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THE SUPREME COURT.

CHIEF JUSTICE,

FRANK NESMITH PARSONS.

ASSOCIATE JUSTICES,

WILLIAM MARTIN CHASE,*
REUBEN EUGENE WALKER,
GEORGE HUTCHINS BINGHAM,
JOHN EDWIN YOUNG,
ROBERT JAMES PEASLEE.*

ATTORNEY-GENERAL,

EDWIN GAMAGE EASTMAN.

* See memorandum on page 424.

THE SUPERIOR COURT.

CHIEF JUSTICE,

ROBERT MOORE WALLACE.

ASSOCIATE JUSTICES,

ROBERT GORDON PIKE,
ROBERT JAMES PEASLEE,*
CHARLES FRANCIS STONE,
ROBERT NELSON CHAMBERLIN,
WILLIAM ALBERTO PLUMMER.†

*Retired December 28, 1907, to become an associate justice of the supreme court.

† Assumed office December 28, 1907, under appointment of December 6.

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CASES

DETERMINED IN

THE SUPREME COURT

OF

NEW HAMPSHIRE.

Rockingham, July 2, 1906.

GALLAGHER *v.* COTTON.

The fact that a deposition was written by a stenographer under the direction of the commissioner is not a valid ground of objection to its admissibility as evidence.

If the caption of a deposition omits to state whether the adverse party was or was not present, the defect may be obviated by amendment.

ASSUMPSIT, to recover the amount due on a sale of spirituous liquor. Trial by the court and verdict for the plaintiff. Transferred from the January term, 1906, of the superior court by *Wallace*, C. J.

The defendant objected to the reception of a deposition offered by the plaintiff because it was written by a stenographer, who typewrote it under the direction of the commissioner, and because the caption did not state whether the defendant was or was not present. The objections were overruled, and the defendant excepted.

John W. Kelley and *William E. Marvin*, for the plaintiff.

Page & Bartlett and *Ernest L. Guptill*, for the defendant.

WALKER, J. The plaintiff's right to maintain an action for the recovery of the price of the liquors sold to the defendant cannot be doubted. The facts differ in no material respect from those presented in *Corbin* v. *McConnell*, 71 N. H. 350.

The exception to the admission of the deposition on the ground that it was written by a stenographer under the direction of the commissioner is not tenable. See Rule 24 of the superior court (71 N. H. 679).

The defendant also excepted to the deposition as evidence because the caption does not state whether he was or was not present. The statute provides that the magistrate "shall certify . . . that the adverse party was or was not present, was or was not notified, and that he did or did not object." P. S., *c.* 225, *s.* 9. While it has been held that in order to make a deposition competent as evidence it must appear from the caption that the provisions of the statute have been strictly followed (*Burnham* v. *Porter*, 24 N. H. 570; *Hayward* v. *Barron*, 38 N. H. 366, 370; *Cushman* v. *Wooster*, 45 N. H. 410; *Wells* v. *Iron Co.*, 47 N. H. 235), it is probably unnecessary to decide the legal question raised by the exception in this case. The defendant either was or he was not present at the caption; and if he is in a position to take advantage of the omission in the commissioner's certificate to state that fact, the defect may be obviated by an amendment. The effect of the omission related exclusively to the competency of the deposition as evidence. The question, therefore, was for the court to pass upon as a question of law. After the deposition was admitted, it is not perceived how the omission in the caption could affect the relevancy or weight of the testimony of the deponent to the disadvantage or prejudice of the defendant. The objection relates merely to the validity of the certificate, and the defendant would suffer no harm if the truth as to his presence or absence at the caption were now inserted by the commissioner in his certificate. In such a situation justice is secured by an amendment. *Whittier* v. *Varney*, 10 N. H. 291, 304; *Rand* v. *Dodge*, 17 N. H. 343, 355; *Cater* v. *McDaniel*, 21 N. H. 231; *Hutchins* v. *Gerrish*, 52 N. H. 205. When the amendment suggested is made the order will be,

Exceptions overruled.

PARSONS, C. J., and CHASE, J., concurred: BINGHAM, J., doubted: YOUNG, J., concurred in the result.

Strafford,
July 2, 1906.

MURCHIE *& a., Assignees, v.* WENTWORTH *& a.*

If the seizure of property upon execution and the proceedings leading to a sale thereof are valid as against the debtor, his subsequent assignee in insolvency cannot avoid the levy on the ground that the officer did not retain exclusive possession of the goods.

BILL IN EQUITY, to restrain the levy of executions. Trial by the court. Transferred from the February term, 1905, of the superior court by *Peaslee*, J.

In June, 1903, creditors of the Place Lumber Company, defendants in this suit, attached its stock of lumber and other personal property. In December, 1903, executions issued in those actions, and the officer took exclusive possession of the property thereon. It is claimed by the plaintiffs that he did not retain the exclusive possession because he appointed an employee of the company as keeper and allowed sales of the property to be made. January 24, 1904, the corporation made a common-law assignment to the plaintiffs for the benefit of its creditors, and on January 28 the officer posted notices of a sale of the property on the executions, to take place February 2. The debtor, the attaching creditors, and the officer understood that there had been no abandonment of the execution lien. The court ordered the bill dismissed, and the plaintiffs excepted.

Jewett & Plummer and *Guy Murchie* (of Massachusetts), for the plaintiffs.

Arthur G. Whittemore, for the defendants.

WALKER, J. It is conceded that as against the assignor, the debtor, the seizure of the property upon the executions and the subsequent proceedings leading to a sale of it, before the assignment was made, were valid. The officer took exclusive possession of the property, and both he and the debtor understood at the time of the assignment that there had been no abandonment of the levy. If the property had been sold under the levy thus begun, the debtor's interest therein would have been legally disposed of. It would have been bound by the execution lien. The fact that it made a common-law assignment to the plaintiffs for the benefit of its creditors, after the seizure and before the time advertised for the sale, did not confer upon the assignees rights in the prop-

erty not possessed by the assignor. If it was bound by the levy, they were. If it is assumed that the proceedings under the levy were voidable by attaching creditors, because the officer's possession was not sufficiently exclusive, it does not follow that the assignees can avoid the levy for that reason. If they are entitled to an injunction against the levy, it must be because they have a superior title to the property; but it has been determined that the title of a common-law assignee, in the absence of statutory provision, is merely the title of the assignor, and that if the latter had no enforceable right to the property, the former had none. *Adams* v. *Lee*, 64 N. H. 421; *Peterborough Savings Bank* v. *Hartshorn*, 67 N. H. 156, 158; *Ætna Insurance Co.* v. *Thompson*, 68 N. H. 20; *Hurlbutt* v. *Currier*, 68 N. H. 94; *Thompson* v. *Esty*, 69 N. H. 55, 76; Bur. Ass., *s.* 349; 4 Cyc. 218. The plaintiffs are not entitled to the relief sought.

Exception overruled.

All concurred.

Hillsborough, July 2, 1906.

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ST. PIERRE *v.* FOSTER *& a.*

The failure of a master to inspect an appliance furnished for his servant's use does not constitute actionable negligence, if the particular defect which caused the servant's injury was not reasonably to be anticipated and was not known by the master in season to prevent an accident.

CASE, for personal injuries. Trial by jury and verdict for the plaintiff. Transferred from the January term, 1906, of the superior court by *Peaslee*, J., upon the defendants' exceptions to the denial of motions for a nonsuit and the direction of a verdict in their favor.

The plaintiff was employed in the defendants' tannery, in one room of which a new blower had been installed a few days before his injury. The plaintiff was required to oil this machine when it was in motion. The blower belt ran at a speed of about thirty feet a second. In order to oil one of the bearings when the machine was running, it was necessary for the plaintiff to insert his hand through the belt, remove the cap of the oil-cup, and fill the cup from an oil-can. On the morning of the accident the plaintiff proceeded to oil the blower while it was running. Having first removed the cap, he took the oil-can in his left hand and reached through the belt. As to what subsequently occurred the

plaintiff testified as follows: "Before I put a drop of oil in the oil-cup, I heard something kind of slap me and caught me and take my oil-can away and threw my hand right in somewhere, I do n't know where, so it got broke and pulled my thumb right off. Felt like a whip." The plaintiff stood by the blower a few moments, looked at the machine to discover the cause of his injury, and saw "something like a piece of lacing, four or five inches long, . . . slapping." He also testified that he did not notice any trouble with the belt until he felt the lacing strike his hand.

Branch & Branch and *Hamblett & Spring*, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. The plaintiff bases his right to recover on the proposition that it can be found the defendants' failure to do what the ordinary man would have done in relation to inspecting the belt was the legal cause of his injury. If it can be found that they were negligent in that respect,—a question as to which no opinion is expressed,—it cannot be found that their failure to inspect the belt was the legal cause of the plaintiff's injury unless there is some evidence which tends to prove that if they had used ordinary care for the plaintiff's safety they would have known either that the belt lace was likely to pull out in the way it did, or that it had in fact done so, in time to prevent the accident. Is there any evidence which tends to establish either proposition?

It cannot be said the defendants were in fault for not anticipating that the lace might pull out in the way it did, if they used such a lace as the ordinary man would use in lacing such a belt and did the lacing in a skillful manner, unless it can either be said as a matter of law or found as a fact that the defendants either knew or ought to have known that even under such circumstances belt laces are liable to pull out in the way this one did, and that the plaintiff did not know it and was not in fault for not knowing it. That belt lacings are liable to pull out under these circumstances is not a matter of common knowledge, and there is no evidence which tends to prove that such is the fact; consequently, it cannot be found the defendants were in fault for not anticipating that this lace might pull out in the way it did unless there is evidence tending to prove either that such a lace should not have been used in lacing such a belt, or that the lacing was unskillfully done. An examination of the belt made shortly after the accident furnishes all the evidence there is on these issues. This examination showed that about five inches of one end of one of the laces used in the belt was loose, but that otherwise the belt was all

right. It cannot be found from such evidence either that the lace was unsuitable for the purpose for which it was used, or that the lacing was unskillfully done; in other words, it cannot be found from the mere fact that one end of the lace pulled out that the defendants ought to have anticipated that it would do so. Consequently, it cannot be found that the defendants were in fault for not anticipating that it would.

Since this is so, it will be necessary to consider whether there is any evidence from which it can be found that the defendants ought to have known that the lace had pulled out in time to prevent the accident. That five inches of one end of the lace was loose, and that it caught the plaintiff's hand and drew it into the machine, has no tendency to prove that the end of the lace had been loose an appreciable length of time; and the other evidence on this issue all tends to show that the lace pulled out at or about the time the plaintiff felt it strike his hand. When he was taking the cap off the oil-cup he stood so close to the belt that it is probable he would have both seen the end of the lace and heard it slap as it passed over the pulley if it had been loose at that time; for notwithstanding it required but a few seconds to remove the cap, the belt was running so fast that the lace passed around the pulley about twice a second, and there is nothing to show why the unusual noise caused by the slapping of the loose end of the lace would not have been as likely to attract his attention at that time, as after he was hurt. He does not claim either that his attention was distracted or that he was not on the lookout for the dangers he knew were incident to oiling the blower when it was running. One of these must have been trouble with the belt, for the danger incident to putting his hand in the narrow space between the rapidly revolving fans and the swiftly running belt when there was trouble with either was perfectly obvious. So the only reasonable inference that can be drawn from the fact that he neither saw the loose end of the lace before he was hurt nor heard the slapping as it passed over the pulley is that the lace pulled out of the belt after he removed the cap from the oil-cup, or, in other words, at or about the time he felt it strike his hand.

In short, the facts disclosed by the examination of the belt have no tendency to prove that an unsuitable lace was used, or that the lacing was unskillfully done, or that the end of the lace was loose so long prior to the accident that the defendants would have discovered it if they had used ordinary care for the plaintiff's safety. Consequently, the cases on which the plaintiff relies (*Spicer* v. *Company*, 138 Mass. 426; *Bushby* v. *Railroad*, 107 N. Y. 374; *Flanigan* v. *Company*, 63 N. J. Law 647; *Toledo etc. Ry.* v. *Conroy*, 68 Ill. 560; *Munch* v. *Railway*, 75 Minn. 61; *Union Pacific Ry.* v.

Daniels, 152 U. S. 684) are not in point; for in all of them the evidence derived from an examination of the appliance which caused the servant's injury tended to prove that it was constructed from unsuitable material, or that the work of constructing it was unskillfully done, or that the defect which caused the servant's injury originated so long before the accident that the master would have known of it in time to prevent the accident if he had used ordinary care for his servant's safety.

Since there is no evidence from which it can be found either that the defendants ought to have anticipated that this lace would pull out as it did, or that they could have done anything after it did pull out to prevent the accident, it cannot be found that their failure to inspect the belt was the legal cause of the plaintiff's injury, even if it can be found they failed to do what the ordinary man would have done in relation to inspecting it.

Exceptions sustained: verdict set aside: verdict and judgment for the defendants.

All concurred.

Cheshire,
July 2, 1906.

BRIGHAM, *Guardian, & a. v.* MADDEN, *Guardian.*

A mortgagee of chattels cannot, without the mortgagor's consent, apply the property in satisfaction of a claim against the mortgagor which is not included in the mortgage indebtedness.

The guardian of an incompetent person may maintain an action for the discharge of a mortgage given by his ward in fraud of creditors and covering property needed for the payment of debts.

BILL IN EQUITY, to compel the defendant to discharge a mortgage of personal property, given by Austin N. Kingsley to Charles C. Kingsley in April, 1904. Brigham is the guardian of Austin, and the defendant of Charles. Transferred from the October term, 1905, of the superior court by *Peaslee*, J., upon the defendant's exception to a decree ordering him to discharge the mortgage.

At the time the mortgage was executed neither of the parties thereto was under guardianship. Austin was then capable of making a contract, while Charles was not. Austin was largely indebted to various persons and had in his possession property of Charles amounting to about $4,000, but neither understood that

the mortgage was given as security for Austin's liability on that account. Charles had no purpose when he executed the affidavit on the mortgage, and Austin's sole purpose was to delay and defraud his creditors. Austin is insolvent, and the property covered by the mortgage is needed to pay his debts.

Hosea W. Brigham and *Cain & Benton*, for the plaintiffs.

Joseph Madden and *Charles H. Hersey*, for the defendant.

YOUNG, J. If Austin was indebted to Charles when the mortgage was made, the court has found the mortgage was not made to secure Charles against loss on that account. Consequently the latter's guardian cannot hold the property for that purpose; for when the mortgagee has a claim against the mortgagor that is not included in the mortgage indebtedness, he cannot apply the mortgaged property in satisfaction of it without the mortgagor's consent.

Notwithstanding Austin is estopped to deny the validity of this mortgage, his creditors are not, and Austin's guardian represents them in so far as the property is needed to pay his debts (*Cook* v. *Lee*, 72 N. H. 569, 571); and since the property is needed for that purpose, the order must be,

Exception overruled.

All concurred.

Grafton,
July 3, 1906.

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CANAAN v. ENFIELD VILLAGE FIRE DISTRICT.

Where exempted property is assessed for purposes of taxation, the owner cannot plead the exemption in defence of an action for recovery of the tax, but must file a petition for an abatement within the time limited by statute.

ASSUMPSIT, to recover the amount of a tax assessed for the year 1904 upon property of the defendants located in the town of Canaan. The writ is dated September 16, 1904. Transferred from the November term, 1905, of the superior court by *Chamberlin*, J., upon an agreed statement of facts.

The defendants are a municipal corporation within the limits of the town of Enfield. In pursuance of legislative authority and a

vote of the inhabitants, the district purchased land in Canaan, constructed a reservoir thereon, and established a system of water-works which at the time of the assessment in question was used for municipal purposes and for supplying private persons with water under contracts which yielded an income; and the tax sought to be recovered was assessed upon the defendants' property in Canaan so used. The defendants do not question the regularity of the assessment, or claim that the tax is not proportional. Judgment is to be rendered in accordance with the opinion of the court upon the foregoing facts.

James B. Wallace, *George F. Morris*, and *Batchellor & Mitchell*, for the plaintiffs.

Streeter & Hollis, for the defendants.

BINGHAM, J. This suit is brought under section 17, chapter 60, of the Public Statutes, to recover a tax assessed April 1, 1904, upon certain real estate owned by the defendants in the plaintiff town. The contention of the defendants is that their charter authorized the purchase of the property for water-works purposes and exempted it from taxation (Laws 1903, *c.* 221); but this contention cannot be set up in defence of the action. The assessment is in the nature of a judgment and cannot be attacked collaterally. If the property assessed was not taxable, or the tax was excessive, the defendants' remedy was by an application to the selectmen of Canaan for an abatement, and, in case they declined to grant it, to seasonably petition the court for a like purpose. By so doing a hearing could be had and any error in the assessment corrected. *Farmington* v. *Downing*, 67 N. H. 441, 442; *Pittsfield* v. *Exeter*, 69 N. H. 336, 338. But as more than nine months have elapsed since the defendants were notified of the tax (P. S., *c.* 59, *s.* 11), it is now too late to petition for an abatement; and in compliance with the order made in the superior court, there must be,

Judgment for the plaintiffs.

All concurred.

Hillsborough,
August 7, 1906.

74 10
74 209

STATE v. NEWMAN & a.

An objection that evidence adduced is insufficient to establish the facts in issue with the requisite degree of certainty goes merely to the weight of the proof and raises no question of law.

If there is any competent evidence to sustain a verdict, a motion to set it aside as against the weight of the evidence raises no question of law.

Where officers of a corporation are charged with knowingly using funds of the company for the payment of a private debt, their previous statements as to the character of the obligation are admissible in evidence against them.

In a criminal proceeding against one party to a written contract, parol evidence is admissible to show the belief under which he acted, although it may tend to alter or contradict the terms of the instrument.

Where instructions to a jury embody a plain and correct statement of a rule of law, with all the modifications thereof applicable to the particular case, it is not sufficient ground for a new trial that in commenting upon the evidence the rule was repeated, omitting some of its exceptions and qualifications

The recital in a charge of a purely supposititious state of facts and the inferences fairly deducible therefrom, made for the purpose of illustrating to the jury the inconclusive character of certain evidence upon a question at issue, is within the discretion of the trial justice and does not furnish cause for setting aside a verdict.

INDICTMENT, for embezzlement of the funds of the Manchester News Publishing Company, a corporation of which the defendants were officers. Trial by jury and verdict of guilty. Transferred from the January term, 1906, of the superior court by *Peaslee*, J.

The evidence for the state tended to prove that the Manchester News Publishing Company was organized in January, 1901, for the purpose of publishing a newspaper and doing job printing. The defendant Davison was elected treasurer at the first meeting. The corporation issued no stock and acquired no property until several months later. In September, 1901, the capital stock was increased from $15,000 to $25,000, and the defendant Newman was elected president. At a meeting of the directors, held December 23, 1901, Newman and Davison expressed a desire to sell to the corporation a printing press and fixtures previously purchased by them of the Goss Printing Company. They stated that the property had been purchased conditionally, that the vendors had a lien thereon for the purchase price, and that a part of the consideration was unpaid. The directors voted to purchase

the property of the defendants, to issue to them in payment therefor $13,000 of the capital stock of the corporation, to "deliver the same, in consideration of the payment of the purchase price, and to take therefor a bill of sale of the same subject to such conditions as exist between said Davison and Newman and the Goss Printing Company." The clerk of the corporation was instructed to attend to the execution of a "proper bill of sale and other papers." January 1, 1902, a bill of sale of the property was drawn by Fellows, clerk of and counsel for the corporation, and was signed by the defendants. It names the parties, recites the consideration, describes the property, and states that the vendors "warrant the said printing press and fixtures free from all claims and incumbrances of any and all persons whatsoever."

It also appeared from the state's evidence that on September 30, 1901, an account was opened in the First National Bank of Manchester, New Hampshire, in the name of "Manchester News Publishing Company, H. N. Davison, Treasurer." The first deposit of $4,750 was the proceeds of a note for $5,000, signed by the corporation and indorsed by E. S. Whitney and B. F. Welch. The total deposit was $10,667.50 to February 10, 1902, when there was a balance of $2,501.25; and on that day the press was accepted, and a check for $1,770, payable to the order of the Goss Printing Company, signed by Newman as president and Davison as treasurer, was drawn upon the First National Bank and given in part payment of the first instalment of $1,875 due upon the property. The check was paid by the bank and charged against the account of the corporation. The state alleged that the check was drawn in fraud of the corporation's rights, and that the transaction constituted the crime alleged in the indictment. The defendants were general managers of the corporation. Although there was no by-law which authorized them to disburse the funds, they paid bills as they came due. Newman knew and approved all that Davison did.

The defendants made two defences: (1) That the money used to pay the instalment on the press was their own; (2) that the instalment was a debt which the corporation had assumed, and that the money used to pay it, if money of the corporation, was devoted to a lawful and proper purpose. Their testimony tended to prove that the corporation was formed to take over a business conducted by them as copartners, and that nothing was done by the company until January, 1902, except to perfect an organization. From October 30, 1900, to January 1, 1902, the defendants did business under the name "Manchester News Publishing Company," and on the former date they opened an account with the First National Bank, under the name "H. N. Davison, Treasurer Manchester

News Publishing Company," which was continued until May, 1901, when they removed the account to the Second National Bank, and thereafter deposited with the latter institution moneys received in their business and drew checks thereon in payment of a considerable part of the bills of the corporation during its existence.

The defendants further testified that prior to the purchase of the press from the Goss Printing Company, and in anticipation of it, they arranged with Whitney and Welch, who were their personal friends, to have the two indorse a note for $5,000 for discount at the First National Bank. This was done on September 30, 1901. The proceeds of the note were deposited to the credit of "H. N. Davison, Treasurer Manchester News Publishing Company," because the defendants were conducting their partnership business in that name. The note was signed "Manchester News Publishing Company, H. N. Davison, Treasurer," and was secured by fifty shares of the stock of the corporation, issued in Whitney's name. The note was indorsed by Whitney and Welch on the credit of the defendants and as a matter of personal friendship. At that time the corporation had neither credit nor property. The subsequent deposits in the First National Bank consisted of a note for $500 given by one Kennard for stock issued to him and proceeds of sales of other stock belonging to the defendants. The account was kept separate from the moneys of the corporation in the Second National Bank, for the reason that the defendants considered that the funds belonged to them. From September 30, 1901, to February 10, 1902, the defendants drew checks upon the First National Bank to the amount of $2,500 in excess of the proceeds of the first note, for the payment of bills incurred in installing the press and running the business; and they did this "because the bills had to be paid, and there was no other money with which to pay them."

It also appeared from the defendants' evidence that on August 1, 1901, they entered into a contract with the Goss Printing Company for the purchase of a press and fixtures. The contract purported to be a lease of the property, and provided for the payment of $7,500, less $500 allowed for an old press. The first instalment of $1,875 became due when the press was set up, and the remaining instalments were payable monthly in varying amounts. In addition to the first instalment of $1,875, the defendants expended about $2,500 in transportation charges and expenses of installation. The value of the press when set up was $15,000, the folder alone was worth $10,000, and a fair rental for the property was $200 a month. When the vote was passed authorizing the purchase of the press by the corporation, both defendants understood

that the company assumed the payment of future instalments. Their attention was not called to the warranty in the bill of sale, and when they signed they assumed that the instrument had been drawn in accordance with the vote of the directors as they understood it.

