of a street railway company a car of the company and a motorman employed by the company to operate express cars running on the tracks are fellow servants. *Paradis* v. *L. A. & W. St. Ry.*, 125.

A motorman injured in a collision with a car on the track is guilty of contributory negligence. *Paradis* v. *L. A. & W. St. Ry.*, 125.

When plaintiff's injuries were caused by the negligence of his fellow servant, he cannot recover of the defendant damages therefor.
Paradis v. *L. A. & W. St. Ry.*, 125.

MONEY HAD AND RECEIVED.

See ATTORNEY.

When one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained. *Mayo* v. *Purington*, 452.

This form of action is comprehensive in its reach and scope and, though the form of the procedure is in law, it is equitable in spirit and purpose, and the substantial justice which it promotes renders it favored by the courts.
Mayo v. *Purington*, 452.

It lies for money paid under protest or obtained through fraud, duress, extortion, imposition or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid. *Mayo* v. *Purington*, 452.

When the defendant is proved to have in his hands the money of the plaintiff, which in equity and good conscience he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly; and after verdict, the promise is presumed to have been actually proved.
Mayo v. *Purington*, 452.

MORTGAGE.

See CORPORATIONS.

A deed by a mortgagee out of possession, unaccompanied by a transfer or assignment of the mortgage indebtedness, conveys no title.
Vermeule v. *Hover*, 74.

In a suit to redeem land from an alleged equitable mortgage, evidence held insufficient to show that a deed absolute on its face was, in fact, a mortgage.
Jackson v. *Maxwell*, 366.

The evidence must be of such weight and character as would justify a court in reforming a written instrument, which upon the ground of mistake did not set forth the intention of the parties thereto. *Jackson* v. *Maxwell*, 366.

The holder of the absolute title to land may convey to another by absolute deed and make the deed an equitable mortgage in favor of a third person.
Jackson v. *Maxwell*, 366.

One asserting that a deed absolute on its face was in reality an equitable mortgage has the burden of proving that fact, by clear, certain, conclusive and unequivocal evidence. *Jackson* v. *Maxwell*, 366.

In an action to recover damages for false representations as to title in the exchange of horses, the horse which plaintiff received having been subsequently taken from him on a replevin writ by virtue of a mortgage, the burden of proof rested on the plaintiff to show that the horse was taken from him by one having a title under the mortgage superior to the title of his vendor Wright.
Horton v. *Wright*, 439.

Under R. S., Chap. 93, Sec. 1, possession of personal property mortgaged shall be delivered to and retained by the mortgagee, or the mortgage shall be recorded in the town where the mortgagor resides. *Horton* v. *Wright*, 439.

That in the absence of evidence showing one or the other of these facts, the validity of the mortgage, although recorded, is not established as against a bona fide purchaser for value without notice. *Horton* v. *Wright*, 439.

That the record of the mortgage in the town of Waite did not establish its validity as against the plaintiff, because it was not shown that the mortgagor resided in that town, and the mortgage itself is silent on the point.
Horton v. *Wright*, 439.

MOTION TO DISMISS.

See EXCEPTIONS.

A motion to dismiss a writ lies only to a defect disclosed on inspection of the writ.
Richardson v. *Wood*, 328.

MUNICIPAL CORPORATIONS.

See DAMAGES.

That the replacing of matter that has been scraped off, or that has been washed off by the action of the elements, or that has been worn down by travel, is not a raising of the street, within the meaning of R. S., Chap. 23, Sec. 68.
Sherburne v. *Sanford*, 66.

A town is not liable for fault in the location, size, plan of construction, or general design of its sewers, but it may be liable for failure to keep them in repair.
Sherburne v. *Sanford*, 66.

The measure of damages from raising the street, under R. S., Chap. 23, Sec. 68, is the diminution in market value of the property from the raising, and not to include damages from subsequent injuries by surface water, or defective catch basins. *Sherburne* v. *Sanford*, 66.

When a land owner has obliterated a natural channel into which the surface water would have run, by putting into it a closed pipe, he cannot complain if surface water finds its way over his land in other courses.
Sherburne v. *Sanford*, 66.

R. S., Chap. 21, does not fix the time for making an assessment for benefits for construction of a sewer, and officers in office when the sewer was completed have not exclusive authority to make the assessment.
Paul v. *Auburn*, 207.