It further appeared that when the corporation was formed, and later when the capital stock was increased, it was understood that the greater part, if not all, of the stock was to be issued to the defendants for the property which they were to transfer to the company. January 28, 1902, the directors voted to purchase of the defendants the plant used by them as partners, and to issue to them in payment therefor capital stock of the par value of $7,000, "providing the same shall be agreed to by said parties, and a full and complete title is given." A bill of sale of this property was subsequently executed. The defendants understood that the stock voted to them in payment for the press and the plant might be issued by them in such form and to such persons as would best serve their purposes and the requirements of the business. The proceeds of the note for $5,000 and all moneys received from sales of stock were used by the defendants in the company's business and for the payment of its legitimate bills. There was no direct evidence that the funds deposited in the First National Bank came from any other source than the first note and sales of the defendants' stock.

The evidence in rebuttal tended to prove that Whitney understood he was indorsing a note of the corporation and was giving credit to the corporation; that at the annual meeting in February, 1903, Davison, as treasurer, reported that the entire capital of $25,000 had been paid in; that the press in question was worth about $7,500; that the clerk of the corporation, understanding from the defendants' statements that they considered themselves bound to make future payments upon the press, inserted the warranty in the bill of sale for the purpose of securing a clear title, in accordance with the vote of the directors.

At the close of the state's evidence and again at the close of all the evidence the defendants moved that a verdict of not guilty be directed. Both motions were denied, subject to the defendants' exceptions.

Fellows, clerk of the corporation, was called as a witness by the state. He testified that he recalled the substance of several conversations with the defendants, and was then asked: "Who was to pay the balance due to the Goss Printing Company, as they told you?" Subject to the defendants' exception, the witness was permitted to reply. His answer was: "I understood that Davison and Newman were to pay for it."

The court instructed the jury in part as follows, the defendants excepting to the portions enclosed in brackets: "The charge here is embezzlement, and it means that these defendants, having the custody of the funds of the corporation, intentionally used those funds for their own purposes. . . . The state . . . must have shown that the money in the bank was the property of the corporation, that the debt on the press was theirs and not that of the corporation, and that these respondents, well knowing these facts, took the funds to pay their own debts. . . . [Something has been said about a guilty intent; that such an intent must be proved. That is true; and it is also true that proof of the intent is usually found in the nature of acts knowingly done. If a man stealthily takes your horse from the barn at night, it is sufficient evidence to warrant the conclusion that he intended to steal the horse; and if he should afterward, upon his trial, testify that he took it because he thought he owned it, his evidence would not be likely to raise a reasonable doubt in your minds. In this case, if the facts are that the debts were those of the respondents, and they took the funds of the company to pay such debts, you are warranted in drawing the inference that they intended to embezzle the funds.] It is also suggested that they may have misunderstood the situation, and therefore that they have a defence on that ground. If such is the fact, the contention is correct, and they are entitled to your verdict; but on this issue the question is not what they now say about the matter, but what they in fact knew about it at the time of the transaction. . . . If at the time these transactions took place these men understood that the company assumed the debt, and that the debt was the company's and not theirs, and acted upon that belief, they are not guilty. The question is: Did they then so believe, or did they understand that the debt was theirs? This is the issue for you to decide."

Edwin G. Eastman, attorney-general, and *Edward H. Wason*, solicitor, for the state.

Branch & Branch, *Doyle & Lucier*, *Moodybell S. Bennett*, and *Eugene B. Hayes*, for the defendants.

George L. Dillaway and *Coggan & Coggan* (all of Massachusetts), filed a brief for the defendants.

PARSONS, C. J. "If any officer, agent, or servant of a corporation, public or private, . . . shall embezzle or fraudulently convert to his own use any money, bill, note, or security for money, evidence of debt, or other effects or property whatever of such

person or corporation, or in their possession or keeping, or shall knowingly or voluntarily pay or deliver any such money . . . to any person or to the order of any person, knowing that such person is not entitled to receive it, . . . he shall be fined," etc. P. S., *c.* 273, *s.* 17.

There was evidence tending to show that the deposit in the First National Bank to the credit of the Manchester News Publishing Company was the property of that corporation; that the claim of the Goss Printing Company was the debt of the defendants, and that no liability therefor had been assumed by the corporation; and that the defendants, knowing these facts, and having as officers of the corporation possession of the money owned by or in the possession and keeping of the corporation, knowingly applied the corporate funds to the payment of their private debt.

If the facts which the evidence tended to prove were established with the requisite degree of certainty, a violation of the statute was made out. The objection, that the evidence was insufficient to establish the facts in issue with that degree of certainty, is merely to the weight of the evidence and raises no question of law. The claim that "if in connection with the act which is alleged to be criminal there are other facts and circumstances which negative the existence of a criminal intent or are consistent with innocence, then a conviction cannot be had" may be sound, but it has no application here; for there are no facts or circumstances whose existence is conceded, or which are so conclusively proved as to be beyond dispute, which "negative a criminal intent" or are "consistent with innocence." It is not conceded or conclusively established that the money in the bank was the defendants', or that the debt was the corporation's to pay, or that the defendants misunderstood the situation. All these facts were in dispute before the jury; and if there was evidence to support the state's claim, it cannot be held as matter of law that any one of them is established by the contrary evidence, or by the presumption of innocence. As the defendants did not rest their case upon their motion for a verdict made at the close of the state's case, but proceeded to introduce evidence, the question is whether the whole case contains any evidence for the jury.

The defendants, having done business as a copartnership under the name of the Manchester News Publishing Company, formed a corporation with the same name. Before this their bank account was kept in the name of H. N. Davison, treasurer Manchester News Publishing Company. Soon after the vote (September 23, 1901) making the capital stock of the corporation $25,000, an account was opened (September 30, 1901) under the name "Man-

chester News Publishing Company, H. N. Davison, treasurer." There was direct evidence that the deposit with which this account was opened ($4,750) was the property of the corporation, and that claims against the corporation were paid from this account. The defendants contended that all other deposits to this account came from sales of stock belonging to them; but there was no evidence of the issue of any stock to them until the issue of $13,000 for the press was authorized on December 23, 1901, and the transaction completed by the bill of sale of January 1, 1902, before which dates there had been additional deposits amounting to $2,792.50. The act charged as embezzlement was a payment made from this account. That the account stood in the name of the corporation, changed from the form used by the copartnership, and that moneys belonging to the corporation were deposited in the account and claims against it paid therefrom, was evidence tending to show that the account represented money belonging to the corporation. Whether the defendants' explanation was true, and what inference should be drawn from the inability of the defendants to tell from whom they had received the money deposited in the account, was for the jury.

The language of the vote of the directors was evidence as to the terms upon which the press was purchased by the corporation. Other evidence consisted of the bill of sale signed by the defendants and the oral testimony. But the vote of the directors even does not conclusively establish that the corporation were to pay the defendants $13,000 in capital stock for the press and then pay the parties of whom it was purchased substantially the full purchase price. The directors voted to purchase of the defendants the press and fixtures at a price not exceeding $13,000, and to pay for it in capital stock at par. This language is at least open to the inference that complete title to the press was to be acquired by the corporation by the issue of $13,000 capital stock. It being understood that Davison and Newman had not a complete title, the title that could be then acquired from them would necessarily be subject to the conditions then attached to the press. The instructions to the clerk to see to the execution of "the proper bill of sale and other papers" might indicate an understanding that something more than a mere bill of sale would be necessary to secure to the corporation complete title to the press in exchange for the capital stock. There is no necessary conflict between the vote of the directors and the bill of sale. The directors voted to buy, not the interest of Davison and Newman, but the press. The bill of sale conveys what the directors voted to buy, and warrants the title. Assuming that Davison and Newman were responsible, this was a simple method of carrying out the vote and authorizing

the issue of the $13,000 capital stock. The vote may have contemplated "other papers" to secure the warranty of the bill of sale; but whether the mere bill of sale with warranty was or not a complete execution of the duty imposed on the clerk, the evidence of the record of the directors' vote does not conclusively establish that the corporation bought Davison's and Newman's title instead of the "press and fixtures." What inference should be drawn from a comparison of the vote to purchase the press with the vote of January 28, 1902, to purchase the Hanover-street plant in exchange for $7,000 of the capital stock at par, "providing . . . a full and complete title is given by the company," was also for the jury. If it can properly be argued therefrom that in the case of the press only the interest of the defendants in the contract for the press was purchased, it may also be suggested that the reason for the definiteness of the second vote was the better understanding of the character of the defendants' title to the press and an unwillingness to take other property from them upon their warranty of title. There being some evidence to sustain the state's case, the motion to set aside the verdict as against the weight of the evidence raises no question of law.

The objection to the testimony of Fellows, that his understanding of the contract evidenced by the bill of sale was incompetent, is sound as matter of law as stated, but is not sustained by the record. The witness was not asked for his understanding, but for what the defendants told him. The question to which objection was made and to which the exception relates was competent. If the defendants thought the answer of the witness might be understood as giving his own understanding of the contract, for which he was not asked, instead of the substance of what the defendants said, for which he was asked, the matter could have been made clear by cross-examination, or the answer could have been objected to as irresponsive. No objection to the answer was taken. The only fair and intelligent construction that can be given to this portion of the record is that the witness intended to give, and must have been understood to have stated, the substance of what the defendants said to him. The objection taken in the brief filed since the argument, that Fellows' testimony was incompetent because the evidence of the contract was all in writing which could not be affected or changed by parol, is not applicable. "In a suit at law between the parties to a written agreement, or those claiming under it, extrinsic evidence is not admissible to contradict or alter its terms. The agreement does not conclude strangers. In a controversy between . . . one of the contractors and a stranger, either party may show by parol that the written contract was made by mistake or fraud, or that by design

of the parties it misrepresents the true transaction." *Libby* v. *Company*, 67 N. H. 587, 588. In this controversy between the state and one of the parties to the contract, where the criminal intent of the defendants was in issue, any facts bearing upon the belief under which the defendants acted were competent. 4 Wig. Ev., s. 2446; *Walker* v. *State*, 117 Ala. 42. If such evidence could not have been received, the bill of sale as conclusive evidence of the contract finally made would have established, against the defendants' contention, that the debt which they were charged with paying from the funds of the corporation was their own debt, and their own parol evidence of their understanding must have been excluded. Furthermore, Fellows' evidence did not contradict, change, or alter the meaning of the bill of sale to which alone it related, and if incompetent on the ground suggested was immaterial and not prejudicial, since it only tended to prove a point, on the contention now made, already conclusively proved. *State* v. *Blaisdell*, 59 N. H. 328; *Foye* v. *Leighton*, 24 N. H. 29, 38.

The charge contained the following sentence: "In this case, if the facts are that the debts were those of the respondents, and they took the funds of the company to pay such debts, you are warranted in drawing the inference that they intended to embezzle the funds." Objection is now made, in support of an exception taken at the time, that this statement excluded from the consideration of the jury the belief under which the respondents acted. It does not appear that this omission, if erroneous, was called to the attention of the court at the time. There was no occasion to do so; for in the following sentence the court referred to the suggestion that the defendants may have misunderstood the situation, and said that if such were the fact the defendants were entitled to a verdict. Earlier in the charge the jury were told that to authorize a verdict of guilty it was incumbent upon the state to prove that the "defendants, having custody of the funds of the corporation, intentionally used those funds for their own purposes; . . . that the money in the bank was the property of the corporation, . . . and that these respondents, well knowing these facts, took the funds to pay their own debts." The court also adopted and approved the contention of the defence, that the state was bound to prove the acts charged as constituting the offence were done with guilty intent. Whatever inference might be drawn from the sentence by itself, the whole paragraph in which it appears does not exclude, but expressly includes, the belief under which the defendants acted as an element of the crime charged against them. And the point was impressed upon the jury at the close of the instructions, when they were told that "if at the time these transactions took place, these men understood that the company assumed

the debt, and that the debt was the company's and not theirs, and acted upon that belief, they are not guilty. The question is: Did they then so believe, or did they understand that the debt was theirs? That is the issue for you to decide." Taking into account all that was said, plainer language could not be found to inform the jury that a mistaken belief as to their right excused the defendants. If the legal rule is correctly stated to the jury with all the exceptions and qualifications applicable, it is not a sufficient ground for a new trial that in commenting upon the evidence the rule was repeated, omitting some of the exceptions or qualifications. *Cohn* v. *Saidel*, 71 N. H. 558, 571; *Saltmarsh* v. *Bow*, 56 N. H. 428; *Belknap* v. *Wendell*, 36 N. H. 250.

Exception was also taken to the instruction of the court that proof of the intent is usually found in the nature of acts knowingly done, and to the illustration used. The jury were told that what the defendants now said was not conclusive, but was evidence for the jury to consider and give such weight to as they deemed just. It is not claimed there was error of law in these statements, but the objection now urged relates solely to the illustration used. The court said: "If a man stealthily takes your horse from the barn at night, it is sufficient evidence to warrant the conclusion that he intended to steal the horse; and if he should afterward, upon his trial, testify that he took it because he thought he owned it, his evidence would not be likely to raise a reasonable doubt on the subject in your minds." Even in jurisdictions where the common-law rule which permits the judge to give to the jury his opinion of the weight of a part or of the whole of the evidence, leaving the jury to pass thereon, has been abrogated by constitutional or statutory provisions forbidding a charge upon the facts or upon the weight of the evidence, what was said might not be considered objectionable. No opinion was expressed as to the credibility of the defendants as witnesses. The suggestion related merely to the value of a class of evidence. *Durant* v. *Burt*, 98 Mass. 161; *Commonwealth* v. *Larrabee*, 99 Mass. 413; *Harrington* v. *Harrington*, 107 Mass. 329. But the common-law rule has not been changed by statute in this state, and the constitution contains no reference to the subject. The defendants' citations from jurisdictions controlled by such provisions are not applicable. The power of the court at common law of "advising the jury as to the nature, bearing, tendency, and weight of the evidence, . . . a duty which from its very nature must be, in a great measure, discretionary on the part of the judge" (1 Stark. Ev. *440), even to the extent of expressing an opinion upon the merits of the case, is recognized in England, in the federal courts, and in states where the lawmaking power has not interfered to change the practice.

State v. *Pike*, 49 N. H. 399, 417; *State* v. *Reed*, 62 Me. 129; *Rowell* v. *Fuller*, 59 Vt. 688, 695; *Commonwealth* v. *Child*, 10 Pick. 252, 256; *Matthews* v. *Allen*, 16 Gray 594, 596; *State* v. *Duffy*, 57 Conn. 525; *Jackson* v. *Rowland*, 6 Wend. 666, 669; *Massoth* v. *Canal Co.*, 64 N. Y. 524, 533; *Gordon* v. *Little*, 8 S. & R. 533,—11 Am. Dec. 632, 639; *Mitchell* v. *Harmony*, 13 How. 115, 130, 131; *Allis* v. *United States*, 155 U. S. 117, 123; authorities collected in 11 Enc. Pl. & Pr. 91, 93; Sackett Inst. Jur. 8.

In the absence of decisions in point, it may be difficult to determine the precise limit which uniform practice in this state has placed upon the discretion of the trial judge in charging the jury as to the facts. *Doe*, J., in his dissenting opinion in *State* v. *Pike*, 49 N. H. 399, 416, refers to the common-law practice as obsolete in this state, and in subsequent opinions he refers to the English practice of the judge advising the jury on the facts and weight of the evidence as though it was unknown here. *Lisbon* v. *Lyman*, 49 N. H. 553, 572; *State* v. *Hodge*, 50 N. H. 510, 520; *Gray* v. *Jackson*, 51 N. H. 9, 15; *Aldrich* v. *Wright*, 53 N. H. 398, 404; *Orr* v. *Quimby*, 54 N. H. 590, 632 (dissenting opinion). But no case is to be found where a verdict has been set aside because of the comments of the court upon the evidence. The opinion in *State* v. *Pike* is reported as of June, 1870. Among the authorities cited by Judge *Doe* is *Nutting* v. *Herbert*, 37 N. H. 346, 355, decided in July, 1858, in which it was expressly held that "observations of the court upon mere matters of fact, and their commentaries upon the weight of evidence and its application, are understood to be addressed to the jury merely for their consideration as the ultimate judges of matters of fact, and are entitled to no more weight or importance than the jury, in the exercise of their own judgment, choose to give them. They neither are, nor are understood to be, binding upon them, as true and conclusive expositions of the evidence; and therefore whether perfectly correct and appropriate or not, a bill of exceptions does not lie to such observations and commentaries." It is not probable that Judge *Doe* intended, in 1870, to describe as obsolete a practice recognized by the court as in existence twelve years before. His remark is to be understood in the light of the rule on the subject laid down and approved in several earlier cases. "It is not the ordinary practice in this state for the court to express opinions upon the weight of evidence; . . . but it is not irregular for them to make such suggestions in relation to the facts as they may suppose will be useful to the jury, the matter being left to the jury for decision." *Cook* v. *Brown*, 34 N. H. 460, 470. A similar statement of the practice is approved in *Patterson* v. *Colebrook*, 29 N. H. 94, 102. In *Flanders* v. *Colby*, 28 N. H. 34, the court suggested

to the jury that they could better judge of the credit to be given to a witness by his appearance on the stand than by any other circumstances. In the opinion *Gilchrist*, C. J., said: "The judge must make such suggestions upon the evidence as he deems most proper. This is a matter which cannot be limited." The substance of the rule as stated in the cases appears to be that the extent to which the facts shall be stated in the charge, and the commentaries to be made upon them, is for the trial judge, and that his action is not open to exception. Cases *supra; Beach* v. *Hancock*, 27 N. H. 223, 230; *Rollins* v. *Varney*, 22 N. H. 99; *Haven* v. *Richardson*, 5 N. H. 113, 126. In view of the reported cases, it is probable it was not intended, in the dissenting opinion in *State* v. *Pike*, to characterize as obsolete a practice of making general suggestions as to the evidence, which would tend to aid the jury in coming to a result and which in one view may be considered comments upon the weight of evidence, but that the judge had in mind the English practice of giving to the jury the view of the court upon the particular case or evidence before them. In *McDougall* v. *Shirley*, 18 N. H. 108, 109, there is a suggestion by *Parker*, C. J., to the effect that the expression of personal opinion by the judge in the charge might be error.

As suggested, in the absence of any decisions the precise line which bounds the discretion of the court may be difficult to define. For a judge to inform the jury how he thought the evidence in which a fair conflict existed ought to be determined would probably appear to all lawyers now in practice an invasion of the province of the jury. Upon the general grounds of a violation of uniform and invariable practice and a denial of the right to a fair trial by the jury, and from the manner in which the distinction between law and fact is now drawn in this state (*State* v. *Hodge*, 50 N. H. 510, 526), all would probably agree that such a proceeding should and would vitiate a verdict found in conformity thereto; but authorities would not be wanting to sustain it. There is no probability that such a case will ever arise, and it is not necessary now to seek the reasons why such a proceeding would constitute legal error, or to attempt to define the precise line between fair and unfair comment. In the present case, the only purpose of the illustration used, of which there was no pretence there was any evidence in the case (*Simonds* v. *Clapp*, 16 N. H. 222; *Nutting* v. *Herbert*, 37 N. H. 346), was to make clear to the jury that they were to pass upon the understanding of the defendants at the time of doing the acts charged in the indictment, and that they were not bound by the statements made by the defendants at the trial. The remark had no bearing on the preliminary questions before the jury—whether the debt was the defendants',

and the money used to pay it the corporation's. Unless both of these facts were found against the defendants, their understanding was immaterial. Being made material by the finding against them, it was proper that the attention of the jury should be directed to the character of the evidence which they were to consider in determining it. What was said was within the limits of the discretion recognized by the New Hampshire cases cited to be within the province of the presiding judge. It does not appear that the defendants were prejudiced or the jury misled.

Exceptions overruled.

All concurred.

Merrimack,
August 13, 1906.

EMERSON TROY GRANITE CO. *v.* PEARSON.

A road locomotive or traction engine used to draw cars on the highways is required to be registered under the provisions of chapter 86, Laws 1905, and its operator should be licensed.

A partnership or corporation owning an automobile or similar vehicle should register it in the firm or corporate name, but the license required must be issued to the person who acts as operator.

PETITION, for *mandamus* to compel the defendant, as secretary of state, to issue to the plaintiffs a license under chapter 86, Laws 1905, for the operation of a road locomotive or traction engine, with cars attached. The question whether this engine is within the provisions of the above mentioned statute was transferred from the April term, 1906, of the superior court by *Peaslee*, J.

John E. Allen, for the plaintiffs.

Edwin G. Eastman, attorney-general, and *Elwin L. Page*, for the defendant.

CHASE, J. Section 4, chapter 86, Laws 1905, reads in part as follows: "No person shall operate an automobile or motor cycle until he shall have first obtained a license for that purpose. Applications for licenses shall be made upon blanks prepared by the secretary of state, and the licenses issued shall be in such form and contain such provisions as said secretary of state may determine. To each license shall be assigned a distinguishing

number or mark, and a proper record of all applications for licenses and of all licenses issued shall be kept by the secretary of state at his office and shall be open to the inspection of any person during reasonable business hours. Each license shall state the name, place of residence, and address of the licensee, and the distinguishing number or mark assigned to him. Such licenses shall be granted for one year only, and the fee therefor shall be one dollar. . . . Every licensee when operating a machine shall keep his license with him and exhibit it upon the request of any officer of the law." By section 2, all automobiles and motor cycles are required to be registered by the owner or person in control, in accordance with the provisions of the chapter. Applications for such registration must contain a statement of the name and address of the applicant and a brief description of the automobile or motor cycle, including the name of the maker, its number, if any, and the character and amount of its motive power. The secretary of state, upon the receipt of a registration fee of three dollars, is required to register the automobile or motor cycle described in the application, giving to it a distinguishing number or mark, and to issue to the applicant a certificate of such registration, furnishing him with two number plates or tags bearing the distinguishing number or mark, to be attached to the registered vehicle. The certificate is to be carried in the vehicle; and a record of all applications and certificates issued is to be kept by the secretary of state and to be open to the inspection of any person during reasonable business hours. By section 1, the terms "automobile and motor cycle," as used in the chapter, "include all vehicles propelled by other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks, and road rollers."

The vehicles referred to in this chapter have recently come into use, and have introduced a new and serious peril to travelers upon highways. They are propelled by great power developed by steam, electricity, or the explosion of gasoline vapor, and may be driven with great speed. More or less noise attends their operation, and when gasoline is used a disagreeable odor results, both the noise and the odor having a tendency to frighten horses. They are used in performing long journeys, and their owners and operators are oftentimes unknown in the locality where the vehicles happen to be. Skill and care are required in operating them to avoid injury to other travelers. Registration of them is required to enable persons to readily discover their character and who owns or has control of them, so that in case any wrong is done in their use the responsibility for it can be easily ascertained. But registration is not full compliance with the statute; the person who

operates a vehicle must be licensed. The object of the license is to furnish a further guaranty that proper use of the vehicle will be made, and that it will be operated in compliance with the law.

While the traction engine in suit may not be an automobile, motor cycle, or vehicle, according to a strict interpretation of those terms, it appears to be such within the meaning of this statute. It certainly is a vehicle in the sense that it carries the operator and the materials used in its operation. "It is a carriage moving on land . . . on wheels." Cent. Dict. The statute contains decisive evidence that the term was used in a sense sufficiently broad to include road rollers—machines that are not used for the carriage of persons or merchandise. If it had not been supposed that they were "vehicles," there would have been no reason for expressly excepting them from the statutory definition. The implication is irresistible that other machines, aside from road rollers, passing over highways, carrying only the operators and the materials used in their operation, are "vehicles" within the meaning of the term as defined in the statute. There certainly are as forcible reasons for requiring the registration of a traction engine not confined to rails, and the licensing of its operator, as for requiring these acts in respect to an ordinary automobile. The conclusion is that the plaintiffs' engine is a "vehicle" within the meaning of this statute and should be registered, and its operator should be licensed. The use of it in highways without registration and license of the operator would be a violation of the statute. Whether the registration and the licensing of the operator will have any effect other than relieving the owner or person in control and the operator from the penalties of the statute, is a question that need not now be considered. Probably the user of such a vehicle, although it is duly registered and its operator is duly licensed, has no greater or different rights in highways than other travelers, and is subject to all the statutory and common-law obligations of such travelers.

The title of the case indicates that the plaintiffs are a corporation, partnership, or composite body of some kind. If so, they are not entitled to a license as such. The license contemplated by the statute is personal to the particular person who operates the vehicle. Every person who operates it must have a license. A corporation or partnership which owns or controls a vehicle should register it in the corporate or partnership name, but is not entitled to a license to operate it.

Case discharged.

All concurred.

Rockingham, }
Sept. 4, 1906. }

HUBBARD v. GOULD & a.

One who is notified of pending litigation and given an opportunity to defend is concluded as to all questions determined therein which are material in an action for indemnity brought against him by the defendant in the original suit.

In an action for indemnity against one who was notified to defend, parol evidence is admissible to show the matters actually litigated in the original suit not disclosed by the record.

The fact that a landowner has paid damages recovered against him for injuries resulting from an unsuitable fence does not entitle him to an order of judgment in an action for indemnity against adjoining owners who were bound to repair, if the verdict and judgment in the prior suit fail to establish that the injury was occasioned by their negligence, without contributing fault on his part.

Where a landowner seeks to recover for an injury caused by an unsuitable fence which adjoining owners have agreed to maintain, the ground of his action is not the breach of the defendants' engagement, but their negligence in the performance of the assumed duty; and it is incumbent upon him to show that the injury was occasioned by such neglect, and was not due to want of care on his part.

In a suit for indemnity against one who was notified of pending litigation and failed to defend, the plaintiff may recover the expenses reasonably incurred in good faith in the prior action, as well as the amount of his property taken to satisfy the judgment rendered therein.

A bankrupt may litigate a claim in his favor which his assignee fails to prosecute after notice.

CASE, for negligence, with counts in assumpsit, to recover the amount paid on a judgment recovered by one Rogers against the plaintiff and the expense of defending the suit in which the judgment was rendered. Transferred from the April term, 1905, of the superior court by *Stone*, J.

In 1898, the plaintiff conveyed to the defendants a small tract of land adjoining his own. The *habendum* of the deed began as follows: "To have and to hold . . . so long as they make and maintain a line fence separating it from land of grantor and his heirs." The lands were separated by a barbed wire fence. In August, 1901, Rogers turned his horse to pasture on the plaintiff's land adjoining that of the defendants. At that time the wire fence between the lands of the parties was out of repair and in such a condition that Rogers' horse became entangled in the fence and was injured. The fence was in a suitable condition on July

4, and the defendants had no knowledge of any change in its condition. The place of the accident was about 200 feet from the railway station where Hubbard was employed and about fifty feet from the bars where the horse was turned into pasture. Rogers brought suit against the plaintiff for the injury to his horse and recovered a judgment which was satisfied by levy upon the plaintiff's property. The defendants were duly notified of the pendency of the suit and requested to undertake its defence, but did not do so. The question tried in the suit was the negligence of one or both parties. Hubbard, the present plaintiff, paid counsel and witnesses and other expenses in defending the action brought by Rogers.

On the foregoing facts, it was ruled *pro forma* that the plaintiff was entitled to judgment for the damages and costs recovered by Rogers and the costs of the levy, but not for the expense of defending the suit, and both parties excepted.

At the October term, 1902, the bankruptcy of Hubbard was suggested, and it was ordered that his trustee appear at the next term or there would be judgment for the plaintiff. The trustee did not appear.

Burnham, Brown, Jones & Warren, for the plaintiff.

G. K. & B T. Bartlett, for the defendants.

PARSONS, C. J. As the defendants had notice of and an opportunity to defend the suit *Rogers* v. *Hubbard*, they are now concluded by the determination therein made of all facts which are now in controversy. *Boston & Maine R. R.* v. *Brackett*, 71 N. H. 494. The ground upon which the plaintiff can now recover for the injury to him because of the accident to Rogers' horse is the same as it would be if the suit were for injury to his own horse under similar circumstances. The judgment in Rogers' action is material only as evidence. Its sole effect is to relieve the parties of the necessity of proving or disproving any facts therein determined. *Gregg* v. *Company*, 69 N. H. 247. The defendants are concluded as to all matters which were actually litigated and determined in the suit, and as to all matters of defence which they might have set up but did not. If the record does not disclose the matters actually litigated, the same may be shown by competent evidence. *Hearn* v. *Railroad*, 67 N. H. 320.

It is found that the questions litigated in that suit were the negligence of both parties. The verdict and judgment establish, therefore, that Rogers was not guilty and the defendant Hubbard was. Hubbard's negligence for which he was held responsible in

that action may have been his personal fault, or it may have been the fault of the defendants, for which, as the owner of the land and lessor of the pasturage, he was responsible to Rogers. The declaration in this suit alleges the negligence established by the verdict and judgment to have been the negligence of the defendants. To recover for the damage to him because of an injury caused by the defendants' negligence in the performance of an assumed duty to maintain the fence, the plaintiff must show that the injury arose from the default of the defendants without the breach of any duty owed by him to them. The established fact that Hubbard is in fault, as between himself and Rogers, does not necessarily determine that he is also in fault as between himself and the defendants. *Boston & Maine R. R.* v. *Sargent*, 72 N. H. 455, 462, 463. The sole negligence charged against Hubbard may have been the unsafe condition of the fence, for which the defendants may be solely responsible. He may have been considered negligent, as between himself and Rogers, for not ascertaining the condition of the fence, or it may have been shown that he knew the danger before the horse came to the pasture. Reliance on the defendants to properly maintain the fence may not be negligence as between himself and them, and be of an entirely different character as between himself and Rogers.

Some of these questions may have been determined by the prior litigation; all of them could not be. The facts are not found by the case. There is no verdict for the plaintiff which upon the evidence and allegations might be considered to include a finding upon the essential facts in issue. The case is presented upon a *pro forma* ruling of law, that upon the facts stated the plaintiff is entitled to judgment. In the absence of a finding upon the issues raised by the declaration of the responsible fault of the defendants as the cause of the injury, without contributing fault by the plaintiff, the order of judgment cannot be supported. It is set aside, and the case must stand for further action in the superior court.

The ground upon which at the trial the plaintiff placed his right to recover does not appear upon the record. It is claimed in the brief for him that the action is for the breach of the defendants' contract to maintain a suitable fence, and sounds in contract and not in tort. If this be so, it would still be necessary for the plaintiff to show that the injury of which he complains was not due to his own want of care. In such an action the damages recoverable would be only such as were fairly within the contemplation of the parties when the contract was made, as the possible result of a breach. The parties could not have contemplated that the plaintiff would knowingly expose his own or others' beasts to injury. *Cate* v. *Cate*, 50 N. H. 144, 149; *Gilman* v. *Noyes*, 57

N. H. 627, 632; *Noyes* v. *Blodgett*, 58 N. H. 502; *Rafferty* v. *Drew*, 64 N. H. 616; *Hutt* v. *Hickey*, 67 N. H. 411, 417, 418; *Hadley* v. *Baxendale*, 9 Exch. 341.

But according to the declaration, and as matter of law, the ground of the plaintiff's action is not the breach of the defendants' engagement to maintain the partition fence, but is their negligence in the performance of the duty. Parties owning adjoining lands may have the fence between them divided by legal proceedings, or may agree upon a division, and of course may agree that one party shall be bound to maintain the whole. By statute (P. S., *c.* 143, *s.* 15), the party neglecting to build and keep in repair any partition fence which he is bound to maintain is liable for all damages resulting from such neglect. But the partition fence which an adjoining owner is bound to maintain is one sufficient to prevent the escape of domestic animals upon the land. Such a fence the statute defines. P. S., *c.* 143, *s.* 5. But any other fence which prevents the escape of such animals is sufficient. Rogers' horse did not escape through the insufficiency of the fence, but was injured by the character or condition of the fence. In performance of their fence-building duty, whether imposed by law, or by contract, or voluntarily undertaken, the common law imposed upon the defendants the duty of exercising care not unnecessarily to injure others, *i. e.*, to maintain the fence they agreed or assumed to maintain, in a condition reasonably safe and unlikely to injure animals on the plaintiff's land. *Durgin* v. *Kennett*, 67 N. H. 329. As the defendants' liability, if it exists, arises from a breach of this common-law duty, and not from a statute requiring them to fence against animals rightfully on the defendants' land, *Cressey* v. *Railroad*, 59 N. H. 564, cited by the plaintiff, is not in point.

The defendants also except to any liability upon the facts in the case. So far as that exception is based upon the findings made, it has already been sustained. Whether the acceptance of the deed reading "To have and to hold . . . so long as they make and maintain a line fence" implies a covenant or agreement to maintain the fence is not material. It is to be implied from the case that the defendants assumed to maintain the fence. Whether this duty resulted from a valid contract imposing the same, or was voluntarily assumed, they were bound to the exercise of care in what they did. *Pittsfield etc. Co.* v. *Shoe Co.*, 71 N. H. 522. If it is established that the defendants and not the plaintiff are responsible for the injury to Rogers' horse, the expenses reasonably incurred in good faith by Hubbard in litigating the questions raised by Rogers' claim are a part of his damages, as well as the amount of his property taken to satisfy the judgment against him, the defendants having declined the opportunity to conduct

the defence which was tendered them. *Fairfield* v. *Day*, 71 N. H. 63, 65; *Chase* v. *Bennett*, 59 N. H. 394, 396.

Under the bankrupt act of 1867, it was held that the bankrupt might litigate a claim which the assignee upon notice refused to prosecute. *Towle* v. *Rowe*, 58 N. H. 394; *Ramsey* v. *Fellows*, 58 N. H. 607; *Young* v. *Kimball*, 59 N. H. 446. No provision of the present law requiring a different conclusion has been called to our attention. The order of judgment for the plaintiff is set aside.

Case discharged.

All concurred.

Rockingham, Sept. 4, 1906.

GILCREAST v. BARTLETT.

Where a bill in equity to remove a cloud from title is dismissed because an execution sale under which the plaintiff claims is void, a finding of fact that a conveyance of the premises to the defendant was fraudulent is not an adjudication which estops the parties from litigating the nature and validity of the transaction in a new and independent action.

If real estate is fraudulently conveyed by a husband to his wife, his creditors cannot avoid the transaction as against her innocent mortgagee for value, but they may levy upon the grantor's right to redeem from the mortgage.

A levy upon real estate occupied by the execution debtor and his family is not void merely because no homestead was set out to the wife, since that right may be subsequently asserted, unless waived by neglect to demand it, if she has continued to occupy the premises.

BILL IN EQUITY, to remove a cloud from the plaintiff's title, caused by the levy hereinafter mentioned. Facts found, and case transferred from the January term, 1906, of the superior court, by *Chamberlin*, J.

The present plaintiff was the defendant in *Bartlett* v. *Gilcreast*, 72 N. H. 145, and the present defendant was the former plaintiff. After the decision in that action, the judgment in favor of Sleeper against John R. Gilcreast was sued and a new judgment was recovered, from which an execution issued and was levied February 20, 1905, upon all the right in equity of John R. to redeem the undivided half of the tract of land mentioned in the former case that was conveyed by John R. to his wife (the present plaintiff), April 13, 1897. The defendant was the purchaser of this right at the sheriff's sale. June 21, 1898, the plaintiff, in her own right, and

her husband mortgaged the entire tract to John H. Parmerton, and the mortgage was outstanding and unpaid at the time of the levy.

It was found in the former action that the conveyance of April 13, 1897, was a gift and that the real estate was all the property owned by John R. In this action the plaintiff offered to prove that there was a good and valuable consideration for this conveyance. The evidence was excluded, subject to her exception.

At the time of the levy, the plaintiff and her husband were living upon the tract of land. No homestead was set off to her, nor did she petition or request that one should be set off. The plaintiff excepted to the denial of a motion for a decree in her favor and to the dismissal of the bill.

John G. Crawford, for the plaintiff.

G. K. & B. T. Bartlett, for the defendant.

CHASE, J. The title set up by Bartlett in the former action was a levy which was held to be void. *Bartlett* v. *Gilcreast*, 72 N. H. 145. It is apparent from the facts reported in that case and in this, and from the former opinion of this court, that the bill in that action was dismissed because of Bartlett's failure to show that he had a valid title to the property upon which the alleged cloud existed. The judgment, therefore, was not an adjudication that the conveyance of April 13, 1897, from John R. Gilcreast to his wife, was a gift to her and was fraudulent and void as against his creditors. Neither of the parties was estopped by it from litigating the nature and validity of this conveyance in a subsequent action. The testimony offered by the plaintiff in the present action, tending to prove that the conveyance was not a gift but was induced by a good and valuable consideration, was competent and should have been received, notwithstanding the former judgment. The defendant's position that the finding in the former action should be allowed to stand, under the authority of *Lisbon* v. *Lyman*, 49 N. H. 553, and kindred cases, cannot be upheld for the reason that this is a new and independent action. The practice relied upon does not apply under such circumstances. The plaintiff's exception to the exclusion of her proffered testimony is sustained, as is also her exception to the dismissal of the bill, which is understood to have been ordered on the erroneous theory that the former judgment estopped the plaintiff from making the defence she set up.

The plaintiff further excepted to the denial of her motion for a decree in her favor, on the ground that the levy by which Bartlett

asserts title was void because made upon John R. Gilcreast's right in equity to redeem from the Parmerton mortgage, instead of upon his half of the tract, unincumbered. The tract of land formerly belonged to the plaintiff and her husband (John R. Gilcreast) in common. John R. conveyed his interest in it through a third person to the plaintiff. Subsequently, but before the levy, the plaintiff, in her right, and John R., as her husband, mortgaged the entire tract to Parmerton. It is not found, and there is no suggestion, that Parmerton had any knowledge of the alleged fraudulent character of the plaintiff's title, or that he was put upon inquiry in regard to it. So far as appears, he was an innocent purchaser for value. There is no presumption of law to the contrary. Being an innocent purchaser, his mortgage was valid, although given to him by one whose title was fraudulent and void as against creditors. *Comey* v. *Pickering*, 63 N. H. 126; *Ashland Savings Bank* v. *Mead*, 63 N. H. 435; *Lewis* v. *Dudley*, 70 N. H. 594. If John R.'s conveyance to his wife was fraudulent and void as to creditors, the only interest in the property which the creditors could reach, after the mortgage, was the right in equity to redeem an undivided half of the tract from the mortgage. Upon the theory that his conveyance was void, he and the plaintiff at the time of the levy were owners in common of the entire tract, subject to the mortgage; or, in other words, he had a right in equity to redeem one undivided half of the tract from the mortgage; and this right might be levied upon by his creditors. *Russell* v. *Fabyan*, 34 N. H. 218, 228.

The plaintiff further says the levy was void because no homestead was set out to her. Although made in disregard of the homestead right, the levy would not be void. If she did not waive the right by neglecting to demand it, it continues and may be asserted now, if she has continued to occupy the tract as a homestead. *Currier* v. *Sutherland*, 54 N. H. 475; *Brookfield* v. *Sawyer*, 68 N. H. 406. The plaintiff's last mentioned exception is overruled.

Exceptions sustained in part and overruled in part: decree dismissing the bill set aside.

All concurred.

Merrimack,
Sept. 4, 1906.

CONCORD v. MORGAN.

A permanent structure located in a wood-yard, adapted to the peculiar requirements of the business, and used by the owner for storing the commodity in which he deals and the machinery employed in its preparation for market, is a "building" within the meaning of an ordinance regulating the use of steam engines in "any building" in a fire precinct.

PETITION, for an injunction. Transferred without a ruling from the April term, 1906, of the superior court by *Peaslee*, J.

The defendant is using an engine in a structure in the fire precinct of Concord, without the written permission of the city engineer and the chief of the fire department. The structure is sixty feet long and thirty feet wide, and consists of a gable roof made of boards and roofing paper and supported by three rows of posts, the outside rows being nine feet high and the middle row twelve feet high. About three fourths of one side of the structure is covered with boards separated by open spaces, the upper edge of the topmost board being some five feet from the ground. The other side is at times closed with piles of wood. Otherwise, the sides and ends of the structure are open. The structure is located in the defendant's wood-yard, and he uses it in connection with his business. If it is a "building," within the meaning of the city ordinance "relating to the building and fire precinct," an injunction is to issue; if not, the petition is to be dismissed.

Edmund S. Cook, for the plaintiffs.

Taggart, Tuttle, Burroughs & Wyman, for the defendant.

YOUNG, J. The only question transferred is whether the defendant's wood-shed is a "building," within the meaning of an ordinance which provides that "no person shall . . . use any . . . engine in any building [in the fire precinct] without the written consent of the city engineer and the chief of the fire department." Whether or not it is a "building" within the meaning of this ordinance depends on whether the city councils intended to include such structures within its operation. The only evidence in the case relevant to that issue is the language they used and the purpose they had in view when they enacted the ordinance. The language they used to describe the structure to which the ordinance is intended to apply is "any building" in the fire precinct.

Does the word "building" include such structures as the defendant's if it is given its ordinary meaning? Although all structures are not "buildings" within the common acceptation of that term (*Truesdell* v. *Gay*, 13 Gray 311; *Coddington* v. *Dry Dock Co.*, 31 N. J. Law 477; *La Crosse etc. R. R.* v. *Vanderpool*, 11 Wis. 119), all permanent structures intended to shelter human beings or domestic animals, or to receive, retain, or confine the goods in which a person deals, or to house the tools or machinery he uses or the persons he employs in his business, are commonly called "buildings." *State* v. *Garity*, 46 N. H. 61; *Smart* v. *Hart*, 75 Wis. 471; *Watson* v. *Cotton*, 5 C. B. 51; *Powell* v. *Farmer*, 18 C. B. N. S. 168.

The structure in which the defendant is using his engine is permanent. The roof and the wood stored under it furnish the protection he needs in order to operate his engine and to prepare his wood for market. It is constructed as it is, partly to enable him to unload wood in all parts of it from his wagons and to load it on them again when it is sold, and in part because wood seasons more quickly and thoroughly in such structures than when stored in buildings constructed in the ordinary way. In other words, it is a permanent structure adapted to the peculiar requirements of his business, and used by him to store the goods in which he deals and the machinery and men he employs in his business. Consequently, it is a "building" within the ordinary meaning of that word.

Since this is so, the natural inference to be drawn from the words the city councils used to describe the structure in which all persons are forbidden to use engines in the compact parts of the city, without the written consent of the city engineer and the chief of the fire department, is that such structures as that in which the defendant is using his engine are "buildings" within the meaning of the ordinance; for there is a presumption that persons intend to give the words they use their common meaning, and this presumption obtains in the construction of city ordinances as well as all other written instruments. The defendant's structure therefore is a "building" within the meaning of the ordinance, unless the purpose of the ordinance shows that the city councils could not have intended to include such structures within its operation; or, in other words, unless such structures are not likely to cause the public danger at which the ordinance is aimed.

It is obvious that the public danger the ordinance is intended to remove is the risk of fire to surrounding buildings, incident to using an engine in any structure in the compact part of the city without doing what experience has shown should be done to render its use reasonably safe,—that is, without taking such precau-

tions in installing it as make it improbable that the engine will communicate fire to the structure in which it is used or to the surrounding structures. In other words, the ordinance is intended to regulate—not to prevent—the use of engines within the fire precinct. Consequently, a person has a legal right to use one in any structure in any part of the city when he has done all that is necessary to enable him to use his engine without unreasonably increasing the fire risk to the surrounding property. Therefore, when a person applies to the city engineer and the chief of the fire department for permission to use an engine, the question for them to consider is whether he has done what the ordinary man, acquainted with the use of engines in the compact part of a city, would do to protect, not his own, but the surrounding property from the risk of fire, and not the character of the building in which he proposes to use it or the business in which he is engaged. Since the ordinance is intended to prevent the increase in the risk of fire to surrounding structures, incident to using improperly installed engines in the compact parts of the city, and not the risk incident to using them in any particular class or kind of structure, nor the risk to the structures in which they are used, it is obvious that the purpose the ordinance is intended to accomplish has no tendency to prove that the structure in which the defendant is using his engine is not a "building" within the meaning of the ordinance. So if it were conceded that the purpose of the ordinance has no tendency to show that it is a "building," the ordinance would still be construed to include such structures; for, as has been seen, all the other evidence there is on that question is the language of the ordinance, and that tends to this conclusion.

But it cannot be conceded that the purpose of the ordinance has no tendency to show that such structures are "buildings" within its meaning. The city councils were attempting to reduce the fire risk peculiar to surrounding structures on account of the use of improperly installed engines in the compact parts of the city. It cannot be assumed, in the absence of evidence, that they intended to exempt the owners of a particular class of structures from taking the precautions they compel the owners of all other classes of structures to take, in order that their engines may not communicate fire, either mediately or immediately, to surrounding structures. On the contrary, the fact the city councils were attempting to prevent such increase in the fire risk tends to prove that they intended to forbid the use of engines in all structures in which they can be installed in a way to increase that risk. When the legislature undertakes to protect the public from a threatened danger, there is a presumption that the act forbids everything fairly within its terms which has any tendency to promote the evil

at which it is aimed. In this case there is nothing to rebut that presumption; and the only inference that can be drawn from the purpose the ordinance was intended to accomplish is that the structure in which the defendant is using his engine is a "building." As has been seen, the public evil the ordinance is intended to correct is not the risk of fire peculiar to using an engine in any particular kind or class of buildings, or that to the building in which it is used, but that to surrounding structures because of the use of an engine in any building in the compact parts of the city, without doing what should be done in that particular case to prevent the communication of fire to the surrounding structures.

The roof that covers the defendant's engine is made of boards, and the fire-walls, so far as there are any to protect the surrounding property from a fire that originates in the engine-room, are composed of boards and piles of wood. It is obvious that an engine installed under such conditions would be likely to increase the risk the ordinance is intended to remove. Since this is so, both the language of the ordinance and the purpose it was intended to accomplish tend to prove that the defendant's wood-shed is a "building" within its meaning; consequently the injunction must issue in accordance with the agreement of the parties.

Case discharged.

All concurred.

Hillsborough,
Sept. 4, 1906.

HARRIS *& a., Ex'rs, v.* INGALLS *& a.*

74 35
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Where the terms by which an absolute legacy is given are unambiguous, it is the duty of the executors to pay it, notwithstanding their opinion of its inadequacy for a designated purpose.

The fact that a will directs executors to divide the residue of an estate into four equal parts, one of which the testator "gives and bequeaths" to the heirs of each of certain relatives, is not alone sufficient to invest the executors with authority to convert the realty into money for the purpose of division.

Executors who take possession of the testator's realty during the settlement of an estate in the insolvent course are chargeable with income received therefrom subsequent to the decree of insolvency.

Realty in the possession of executors and not needed for the payment of debts, expenses of administration, and specific legacies should be divided among the persons entitled thereto, or should pass to them in common, immediately upon the settlement of the executors' account.

Where a will directs the payment of annuities, a sufficient sum for the purpose should be set apart upon the settlement of the administration account and be transferred to the executors as trustees, if they choose to act and file the required bond; and upon the expiration of the terms of the annuities, the balance in the hands of the trustees should be divided among the residuary legatees.

BILL IN EQUITY, by the executors of the will of Josiah G. Graves, praying the direction of the court as to the execution of the will. Transferred from the January term, 1906, of the superior court by *Peaslee*, J.