Award of arbitrators, under R. S., Chap. 21, Sec. 6, is a nullity, if made without notice of hearing to a party not waiving notice. *Paul* v. *Auburn*, 207.

When officers, without authority, make an assessment for benefits for the construction of a sewer, a subsequent assessment made by officers duly authorized is not a reassessment. *Paul* v. *Auburn*, 207.

When no limitation of time is fixed by the legislature within which an assessing board must act, the time when an assessment shall be made is confided to the discretion of such board. The court in such case can impose no limitation.
Paul v. *Auburn*, 207.

NEGLIGENCE.

A railroad, whose flagman warned plaintiff not to cross, whose engine bell was constantly ringing and whose engineer put on emergency brakes on flagman's signal to stop, but too late to avoid collision, held not guilty of actionable negligence. *Scripture* v. *M. C. R. R. Co.*, 218.

In an action for injury at a railroad crossing where it appeared that defendant was not negligent, and that its efforts were too late to avoid collision, held that the last clear chance doctrine did not apply.
Scripture v. *M. C. R. R. Co.*, 218.

It is negligence per se for the driver of a team to cross a railroad track without first looking and listening for a coming train.
Scripture v. *M. C. R. R. Co.*, 218.

A chauffeur, backing his automobile without looking, and running into a horse and wagon, was negligent. *Pease* v. *Gardner*, 264.

When an automobile and chauffeur, were hired by others to take a political speaker through the county and were placed at the disposal of the speaker during the time he was making the trip, the speaker was only a passenger, though he could direct the route to be taken, and was not liable as master for the negligence of the chauffeur. *Pease* v. *Gardner*, 264.

The fact that the defendants Hurley and Hobbs were members of the State and Town committees does not relieve them from personal liability. They were not agents, acting under orders from a superior, but were themselves principals in a larger body. *Pease* v. *Gardner*, 264.

Children who are sui juris are not relieved from exercising prudence and care merely because they are children, but are bound to exercise that degree or extent of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances.

Crosby v. *M. C. R. R. Co.*, 270.

A boy twelve years old, riding in a baker's wagon when struck by a train, who took no precaution, was guilty of negligence precluding recovery.

Crosby v. *M. C. R. R. Co.*, 270.

Questions of negligence in cases of personal injuries are always to be considered with reference to the particular injury in the case, and not with reference to other injuries which might have been occasioned in some other manner.

McMinn v. *N. E. Tel. & Tel. Co.*, 519.

A telephone company set one of its poles so that one of the guy wires was anchored in the ground inside a school yard. The guy wire passing through an eye in the anchor was bent back upon itself and tied. In time the end of the wire became untwisted. The rods or steps in the pole were so placed that the lowest one could not be reached from the ground. A boy climbed upon an adjacent hen house roof, then on to a fence and wood pile, where he could reach the lowest rod, then climbed the pole on the steps and slid down the guy wire receiving injuries.

Held: That the question of the defendant's negligence must be weighed not with reference to the liability that boys running or playing in the yard might be injured by the guy wires, but with reference to the liability that a boy might be injured in the manner this plaintiff was; and that in this view, the defendant was not negligent.

Held, also, that the plaintiff was guilty of contributory negligence.

McMinn v. *N. E. Tel. & Tel. Co.*, 519.

The work contracted for, as the plaintiff asserts, was one not attended with unusual or peculiar dangers, while the work assigned of following the mowing machine, as alleged, was hazardous. *Boutotte* v. *Daigle*, 539.

There was conflict as to the terms of the contract, and being an oral contract, it was for the jury to say what the contract really was.

Boutotte v. *Daigle*, 539.

Ordering the plaintiff to do a more dangerous work than that for which the contract provided, without proper instructions, was negligence.

Boutotte v. *Daigle*, 539.

Allowing the plaintiff to grasp the clearing bar in the manner admitted, without instantly stopping his mowing machine, was culpable negligence.

Boutotte v. *Daigle*, 539.

A boy of the plaintiff's age cannot be held to know and appreciate the dangers in such circumstances as are disclosed in this case. *Boutotte* v. *Daigle*, 539.

NEW TRIAL.