By his will, the testator gave $100 a year to each of several persons for certain terms, varying from three to ten years, or during the life of each person should he die before the expiration of his term. He also gave $100 to the Nashua Cemetery Association, the income thereof to be expended, if needed, in caring for his burial lot in the cemetery; and if not needed, to be expended elsewhere in the cemetery, provided trees are not allowed to grow within twenty feet of his lot. There were other legacies, and the residuary clause is as follows: "All the residue and remainder of my property, real, personal, and mixed, I order my executors to divide into four equal parts; and I give and bequeath one part thereof to the legal heirs of my mother's brother, Benjamin Ingalls, to be equally divided among them; and I give and bequeath one part thereof," etc., each part being given by the same terms to the legal heirs of certain brothers and sisters of his mother, to be equally divided among them. The estate consists of real and personal property, and is administered in the insolvent course. The personal property is more than sufficient to pay the legacies.

Advice is asked upon the following points: (1) Have the executors authority to pay the legacy to the Cemetery Association, the income of it not being sufficient, in their opinion, to take full care of said lot? (2) Have they authority to sell and convey the real estate, or if not, to manage it? (3) Have they authority to dispose of the rest and residue of the estate, or any part thereof, before the legacies are fully paid; and if so, what provision shall be made for the payment of the legacies? (4) Are the "legal heirs" mentioned in the residuary clause the persons who are such at the date of the testator's decease, or at some other date; and are they to be identified by the laws of this state, or of the state where they reside?

Burns & Burns, for the plaintiffs.

Burnham, Brown, Jones & Warren, for the defendants.

CHASE, J. 1. The terms by which the legacy to the Cemetery Association is given are unambiguous. The legacy is absolute, and it is the duty of the executors to pay it, notwithstanding their opinion of its inadequacy.

2. The case states that the personal property is more than sufficient to pay the legacies, and it is inferred that the personal property remaining after the debts and expenses of administration have been paid is meant. The only other facts bearing upon the second question submitted are the terms of the will and the fact that the estate consists in part of real estate. The situation, nature, and extent of the real estate are not stated, nor the number of the legatees under the residuary clause of the will. While the order that the executors shall divide all the residue and remainder of the property, real, personal, and mixed, into four equal parts, one of which the testator "gives and bequeaths" to the legal heirs of each of certain of his uncles and aunts, has some tendency to prove an intention that the executors should convert the real estate into money for the purpose of division, it is not conclusive, nor sufficiently full and decisive testimony to render it more probable than otherwise that such was the intention. The order in terms applies to real estate, as well as to personal and mixed property; and it may be that it is practicable to readily make an equal division of the real estate among the legatees. The case certainly does not show any necessity for its conversion into money in order to make division—a fact that would have great weight in determining the question of the testator's intention. *Chandler* v. *Thompson*, 62 N. J. Eq. 723, and authorities cited. See, also, authorities collected in 11 Am. & Eng. Enc. Law (2d ed.) 1043, *et seq.* The use of "bequeath"—a term that is ordinarily used in the disposal of personal property—does not outweigh the force of what appears to be an express order to divide the real estate. If all the circumstances relating to the real estate and the legatees were before the court, it might appear that there is a latent ambiguity in the terms of the will; but all that can now be said is that it does not clearly appear that the testator intended to make it the duty of the executors to convert the real estate into money for division. It may be added that if the legatees prefer to take the real estate in common, or are willing to do so, the executors will run no risk and violate no duty in allowing them to take it in that way.

If during the settlement of the estate the executors took possession of the real estate, they should account in their administration for the income they received from it after the decree of insolvency. *Ayers* v. *Laighton*, 73 N. H. 487. As the real estate is not needed for the payment of debts, expenses of administration, and

legacies, it should be divided among the legatees, or should pass to them in common, immediately upon the settlement of the executor's account. The executors have no authority to hold possession of and manage it after this event. See next point in this opinion.

3. Upon the settlement of the executors' account, a sufficient sum should be set apart from the personal estate to pay the legacies to the persons who are given $100 annually during stated terms, and the balance of the estate should be divided and paid over as provided in the residuary clause. The sum thus set apart should be transferred to the executors as trustees, provided they choose to act as such and give the required bond. When the terms of all the legatees expire, the balance of money in the trustees' possession, less the expenses of the trust, should be divided among the legatees mentioned in the residuary clause. Prior divisions of portions of the trust fund may be made if they are not needed to meet the requirements of the trust. *Thyng* v. *Moses*, 65 N. H. 106; *Campbell* v. *Clough*, 71 N. H. 181; *Brown* v. *Ferren*, 73 N. H. 6.

4. Counsel have not argued the fourth question, perhaps because it was found that the facts reported were not sufficient for giving an intelligent answer. All the persons that may be "legal heirs," within the intention of the testator, should be parties to the action, and their residences and relationship to the testator's uncles and aunts named in the residuary clause should appear; also the fact whether the uncles and aunts died before or after the date of the will and the death of the testator. The situation, value, and general character of the real estate left by the testator may also be a material fact bearing upon the question. The court cannot undertake to answer this question until all the parties are before them or have had an opportunity to appear, and the facts bearing upon the question are more fully submitted.

Case discharged.

All concurred.

Hillsborough,
Oct. 2, 1906.

LORD, *Adm'r*, *v.* BOSTON & MAINE RAILROAD.

The duty of a master to warn servants of a transitory danger of the employment extends only to those whose exposure thereto ought reasonably to be anticipated.

The members of a train crew are not guilty of negligence in failing to apprehend that a pedestrian, who occupies a position of safety and knows that a railroad track is in use, will suddenly step in front of moving cars without taking any precaution to avoid injury.

A railroad company is not liable for injuries to a pedestrian whose presence was not reasonably to be foreseen, unless the employees of the corporation failed to use due care to avoid a collision after discovering his danger.

The failure of a railroad company to prescribe proper rules for the protection of persons likely to be in the path of moving cars does not render the corporation liable for injuries to one whose presence upon the right of way was not reasonably to be anticipated.

CASE, for negligently causing the death of Cyrille Lebrecque, the plaintiff's intestate. Trial by jury. At the close of the plaintiff's evidence the defendants moved for a nonsuit on the grounds (1) that the evidence did not warrant a finding of due care on the part of the decedent, and (2) that it could not properly be found that the defendants were guilty of negligence which was the sole cause of the injury complained of. The motion was denied upon the first ground, subject to the defendants' exception, and was granted upon the second ground, subject to the plaintiff's exception. Transferred from the September term, 1904, of the superior court by *Chamberlin*, J.

Lebrecque was an able-bodied man in full possession of his faculties. During the twenty years prior to his death he had been employed by the defendants at different times for about seven years, working as trackman, shoveler, and laborer in the Manchester repair shop. February 15, 1900, he was sent with others to repair a washout at Kelley's Falls. The crew left Manchester early in the morning, on a train made up, from front to rear, of ten coal cars loaded with ashes, five empty flat cars, engine, combination car, and caboose. The men rode in the caboose and combination car, and left their dinners in them while they were at work. The train stopped before reaching the washout, and the empty cars were dropped in on a side track 400 feet long, which led to a gravel pit and was controlled by a switch in the main line 620 feet south of the washout. A switch in the side track at a point 190 feet south of the main-line switch controlled another

side track, located between the main line and the pit track and called the middle track. Between the switches the pit track was built on an embankment, on either shoulder of which one might walk in safety when the track was in use. There was a slight descent in the grade from the washout to both switches, and a car starting from the washout would move into either side track by its momentum. The barbed wire fence on the westerly side of the railroad extended down the pit track to a point about twenty feet south of the second switch, where it turned and crossed both side tracks, and then continued in a southerly direction between the middle track and the main line. The side tracks were so near together at the point where they were crossed by the fence that one set of bars was sufficient for both and provided the only passageway through the fence. The shortest route from the main-line switch to the gravel pit was by way of the pit track.

After dropping the flat cars, the train proceeded to the washout, some of the crew being detailed to unload the foremost car while others were sent to the gravel pit. In making repairs, the loaded cars were run up to the washout, the forward car was emptied, and the train was then backed down the main line. Just before the main-line switch was reached, the pin which coupled the empty car was pulled and the rest of the train moved away from that car. The switch was set for the side track as soon as the train had passed over it, and the empty car ran in upon the middle track by its momentum. This process was repeated until seven were unloaded and run in upon the middle track, when the three remaining cars were left at the washout and the balance of the train backed down to Manchester. The engine returned with the caboose and combination car at quarter past twelve and stopped on the main line near the bars. The men at the gravel pit then quit work, walked up the side track and through the bars, and entered the cars where they had left their dinners. Lebrecque worked at the washout until about eleven o'clock, when he was sent to the gravel pit and remained there until work was suspended for dinner. At noon he became irritated because the men were not ordered to quit work. He was assured by the foreman that he should have a full hour for dinner, but continued to talk about working overtime, and was finally told that he might leave if he was dissatisfied. He entered the caboose with others and was not noticed again until he was seen by the trainmen just before his injury.

After the shovelers had entered the cars for dinner, the engine was taken to the washout, coupled to the three cars which had been left there, and backed down in order to run the cars upon the middle track. When the engine started on this trip, one of the

brakemen set the middle-track switch and then walked toward the main-line switch. When he had nearly reached the latter point he passed Lebrecque, who was walking in the direction of the gravel pit on the westerly side of the side track, but so far from the rail that he was in no danger of injury by passing cars. Lebrecque had left his coat at the gravel pit, and it was supposed he was going after it. After the engine had passed, the brakeman set the switch for the side track and let the cars run in. He then looked down the side track, saw Lebrecque just stepping over the rail, and shouted to him, but was unable to tell whether his warning was heard. At this time the engineer and fireman were on the locomotive, and the bell was rung continuously. The conductor was on the front of the engine, where he had gone for the purpose of uncoupling the cars. The second brakeman rode on the middle car for the purpose of controlling the cars after their detachment from the engine. Just before he reached the switch he saw Lebrecque on the west side of the track and at a safe distance from it. He paid no more attention to him until he heard a shout, when he looked again and saw Lebrecque walking between the rails. The front end of the forward car was then about sixty feet from Lebrecque, and the brakeman was powerless to prevent an accident. The fireman also shouted a warning to Lebrecque, who looked around, but was unable to escape. The accident happened about 110 feet south of the main-line switch, at which point the distance between the main line and the side track is about twenty feet.

The attention of the shovelers was not directed to the methods employed in shifting cars upon the side tracks, but they would have seen how the work was done if they had looked when they were at the washout or at the gravel pit. The only rule of the defendants in relation to flying switches was that they were to be made only when absolutely necessary. It was necessary to make them at the place of the accident. There was no evidence that other rules in respect to flying switches were in force on other railroads, or that other roads employed larger train crews when doing work of that nature.

Taggart, Tuttle, Burroughs & Wyman and *Andrews & Andrews*, for the plaintiff.

Branch & Branch and *William H. Sawyer*, for the defendants.

YOUNG, J. The plaintiff claims that the defendants were in fault because they failed to notify the deceased of the dangers incident to the service by reason of the method they employed in

setting off cars on side tracks like that leading to the gravel pit. Conceding that the danger incident to moving cars in this way is a matter in respect to which it is the master's duty to notify his servants, the plaintiff cannot be heard to complain of the defendants' failure to do so unless there is evidence from which it can be found that they ought to have anticipated the decedent would be where he was at the time he was killed; for the duty of notifying servants of the transitory dangers of their employment is imposed on the master for the benefit of those servants only whom he ought to anticipate will be injured if he fails to notify them. *McGill* v. *Company*, 70 N. H. 125; *Batchelder* v. *Railroad*, 72 N. H. 528. In order, therefore, to determine whether the plaintiff can be heard to complain that the defendants were in fault because of their failure to notify the deceased of the danger which was the cause of his death, it is necessary to inquire whether they ought to have anticipated that he would step onto this track before the cars had passed him.

Since a person is bound to anticipate all that the ordinary man would anticipate in his situation, the test to determine whether the defendants ought to have anticipated the deceased's action is to inquire whether an ordinary man, who knew all the defendants either knew of the situation and its dangers or would have known if they had used ordinary care for their servant's safety, would have anticipated that Lebrecque was likely to step upon the track before the cars passed him. If this were a suit against the train crew, it would be necessary to determine whether they should have anticipated Lebrecque's action in order to determine whether or not they were in fault for not anticipating it. It is clear that the test to determine that question would be the same as that to determine whether the defendants were in fault; for the evidence shows that the train crew knew all that could be known of the situation and its dangers.

It could be found that the train crew were negligent if there was a time, however short, when they could, and the deceased could not, have prevented the accident by the use of ordinary care. There is no view of the case in which it can be found that the defendants were and the train crew were not in fault, if it could not be found that the train crew were bound to anticipate the action of the deceased. Consequently the plaintiff will not be prejudiced if this case is considered as though the train crew were the defendants. The test to determine whether or not the train crew were in fault would be to inquire (1) whether they ought to have anticipated that the deceased would do what he did at the time of the accident; and if not, (2) whether there was anything they could have done to prevent an accident after they knew of his danger.

1. If the deceased had been walking directly toward the side track without apparently noticing the cars, instead of beside and at a safe distance from it, it could not be found that the train crew ought to have anticipated that he would step in front of the cars they were dropping in on this track. *Gahagan* v. *Railroad*, 70 N. H. 441; *Waldron* v. *Railroad*, 71 N. H. 362. If it could not be found they ought to have anticipated that he would step onto the track under such circumstances, it is obvious that it cannot be found they were in fault for not anticipating that he would turn suddenly toward the track and step in front of the approaching cars, for there was no apparent reason why he should do so. There was no evidence from which it could be found that it was better walking between the rails than on the shoulder of the embankment, that there was anything on the other side of the track which was liable to attract his attention, or that the train crew could have thought he was going anywhere but to the gravel pit. They knew there was no reason, if he was going there, why he should step between the rails until he got to the bars, and that the cars would pass him before he got half-way there. Neither was there any evidence of anything in his appearance which ought to have led them to think he was so engrossed in his own affairs that he might turn from a place where he knew he was safe to a place where he must have known he might be in danger, without looking to see whether or not he could do so in safety; for whether or not he knew how flying switches were made, he knew those tracks were in use on that day, and must have known that the cars were dropped in on them in some way, because it was obvious that only one end of the side track was connected with the main line. There was therefore no evidence from which it could be found that the defendants ought to have anticipated that the deceased would do what he did at the time he was injured.

2. Neither was there any evidence that the train crew could have done anything after they knew of the deceased's danger which they did not do to avoid an accident. Consequently there is no view of the case in which it could be found the defendants were in fault.

Plaintiff's exception overruled.

All concurred.

After the filing of the foregoing opinion the plaintiff moved for a rehearing, and both parties were heard upon the motion, by brief and orally.

Taggart, Tuttle, Burroughs & Wyman and *Andrews & Andrews*, for the motion.

Branch & Branch and *William H. Sawyer*, opposed.

PARSONS, C. J. The principal ground upon which the plaintiff asked for opportunity for further argument was the claim that in the opinion rendered the court had misunderstood the facts of the case. After exhaustive reargument, both oral and written, and careful reëxamination of the record, this claim does not appear to be well founded. The immediate cause of the injury to Lebrecque was his act in stepping from the place of safety where he was walking beside the track, almost directly in front of the cars which were then approaching upon the track. It is manifest that if he had looked to see if the track was about to be used for the purpose for which it was designed, he could not have failed to see the danger. On the question of the defendants' fault at the time, considering them to be responsible for the acts of the trainmen if they were in fault, the case is not to be distinguished from *Waldron* v. *Railroad*, 71 N. H. 362. Lebrecque was a man with some experience in railroad work and knew that the track was in use for the passage of cars, for the work in which he was engaged was loading cars which had been let down into the gravel pit to be drawn out, so that their contents could be utilized in filling the washout. He had worked at both places during the day. The trainmen were not in fault in not apprehending the possibility that with his knowledge of the use of the track, which they could rightfully assume he had, he would suddenly place himself in the path of the train without taking any precautions to see if it was safe to do so. The ruling of the superior court, denying the motion for a nonsuit upon the ground that there was evidence that the plaintiff was in the exercise of care, is not sustained. The opinion heretofore filed proceeded upon the ground, though it was not thought necessary to formally announce the position, that this ruling was erroneous. If Lebrecque's act was that of a man exercising ordinary care, the trainmen who had the same knowledge of the situation that he had would have been bound to anticipate and guard against it. But they were not bound to foresee that he would act without any care for his safety, and hence were not negligent in failing to anticipate his action. Upon this branch of the case the plaintiff's right of action is concluded by

the rule laid down in *Gahagan* v. *Railroad*, 70 N. H. 441. To sustain the plaintiff's action it would be necessary to overrule both these cases. The contention that Lebrecque had reason to understand that the work of the train crew would be suspended during the noon hour is not sustained by the evidence. He had been told that he, one of the shovelers, should have a full hour for dinner from the time work was suspended; but there was no evidence as to the length of time to be taken for that purpose by the train crew, or when they were to take it. That they were at work at this time was self-evident.

The plaintiff places his right of action upon the failure of the defendants to make some rule regulating the making of flying switches. The obligation of the master to make rules to secure the safety of the workmen in the performance of the work is a particular of the general rule which requires him to furnish suitable instrumentalities for the work; or, to state the obligation with entire exactness, requires of him personal care to that end. *McLaine* v. *Company*, 71 N. H. 294, 296, 297; *Hill* v. *Railroad*, 72 N. H. 518. It appeared that there was a rule that a flying switch should be made only when absolutely necessary. There may be various reasons why the making of flying switches is not considered sound railroad practice, and hence is required to be avoided if practicable. By this method, as it is understood, a train is separated for a greater or less distance, a portion being carried on by its momentum or the effect of the grade; and between the passage of the different parts a switch is thrown so that the following cars are deflected onto a different track. Whatever other objections there may be to the practice, it is apparent that the only danger to persons on or about the track is the approach without warning of the separated cars. It is manifest that for a train to pass over a highway crossing in two or more parts, without warning that others are coming after the first has passed on, would constitute a serious menace to travelers about to use the crossing, who might naturally understand, when a portion of the train had crossed, that the danger of immediate collision was over. The danger would arise from the fact that, as trains do not usually occupy the tracks of a railroad in close proximity to each other, prudent men would consider it safe to attempt to cross immediately behind a train. The duty of the railroad in such case to give warning of the approach of other cars would be clear. Failure to give such warning would be strong, if not conclusive, evidence of negligence. The duty imposed on the railroad finding it necessary to conduct operations of this character is to warn persons liable to be injured thereby. As it is to be inferred from the case that such operations are necessary at times, the negligence consists, not in making flying

switches, but in the failure to give proper warning. It is claimed that the action in this case was not properly a flying switch, but a "kicking" or letting the cars down by gravity upon the side track. If this action is technically better described by some other term, the principle upon which liability could be attached would be nevertheless the same—the lack of a warning.

The question in its final shape therefore is: Was Lebrecque entitled to a notice from his employers of the use which was proposed to be made of the track at this time? If he was, and received none through fault of his fellow-servants, he could not recover unless the master was in fault for not providing that a warning should be given. *McLaine* v. *Company*, 71 N. H. 294. If he was not entitled to a warning, it is immaterial that no provision was made for warning him. He was entitled to care on the master's part to make his work-place safe and to secure his safety in going to and from his work. There is no evidence that this duty was not fully performed. If cars were let down into the pit while Lebrecque and his associates were at work there, there is no evidence that the precautions taken were not sufficient to save them from harm. Lebrecque was not injured in going to or from his work. He had come out of the pit and got into the car to get his dinner. There is nothing to show any reason why his occupation of the track should have been expected or apprehended until the close of the noon hour. He was occupying the track for his own purposes; and in the absence of evidence tending to show that his presence ought to have been expected, the defendants are not liable except for failure to avoid injuring him if they could after they knew of his danger. *Brown* v. *Railroad*, 73 N. H. 568; *Shea* v. *Railroad*, 69 N. H. 361. If it was the duty of the defendants to provide by rule, in the case of the making of a flying switch, for a warning to those whom they had reason to apprehend might be in the path of the moving cars, nevertheless they were under no obligation to give such warning for the benefit of one whose presence they were not bound to anticipate. The plaintiff cannot recover except for the breach of a duty to Lebrecque causing the injury. It is immaterial that the facts may establish the breach of a duty owed by the defendants to others, which if observed would have prevented the injury. *Batchelder* v. *Railroad*, 72 N. H. 528.

Motion denied.

All concurred.

Cheshire,
Oct. 2, 1906.

MOORE v. MARYLAND CASUALTY CO. & a.

Although the pendency of a prior suit in another state is not pleadable in abatement, the court may in its discretion direct that an action be continued to await the final disposition of litigation in a foreign jurisdiction between the same parties and involving the same subject-matter.

BILL IN EQUITY. This is the same case which was before the court in 73 N. H. 518, with the exception of some additional facts not necessary to be here stated, Transferred from the April term, 1906, of the superior court by *Pike*, J.

Cain & Benton, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

George W. Estabrook, receiver, *pro se*.

BINGHAM, J. The determination of this controversy depends upon the interpretation of a contract which is governed by the law of Massachusetts. A prior suit involving the same subject-matter and between the same parties is now pending in the courts of Massachusetts. Under these circumstances it is not deemed advisable for this court to now pass upon the question here presented. Although the pendency of the Massachusetts suit is not pleadable in abatement of the present action (*Yelverton* v. *Conant*, 18 N. H. 123; *Goodall* v. *Marshall*, 11 N. H. 88; 1 Cyc. 36), nevertheless, its pendency being suggested, it is discretionary with this court to direct that the present action be continued to await the final disposition of the Massachusetts suit. *Douglass* v. *Insurance Co.*, 138 N. Y. 209, 218; 1 Cyc. 36, 37.

Case continued.

All concurred.

Rockingham,
Nov. 7, 1906.

BECKMAN *v.* HAMPTON *& a.*

Remarks of counsel in argument which contain statements of fact unsupported by the evidence, but which are not relevant to any issue in the case nor prejudicial in their effect, do not furnish cause for setting aside a verdict.

TRESPASS, for breaking and entering the plaintiff's close and destroying his buildings. Plea of soil and freehold as to the portion of the *locus* described as White's Rocks, and the general issue as to the remainder. Trial by jury. Verdict for the plaintiff as to that part of the *locus* described in the plea of soil and freehold, and not guilty as to the remainder. Transferred from the October term, 1905, of the superior court by *Stone*, J.

The location of the land was in dispute. The defendants claimed that it was in Hampton and had never been granted by the town to any individual, and therefore the town owned it; while the plaintiff contended that it was not within the limits of Hampton as originally granted, and therefore the town did not own it. As tending to show that it was within the limits of Hampton, and for that purpose only, the defendants were permitted to show by the records of the Government of Massachusetts Bay and New England that leave was granted to Steven Bachelder and others to begin a plantation at Winnecunnett, and that subsequently Winnecunnett was allowed to be a town under the name of Hampton; and one French, a witness for the defendants, read from the records as follows: "The court grants that the petitioners, Mr. Steven Bachelder, Christo Hussey, Mary Hussey (13 other names), with divers others, shall have liberty to begin a plantation at Winnecunnett, and Mr. Bradstreet, Mr. Wentworth, Jr., and Mr. Rawson, or some two of them, are to assist in setting out the place of the town and apportioning the several quantity of land to each man, so as nothing shall be done without allowance from them or two of them. . . . Winnecunnett is allowed to be a town and hath power to choose a constable and other officers. . . . Winnecunnett shall be called Hampton."

In his closing argument the plaintiff's counsel made the following remarks, to which the defendants excepted, and the same were not withdrawn or changed: "When the plantation of Hampton was granted, it was granted to Steven Bachelder, Christopher Hussey, and others, as Mr. French has named them. The land belonged to those men as proprietors. The proprietary and the

municipality were not the same thing. To be sure, they transacted business in the same meetings and kept their records in the same books until 1729, or some such date. The meetings of the municipality had to be in the town limits; the proprietary could hold their meetings anywhere. This land cannot belong to the municipality. If anything, it belongs to the proprietors and their heirs."

The court declined to instruct the jury, as requested by the plaintiff, that "the title to all lands in Hampton not granted to individuals is in the original proprietors and their heirs, and the town as a municipality has no title to such lands," and charged them as follows: "The town of Hampton is the owner of all lands within the limits of the town not granted to individuals, and owns the title as against everybody except those who can show a better title. The land is not held by the town for public uses, but is like land held by individuals for a private use."

Arthur O. Fuller, for the plaintiff.

Eastman, Scammon & Gardner, for the defendants.

BINGHAM, J. The contention of the defendants is that the remarks of counsel for the plaintiff in his closing argument were not warranted by the evidence and were prejudicial. If the remarks complained of contained statements of fact not supported by the evidence, they were not relevant to any issue of fact tried in the case nor of a character to prejudice the jury against the defendants. In fact, they had no bearing upon the case except so far as they tended to support the conclusions of law sought to be drawn by the plaintiff's counsel, that the lands embraced within the limits of the town of Hampton belonged to the proprietors and their heirs and not to the municipality. But the court declined to charge the jury in accordance with this view of the law, and charged them that lands within the town of Hampton which had not been granted to individuals belonged to the town as against everybody, except those who could show a better title. The remarks not being prejudicial, the error was harmless. Verdicts are not set aside under such circumstances. *Wait* v. *Association*, 66 N. H. 581; *Sabine* v. *Merrill*, 67 N. H. 226; *State* v. *Saidell*, 70 N. H. 174; *Marsh* v. *Insurance Co.*, 71 N. H. 253, 256; *Leavitt* v. *Company*, 72 N. H. 290; *Parsons* v. *Wentworth*, 73 N. H. 122.

Exception overruled.

All concurred.

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Strafford,
Nov. 7, 1906.

STATE v. LANGDON.

An indictment in terms charging an unlawful delivery of intoxicating liquor in violation of section 15, chapter 95, Laws 1903, as amended by chapter 49, Laws 1905, is bad upon demurrer if it fails to allege that the respondent, at the time of the offence set forth, held a license permitting him to engage in the traffic in liquor.

INDICTMENT, charging the unlawful delivery of liquor contrary to the provisions of sections 15 and 27, chapter 95, Laws 1903, as amended by chapter 49, Laws 1905. The defendant demurred (1) because the indictment did not allege that notice in writing had been given to him, as required by section 27, chapter 95, Laws 1903, as amended by section 9, chapter 49, Laws 1905; (2) because it was not alleged that the defendant knew the person to whom the delivery of liquor was charged to be one to whom such delivery was forbidden; (3) because it was not alleged that the defendant was a licensee under chapter 95, Laws 1903. Transferred from the September term, 1905, of the superior court by *Chamberlin*, J., without a ruling.

Dwight Hall, solicitor, for the state.

William S. Pierce, for the defendant.

PARSONS, C. J. "No person shall sell, deliver, or give away, or cause or permit or procure to be sold, delivered, or given away, any liquor, *first*, to a minor, nor to a minor for any other person; *second*, to an intoxicated person; *third*, to an habitual drunkard; *fourth*, to any person where notice in writing has been given in accordance with the provisions of section 27 of this chapter, forbidding sale or delivery to such person." Laws 1905, *c.* 49, *s.* 9; Laws 1903, *c.* 95, *s.* 15. The respondent demurs to an indictment in terms charging a violation of the foregoing section. The only ground of demurrer which it is necessary to consider is the failure to allege that the respondent, at the time of the offence charged, held a license to engage in the traffic in liquor. This objection is fatal, and the demurrer must be sustained.

By the general law of the state (P. S., *c.* 112) the sale of liquor to any person is prohibited. Section 8, chapter 122, Laws 1903, provides that "the procuring, furnishing, or giving away of spirituous liquors, or any shift or device to evade the provisions of chapter 112 of the Public Statutes or amendments thereto, shall

be deemed unlawful selling within the provisions of said chapter, and the punishment shall be the same as in the case of selling or keeping for sale spirituous liquors." If the respondent is not a licensee, the acts charged against him would constitute an offence, without reference to the fact whether the person to whom it was charged the liquor was delivered came within the description of sections 15 and 27, Laws 1903, as amended (Laws 1905, *c.* 49), or not. This section prohibits the delivery of liquor to all persons, the only exception being the "furnishing or giving away" of spirituous liquors by a person in his private dwelling. Laws 1903, *c.* 122, *s.* 8. The supplying of spirituous liquor to any person by sale or otherwise being forbidden by general law, chapter 95, Laws 1903, provides that in a particular situation "it shall be lawful to engage in the traffic in liquor"; and in that respect the chapter is an amendment of the law.

Although such traffic is generally forbidden, those persons who have received licenses are authorized in towns which have adopted the act to sell and keep liquor for sale. The subject of the chapter is the regulation, not the prohibition, of the sale. The sale is permitted, but the act contains numerous restrictions, some of which limit the persons to whom liquor may be sold. Although the language of section 15, providing that "no person" shall sell or deliver liquor to certain persons described, is sufficiently broad to include all persons within its prohibition, it is reasonable to conclude that the enactment was not directed against those who were already forbidden to supply liquor to any one, but against those permitted to sell to some. In the act of 1903, licensees who delivered or gave away liquor in violation of section 15 were punishable under section 28 of the act, but no penalty was provided for the delivery or giving away of liquor in violation of that section by a non-licensee. The absence of such penalty, and the fact that at the same session the section of chapter 122 forbidding the procuring, furnishing, or giving away of liquor to any person by a non-licensee was adopted, establish the legislative understanding in 1903 that section 15 of chapter 95 applied only to licensees. In spite of the general expression "no person," the purpose of the act, in connection with existing and concurrent legislation, establishes that, like other sections of the chapter more definite in expression or made more certain from their subject-matter, this section was intended merely as a restriction upon, or regulation of, the liquor-traffic privilege conferred by the license. See *ss.* 16–24. Hence the provisions of the section are restrictions upon the privilege granted under the act, and not a needless, partial prohibition of acts otherwise totally prohibited by general law. As no penalty was provided by the act, it is not probable that this

prosecution would have been instituted in this form, assuming that the respondent is not a licensee, except for an amendment adopted in 1905. Section 33 of the act—"Whoever, in a city or town wherein the provisions of this act are in force, shall sell or keep for sale liquor contrary to the provisions of this act, shall be punished"—was amended in 1905 (*c.* 49, *s.* 18) by inserting after the word "act" the following, "or whoever, in such city or town, shall deliver, or cause to be delivered, liquor to any person to whom the sale or delivery is forbidden by sections 15 and 27 of this chapter," thereby imposing the same punishment for the delivery of liquor to the persons proscribed by those sections, as was previously attached to a sale to them. This amendment did not extend the prohibition of section 15. As to licensees, it changed the penalty from that of section 28 to that of section 33. If section 15 was originally intended to apply to non-licensees, and the omission of a penalty from the act was a mistake, this amendment might be understood as intended as a correction of the error. But upon the grounds already suggested, and especially the concurrent enactment of section 8, chapter 122, Laws 1903, it seems clear that there was no mistake in this respect in the law of 1903. The original penalty of section 33 applies to sales by licensees contrary to the provisions of the act. *State* v. *Corron*, 73 N. H. 434, 447. Whether it properly applies to acts of any but licensees is not now in question; but it is to be observed that chapter 95, Laws 1903, nowhere prohibits the sale or keeping for sale of liquor by unlicensed persons. It prescribes under what terms it shall be lawful to engage in the sale of liquor (*s.* 31), leaving the prohibition of the general law to apply to all other cases. This understanding has been declared by chapter 117, Laws 1905, which defines as "no-license territory" all parts of the state except the premises actually occupied by licensees. This definition and the provisions of the chapter make clear the legislative understanding: that the prohibitory law is in force generally in license towns, except in so far as it is rendered inapplicable by the special license legislation.

In the case before the court, it is therefore not sufficient to allege that the city of Dover has accepted the provisions of the license statute, to fully and plainly set forth the crime charged. A further allegation is necessary to bring the case within the license statute. The acts relied upon to constitute the offence charged in this case may constitute an offence under section 8, chapter 122, Laws 1903; but the indictment is plainly intended to describe an offence punishable under section 18, chapter 49, Laws 1905. If the description of the person to whom the liquor is alleged to have been delivered, as one to whom the delivery of

liquor is forbidden by sections 15 and 27, chapter 95, Laws 1903, could be rejected as surplusage (*State* v. *LaRose*, 71 N. H. 435), the indictment by the use of the word "deliver" would still imply an attempt to inflict the punishment of section 18, chapter 49, Laws 1905; and, on the most favorable view for the state, it would be doubtful whether the respondent was charged under the license or the prohibitory statute, to the latter of which a less penalty is attached. Laws 1903, *c.* 122, *s.* 1; Laws 1905, *c.* 116, *s.* 1. The indictment would be bad for uncertainty. *State* v. *Leavitt*, 63 N. H. 381; *State* v. *Sherburne*, 58 N. H. 159.

Demurrer sustained.

All concurred.

Merrimack, Nov. 7, 1906.

KENISTON *v.* GORRELL, *Guardian.*

Where a tenant for life and a remainderman have united in the compromise of a claim for damages to their realty and a sale of timber thereon, without agreement as to the disposition of the fund, it is presumed that they contemplated an equitable division according to their respective interests; and a finding of the trial court, that payment to the life tenant of the present worth of his interest in the principal sum, computed according to the tables of mortality, will constitute the most equitable apportionment under all the circumstances, presents no question of law.

BILL IN EQUITY, for an apportionment. Trial by the court. Transferred from the October term, 1905, of the superior court by *Pike*, J.

Sally Randall devised to the plaintiff certain real estate as follows: "I give and bequeath the use of my homestead place in Canterbury to Edith M. Keniston during her life, and at her decease said homestead is to become the property of her children in equal shares." The plaintiff has two minor children of whom the defendant is guardian. In April, 1905, certain timber standing on the premises was injured by fire caused by a railroad, and the defendant, as guardian and as agent for the plaintiff, received $600 in settlement for the damage. Subsequently the defendant sold his wards' interest in the damaged timber under license from the probate court, and at the same time, as agent for the plaintiff, sold her interest in the same property, receiving $600 for both

interests. The sale of the timber was necessary to prevent waste. In these transactions the plaintiff did not waive any right to the present worth of the proceeds, but expressly claimed that right of the defendant.

The plaintiff asks an apportionment of the present worth of her life estate in the $1,200, according to the mortality tables. The defendant claims that the fund should be invested and only the income paid the plaintiff. It has been his understanding since the fire that this should be done and he has not waived any right to such disposition, unless as matter of law such waiver appears from the facts stated. The apportionment claimed by the plaintiff is to be made, unless forbidden as matter of law.

William B. Fellows, for the plaintiff.

Gawn E. Gorrell, guardian, *pro se*.

PARSONS, C. J. The plaintiff under the will of Sally Randall, which gave her "the use of my homestead place in Canterbury . . . during her life," had a life estate therein. *Wood* v. *Griffin*, 46 N. H. 230, 234; *McClure* v. *Melendy*, 44 N. H. 469, 471. The fund in question arises from damages paid by the railroad for injury to timber on this homestead by fire and from a sale of the injured timber rendered necessary by the injury done to it. The fund therefore represents a diminution in value of the estate in which the plaintiff had a life interest and the defendant's wards the remainder, and is so much of the estate. If there were grounds upon which either party could have claimed a greater interest in any part of the proceeds,—a present estate in fee,—no such claim has been made or presented to the court for decision. Conceding that the plaintiff had no right to cut and sell any of the timber (*Miles* v. *Miles*, 32 N. H. 147), she nevertheless had the right to have it remain upon the premises; and as it has been severed without her fault, she is entitled to an estate for life in the proceeds, and to have the proceeds invested and the interest paid to her. *Stonebraker* v. *Zollickoffer*, 52 Md. 154,—36 Am. Rep. 364; *Bateman* v. *Hotchkin*, 31 Beav. 486. This the defendant concedes; and the only question presented is whether the order of the superior court directing an apportionment, by payment to the life tenant of the present worth of her interest in the sum according to the tables of mortality, is forbidden as matter of law.

The plaintiff could have sold and conveyed her life interest in the whole estate, and the proceeds would have been her own property. *Smith* v. *Jewett*, 40 N. H. 530, 533. As she could have sold her interest in the whole, she could have sold that interest in

any part of it. The remaindermen could have done the same. But the settlement and sale which produced the fund in question were joint, not several. There appears to have been no agreement as to the disposition of the fund created by the joint acts of the parties. When a fund is so created, in the absence of agreement it must be understood that the parties contemplated an equitable division according to the value of their respective interests. It has been said that "a court of equity will not interfere *in adversum* to change real estate into personal property, without imposing conditions by which the proceeds shall retain throughout the character of the original fund." *Foster* v. *Hilliard*, 1 Sto. 77, 88, 89. And where the change has been brought about by the fault of the life tenant, he cannot profit by his own wrong and hence has no interest in the fund. *Tooker* v. *Annesley*, 5 Sim. 235; *Bateman* v. *Hotchkin*, 31 Beav. 486. Neither of these conditions appearing, the equitable division of the proceeds according to the value of their several interests, which the parties must have contemplated by their joint action without agreement as to the division, presented a question of fact for the decision of the superior court. The division might be made in either method claimed by the parties. As a mathematical proposition, there is no difference between the two. The fact that one method has been found more equitable under the circumstances presents no question of law. *Houghton* v. *Hapgood*, 13 Pick. 154, 158; *Datesman's Appeal*, 127 Pa. St. 348; *Blakley* v. *Marshall*, 174 Pa. St. 425; *Henderson* v. *Henderson*, 4 Pa. Dist. 688; *Thompson* v. *Thompson*, 107 Ala. 163; *Foster* v. *Hilliard*, 1 Sto. 77; *Harrison* v. *Harrison*, 28 Ch. Div. 220, 230; 1 Sto. Eq. Jur., *s.* 488*a*; 16 Cyc. 639.

Whether the English rule of apportionment, which gives one third to the tenant and two thirds to the remaindermen (*Brent* v. *Best*, 1 Vern. 69), could have been adopted need not be considered. *Dennison's Appeal*, 1 Pa. St. 201; *Shippen's Appeal*, 80 Pa. St. 391; *Foster* v. *Hilliard*, 1 Sto. 77, 90; 1 Sto. Eq. Jur., *s.* 487. No facts are found showing the order to be inequitable as matter of law.

Decree according to the order of the superior court.

All concurred.

Merrimack,
Nov. 7, 1906.

NEW LONDON v. DAVIS & a.

Individual taxpayers are represented by the town in a highway proceeding, and are estopped to deny the validity of a lay-out equally with the municipality.

The right of a town to attack the laying out of a highway is waived by an inexcusable delay of four years.

A highway lay-out is not void because two of the selectmen who made the order were disqualified to act in the proceeding.

PETITION, for leave to discontinue a highway. The case is the same as that reported in 73 N. H. 72. After the rescript was filed in the superior court, the plaintiffs moved that the petition be referred to the county commissioners. The defendants objected to such reference because two of the petitioners for the new road were related to two of the selectmen who laid it out. The court granted the motion, and the defendants excepted. Transferred from the October term, 1905, of the superior court by *Pike*, J.

Nathaniel W. Colby and *Burnham, Brown, Jones & Warren*, for the plaintiffs.

Henry F. Hollis and *George W. Stone*, for the defendants.

YOUNG, J. It was decided when the case was here before that the superior court should hear this petition when the plaintiff satisfied it that the new road (1) is a "statutory highway" and (2) was built was without expense to the town. *New London* v. *Davis*, 73 N. H. 72, 79. It is conceded that it was so built; consequently the only question raised by the defendants' exception is whether it is such a highway. The town records show that it is; but the defendants claim they may have the record of the laying out amended to show that it is not such a road, even if the town cannot, because they were not parties to that proceeding. One serious trouble with this claim is that the facts do not sustain it, for the defendants were represented by the town in that proceeding (*Bennett* v. *Tuftonborough*, 72 N. H. 63) and so are estopped to deny the validity of the laying out if the town is. *State* v. *Corron*, 73 N. H. 434, 454. The town has delayed for four years to attack the laying out, and nothing appears which will excuse such delay; so there is no evidence from which it can be found it has not waived the disqualification of the selectmen,—conceding they were disqualified, a question as to which no opinion is expressed

(*New London* v. *Davis*, 73 N. H. 72, 74),—if it could legally do so. Although jurisdiction of the subject-matter cannot be conferred on the court by agreement, when the court has such jurisdiction any judgment it may render when the parties are in court is not void because the judge was disqualified (*Bickford* v. *Franconia*, 73 N. H. 194, 196; *Moses* v. *Julian*, 45 N. H. 52), nor for any other reason. Consequently, if two of the selectmen who laid out the new road were disqualified, the laying out is not void for that reason.

Exception overruled.

All concurred.

Sullivan,
Nov. 7, 1906.

74 57
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SHACKETT v. BICKFORD.

In an action for deceit in the sale of personalty, the fraudulent character of the defendant's misrepresentation of material facts is established by proof that it was made under suspicion that it might be false.

CASE, for deceit in the sale of a horse. Trial by jury and verdict for the plaintiff. Transferred from the November term, 1905, of the superior court by *Chamberlin*, J., on the defendant's exceptions to the denial of motions for a nonsuit and a verdict in his favor and to certain instructions set forth in the opinion.

Jesse M. Barton, for the plaintiff.

Henry F. Hollis, for the defendant.

BINGHAM, J. The important question in this case arises on the defendant's exception to the charge of the court to the jury. The action was deceit in the sale of a horse, and the ground upon which the trial proceeded was that the defendant knew his representations were false. The court charged the jury "that it was enough, upon the question of the defendant's knowledge, if he knew or if he suspected that the representations were not true"; in other words, that suspicion by the maker that his representations are false is the legal equivalent of knowledge of their falsity, and fraudulent.

What will constitute fraud in such an action has recently been considered by the English courts. The leading case upon the

subject is *Derry* v. *Peek*, 14 App. Cas. 337, decided in the house of lords in 1889. The complainant in that case charged the defendants with knowingly making false representations. It was found in the court of first instance that the representations had been honestly made, believing them to be true; and the court of appeal (37 Ch. Div. 541) held that notwithstanding this fact the representations must be taken to be fraudulent, because the defendants had no reasonable ground for that belief. The question, therefore, which was presented for the consideration of the house of lords, when the case came before that body in 14 App. Cas. 337, was whether a statement honestly made and believed to be true should be treated as fraudulent because those who made it had no reasonable ground for entertaining that belief. In the house of lords the decision of the court of appeal was reversed, and it was held, in conformity with the universally recognized rule, that an action of deceit is based upon fraud; that an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could not be maintained; that want of reasonable ground for believing a representation to be true might be evidence of fraud, if the circumstances indicated such recklessness or negligent disregard for the truth as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud; that notwithstanding a court or jury might find that the speaker had no reasonable ground for believing his representations were true, he may nevertheless have honestly entertained such belief, and consequently that fraud could not be predicated upon such a finding. Lord *Herschell*, who delivered the leading judgment in the case, said (*p.* 374): "I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground; for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

In *Angus* v. *Clifford*, [1891] 2 Ch. 449, 465, 466, *Lindley*, L. J.,

in commenting upon this statement of Lord *Herschell*, said: "You may have . . . a false statement made, but without the matter being present to your mind, and made carelessly; and if that is the fact, that is not fraud, but carelessness, for which an action will not lie. . . . The passages about knowledge—knowingly making it, and making a statement without believing its truth—are based upon the supposition that the matter was really before the mind of the person making the statement; and if the evidence is that he never really intended to mislead, that he did not see the effect, or dream that the effect of what he was saying could mislead, and that that particular part of what he was saying was not present to his mind at all, that I should say is proof of carelessness rather than of fraud. I base my judgment . . . on the . . . ground that . . . an action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is willful recklessness, by which I mean willfully shutting one's eyes, which is of course fraud."

In *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 498, Lord *Esher*, M. R., states: "A charge of fraud . . . against a man . . . cannot be maintained in any court unless it is shown that he had a wicked mind. . . . If a man tells a willful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind." And *Bowen*, L. J., in the same case says (*pp.* 500, 501): "But his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case it is the knowledge of the falsehood, in the second it is the wicked indifference, which constitutes the fraud. There seems to have been some sort of an idea that . . . whether the man had made the representation not knowing and not caring whether his statement was true or false, the expression 'not caring' had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart and conscience whether it was true or false, and that would be wicked indifference and recklessness."

It is apparent from the views expressed by the judges in these cases that to establish fraud you must prove a dishonest mental state or condition of mind on the part of the speaker with reference to the truthfulness of his statement; that when he makes a

statement of fact intending it to be relied upon, he of necessity affirms his belief in its truth (*Smith* v. *Chadwick*, 9 App. Cas. 187, 203; *Angus* v. *Clifford*, *supra*, 470); that if his statement was untrue and he knew it, or he made it without belief in its truth, or with a conscious indifference, not caring whether it was true or false, the wickedness of his mind is manifest and the fraudulent character of his act established.

Applying these principles to this case, it would seem to follow that when the defendant, with a view to effecting the sale, stated to the plaintiff that the horse was safe and just what he wanted, he thereby affirmed his belief in the truthfulness of his statement; and it being found that the horse was vicious, and that the defendant suspected that his statement was false, that his want of belief or conscious disregard for the truth or falsity of his statement was established; for a person who suspects that his statement is false does not entertain an honest belief that it is true, or is consciously and wickedly indifferent to its truth or falsity.

The conclusion here reached is in harmony with the decisions in this state and with the great weight of authority elsewhere. *Mahurin* v. *Harding*, 28 N. H. 128; *Hanson* v. *Edgerly*, 29 N. H. 343; *Pettigrew* v. *Chellis*, 41 N. H. 95; *Springfield* v. *Drake*, 58 N. H. 19; *Rowell* v. *Chase*, 61 N. H. 135; *Stewart* v. *Stearns*, 63 N. H. 99; *Spead* v. *Tomlinson*, 73 N. H. 46, 61; *Pearson* v. *Howe*, 1 Allen 207; *Litchfield* v. *Hutchinson*, 117 Mass. 195; *Cole* v. *Cassidy*, 138 Mass. 437; *Andrews* v. *Jackson*, 168 Mass. 266; *Salisbury* v. *Howe*, 87 N. Y. 128; *Hadcock* v. *Osmer*, 153 N. Y. 604, 609; *Cummings* v. *Cass*, 52 N. J. Law 77; *Lamberton* v. *Dunham*, 165 Pa. St. 129; *McKown* v. *Furgason*, 47 Ia. 637; 1 Big. Fr. 509, 511, 513. In *Mahurin* v. *Harding*, *supra*, the court approved a charge to the jury that "if the affirmation [of the defendants] was known, or believed, or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent," and stated that the terms used to describe the *scienter* were "expressions of equivalent import." With this view we are content.

The defendant's motions for a nonsuit and verdict were properly denied. The evidence was sufficient to warrant the jury in finding that the representations were fraudulent.