See FRAUD. INDEBITATUS ASSUMPSIT. PROMISSORY NOTES.

A verdict on conflicting oral testimony will not be disturbed when not so contrary to the evidence as to show that the jury were influenced by prejudice, bias, passion or mistake. *Leavitt* v. *Seaney*, 119.

Where, on conflicting evidence, the jury found under proper instructions for the plaintiff, defendant on general motion for new trial has the burden of making it clearly appear that the jury erred, or the verdict will not be disturbed. *Sterns* v. *Hudson*, 154.

A buyer suing for damages for breach of warranty in the sale of a horse may show the expense incurred by him in caring for the horse, for medicine, medical attendance and like expenses. *Sterns* v. *Hudson*, 154.

Where an issue of fact was clearly presented to the jury, and it did not appear that their finding on the conflicting evidence was manifestly unwarranted, a new trial will not be granted. *Horne* v. *Richards*, 210.

A verdict on conflicting evidence will not be set aside, unless manifestly erroneous. *First Nat. Bank* v. *Blake*, 313.

No tendency is discovered on the part of the plaintiff to exaggerate either his objective or his subjective symptoms. The evidence as a whole leaves no doubt that the verdict, if excessive at all, is not so excessive as to justify the interference of the court. *Hyer* v. *L. A. & W. St. Ry.*, 482.

NOTARY PUBLIC.

See EXECUTOR AND ADMINISTRATOR.

At common law, a notary public had no authority to administer oaths. *Holbrook* v. *Libby*, 389.

OFFICER.

An officer cannot defend against an action for false imprisonment by claiming to act under a warrant which is void on its face. *Faloon* v. *O'Connell*, 30.

An officer is not protected by a warrant issued by a magistrate, unless it shows on its face that the magistrate had jurisdiction to issue it.
Faloon v. *O'Connell*, 30.

PARTITION.

Testator's daughter held to have a future contingent interest which would be interfered with by a partition, but which interest she waived by joining in the petition for partition. *Tibbetts* v. *Tibbetts*, 201.

The existence of a trust in a part interest in property to be partitioned is no objection to the partition. *Tibbetts* v. *Tibbetts*, 201.

PARTNERSHIP.

That the agreement of dissolution of the partnership is an entirety.
Bailey v. *Webber*, 434.

That the defendant in this action therefore has the legal right to recoup any damages sustained by him by reason of the fraudulent concealment by the plaintiff, at the time when the agreement was made, of various items which the plaintiff had received from the firm without the knowledge of the defendant and had not accounted for. *Bailey* v. *Webber*, 434.

PAUPERS.

See CONTRACTS.

Laws of 1909, Chap. 25, Sec. 2, provides that persons becoming needy while in quarantine shall not be considered paupers unless they were paupers.
Lesieur v. *Rumford*, 317.

A physician contracting with a town to give medical aid to the town paupers is not bound to take care of one quarantined, because infected with smallpox, unless he was a pauper when he became infected. *Lesieur* v. *Rumford*, 317.

The intention with which one performs an act may be testified to by such party.
Rumford v. *Upton*, 543.

The selectmen of towns when performing the duties of a registration board are public officers. When so employed, they are in no sense agents of the municipality. *Rumford* v. *Upton*, 543.

Lists of voters made up by the municipal officers, acting as a registration board, are not admissible to show the residence of a pauper, in the absence of proof that the pauper voted at the election in anticipation of which they were made.
Rumford v. *Upton*, 543.

The treasurer of a town is a public officer and his records are public records. He is not, however, the town's financial agent. *Rumford* v. *Upton*, 543.

The records or accounts of a town treasurer are required to be kept by law and are evidence of the facts contained therein, which it is made his duty by law to enter. *Rumford* v. *Upton*, 543.

Where a public record is in existence, entries therein may be proved by the production of the record, or by a certified copy, or by examined copy, and not otherwise. *Rumford* v. *Upton*, 543.

PHYSICIANS AND SURGEONS.

The physician contracts with his patient that he has the ordinary skill of the members of his profession in like situation; that he will exercise ordinary or reasonable care and diligence in his treatment of the case, and that he will use his best judgment in the application of his skill to the case.
Merrill v. *Odiorne*, 424.

The physician is not an insurer. He does not warrant favorable results. If he possesses ordinary skill, uses ordinary care, and applies his best judgment, he is not liable even for mistakes in judgment. *Merrill* v. *Odiorne*, 424.

In cases of this nature, a duty devolves upon the patient. It is his duty to follow the reasonable instructions and submit to the reasonable treatment prescribed by his physician or surgeon. *Merrill* v. *Odiorne*, 424.

If the patient fails in his duty, and his negligence directly contributes to the injury, he cannot maintain an action for malpractice against the physician or surgeon, who may also be negligent in treating the case.
Merrill v. *Odiorne*, 424.

PLEADING.

See REPLEVIN. QUO WARRANTO. EXCEPTIONS. DIVORCE.

If a local action be brought in the wrong county, the error may be pleaded or taken advantage of at the trial under the general issue, or if the error is shown on the face of the record, it may be reached by demurrer.
Central Power Co. v. *M. C. R. R. Co.*, 103.

A motion to dismiss an action of replevin brought in the wrong county is not regarded as a dilatory motion and may be filed at any time.
Central Power Co. v. *M. C. R. R. Co.*, 103.

The pleadings in quo warranto are governed in general by the rules applicable in ordinary civil actions. *State* v. *York Light & Heat Co.*, 144.

If the phrase "in a plea of" were a necessary part of the pleading to begin a divorce proceeding, when inserted in a writ of attachment, a plea in abatement would be necessary to take advantage of its absence. *Cole* v. *Cole*, 358.

The clerical error in a libel for divorce, setting out an impossible date of marriage, is amendable in the discretion of the court. *Cole* v. *Cole*, 358.

POOR DEBTOR.

See DISCLOSURE.

It is necessary, in an action under R. S., Chap. 114, Sec. 76, to allege in the writ the false oath of the debtor and the fraudulent concealment of his estate or property, and to entitle the plaintiff to judgment, the allegations must be proved. *Doughty* v. *Sullivan*, 243.

The statement by the stenographer that the defendant was duly sworn is no proof of the fact. There is no provision of law making unsigned and unsworn statements of a stenographer in disclosure proceedings proof of the facts stated by him. *Doughty* v. *Sullivan*, 243.

To entitle the plaintiff to a verdict for such highly punitive damages as are allowed by the statute, the evidence must be clear and convincing that the defendant on oath wilfully disclosed falsely, or withheld or suppressed the truth upon an issue material to the subject being investigated.
Doughty v. *Sullivan*, 243.

The burden was upon the plaintiff to prove that the defendant did have in his possession or under his control, at the time of the disclosure, property not exempt from attachment and execution. *Doughty* v. *Sullivan*, 243.

PRINCIPAL AND AGENT.

See FRAUD.

A principal is liable for the fraudulent acts of his agent within the scope of his authority as agent. *Leavitt* v. *Seaney*, 119.

In such case, the principal holds out his agent as competent and fit to be trusted; thereby in effect, he warrants the fidelity and good conduct in all matters of his agency. *Leavitt* v. *Seaney*, 119.

PROMISSORY NOTES.

See NEW TRIAL. EVIDENCE.

One not a party, who signs his name on the back of a note in blank at its inception, and before it is negotiated, is an original promissor as to a bona fide holder before maturity. *First Nat. Bank* v. *Blake*, 313.

An indorser's revocation of his indorsement in blank does not effect another indorser's liability to a bona fide holder of the note. *First Nat. Bank* v. *Blake*, 313.

An extension of time of payment will not discharge a surety, unless it is valid and enforceable against the creditor, is based on sufficient consideration, and gives further definite time to the principal without the sureties' consent. *First Nat. Bank* v. *Blake*, 313.

A surety's possession of negotiated notes at the time of her death, without any explanation of such fact, was presumptive evidence that he paid them and had not been repaid by the principal. *Talbot* v. *Hathaway*, 324.

Partial payments made on a note before its maturity are presumed to have been made by the maker rather than the surety. *Talbot* v. *Hathaway*, 324.

QUO WARRANTO.

See PLEADING.

Quo warranto is a civil and not a criminal action. *State* v. *York Light & Heat Co.*, 144.

Quo warranto is the appropriate remedy against a corporation for abuse of power, misuse of privilege, malfeasance or nonfeasance. *State* v. *York Light & Heat Co.*, 144.