Exceptions overruled.

All concurred.

Grafton,
Nov. 7, 1906.

STATE v. HALL.

It is a defence to an indictment for not causing a child to attend school that the schoolhouse is not within reasonable walking distance and no conveyance is provided by the school board.

INDICTMENT, for not causing a child eleven years old and in the custody and under the control of the defendant to attend a public school, as required by chapter 13, Laws 1903. At the May term, 1905, of the superior court, it was agreed before *Wallace*, C. J., that the defendant was guilty unless the facts hereinafter stated constitute a defence.

The defendant and the child reside in the school district of Orford three miles from a schoolhouse in the district where a public school is annually taught. Under the circumstances it was unreasonable to require the child to walk that distance, and no transportation was provided by the school board. The board set aside twenty-five per cent of the school money for the conveyance of scholars, and offered the defendant a proportionate part of that sum to convey this child and others in his custody and under his control to and from school. The defendant declined to accept the sum offered and refused to transport the child. The board were unable to procure transportation for the sum offered the defendant. The rate offered him for the service was the same paid for the conveyance of other scholars in the district where such conveyance was required.

Marshall D. Cobleigh, solicitor, for the state.

Batchellor & Mitchell, for the defendant.

PARSONS, C. J. "Every person having the custody and control of a child between the ages of eight and fourteen years, . . . residing in a school district in which a public school is annually taught, shall cause such child to attend the public school all the time such school is in session, unless," etc. Laws 1903, *c.* 13; Laws 1901, *c.* 61, *s.* 14; P. S., *c.* 93, *s.* 14. The respondent is indicted under this section. It appears that he resides three miles from the place where the school is taught, that the distance is an unreasonable one for the child to walk, and that no conveyance has been provided by the school board. The sole question in the case is whether his failure to provide conveyance for the child to and from school, or to secure a residence for himself and child, or

for the child, within reasonable walking distance of a schoolhouse in which a school is taught, is a violation of the statute.

The section under which the respondent is indicted was first enacted in 1871. It was then expressly provided that to be amenable to the law the person in charge of the child must be one "residing in any school district in which a public school is annually taught . . . within two miles by the nearest traveled road from his residence." Laws 1871, *c.* 2, *s.* 1. In the reënactment of 1878, the same provision is found. G. L., *c.* 91, *s.* 14. In the revision of 1891, the reference to the distance of the person's residence from the place where the school is taught is omitted, and the statute appears in its present form so far as it relates to this question. P. S., *c.* 93, *s.* 14; Laws 1901, *c.* 61, *s.* 14; Laws 1903, *c.* 13. If the omission was intended to impose the duty of conveyance upon the person in charge of the child when the distance was as great as in this case, the omission constituted a material change in the law. If no change in the law was intended, the respondent is not within the terms of the statute, residing as he does three miles from the school. The commissioners who prepared the revision known as the Public Statutes indicate by the marginal note in their report that the omission was made by them without intent to change existing law. Comm'rs' Rep. P. S., *p.* iii; *Ib.*, *c.* 92, *s.* 14. If by statutory enactment since the General Laws the clause in question had been impliedly repealed or made nugatory, its omission upon reënactment did not change existing law. If the law as it stood did not require the person named therein to furnish conveyance for a child in his care who could not be reasonably required to walk less than two miles, the law was not materially changed except by dropping the legislative definition of two miles as the limit of the reasonable distance which children could be required to walk. Both of these considerations appear to be well founded and to establish that no change in the law was intended in 1891.

In 1878, towns and districts were authorized to expend not exceeding ten per cent of the school money for the conveyance of scholars residing not less than one mile and a half from school (Laws 1878, *c.* 55); and in 1885, by the statute abolishing school districts, the amount expendable by the school board for this purpose was increased to twenty-five per cent of the school money. Laws 1885, *c.* 43, *s.* 6. The latter provision was reënacted in the Public Statutes (*c.* 92, *s.* 1). If the omission made in the enactment of the section under which the respondent is indicted was understood to require the parent or guardian to provide for the conveyance of the child, there was no occasion to authorize the school board to do it. The purpose of both sections was to secure the attendance of children of the school age. If the law did not

require the guardian residing two miles from the school to cause children in his care to attend even when conveyance was furnished by the school board, the purpose of the law was defeated. Although conveyance was provided, the children might not be permitted to attend. One general purpose of the law abolishing school districts was to gather the children together into larger schools where they might receive better instruction for longer terms. The conveyance was intended as a substitute for school accommodations in a neighborhood where the scholars were too few to render the maintenance of a separate school reasonable or profitable. By implication, at least, distance as an excuse for non-attendance was abrogated in all cases where conveyance was furnished.

It seems more probable that the omission of the provision was not intended to compel the parent to furnish conveyance when none was provided by the school board, but that it was made to make it clear that the law required him to send the child when conveyance was provided. The omission did not change existing law, because the provision had in effect already been repealed. Furthermore, the original statute was not intended to place the duty of conveyance upon the parent in any case where the child's attendance would otherwise be unreasonable. The law, as has already been held, is to have a reasonable construction. It was "intended to secure the attendance of children who were able, not to confer arbitrary power upon the school board." *State* v. *Jackson*, 71 N. H. 552, 558. Its language originally was: "Every parent, guardian, master, or other person having the custody, control, or charge of any child . . . shall cause such child to attend." While the word "cause" in its usual meaning—to effect, to produce, to bring about—might imply that the duty was thereby placed upon such person to do everything necessary to secure the attendance of the child, and that if he did not succeed in so doing he would be liable to the punishment provided, it is evident that the duty imposed related to the exercise of the parental power of control implied by the custody and charge of the child, and required merely the exercise of that power to secure the child's attendance and forbade its exercise to keep the child from school. The legislature did not intend to imprison or fine a parent who had not the means to secure conveyance for his child. The purpose of the law is the education of the child. Accordingly, the existing statute provides: "The school board of every district shall provide schools at such places within the district . . . as will best subserve the interests of education and will give to all the scholars of the district as nearly equal advantages as may be practicable. They may use a portion of the

school money, not exceeding twenty-five per cent, for the purpose of conveying scholars to and from the schools." P. S., *c.* 92, *s.* 1. If the school board are unable to so arrange the schools as to give all the scholars reasonably equal advantages, they may by providing conveyance render such advantages as equal as practicable. But if as the schools have been arranged the amount of expenditure permitted for that purpose is insufficient to provide the necessary transportation, the remedy is to be found in an additional number of schools, which will require less expenditure for the conveyance of scholars.

The case contains facts conflicting as evidence upon the question whether the school board offered the respondent reasonable payment for the conveyance of his children. Whether the sum offered was or was not reasonably sufficient does not appear and is immaterial. The respondent was under no more legal obligation to convey the children under his care for reasonable compensation than he was to convey any other children in the district, nor was a greater duty to engage in this business placed on him because of his children than upon any other inhabitant who had no children. The statute does not require the respondent to furnish to the district conveyance of scholars at his own expense, or for the sum thought reasonable by the school board. The facts agreed, that the child cannot reasonably be required to walk and that no conveyance has been provided by the school board, constitute a defence to the indictment.

Respondent discharged.

All concurred.

Grafton,
Nov. 7, 1906.

WINSLOW, *Ap't*, *v.* SMITH, *Adm'r*.

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A statement by counsel in argument to the effect that expert witnesses are employed in the interest of their clients and are well paid for the service, made for the purpose of discrediting testimony presented by the adverse party, unsupported by any evidence as to the compensation paid to such witnesses generally or in the particular case, and not neutralized by subsequent action of counsel or instruction from the court, furnishes sufficient cause for setting aside a verdict.

Where it is claimed that misconception of an issue has resulted in an erroneous verdict, it is within the power of the trial court to recall the jury after a separation and inquire of them as to the grounds on which they proceeded; and if it appears that there has been a misconstruction, the verdict should be set aside, and the question should be recommitted under proper instructions or submitted to another jury upon a new trial.

The affidavits of jurors are not admissible in evidence to prove their misconstruction of an issue submitted to them.

APPEAL, from the probate of a will. The issues were: (1) Was the testatrix, Lora T. Bosworth, of sound mind when she executed the will? (2) "Was Lora T. Bosworth, on December 13th, A. D., 1904, [the date of the execution of the will] induced to execute this instrument as her last will, by undue influence . . . on the part of Ellen F. Smith and others interested in the making of said will?" The questions were drawn by the defendant's counsel and agreed to by the plaintiff's counsel. Transferred from the November term, 1905, of the superior court by *Stone*, J.

Two of the plaintiff's witnesses were physicians, who, having shown that they were qualified, testified as experts. The defendant's counsel in his closing argument said: "Well now, Mr. Foreman and gentlemen of the jury, they produce two experts to say she [the testatrix] was not fit at that time to make a will,—very good men, men for whom I have great respect, as much respect as I can have for any expert, which I confess is mighty little, because they are employed to serve their clients and paid mighty well for it." The plaintiff excepted. The court said the plaintiff could have the exception, and the defendant's counsel said "Undoubtedly," and continued his argument. There was no evidence relating to the pay the experts received or were to receive for testifying, or to the fees usually paid experts. The counsel did not withdraw his remarks, nor offer an apology for making them. The plaintiff's motion to set aside the verdict because of the prejudicial

effect of the remarks was denied, subject to exception. The court did not find whether the remarks had any effect one way or the other upon the jury, nor whether they were prejudicial or misleading.

The court instructed the jury as to what constituted undue influence, and, in substance, that in deciding the question they should take into consideration all the evidence before them bearing thereon.

The case was submitted to the jury about three o'clock in the afternoon of Wednesday, the day before the annual Thanksgiving, and the jury were instructed, in the presence of both parties and without objection by either, that if they agreed upon a verdict when the court was not in session they could seal it up and hand it to the sheriff. The presiding justice and counsel left the town that afternoon. It was understood by the jury and the counsel for both parties that there would be no further session of the court until the following Monday, and there was none. The verdict was handed to the sheriff about eleven o'clock in the evening of the same day. The answer to the first question was "Yes," and to the second "No."

After the opening of the court's session Monday morning and before the verdict was opened, the plaintiff's counsel stated to the court that he had learned that the jury had construed the second question as limiting them to the consideration of testimony showing that the undue influence was exerted December 13, 1904; that they had answered the question upon that construction, although many, if not all, of them were of the opinion that the will was the result of undue influence previously exerted; that they would have decided the question in the affirmative had they understood they were at liberty to consider the evidence of such influence; and that before deciding the question they desired further instructions, but were unable to obtain them because of the absence of the court. The counsel moved that the jury be sent back to their room with instructions as to the meaning of the second question. The court ruled that, inasmuch as the verdict had been delivered to the sheriff and the jury had separated, it was beyond his power to recall the verdict and grant the motion. The motion was accordingly denied, subject to the plaintiff's exception.

The plaintiff subsequently filed a motion to set aside the verdict because, among other things, (1) the jury desired further instructions and were unable to obtain them, and (2) the language of the question was erroneous and likely to mislead the jury, and did in fact mislead them. He offered the affidavit of the foreman that further instructions were desired by the jury, and that they construed the second question as alleged and probably would have

come to the opposite conclusion if they had understood that they were to consider the testimony relating to undue influence exerted prior to the day stated in the question; also the affidavit of another person that the foreman made to him immediately after the trial substantially the same statement as that contained in his affidavit. The court declined to receive or consider the affidavits and denied the motion, both subject to the plaintiff's exception.

Branch & Branch and *Alonzo L. Chamberlin*, for the plaintiff.

Mitchell & Foster and *Marshall D. Cobleigh*, for the defendant.

CHASE, J. 1. The defendant cites *Lee* v. *Dow*, 73 N. H. 101, in support of his position that the verdicts should not be set aside because of the statement of his counsel to the jury in the closing argument to which the plaintiff excepted. In that case the question of fact, whether the jury were misled and prejudiced by the misconduct alleged, was distinctly presented to the presiding justice by the motion of the excepting party and was decided in the negative. Moreover, the statement objected to was withdrawn by the counsel making it, the jury were instructed by the court to disregard it, and the conduct of the opposing counsel had a tendency to show that he waived the making of further efforts to remove from the minds of the jury the impressions made by the statement. In this case it appears that the court did not pass upon the question of the effect of the counsel's statement upon the minds of the jury, nor upon the character of the question; and there was no withdrawal of the statement, or instruction to the jury to disregard it, or any conduct of the opposing counsel tending to show a waiver of further efforts to neutralize its effect. *Lee* v. *Dow* certainly does not support the defendant's position.

The objectionable statement of counsel was, in substance, that he had "mighty little" respect for experts "because they are employed to serve their clients and paid mighty well for it." The object of the statement obviously was to discredit the testimony of the experts produced as witnesses by the plaintiff. In effect, it was asserted that experts generally are liberally paid hirelings, or persons actuated by mercenary motives, and for this reason the counsel had very little respect for them. If the jury were not asked to consider the fact of the counsel's want of respect for such witnesses, they were asked to entertain a like want of respect because of their venal character. In other words, they were asked to regard the testimony of the physicians referred to, as likely to be colored and made untrustworthy by the partisanship arising from such employment. It appears that there was no evidence

before the jury in relation to the compensation these physicians were paid or promised, or the compensation experts usually receive. It does not appear that there was any evidence tending to prove that the physicians were specially employed by the plaintiff, or rendered him any service in the case other than giving their testimony under oath upon the witness stand, or that experts generally are employed by the party in whose behalf they testify, to specially serve his cause. So far as the record discloses, there was no difference between these witnesses and the plaintiff's other witnesses, in the manner of procuring their testimony and paying therefor. While it may be that lawyers know that experts are sometimes employed by parties to aid in the preparation of their cases and to render special and perhaps valuable services before and at the trial, and are paid much larger sums for such services than the statutory fees of witnesses or the sums received by unskilled laborers for services, it cannot be said that these are matters of common knowledge, which need not be proved to entitle a party to found an argument upon them before the jury. To entitle the defendant to attempt to impeach the testimony of these witnesses as he did, he should have laid before the jury testimony tending to prove that the witnesses were employed to serve the plaintiff in a different way from that in which witnesses are ordinarily produced upon the witness stand, and that the witnesses were paid or promised sums for their services which would justify the characterization "mighty well paid." The counsel was not at liberty to supply this testimony by his unsworn statement. The statement had a tendency to prejudice the jury against the physicians' testimony and so was prejudicial to the plaintiff. As it was not withdrawn and no steps whatever were taken to remove its prejudicial effect from the minds of the jury, it must be presumed in this court that it influenced the jury in forming their verdict, to the prejudice and injury of the plaintiff. *Story* v. *Railroad*, 70 N. H. 364, and authorities cited. The plaintiff's exception thereto is sustained.

2. The second question submitted to the jury is capable of two constructions: one, whether undue influence exerted on December 13, 1904, the day of the execution of the will, induced its execution; and the other, whether such influence, whenever exerted, operated on that day to induce the execution. It is not strange that the court and counsel, with their knowledge of the law, should have understood that the limitation introduced into the question by the date applied, as it did in the first question, to the execution of the will, rather than to the acts relied upon as constituting undue influence. If attention had been called to the ambiguity before the jury retired, it probably would have been

removed by changing the form of the question, or by more specific instructions to the jury. If not so removed upon the plaintiff's request, he could have fully protected his rights by an exception and transfer of the case. But not noticing the ambiguity, he did not take either of these precautions. His failure cannot fairly be attributed to want of care, in view of the fact that the ambiguity is not very pronounced and was not noticed by the opposing party or the court. But he did notice it before the verdict was accepted and recorded, and immediately called the court's attention to it and moved that the case be recommitted to the jury, with instructions concerning the true meaning of the question. The motion was denied, not because the question was regarded as unambiguous, nor in the exercise of discretion, but for want of power. The plaintiff's exception raises the question whether, under the law, the court was as powerless as he believed himself to be.

In *Dearborn* v. *Newhall*, 63 N. H. 301, *Doe*, C. J., in stating the law of the state on the subject used the following concise and plain language, which, because it so unmistakably shows that the court in the present case possessed the power invoked by the plaintiff's motion and because it so definitely points out the way for ascertaining the facts required for an intelligent exercise of the power, is quoted at length: "In some jurisdictions a recorded verdict cannot be amended by the jury after their separation; but in this state a different practice prevails. The error in this case [the application by the jury of the sum for which the property attached in the action was sold at the sheriff's sale, in part payment of the amount they found to be due the plaintiff] could be corrected, whether the verdict had or had not been recorded, and whether the jury had or had not separated. Their separation increased the danger of wrong being done by their amendment of the verdict. The increased danger raised the question whether justice required a recommittal of the case for reconsideration, and when, on reconsideration, the verdict was amended, there was a question whether justice required a judgment on the amended verdict. Both questions were matters of fact to be determined at the trial term. . . . The court could inquire of the jury touching their verdict and the grounds upon which they proceeded, for the purpose of ascertaining whether the case had been properly tried. . . . The inquiry could be made after the jury, being discharged from the case, had separated. . . . The reason for making the inquiry [information communicated to the court by one of the jurors] did not suspend either the power of inquiry or the power of recommitment. . . . The recording of an erroneous verdict, award, or judgment does not necessarily render all its errors incurable; and the separation of jurors, ref-

erees, or other judges does not necessarily disable them to undo the injustice of such a mistake as the jury fell into in this case." The jurors were called together by the court two days after they had rendered their verdict and separated; and it appearing, upon inquiry of them, that a mistake was made, the case was recommitted to them with further instructions, and a new verdict was rendered.

If the affidavits offered by the plaintiff in the present case to sustain his motion were not competent testimony, as it seems they were not (*Tyler* v. *Stevens*, 4 N. H. 116; *State* v. *Ayer*, 23 N. H. 301; *Folsom* v. *Brawn*, 25 N. H. 114; *Leighton* v. *Sargent*, 31 N. H. 119; *Knight* v. *Epsom*, 62 N. H. 356; *Hearn* v. *Railroad*, 67 N. H. 320), it appears from *Dearborn* v. *Newhall* that the law furnished other adequate means for ascertaining whether the question submitted to the jury was misconstrued by them and whether their verdict was rendered erroneous thereby. The court could have called the jury together and inquired of them how they construed the question. Besides *Dearborn* v. *Newhall* and the cases cited in it, the following authorities are to the same effect: *Norris* v. *Haverhill*, 65 N. H. 89; *Hearn* v. *Railroad*, *supra*; *Jenness* v. *Jones*, 68 N. H. 475. The ambiguity in the question and the consequent danger of there being error in the verdict would have induced the court, without doubt, to take this course, had he believed that the error, if one was discovered, could be corrected. The court's ruling that it was beyond his power to recall the verdict and grant the plaintiff's motion rendered it useless to make any inquiry concerning the jury's action. The ruling was highly prejudicial to the plaintiff. It deprived him of the last opportunity for having the possible error discovered and corrected. It deprived him of the right to have the court exercise his discretion upon the questions whether inquiry should be made of the jury and whether the matter should be submitted to them for further consideration. If an inquiry of the jury had been made and it brought out the fact that the question was properly construed, there would be no occasion for further action; but if it showed that they had misconstrued the question, justice would require that their verdict should be set aside and the question in its true sense should be submitted to them or to another jury. Whether their separation and the subsequent lapse of time rendered it improper to submit the question to them depended upon the circumstances. If nothing occurred between their separation and reassembling to disturb their impartiality and fair-mindedness, there could be no objection to submitting it to them with proper instructions; but if the circumstances showed that during this interval the jurors had become disqualified to properly discharge

their duties, the question would have to be submitted to another jury upon a new trial.

As the ground upon which the plaintiff's motion was denied was erroneous, his exception to the denial must be sustained. Ordinarily such error would be cured by resubmitting the motion to the trial court, to be considered and determined in the light of the law as finally decided. But it is probable that the discharge of the jury, the adjournment of the court, and the lapse of time render this course impracticable in this case. Whether, under these circumstances, the error can be cured in any way except by a new trial need not now be determined, since both verdicts must be set aside in consequence of the error first considered—a result that must necessarily avoid the prejudicial effect of the last error, as well as the first.

Exceptions sustained: verdicts set aside.

All concurred.

Grafton,
Nov. 7, 1906.

WHITE *& a., Ex'rs, v.* POOLE *& a.*

An oral agreement to convey real estate is sufficiently definite to sustain a decree for specific performance when the identity of the land is made reasonably certain by the contract itself and the acts of the parties in part performance thereof.

A bill in equity to enforce specific performance of an oral promise to convey land is not barred on the ground that the contract is not in writing, if a refusal to convey will operate as a fraud upon a promisee who has performed his part of the agreement.

A husband's interest in his wife's property does not disqualify him from being a witness in her behalf, although he is a party to the action and the adverse party is an executor who does not elect to testify.

If one who has orally agreed to convey land sends his agent to a third party to arrange for a transfer of the property, the testimony of the latter as to the transaction is not inadmissible as hearsay.

In an action against an executor to enforce specific performance of the testator's oral agreement to purchase land, build thereon, and convey, evidence of the latter's declaration that he was building upon the premises for rental purposes is not admissible, if such statement was made in the absence of the promisee and was in no way connected with the erection of the house or the purchase of the land.

WRIT OF ENTRY, to recover possession of a tract of land in Hanover. The plaintiffs are executors of the will of William H.

White. The defendants are William H. Poole, who filed a disclaimer, and his wife, Annie L., who for a plea filed a bill in equity praying for the specific performance of a parol contract made with the plaintiffs' testator. Facts found, and case transferred from the November term, 1905, of the superior court, by *Chamberlin*, J.

In the summer of 1899, Mrs. Poole, being then in poor health, decided to make her home in Cuba and notified White, who was her uncle, of her intention. He wanted her near him; and in order to induce her not to remove to Cuba, he promised that if she would remain in Hanover he would buy a lot they should both approve, erect a house upon it, and give her the land and building as soon as the house was finished. His offer was accepted, the lot was selected, he built the house and put her in possession of it as her property, and she has occupied it ever since under a claim of ownership. It was his intention to convey the property to her, but he died in November, 1903, without doing so. In 1902, White, with the knowledge and consent of Mrs. Poole, tried to exchange the house and lot for a farm in Hanover which he thought would be more suitable for her and might at some time produce an income; and this was one reason for his failure to convey the property to her.

When the case came on for trial it was ruled that the plaintiff in the bill in equity should produce her evidence in support of the allegations thereof; and after a hearing the court made a decree for her in accordance with the prayer of the bill, and ordered an entry of judgment for the defendant in the action at law. The plaintiffs in the action at law thereupon moved that the decree and order be set aside, and that judgment be ordered for them in the writ of entry. The motion was denied, subject to exception.

The plaintiffs offered to show by White's widow that while the house was in process of erection he said he was building it to rent. The evidence was excluded, and the plaintiffs excepted. William H. Poole was permitted to testify to matters happening in the lifetime of White in so far as they tended to establish his wife's claims; and she was permitted to show by one Storrs that her husband came to him shortly before White's death, for the purpose of arranging for a transfer of the property to her. To both of these rulings the plaintiffs excepted.

Henry F. Hollis and *Prescott F. Hall* (of Massachusetts), for the plaintiffs.

Smith & Smith and *Edward A. Lane*, for the defendants.

YOUNG, J. The plaintiffs claim that the fact Mrs. Poole lived in the house for three years without enforcing her agreement with White estops her to set it up now that he is dead. This claim has no merit, for the court has found that the reason a conveyance was not made in his lifetime was because both White and Mrs. Poole thought a farm would be better for her; and that as soon as they found they could not trade the house for one, he arranged to convey the house to her, but died before he could do it.