The pleadings in quo warranto are governed in general by the rules applicable in ordinary civil actions. *State* v. *York Light & Heat Co.*, 144.

An information in quo warranto for forfeiture of a franchise of a corporation to supply gas and electricity to inhabitants of a town is demurrable for failing to set forth the facts. *State* v. *York Light & Heat Co.*, 144.

The relief to be granted in quo warranto does not depend on the prayer for relief, but on the complaint and evidence. *State* v. *York Light & Heat Co.*, 144.

RAILROADS.

See EMINENT DOMAIN.

In an action under R. S., Chap. 52, Sec. 73, for injury to building by fire, evidence held to support findings that defendant's engine communicated the fire. *Warner* v. *M. C. R. R. Co.*, 129.

Under R. S., Chap. 51, Sec. 33, County Commissioners in assessing damages for land taken by railroad are not authorized to order construction of underground farm passes 14 feet high and 12 feet wide, costing from $12,000 to $17,000. *True* v. *M. C. R. R. Co.*, 375.

REAL ACTION.

See WRIT OF ENTRY.

Under R. S., Chap. 84, Secs. 14, 17, 19 and 21, when the court decreed that the issues on writ of entry were to be determined under the rules of equity, the case became practically a cause in equity, save in matters of pleading and procedure. *Poland* v. *Loud*, 260.

A final decree that will work a determination of the action is one which fully decides and disposes of the whole cause, leaving no further question for the future consideration and determination of the court. *Poland* v. *Loud*, 260.

One having neither prescriptive nor record title to land, but only a quitclaim from the State which had conveyed the property to another, and received no reconveyance thereof, cannot maintain a writ of entry therefor. *Lazell* v. *Strawbridge*, 362.

Writ of entry must fail, because plaintiff, after instituting the suit, conveyed her interest to another. *Lazell* v. *Strawbridge*, 362.

REPLEVIN.

See PLEADING.

The action of replevin is a local action, made so by statute, and must be brought in the county where the goods are detained.
Central Power Co. v. *M. C. R. R. Co.*, 103.

If a local action be brought in the wrong county, the error may be pleaded or taken advantage of at the trial under the general issue, or if the error is shown on the face of the record, it may be reached by demurrer.
Central Power Co. v. *M. C. R. R. Co.*, 103.

A motion to dismiss an action of replevin brought in the wrong county is not regarded as a dilatory motion, and may be filed at any time.
Central Power Co. v. *M. C. R. R. Co.*, 103.

SALES.

See EVIDENCE.

A seller seasonably delivering the goods on board a schooner chartered by the buyer for transportation is a delivery to the buyer.
Keeling-Easter Co. v. *Dunning*, 34.

A seller required to deliver the goods f. o. b. schooner for transportation to a distant point was not responsible for loss in the process of storing on the vessel.
Keeling-Easter Co. v. *Dunning*, 34.

There is a presumption that the common law of another State is similar to our own, but there is not presumption that the statute of another State is like the statute of our State. *Franklin Motor Co.* v. *Hamilton*, 63.

At common law there is no right of redemption by a conditional vendee.
Franklin Motor Co. v. *Hamilton*, 63.

That when no right of redemption is shown, R. S., Chap. 83, Sec. 45, requiring forty-eight hours' notice by the vendor before bringing suit against an attaching officer, does not apply. *Franklin Motor Co.* v. *Hamilton*, 63.

The sale of an automobile on instalments, whereby title was to remain in vendor until the instalments were fully paid, and he was to have the right to take immediate possession on default, was a conditional sale.
Franklin Motor Co. v. *Hamilton*, 63.

The conditional sale was a Massachusetts contract, to be construed and applied in accordance with the laws of Massachusetts.
Franklin Motor Co. v. *Hamilton*, 63.

The law of another State is to be proved, as a matter of fact.
Franklin Motor Co. v. *Hamilton*, 63.

SLANDER.

If slanderous words, whether written or oral, directly tend to the prejudice or injury of one in his profession, trade or business, they are actionable.
Pattangall v. *Mooers*, 412.

When the defamatory words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of the business great confidence must necessarily be reposed, they are actionable, although not applied directly by the speaker to the profession or occupation of the plaintiff. *Pattangall* v. *Mooers*, 412.

It is the law that when a person becomes a candidate for a public office, his qualifications and fitness for that office may be freely and fully discussed, commented on and criticised by any member of the community having an interest in the matter. *Pattangall* v. *Mooers*, 412.

The conduct and actions of such candidate may be canvassed, discussed and boldly criticised. Even his faults and vices, in so far as they necessarily affect his fitness for the office, may be investigated and commented on.
Pattangall v. *Mooers*, 412.

His private character, however, is only put in issue so far as his qualifications and fitness for the office may be affected by it. *Pattangall* v. *Mooers*, 412.

He does not, by becoming a candidate for office, surrender his private character to false accusations. *Pattangall* v. *Mooers*, 412.

Such comment and criticism may be harsh, severe and unnecessarily acrimonious, but so long as it is made in good faith, without express malice, it is privileged in law, and therefore not actionable. *Pattangall* v. *Mooers*, 412.

The law does not justify, under the guise of qualified privilege, a false, defamatory statement of specific acts of misconduct concerning a candidate for office.
Pattangall v. *Mooers*, 412.

While the publication of the truth respecting him may be justified, the publication of defamatory falsehoods will not be. *Pattangall* v. *Mooers*, 412.

STREET RAILROADS.

The construction by a street railroad company of additional turnouts in a street is unlawful, unless the approval of the municipal officers is first obtained.
Percy v. *L. A. & W. St. Ry.*, 106.

In a petition by a street railroad company to municipal officers to approve additional turnouts in a street, under R. S., Chap. 53, Sec. 9, it is not necessary to allege that public convenience or necessity requires it.
Percy v. *L. A. & W. St. Ry.*, 106.

Where the mayor of a city cast no vote on the question of the approval of a proposed turnout by a Street Railway Company, the permission granted by the other officers is valid, despite the mayor's interest.
Percy v. *L. A. & W. St. Ry.*, 106.

A street railway company, though authorized to use a street for purposes of conveying persons and property, is not authorized to construct a turnout in the street to use for switching cars. *Percy* v. *L. A. & W. St. Ry.*, 106.

A property owner, who would suffer special damage by reason of the construction of a turnout by street railway company, which was to be used for switching, is entitled to an injunction. *Percy* v. *L. A. & W. St. Ry.*, 106.

A street railroad company has no right to use the public highways as a switching yard, and is not entitled to a turnout for that purpose, nor for the purpose of affording a standing place for its cars, nor for its mere business convenience.
Percy v. *L. A. & W. St. Ry.*, 106.

TAX DEED.

One claiming under a tax deed must show that the taxing officials complied with the provisions of law giving authority for sale.
Hatch v. *Hollingsworth & Whitney Co.*, 255.

The recitals of a tax deed are not evidence of the facts stated, and they must be shown by proof aliunde the record.

Hatch v. *Hollingsworth & Whitney Co.*, 255.

It is held to be a condition precedent to the passing of the title, at such sales, that all of the proceedings of the officers who have anything to do with the listing and valuation of the land, the levy and collection of the tax, the advertisement and sale of the property, the return, filing, the record of the proceedings, whether the acts are to be performed before or after the sale, must be in strict compliance with the statute authorizing the sale.

Hatch v. *Hollingsworth & Whitney Co.*, 255.

TELEGRAPHS AND TELEPHONES.

In R. S., Chap. 55, Sec. 17, the word "upon" includes crossing a way by wires; therefore, the erection and maintenance of defendant's wires across highways and public ways were contrary to law.

Mt. Vernon Tel. Co. v. *Franklin Tel. Co.*, 46.

Where wires and poles erected and maintained in accordance with the statute are declared by R. S., Chap. 55, Sec. 17, to be deemed legal structures, it cannot be held by inference that those not so erected and maintained are nuisances, since the statute is in derogation of the common law, and therefore, must be construed strictly. It cannot be enlarged by implication.

Mt. Vernon Tel. Co. v. *Franklin Tel. Co.*, 46.

TRESPASS.

The plaintiff entered without force about half past ten in the evening, the place of business of defendant, a dentist, upon some business in which both parties were interested, and while there, indulged in improper language and declined to withdraw when ordered so to do by plaintiff.