The test to determine whether a parol contract is definite enough to sustain a decree for specific performance is the same as it would be if the contract were in writing. 4 Pom. Eq. Jur. (3d ed.), *s.* 1409. A written contract is sufficiently definite whenever it is reasonably certain from the contract itself and the acts of the parties in performance of it what land was intended. *Troup* v. *Troup*, 87 Pa. St. 149; *Work* v. *Welsh*, 160 Ill. 468; *Ottumwa etc. Ry.* v. *McWilliams*, 71 Ia. 164; *Overstreet* v. *Rice*, 4 Bush 1; *Bigelow* v. *Armes*, 108 U. S. 10. When the agreement in this case is considered in connection with what the parties did to carry it into effect, there is no doubt as to the land to which it relates; consequently the description is sufficiently definite to sustain the bill in equity.

If the plaintiffs' refusal to convey the property to Mrs. Poole will operate as a fraud on her, her action is not barred by section 1, chapter 215, Public Statutes. *White* v. *Poole*, 73 N. H. 403; *Weeks* v. *Lund*, 69 N. H. 78, 81; *Stillings* v. *Stillings*, 67 N. H. 584; *Brown* v. *Drew*, 67 N. H. 569; *Peters* v. *Dickinson*, 67 N. H. 389; *Brown* v. *Prescott*, 63 N. H. 61; *Seavey* v. *Drake*, 62 N. H. 393; *Abbott* v. *Baldwin*, 61 N. H. 583, 585; *Johnson* v. *Bell*, 58 N. H. 395; *Kidder* v. *Barr*, 35 N. H. 235, 255; *Burnham* v. *Porter*, 24 N. H. 570, 580; *Ayer* v. *Hawkes*, 11 N. H. 148; *Tilton* v. *Tilton*, 9 N. H. 385; *Newton* v. *Swazey*, 8 N. H. 9; Br. St. Fr., *s.* 463; 2 Sto. Eq. Jur., *s.* 761. She cannot maintain an action at law on White's agreement (*Smith* v. *Phillips*, 69 N. H. 470), nor can she maintain one on an implied promise, unless she can show that he received a benefit from what she did in performing the contract, which can be measured in money. *Cocheco Aqueduct Ass'n* v. *Railroad*, 59 N. H. 312. She changed her plans for life at White's request; and although the benefit he received because of it may have been worth more to him than the house and lot, still it has no money value. Consequently, unless she can maintain her bill the plaintiffs can retain both the property and what White received in exchange for it; and that is such a fraud on her as will take the case out of the operation of the statute. *Weeks* v. *Lund*, 69 N. H. 78, 83; *Svanburg* v. *Fosseen*, 75 Minn. 350,—74 Am. St. Rep. 490.

A husband's interest in his wife's property does not disqualify him from being a witness in her favor, even when the other party is an administrator who does not elect to testify. *Smith* v. *Wells*, 70 N. H. 49; *Noyes* v. *Marston*, 70 N. H. 7; *Chase* v. *Pitman*, 69 N. H. 423. The effect of Poole's disclaimer is immaterial. Although he cannot be a witness for himself, he may be one for his wife, even if he is a party to the action. *Weston* v. *Elliott*, 72 N. H. 433.

It cannot be said as a matter of law from the reported facts that there was any legal error in the admission of Storrs' testimony. If White sent Poole to Storrs to arrange for a transfer of the property through him, what Storrs testified to was not hearsay.

The plaintiffs offered to show by Mrs. White what White said concerning the house when Mrs. Poole was not present. Such evidence was inadmissible, for it consists of declarations in White's favor; and notwithstanding they were made while the house was in process of construction, they were not made on the land, nor were they in any way connected with the erection of the house or the purchase of the lot.

Exceptions overruled.

All concurred.

Rockingham, Dec. 4, 1906.

KENT, *Ex'x*, *v.* HUNT, *Guardian.*

SAME *v.* SAME.

Where an executor, upon settlement of the testator's guardianship account, is charged *in specie* with certain promissory notes as the property of the wards, and no appeal is taken therefrom, the decree is conclusive upon the executor's subsequent petition for leave to transfer the securities to a new guardian.

PROBATE APPEALS. Facts found, and case transferred without ruling from the April term, 1906, of the superior court, by *Chamberlin*, J.

May 6, 1905, the plaintiff, as executrix of her husband's will, settled his accounts as guardian of two minors in the probate court. In that accounting she was charged *in specie* for three several notes of the Exeter Manufacturing Company, payable to her husband as guardian. From this decree no appeal was prosecuted. July 25, 1905, upon her petition the court authorized her to trans-

fer to the defendant as guardian, succeeding her husband in that capacity, certain securities named in the petition, but excepting the notes above referred to. From this decree the plaintiff appealed.

Eastman, Scammon & Gardner, for the plaintiff.

Nathan P. Hunt, guardian, *pro se*.

WALKER, J. From the reported facts and the briefs of counsel it appears that the ground of the appeal is, that there is error of law in the decree of the probate court denying the plaintiff's petition, so far as it asks for authority to transfer to the defendant the notes of the Exeter Manufacturing Company. By the decree of May 6, it was determined that George E. Kent's estate was chargeable upon the settlement of his guardianship account with the notes in question *in specie*, and not for their value represented in money. Thereupon the plaintiff held the notes as specific property belonging to the wards. From this decree no appeal was prosecuted. The jurisdiction of the probate court in that matter is unquestioned. The decree bound the wards as well as the plaintiff. It was a final adjudication between parties who, it must be presumed, were properly before the court, upon a matter within the court's jurisdiction. *Simmons* v. *Goodell*, 63 N. H. 458. Unappealed from, it is so far conclusive that "evidence of facts inconsistent with it is incompetent." *Simmons* v. *Goodell*, *supra*. Hence the first decree was of binding force upon the plaintiff's subsequent petition for leave to transfer the securities to the defendant. The attempt to show in this proceeding that the wards' money was improperly or illegally invested in the notes is an attack upon the former subsisting judgment between the same parties in interest. The refusal of the probate court to allow the plaintiff to turn over the notes to the defendant was in effect a reversal of the former decree *pro tanto*, and cannot be sustained. Upon receiving the notes, the defendant will take such action with reference to them as the interests of his wards may seem to require. *Stevens* v. *Meserve*, 73 N. H. 293.

Case discharged.

All concurred.

Rockingham,
Dec. 4, 1906.

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STATE v. KENNARD & a.

An indictment alleging that the respondent, not being a licensed dealer in intoxicating liquor, kept for sale distilled spirit, is not bad because it does not use the word "liquor" as descriptive of the offence.

A respondent's guilt is provable by evidence that the offence charged was committed on a date subsequent to that alleged and prior to the finding of the indictment.

In the trial of an indictment against several respondents, a statement of one of them, made in the absence of the others and tending to prove the guilt of all, is admissible against the declarant.

In the absence of exception, it is presumed that the jury were properly instructed as to the legitimate use of evidence submitted to them.

INDICTMENT, against three respondents for keeping for sale "one pint of distilled spirit . . . called whiskey." Trial by jury and verdict of guilty. Transferred from the April term, 1906, of the superior court by *Chamberlin*, J.

The indictment alleged that the defendants were not licensed to sell intoxicating liquor. The defendants moved to quash the indictment because the word "liquor" was not used in it as descriptive of the offence, under section 33, chapter 95, Laws 1903. The motion was denied, subject to exception.

The date of the offence as alleged in the indictment was December 1, 1905. The defendants excepted to the admission of evidence of their keeping intoxicating liquor for sale on the following day, and to the admission of statements of one of them, made in the absence of the others, bearing upon the question of their guilt.

Charles H. Batchelder, solicitor, for the state.

William F. Nason, for the defendants.

WALKER, J. The defendants are indicted for keeping for sale "distilled spirit, containing more than one per cent of alcohol, called whiskey," and it is alleged in substance that they are not licensees for the sale of liquor under the provisions of chapter 95, Laws of 1903, as amended by chapter 49, Laws of 1905. In view of the recent decision in *State* v. *Langdon*, *ante*, 50, it is clear that the offence described in the indictment is a violation of section 15, chapter 112, Public Statutes, as amended by section 1, chapter 122, Laws 1903, and not of section 33, chapter 95, Laws of 1903.

The defendants' exception, therefore, that the indictment does not properly allege an offence under the latter statute, is unimportant; and as no other objection was raised to the indictment, the court is not called upon to pass upon its technical sufficiency.

The exception to the admission of evidence that the defendants kept liquor for sale on the second day of December, while the date of the offence as alleged in the indictment was the first day of December, cannot be sustained. The keeping of liquor for sale after the date alleged and before the finding of the indictment was competent evidence of the defendants' guilt. *State* v. *Pratt*, 14 N. H. 456; *State* v. *Rundlett*, 33 N. H. 70; *State* v. *Havey*, 58 N. H. 377; *State* v. *Ingalls*, 59 N. H. 88; *State* v. *Perkins*, 70 N. H. 330.

If the statements of one of the defendants in the absence of the others were not competent evidence against the latter that they kept intoxicating liquor for sale, they were admissible against the former. That the jury were properly instructed as to the legitimate use to make of the evidence is presumed, in the absence of an exception to the charge of the court upon that subject. *Haskell* v. *Railway*, 73 N. H. 587.

Exceptions overruled.

All concurred.

Rockingham, Dec. 4, 1906.

MURDOCK, *Guardian*, *v.* MURDOCK *& a.*

The adoption of a child by a husband and wife does not give him a right to an estate by the curtesy.

PETITION FOR PARTITION. Trial by the court and decree for the plaintiff. Transferred from the April term, 1906, of the superior court by *Chamberlin*, J.

Lydia A. Murdock died seized of the premises of which partition is sought. The only persons interested in the property are John C. Murdock, the decedent's husband, and Lena C. Yeaton, her daughter by a former marriage, who are the defendants, and Carrie L. Murdock, the plaintiff's ward and an adopted daughter of John and Lydia, who had no issue. John claimed an estate by the curtesy, and for that reason excepted to the denial of his motion to dismiss the petition.

Edwin B. Weston, for the plaintiff.

John G. Crawford, for the defendants.

YOUNG, J. If the language of section 9, chapter 195, Public Statutes, is given its ordinary meaning,—and there is nothing to show that the legislature intended to give it any other meaning,—John is not entitled to an estate by the curtesy. *Foster* v. *Marshall*, 22 N. H. 491. Although the fact that their adopted child takes more and he less than if she were their own child may have some tendency to prove that he ought to have such an estate, it has no tendency to prove that the legislature intended to give it to him, for he takes the same share of his wife's estate that he would if they had not adopted Carrie. P. S., *c.* 195, *s.* 12.

Exception overruled.

All concurred.

Belknap,
Dec. 4, 1906.

WILSON *v.* BARNSTEAD.

The term "bridge" includes not only that part which spans a stream, road, or other depression, but also the abutments and such other portions of the structure as are required to render it complete according to the plan upon which it is built.

A town is liable for injuries resulting from a defect in that part of a highway which is above the abutments and other essential portions of a bridge.

Whether a particular part of a highway is upon a "bridge," within the legal definition of that word, is a question of fact.

CASE, for personal injuries happening from being thrown from a wagon by reason of a defect in a highway bridge. Trial by jury and verdict for the plaintiff. Transferred from the March term, 1906, of the superior court by *Chamberlin*, J.

The plaintiff's evidence tended to prove that the bridge is constructed of planks laid upon iron girders, the easterly ends of which rest upon an abutment ten feet in height, built of split stone laid in cement. The stones constituting the base of the abutment are five or six feet long and are laid at right angles with the stream, the ends projecting toward the thread of the stream about a foot more than the face of the abutment. The stones above the base are laid so as to form a perpendicular face toward the stream,

and, excepting the binding stones, extend backward less and less as the top of the abutment is approached. There are occasional binding stones six feet long, laid at right angles with the stream, one end being flush with the face of the abutment. There are stone headers on the top of the abutment, seven to nineteen inches wide, the inside surfaces of which are fourteen inches back from the face of the abutment. Cobble stones, placed by hand, extend backward from the split stone for a distance of six feet, and upward to within about a foot of the surface of the roadway. For a distance of about six feet further there are cobble stones which were dumped there, and which were designed to protect the split stone structure and render it secure. Such filling is commonly used in bridge building. Above the cobble stones there is sand and hard pan. The planks extend to the edge of the headers, their upper surfaces being an inch and a quarter lower than the upper surfaces of the headers. The header over which the plaintiff's wagon passed was nineteen inches wide; and the surface of the roadway for about four and a half feet from its easterly edge gradually sloped downward until it was five and one fourth inches lower than the plane of the upper surface of the header, extended in that direction on a level. From this point the surface of the roadway gradually sloped upward until it reached the level plane last mentioned, at a distance of about five feet from its lowest point. This depression extended over about twelve feet in width of the roadway and was probably caused by the wear of passing travel. There is a wing wall extending from the abutment northerly about ten feet, at an angle with the bridge, and a wall extending from the abutment southerly several feet on a line with the face of the abutment. The difference in the levels of the planking and the headers and the above described depression constituted the defect which the plaintiff says caused her injury.

The defendants moved for a nonsuit at the close of the plaintiff's testimony, and for an order of judgment in their favor at the close of all the testimony, on the ground that the plaintiff's injury was received on the highway instead of on the bridge, and that the alleged defect was not itself caused by any defect in the bridge or its permanent structure. They also moved for an instruction to the jury, in substance, that the abutment is a part of the bridge, but that the cobble stones and filling immediately back of it are not a part of the bridge. These motions were severally denied, subject to the defendants' exceptions.

After instructing the jury that the defendants were not liable unless the plaintiff's injury was caused by a defect in the bridge, and after defining a bridge, in substance, as including not only the structure which spans the stream but also the abutments upon

which it rests, and the wings, if any, and such back filling as is required to make the entire structure complete and safe, the court told them that they were to determine where the highway leaves off and the bridge begins.

Charles B. Hibbard, Edward A. Lane, Frank M. Beckford, and *Shannon & Tilton,* for the plaintiff.

Jewell, Owen & Veazey, for the defendants.

CHASE, J. "Towns are liable for damages happening to any person, his team or carriage, traveling upon a bridge . . . upon any highway, by reason of any obstruction, defect, insufficiency, or want of repair of such bridge, . . . which renders it unsuitable for the travel thereon." Laws 1893, *c.* 59, *s.* 1. The principal question raised by the exceptions is whether the alleged defect was a defect in the bridge described in the record, within the meaning of the statute. A "bridge" is defined to be "any structure which spans a body of water, or a valley, road, or the like, and affords passage or conveyance." Cent. Dict.; 4 Am. & Eng. Enc. Law (2d ed.) 919, and 5 Cyc. 1052, and authorities cited therein. This definition necessarily implies that the term includes the abutments, if any, upon which the portion of the bridge specially designed for travel rests, and all other portions of the structure that are required to render it complete according to the plan on which it is built. The portion of the highway occupied by such completed structure is a bridge, within the ordinary meaning of the term. *Tinkham* v. *Stockbridge*, 64 Vt. 480; *Tolland* v. *Willington*, 26 Conn. 578. There is nothing in the statute itself or its history tending to show that the term was used in it in a different sense. It must, therefore, be understood in that sense. A person is "traveling upon a bridge," within the meaning of the statute, when he is traveling over that part of the way which is above the abutments and other essential portions of the structure, as well as when he is traveling over the part that spans the stream, valley, or other depression. If he is injured by any "obstruction, defect, insufficiency, or want of repair" there existing, he is injured by an "obstruction, defect, insufficiency, or want of repair of such bridge," and the town is liable, by virtue of the statute, for the damages he suffers by the injury. The location of the particular lines which, in a given case, separate a bridge from the other parts of the highway of which it forms a part obviously depends upon the plan of its construction. Such location will differ as bridges differ in plans of construction. It is the duty of the court to construe the statute and determine what is the mean-

ing of the term "bridge" there used; but it is purely a question of fact whether a particular part of the way is upon the bridge, within the meaning of the term thus defined.

In this case there was evidence from which impartial men might reasonably find that the defect in question was a defect in the bridge, within the true meaning of the term as used in the statute. No question is or can reasonably be made but that the difference in the levels of the planking and the header appertained to the bridge. While this difference was small, it cannot be said that it was not a defect, especially in connection with the depression beyond. Its natural tendency was to produce a jolt, more or less severe according to the character of the wagon and the speed the wagon was drawn. It might reasonably be found from the testimony that the depression beyond the header was over the abutment and over cobble-stone filling required to protect the abutment and complete the bridge structure, and so was upon the bridge. While this depression was not very deep, its natural tendency was also to produce jolts in a passing wagon. It was certainly a defect in the way, and it does not appear probable that reasonable, impartial men would unanimously find that it alone, or in connection with the other defect mentioned, did not render the way unsuitable for the travel over it. The defendants' position, that as the defect was not in the abutment itself or the cobble-stone filling, but in the sand and hardpan surfacing, it was therefore not in the bridge structure, cannot be sustained. The surfacing above the abutment and filling was as much a part of the permanent structure as were the abutment and filling. The fact that the depression arose from the wear of passing travel, instead of from faulty construction, is immaterial. The statute makes no distinction of this kind.

The defendants' motions were all properly denied. No exception was taken to the court's definition of a bridge in his instruction to the jury. It may be said, however, that it appears to have been in accordance with the law.

Exceptions overruled.

All concurred.

Belknap,
Dec. 4, 1906.

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WINNIPISEOGEE LAKE COTTON AND WOOLEN MANUFACTURING CO. *v.* LACONIA.

SAME *v.* SAME.

SAME *v.* SAME.

SAME *v.* SAME.

A judgment rendered on appeal from the refusal of selectmen to abate taxes is not evidence of the true value of the property, in a proceeding for the abatement of a tax subsequently assessed upon the same property.

In a proceeding for the abatement of taxes, the question technically in issue is whether the petitioner is required by the assessment to contribute more than his fair share of the public expense; but the true value of his property is not technically in issue, although it may become material in the course of the evidence.

In a subsequent suit for a different cause of action, a prior judgment between the same parties is competent and conclusive evidence of only such facts as were technically in issue and actually tried in the prior suit; and the facts technically in issue in the former proceeding are such as upon the face of the pleadings were essential to be established by one party or the other in that action, and not such as became material by the course of the evidence.

PETITIONS, for abatements of a portion of the taxes assessed upon the plaintiffs' real estate in the years 1893 to 1896, inclusive. Transferred from the November term, 1905, of the superior court by *Peaslee*, J.

The real estate in question was appraised by the defendants for purposes of taxation in 1893 at $60,000, in 1894 at $68,600, and in 1895 and 1896 at $67,100. Applications were seasonably made to the selectmen for abatements, and after their refusal petitions were filed in court within the time limited by statute. By agreement of the parties the findings in similar proceedings by the plaintiffs in 1890, 1891, and 1892 (67 N. H. 514), in which the value of the property now in question was found to be $57,000, were put in evidence. At the November term, 1905, of the superior court, the defendants petitioned to be relieved from this agreement; and the court, being of opinion that the judgment in *Winnipiseogee etc. Co.* v. *Gilford*, 67 N. H. 514, was not evidence in the case for the years 1895 and 1896, granted the petition as to them, but denied it as to the years 1893 and 1894, stating, however, that if such evidence was admissible the petition should be dismissed. To this ruling the plaintiffs excepted.

Charles B. Hibbard and *Harry G. Sargent*, for the plaintiffs.

Stephen S. Jewett and *Frank S. Streeter*, for the defendants.

BINGHAM, J. The question presented by the exception is whether the judgment entered upon the appeal from the tax assessed in 1892 upon the plaintiffs' real estate is evidence of the true value of the same real estate in a subsequent appeal from the taxes assessed upon it in 1895 and 1896. In *Winnipiseogee etc. Co.* v. *Laconia*, 68 N. H. 284, it was held: First, that the principles of *res adjudicata* apply in tax appeals as in other cases. Second, that when the value of property upon a given date is *res adjudicata* between the parties, the judgment establishing such fact is conclusive proof of its value on that date, and if not too remote, competent evidence of the value of the same property at a later time in a subsequent suit between the same parties for a different cause of action. Third, that in such case the value established by the prior adjudication would be the value at the later date, "except in so far as the property may have increased or decreased in value" during the intervening period; that "on the trial the inquiry would be restricted to the question of the alterations of value during that period and their extent." And, fourth, that "the act of July 18, 1876 (P. S., *c.* 58, *s.* 7), providing that the assessors and selectmen shall, in the month of April in each year, examine all the real estate in their respective cities and towns, shall reappraise all such real estate as has changed in value in the year next preceding, and shall correct all errors that they find in the then existing appraisal, has no relation or application to the present question"; that "'the then existing appraisal' intended is the appraisal made by the last preceding board of assessors, and not the valuation established by a judgment."

The second conclusion reached in that decision is based upon the assumption that the true value of the appellants' property was technically in issue in the prior suit. If the court was right in making this assumption, and the principles of *res adjudicata* apply in tax appeals notwithstanding our statutory and constitutional provisions for periodic revaluation, then there would seem to be no escape from the conclusion that the judgment in the appeal from the tax of 1892 was conclusive of the value of the property at that time; and not being too remote, was competent evidence of the value of the same property in 1893, on the appeal from the tax of that year. But the rule is settled for this state, at least, that a fact embraced within a judgment, to be competent as evidence in a subsequent suit between the same parties for a different cause of action, must have been technically in issue in the prior

suit; and that if the fact was not technically in issue in that suit, —if its ascertainment was made material only by the course of the evidence,—that it cannot be proved by the judgment. *King* v. *Chase*, 15 N. H. 9; *Metcalf* v. *Gilmore*, 63 N. H. 174, 187, 189. In the latter case it was said: "The distinction is between facts which, being alleged in pleading, constitute a good cause of action or a good defence, and facts which are merely evidence—between facts which upon the face of the pleadings are essential to be established by one party or the other, and facts which upon the face of the pleadings are immaterial, and become material only by the course of the evidence. A judgment is conclusive upon the parties and privies of such of the former class of facts as are actually tried, but never of any of the latter class of facts, although they may be the only questions litigated."

The value of the appellants' property in 1892 having been actually tried in the appeal from the tax of that year, the material question for our consideration is whether that fact was technically in issue on that appeal. The subject-matter of the appeal was the recovery or abatement of the part of the tax for 1892 that was excessive. To entitle the appellants to a judgment in their favor they should have alleged in their petition and proved (1) that they had complied with the requirements of chapter 57 of the Public Statutes, and (2) that the tax they had paid or were required to pay was excessive—that it subjected them to more than their fair share of the public expense. The first allegation was essential to give the appellate court jurisdiction. P. S., *c.* 59, *s.* 11. The second was the issue upon which the action proceeded. *Edes* v. *Boardman*, 58 N. H. 580, 588, 589; *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 200, 205; *State* v. *Corron*, 73 N. H. 434, 457, 458, 460. If the appellants established the fact that their tax for the year 1892 was excessive, they were entitled to a repayment or abatement of the excess tax, according as they had or had not paid it. They could have shown that the tax was excessive in various ways. If the whole or a part of the property taxed to them was exempt from taxation, they could have shown that their tax was excessive by proof that the whole or a part of their property was exempt. If they did not own the whole or a part of the property taxed to them, they could have shown the same fact by proof that they did not own any property in the taxing district, or a less quantity than was taxed to them. If their property was correctly appraised, they could have shown that their tax was excessive by proof that a greater valuation than that assessed upon it or too large a rate was made use of in computing the tax, or that some mathematical error occurred in the computation. And if the ratio between the true and assessed value of their property

was greater than the ratio between the true and assessed value of all other property in the taxing district, this might have constituted the evidence from which it could have been found that their tax was excessive. The proof of any one of these facts would not have been the issue upon which the appeal proceeded, but evidentiary facts from which the ultimate fact or issue could have been found; and they fall within the rule that "facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial." *King* v. *Chase*, *supra*. No one of them was essential to the petitioners' right of recovery on that appeal, while any of them could have been made material by the course of the evidence.