Held: That defendant was not a trespasser ab initio; that although the distinction between trespass and trespass on the case has been abolished, the declaration cannot be regarded as one in case and plaintiff allowed to recover under it for damages for acts committed by defendant after his entry, the allegation of breaking and entering being of substance and not of form merely.

Nichols v. *Sonia*, 529.

TRIAL.

See REPLEVIN.

In replevin, verdict of not guilty returned by mistake will not be set aside, but amended and judgment entered for property and nominal damages.
Holt v. *Elwell*, 236.

The law does not allow a clerical error in a matter of form to deprive a suitor of a verdict won upon the merits of the case, and the verdict may be amended by the court. *Holt* v. *Elwell*, 236.

TRUSTS.

See BANKS AND BANKING.

The court, in instructing a trustee, in general can only lay down such rules of law as are within the scope of the questions propounded.
Bartlett v. *Pickering*, 96.

Where a trust conferred large discretionary powers on the trustee, it was not within the province of the court to direct him how he should exercise his discretion. *Bartlett* v. *Pickering*, 96.

Where an undivided interest in wild timberland was part of a trust estate, and the trustee was embarrassed in operating it, he could sell his interest under the will and reinvest the proceeds or obtain partition. *Bartlett* v. *Pickering*, 96.

Where an undivided interest in certain timberland was included in the property of a trust, the trustee was authorized to pay taxes, expenses of scaling, commissions, etc., out of any income in his hands, and was not limited to the proceeds of a sale of stumpage. *Bartlett* v. *Pickering*, 96.

Where wild timberland was the subject of a trust, the income of which was bequeathed to life tenants and the corpus to remainder-men, the income consisted of the annual growth of the timber. *Bartlett* v. *Pickering*, 96.

The income derived from the cutting of trees or the sale of stumpage rights belongs to the life beneficiaries and not to the remainder-man.
Bartlett v. *Pickering*, 96.

Where the trustee cuts trees, or permits such cutting, so much, and no more, of the proceeds of such cutting, in addition to previous cuttings, as is equivalent to the growth since the commencement of the trust, of available marketable timber, taking the tract as a whole, is income to be paid to the life beneficiaries. *Bartlett* v. *Pickering*, 96.

A trust in favor of a wife in a savings bank deposit in her husband's name was not established where no trust was declared when the deposits were made, and the husband's acts and words did not unequivocally imply that he held the deposits in trust for the wife. *Gower* v. *Keene*, 249.

VENDOR AND PURCHASER.

The right of rescission is limited to cases where the vendor can be put substantially in statu quo. *Getchell* v. *Kirkby*, 91.

A notice by a vendee to his vendor of his election to rescind the contract and a tender of the farm, containing a further statement that the vendee would deliver up possession as soon as he could move, which would be within the next ten days, did not constitute a restoration of the farm, and was, therefore, insufficient to constitute a complete rescission. *Getchell* v. *Kirkby*, 91.

Where a vendee rescinds for alleged fraud, he must restore within a reasonable time. *Getchell* v. *Kirkby*, 91.

What is a reasonable time is a mixed question of law and fact, except that when the facts are ascertained it becomes a question of law. *Getchell* v. *Kirkby*, 91.

The rule that a contract obtained by false and fraudulent representations may be rescinded, or affirmed, at the election of the defrauded party, applies to a conveyance of land under seal. *Getchell* v. *Kirkby*, 91.

The rescission of a contract for the sale of land for fraud does not follow, unless the vendee abandons possession to the vendor. *Getchell* v. *Kirkby*, 91.

A vendee may avail himself of a partial failure of consideration to reduce damages when sued for the price, and is not bound to resort to a separate action for deceit or on the warranty. *Getchell* v. *Kirkby*, 91.

WAIVER.

See CRIMINAL LAW. DEMURRER.

Accused held to have waived exceptions to refusal to direct a verdict by moving before the presiding Justice to set aside the verdict as against the law and the evidence. *State* v. *Simpson*, 27.

Where the demurrer of defendant to the declaration of plaintiff is overruled and the parties proceed to trial upon the merits of the case, the defendant will, under the circumstances of this case, be held to waive the right to exceptions to the overruling of the demurrer. *Gilbert* v. *Cushman*, 525.

WILD GAME.

The fish in the waters of the State and the game in the forests belong to the people of the State in their sovereign capacity, who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking. *State* v. *Sawyer*, 458.

The power to legislate respecting the protection and preservation of wild game within the States was not conferred upon Congress through the commerce clause of the Constitution. *State* v. *Sawyer*, 458.

The ownership of wild game, so far as it is capable of ownership, is in the States for the benefit of all their people in common. *State* v. *Sawyer*, 458.

Congress therefore acquired no power under the general welfare clause of the Constitution to make regulations concerning wild game, because wild game is not "property belonging" to the United States. *State* v. *Sawyer*, 458.

The power of the State of Maine to enact laws and regulations for the protection and preservation of wild game within her borders, including migratory game birds, was in no way suspended or abridged by the Act of Congress of March 4, 1913. *State* v. *Sawyer*, 458.

The provision of the game laws of the State of Maine, which the respondent violated, was operative and enforceable against him. *State* v. *Sawyer*, 458.

WILLS.

The statute regulates the right of appeal from decrees of the Judge of Probate, and but two ways are provided, Secs. 28 and 29, Chap. 65, of R. S., and unless the provisions of the statute are complied with, the right of appeal is lost.
Carter et al., Applts., 232.

A notice of appeal from an order allowing the probate of a will, filed more than twenty days after the entry of the order, is of no effect under R. S., Chap. 65, Secs. 28, 29 or 30. *Carter et al., Applts.*, 232.

The grant of leave to file an appeal from the Judge of Probate, under R. S., Chap. 65, Sec. 30, does not authorize the filing of a subsequent appeal after the dismissal of one appeal. *Carter et al., Applts.*, 232.

Before an appeal can be entered under Section 30 of Chap. 65, of R. S., there must be a petition and notice thereon, and if upon hearing the petition is granted, the entry should be made at the term which it is granted, but before the appeal is entered, the petitioners must file an appeal bond, as required by the statute giving the right of appeal. *Carter et al., Applts.*, 232.

An executor cannot maintain a bill for the construction of a will when he has no personal interest which may be effected by a construction.
Tapley v. *Douglass*, 392.

An executor may be advised, when necessary to aid him in the performance of his duties as executor, and for his protection. *Tapley* v. *Douglass*, 392.

His duties are to conserve, administer and distribute the estate in accordance with the will. *Tapley* v. *Douglass*, 392.

WITNESSES.

At common law, parties were not competent witnesses in their own suits. In this State, by statute, parties in general may be witnesses in their own behalf, but not when at the time of the trial, "the party prosecuting, or the party defendant, or any one of them, is an executor or an administrator."
Hallowach v. *Priest*, 510.

An exception to the rule of exclusion exists when "the representative party is nominal only." *Hallowach* v. *Priest*, 510.

The statute makes no distinction between actions of contract and actions of tort. *Hallowach* v. *Priest*, 510.

The statutory policy that living parties should not be permitted to tell their stories when the lips of adverse parties are sealed by death applies with equal force to torts and contracts. *Hallowach* v. *Priest*, 510.

The living party's wife is not a competent witness for him in such case. *Hallowach* v. *Priest*, 510.

WORDS AND PHRASES.

"Attractive Nuisances" 519
"Cattle Guard" 375
"Cattle Pass" 375
"Ceased to do business" 180
"Commerce" 458
"Creditor" 285
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ERRATA

Darling v. *Bradstreet*, page 140, line 12 from top of page, strike out "51" and substitute therefor "55"; also strike out "70" and substitute therefor "79."

Moore, Appellant, page 196, line 8 from top of page and line 10 from bottom of page, strike out "Arthur" and substitute therefor "Albert."

Auburn v. *Paul*, page 209, line 10 from top of page, strike out "Cockbum" and substitute therefor "Cockburn."

Forgioni & Romano Co. v. *Burnham & Morrill Co.*, page 335, line 2 from bottom of page, insert "by" after "made."

Walker v. *Savings Bank*, page 357, line 15 from top of page, strike out "if" and substitute therefor "is."

Horton v. *Wright*, page 441, line 24 from top of page, strike out "mortgagor" and substitute therefor "mortgagee;" and page 442, line 3 from top of page, strike out "Waite" and substitute therefor "White."