As the true value of the appellants' property on the first day of April, 1892, was not technically in issue on the appeal from the tax from that year and became material only by the course of the evidence, it follows that the assumption upon which the decision in *Winnipiseogee etc. Co.* v. *Laconia*, *supra*, was based is erroneous; that the judgment entered upon the appeal from the tax of 1892 is not conclusive evidence of the value of the appellants' real estate for that year, or competent evidence of its value in 1895 or 1896; and that the order must be,

Exception overruled.

PARSONS, C. J., and WALKER, J., did not sit: YOUNG, J., concurred.

CHASE, J., *dissenting*. The foregoing opinion, as I understand it, overrules *Winnipiseogee etc. Co.* v. *Laconia*, 68 N. H. 284, on the ground that the valuation of the plaintiffs' property in the prior judgment was not, as was held in that case, *res adjudicata* within the meaning of the rule recognized and approved in *King* v. *Chase*, 15 N. H. 9. It seems to me that the opinion takes an erroneous view of the decision in *King* v. *Chase*, or rather, makes an erroneous application of it.

The statute provisions relating to the abatement of taxes read as follows: "Selectmen, for good cause shown, may abate any tax assessed by them or by their predecessors." P. S., *c.* 59, *s.* 10. "If they neglect or refuse so to abate, any person aggrieved, having complied with the requirements of chapter fifty-seven, may, within nine months after notice of such tax, and not afterward, apply by petition to the supreme [now superior] court in the county, at a trial term, who shall make such order thereon as justice requires." *Ib.*, *s.* 11. To authorize the selectmen to abate

taxes, "good cause" must be shown. It is only when they neglect or refuse so to abate—that is, to abate for "good cause"—that the court has jurisdiction of the subject-matter. In a petition to the court for an abatement, it would seem to be prudent, if not necessary, to allege the "good cause" relied upon by the petitioner. *State* v. *Corron*, 73 N. H. 434, 457. That would seem to be the matter "technically in issue." A petition merely setting forth that the petitioner's taxes for the year in question were excessive and unequal, or were more than his fair share of the public expense, would, to say the least, be incomplete. It would resemble a declaration in an action at law which merely alleged that the plaintiff had suffered damage at the hands of the defendant, without stating whether it was from the breach of a promise or covenant, or from a tort. The "matter in issue,"—"the matter directly in issue,"—"the matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading,"—in a petition for abatement, is the "good cause" relied upon for asking the abatement. Even if it is not specifically alleged in the petition and denied in the answer, it will be—must be—the issue to be tried. The fact that it is not specifically alleged and denied in the pleadings does not prevent the application of the rule as held in *King* v. *Chase*. "The declaration and pleadings may show specifically what this [the issue] is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special." *King* v. *Chase*, *supra*, 16; *Simmons* v. *Goodell*, 63 N. H. 458, 459.

In the foregoing opinion the court, it seems to me, substitute the result or effect of the "good cause" for the cause itself, as the matter in issue. The excess in the tax—the subjection of the petitioner to more than his fair share of the public expense—is the effect of, or injury occasioned by, the cause relied upon to entitle the petitioner to an abatement, as the injury or damage alleged in an ordinary action at law is the effect or result of the breach of promise or the tort upon which the action proceeds. It is true that there may be many causes for an abatement of taxes—legal exemption from taxation, non-ownership of the property taxed, over-valuation of the property, etc., etc. A party seeking abatement because of the exemption of his property from taxation proceeds in his action on the matter of the exemption. He alleges, in effect if not in form, that he is entitled to exemption under the law by virtue of certain facts—a vote of the town exempting it, for example. In such case, the matter on which he proceeds—the "good cause" which he proposes to show to entitle him to the exemption—is the vote of the town. The matter in

issue thus tendered to the defendant is the validity of the vote as respects both law and fact. If the issue is joined and tried, and judgment is rendered thereon, the parties are concluded by the judgment as to the efficacy of the vote, not only in that particular action, but in all subsequent actions of abatement in which the vote is in controversy. In *Franklin Needle Co.* v. *Franklin*, 65 N. H. 177, if the issue had been the question of fact whether the vote of 1886 exempting the property from taxation was duly passed and the judgment was in favor of the plaintiffs, and the selectmen assessed a tax upon the property the succeeding year notwithstanding the judgment, can there be any doubt as to the competency and conclusiveness of the judgment as evidence, under the decision in *King* v. *Chase*, in a petition by the Needle Company to abate the tax of the second year because of the exemption? If the excess of the tax or want of authority for imposing it—if the subjection of the petitioner to more than his fair share of the public expense—is the matter on which the petitioner's action in such case proceeds, and the vote is only an evidentiary fact with relation to such matter, within the meaning of *King* v. *Chase*, then a person claiming exemption may be required to try the question of exemption *de novo* as many times as the selectmen may see fit to disregard the judgment of the court—an evil which the rule of *res judicata* was particularly designed to prevent.

Take the case of over-valuation. The statute requires the selectmen to appraise all taxable property for taxation "at its full and true value in money, as they would appraise the same in payment of a just debt due from a solvent debtor." P. S., *c.* 58, *s.* 1. It further requires them to make oath that, in performing the duty thus imposed upon them, they "appraised all taxable property at its full value, and as we [they] would appraise the same in payment of a just debt due from a solvent debtor." *Ib.*, *s.* 6. These redundantly explicit provisions—purposely made redundant to avoid the danger of misunderstanding or misconstruction—were enacted to secure the reasonable apportionment of the burden of taxation required by the constitution. If selectmen and assessors of taxes uniformly performed this duty, and all taxable property was taken into account, the burden of taxation would be distributed among taxpayers according to the true intent expressed in the constitution, and all reasonable grounds for the unrest now existing with reference to taxation would be removed. In that event, the "good cause" for abatement of taxes on account of over-valuation—the matter upon which the petitioner would proceed in his action—would be the excess in the valuation of the property above its "full and true value in money," or, in other words, the true value of the property; for that fact necessarily

determines whether there is excess in the valuation and the amount of it. But it a well known and lamentable fact that these provisions of the statutes are not observed. Sometimes one class of property in a town is appraised for taxation at one ratio of its true value,—six tenths, for example,—while another class is appraised at another ratio,—say one third,—and another class is appraised at its full value. See *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 200, 204; *Manchester Mills* v. *Manchester*, 57 N. H. 309. The ratio between the assessed and the true valuation also differs in different towns. When it appears in abatement proceedings that such violations of the law have been made, it is not practicable to reassess the entire taxes in the town according to law and in that way ascertain the petitioner's proportional share. The requirement of justice is satisfied by determining what ratio the assessed valuation of all the taxable property in the town excepting the petitioner's bears to its true value, and valuing the petitioner's property at the same ratio with reference to its true value. The proceeding for abatement being an equitable one, calling for "such order thereon as justice requires," the demands of justice are met in this way. P. S., *c.* 59, *s.* 11; *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 200. So it happens that a complication is introduced into proceedings for the abatement of taxes on account of over-valuation that would not be there if the statutory provisions relating to the appraisal of property were faithfully followed. But notwithstanding this complication, the true value of the petitioner's property continues to be the matter in issue in the proceeding. It is the only standard recognized by the statutes as the basis of taxation. It is the initial matter upon which the court works out equity in the case. Departure from it in its actual or relative state is the "good cause" which the petitioner must show to entitle himself to an abatement of a tax on account of over-valuation.

When the case of *Winnipiseogee etc. Co.* v. *Laconia*, 68 N. H. 284, was decided, the majority of the court consisted of the same persons (*Doe*, *Clark*, *Blodgett*, and *Carpenter*) as it did when *Metcalf* v. *Gilmore*, 63 N. H. 174, was decided; and *Carpenter*, J., wrote the opinion in both cases. Although *Metcalf* v. *Gilmore* and *King* v. *Chase* are not cited in *Winnipiseogee etc. Co.* v. *Laconia*, it would be unreasonable to suppose that these cases were not in mind. The sentence containing the substance of the decision on this point—"No sufficient reason has been suggested or is perceived for denying to the judgment the same conclusive effect upon the question adjudicated that by law appertains to judgments in other cases"—clearly shows that these cases were in mind, and that the principles of them were regarded as familiar

law requiring no citation of authority in their support. The decision merely applied the principles of these cases to the case in hand. I do not understand that the quotation from *Metcalf* v. *Gilmore* in the foregoing opinion was intended to limit or in any way modify the rule of *King* v. *Chase*. As appears from the quotation already herein made from that case, if the pleadings in a case do not specifically show what "the matter directly in issue" is, the party may adduce other evidence to show it, "and thereby make the pleadings as if they were special." The court, through *Carpenter*, J., spoke definitely on this point a year and a half after *Metcalf* v. *Gilmore* was decided, in *Simmons* v. *Goodell*, 63 N. H. 458, 459, as follows: "If the precise matter in issue does not appear upon the face of the record, extrinsic evidence may be received to show what facts were determined,—as, for example, to show that a particular item of account formed a part of a larger one" (citing *King* v. *Chase*).

The other reasons offered by the defendants in support of the superior court's ruling in their favor were submitted to and considered by the court in *Winnipiseogee etc. Co.* v. *Laconia*. No reasons have been presented in the arguments of counsel or the decision of the present case, or have been found, which seem to me to be of sufficient weight to justify overruling that case; and consequently I am compelled to dissent from the present decision.

Merrimack,
Dec. 4, 1906.

THOMPSON, *Ex'r*, v. KIDDER *& a.*

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The statute imposing a tax upon collateral legacies and successions (Laws 1905, *c.* 40) is not in conflict with the constitution.

BILL IN EQUITY, by the executor of the will of James Thompson, alleging that by the terms of chapter 40, Laws 1905, legacies given by said will to each of the defendants are subject to a tax of five per cent, which it may be the duty of the plaintiff to pay. The defendants claim that said chapter is unconstitutional; and upon this question the plaintiff asks the instruction of the court. By leave of court, the attorney-general appeared for the state. The facts alleged in the bill were found to be true, and the case was transferred from the October term, 1905, of the superior court, by *Pike*, J.

Section 1, chapter 40, Laws 1905, is as follows: "All property within the jurisdiction of the state, real or personal, and any inter-

est therein, whether belonging to inhabitants of the state or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of charitable, educational, or religious societies or institutions in this state the property of which is by law exempt from taxation, or to a city or town in this state for public purposes, shall be subject to a tax of five per cent of its value, for the use of the state."

Streeter & Hollis filed a brief, and *Mr. Streeter* argued orally, in opposition to the tax.

Edwin G. Eastman, attorney-general, and *Joseph S. Matthews*, by brief and orally, for the state.

PARSONS, C. J. "The public charges of government or any part thereof may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance." Const. [1903], *art.* 6. The main argument of the opponents of the tax is in support of the contention that any inheritance tax violates well known constitutional principles. It is not claimed that the language of article 6, as it now stands, is not sufficient to authorize legislation of this character; but the contention is that such action is contrary to the requirements of other provisions of the instrument, namely, article 12 of the bill of rights,—"Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property. He is, therefore, bound to contribute his share in the expense of such protection,"—and the provision of article 5, part second, granting "full power and authority" to the general court "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same." It is claimed that an inheritance tax is of necessity disproportional and in that sense unequal, does not provide for an equal division of public expense, and is contrary to the special provisions cited, as applied in a long line of decisions of this court. This claim has the support of the decision in *Curry* v. *Spencer*, 61 N. H. 624, and for the purposes of the discussion will be considered sound. The contention then is that the constitution as it now stands is

inconsistent and self-contradictory—that a method of defraying public charges expressly authorized by one of its provisions is forbidden by implication by others. While the constitution as it now stands is to be considered as a whole as if enacted at one time (*Drew* v. *Tifft*, 79 Minn. 175,—79 Am. St. Rep. 446), to ascertain the meaning of particular expressions it may be necessary to give attention to the circumstances under which they became parts of the instrument. The whole is to be considered, and the true meaning to be drawn from the consideration of every part. Aid in ascertaining the meaning of the provisions adopted in 1783 and of those introduced in 1903 is to be found in the circumstances surrounding the adoption of each. "Our system of taxation originated, as in all the New England states, in the condition and circumstances of the early settlers of the country, and the nature and character of the general mass of their property. . . . It consisted mainly in lands, buildings, and cattle, visible and tangible property open to observation. The amount of property and the pecuniary condition of each citizen were generally known in his neighborhood. Business transactions were limited in amount and magnitude, and of a direct and simple character, with none of the complications incident to banking, trade, commerce, and manufactures of the present day. To tax visible, tangible property was substantially to tax the entire property of the community. . . . There was but little if any occasion, therefore, to inquire into the principles of political economy upon which a system of taxation should be founded. As all citizens were understood to enjoy the equal protection of government, in life, liberty, person, and property, and the equal benefits of its institutions, the apparently equitable rule, that all should contribute proportionally to the public charges by direct tax upon polls and estates, came to be considered in our provincial and early state history as the true theory of taxation." Report of Judge Sawyer, Chairman of Tax Commissioners, 1876, *p.* 9.

"The definition of taxation, given in the foundation, is taken from books with which the leading statesmen of the Revolution were familiar." *State* v. *Express Co.*, 60 N. H. 219, 250. The inevitable deduction from the theory of taxation understood by the parties to the contract, recognized and adopted by the express terms of the governmental agreement, is that "the obligation of each to contribute 'his share' requires an equal division. . . . Every one's tax being his share of public expense, an unequal division of that expense is not taxation." *State* v. *Express Co.*, *supra*, 251. Any scheme for a disproportional division of public expense is not taxation, as understood by the parties to the compact of 1783. *Winkley* v. *Newton*, 67 N. H. 80, 81; *Curry* v.

Spencer, 61 N. H. 624, 632; *Boston etc. R. R.* v. *State*, 60 N. H. 87, 94. Taxation of the people of the state, "by New Hampshire law, . . . is a division among themselves of the expense of their own government of themselves—a division made by themselves through their own agents, in pursuance of their original contract." *Edes* v. *Boardman*, 58 N. H. 580, 589. The rules prescribed to be followed in making the division are not the only rules that could be provided. *State* v. *Express Co.*, 60 N. H. 219, 256, 257. Though proportion is the rule, an intention to subject themselves to disproportion in all or some of the details of defraying public charges can be proved "by an express stipulation of the contract, or other competent evidence." *Ib.* 255.

However equitable as an abstract proposition and logically correct in principle the rule of the compact of 1783 may be, or however just it proved in practice as applied to conditions then existing, the practical operation of that rule in promoting justice and prosperity under conditions developed by the changes of one hundred and twenty years in the manners, customs, habits, and possessions of a people is at least a question open to debate. The science of government was not exhausted by the writers who preceded the Revolution, nor did the principles laid down by them and adopted by the fathers conclude further thought upon the subject of taxation. It has been suggested since then that a government should impose such a tax as is "easily assessed and collected, and is at the same time most conducive, all things considered, to the public interests." McCullough on Taxation 19 (1844). "Equality of taxation, therefore, as a maxim of politics," says Mill, "means equality of sacrifice. It means apportioning the contributions of each person towards the expenses of government, so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his." Mill Pol. Econ., *bk.* 5, *c.* 2, *s.* 2. Or, as stated by Adam Smith: "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state." Wealth of Nations, *bk.* 5, *c.* 2, *pt.* 2. See Fawcett Pol. Econ., *bk.* 4, *c.* 1; 23 Enc. Brit. (9th ed.) 85. There is evidence that this was the equality sought by the framers of the constitution. Judge Sawyer's Report 9, 10, citing acts of April 12, 1770, and January 2, 1772, in which the object of the legislature was declared to be "that every person may be compelled to pay in proportion to his income." But the questions whether an annual distribution of public expense in proportion to the property of each taxpayer is the most equitable method,—whether in that or some other way

the public charges can be met so as to be least of a burden to the people,—are questions of economics not open in a judicial forum, but properly considered and determined in a convention of the people engaged in arranging the terms of the social compact and settling the fundamentals of government.

While an inheritance tax, or death duty, has been recognized as a method of governmental support from very early times, it was practically unknown in England at the time of the Revolution, but has since that time been in use there and more recently has been adopted in many of the states. *Curry* v. *Spencer*, 61 N. H. 624, 632; *Magoun* v. *Bank*, 170 U. S. 283, 287, 288. The number of these statutes and the judicial ingenuity that has been displayed in supporting them attest the favorable opinion with which the political wisdom of this method of distributing the governmental burden is now regarded; but the decisions themselves, involving as they do consideration of the provisions of particular constitutions, are not of value in the present discussion, except as they may throw light upon the nature of the tax sought to be imposed and the situation in view of which the convention and the people acted in 1903. All the decisions agree, as was held in effect in *Curry* v. *Spencer*, that an inheritance tax is not a proportional distribution of public expense upon the property of the taxing district. "Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. . . . Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." *Knowlton* v. *Moore*, 178 U. S. 41, 47, 56. Whether governmental taking of the property of the individual in this way is properly described as an excise, commodity, succession, or privilege tax is not material. No language of the constitution authorizes taxation by such terms, and it would avail nothing to establish the definitive accuracy of either. The constitution in terms authorizes what the statute attempts to effect. Under such circumstances the discussion of questions of terminology is unnecessary and may be misleading. *Knowlton* v. *Moore*, 178 U. S. 41, 57. Such a proceeding is merely a taking for governmental pur-

poses of a portion of the estate at the death of the owner. If the right of property previously enjoyed embraced the right to dispose of it after, or in view of, death, the authorization of such taking is a limitation upon that right. *Crocker* v. *Shaw*, 174 Mass. 266, 267; *Emmons* v. *Shaw*, 171 Mass. 410, 413; *Minot* v. *Winthrop*, 162 Mass. 113, 124; *United States* v. *Perkins*, 163 U. S. 625, 628.

If at the making of the social compact the right of property, as then understood and reserved, did not include any right of control over it at death,—if the property right was merely a life estate, remainder in the survivors united in the corporate organization called the government,—any power of testamentary disposition would be a grant from the many to the individual, a privilege which could be incumbered, limited, withdrawn, or regulated at will. If by natural right, or preëxisting compact, the right of property enjoyment does, or does not, include the untrammeled power of disposition at death, the parties in revising or renewing the governmental compact may by mutual agreement add to, or detract from, the nature of the right. It might be agreed that all property on the death of the owner should be the property of the survivors. All inheritable quality might be taken from the conception of property as now understood. While such taking or such right of survivorship, if limited in amount and for use for public purposes, would possess some of the elements of a tax, it would lack fundamental elements of taxation as understood in this state from 1784 to 1903. It would be an application of property for public charges, but not a proportional division of public expense.

The sole question, therefore, is whether in 1903 the people intended to provide, in addition to taxation as hereto defined and understood, a different method for meeting public charges by the exaction for that purpose of part of the property of the individual upon his death. The express language is admittedly sufficient for the purpose. The only adverse argument urged is the failure to introduce express limitations of the provisions requiring proportion and equality in the distribution of the public burden. But the evidence is very clear that the intent was to authorize such taxation. The fact that such method of defraying governmental expense was not within the terms of the existing social compact as judicially defined, the growing favor with which such method was with almost entire uniformity regarded in other jurisdictions, the well understood need of additional sources of revenue to defray the increasing state expense, render certain that the purpose of the action upon the subject was to grant a power not understood to be given by the existing compact. The language used,—"property when passing by will or inheritance,"—similar

in form with the language of the statute, which is identical with the Massachusetts statute (Mass. R. L., *c.* 15, *s.* 1), indicates that to make clear that the desired power was granted language similar to that used elsewhere in imposing the tax was employed. The question submitted to the people and upon which they voted was: "Do you approve of empowering the legislature to impose taxes, not only upon polls and estates, but also upon other classes of property, including franchises and property when passing by will or inheritance, as proposed in the amendment to the constitution?" This proposition having been adopted by the requisite constitutional majority, it is impossible seriously to maintain that it was not intended to so amend the constitution as to permit the taxation of "property when passing by will or inheritance."

The only position left is, that though the people intended to so amend the instrument which evidenced their governmental agreement, they failed to express their purpose because they omitted to negative in express terms in this particular the general intent of the document. "The rule, that the general intent appearing shall control the particular intent, must sometimes give way, and effect be given to a particular intent plainly expressed in one part of the constitution, though apparently opposed to a general intent deduced from other parts. . . . The people having voluntarily agreed with each other to form themselves into a body politic, the legal meaning of the written agreement is their intention and understanding shown by competent evidence." *State* v. *Express Co.*, 60 N. H. 219, 235, 255. Of their meaning the evidence leaves no room for doubt. Article 6, as it stood before the amendment,—"And, while the public charges of government or any part thereof shall be assessed on polls and estates in the manner that has heretofore been practiced, in order that such assessments may be made with equality there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order,"—while assuming that only polls and estates were proper subjects of taxation, was intended to secure proportional assessments by requiring frequent revaluations. The main purpose of the amended article is to declare the subjects of taxation. Logically, in its main purpose article 6 might now perhaps more properly stand as an addition to article 5, devoted to an enumeration of powers granted to the general court. But the mere position of the clause is not decisive of its meaning. If any subject or method of taxation specifically permitted cannot conform to some other condition of the constitution, the reasonable conclusion is that the particular condition was not understood to apply to the special method—not that it was intended that no effect should be given to the express language.

Conceding that an inheritance tax is necessarily disproportional, that it is unequal in its lack of proportion, and that it is impossible to lay a proportional tax upon property upon the occasion of death, it cannot have been understood that such impossibility would defeat the express power to lay such a tax, but it must follow that the express authority to impose such a tax is an authority to disregard the general rule of proportion so far as is necessary to exercise the power. Poll taxes are recognized in the constitution and have been imposed since before its adoption. They are not proportional; that is, the amount of the tax has no reference to the ability of the taxpayer to make payment. *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 336, 346. Poll taxes are constitutional because recognized by the constitution, and have never been understood to be rendered unconstitutional by their lack of proportion to the ability to pay. There is no more reason to conclude that the power to impose an inheritance tax, expressly given, is abrogated by a necessary lack of proportion also attaching to such a tax. Neither is it necessary to conclude, because by amendment an additional disproportional tax has been authorized, that it was intended to abrogate the fundamental rule of equal rights or the general rules of equality and proportion as to other taxes. All taxes that can be made proportional must be so assessed. The impossibility of assessing an inheritance tax in proportion permits such a tax to be otherwise laid. If to the words authorizing the imposition of inheritance taxes a clause had been added, in substance "without regard to the rule of proportion otherwise required in taxation," such clause would have furnished evidence of the constitutional intent; but the meaning being clear from competent evidence, the purpose is equally as certain and well established as it would have been by the use of such language. The purpose to authorize such a tax being clear, the intent to avoid any existing provision contrary thereto follows. It is the ordinary rule that a condition repugnant to a grant is void because it cannot be inferred it was intended to make a useless grant. It is not probable that it was intended to grant the power and at the same time to affix a condition rendering its exercise impossible.

But although the power to impose an inheritance tax is clear, it must be exercised so far as possible in accordance with all other provisions of the constitution. It must be an equal tax in the sense that it must affect all persons equally. In the present law all property taxed is taxed at the same rate, and the difficulty found in some cases with exemptions of a certain amount of property and with a tax varying according to the amount of property does not appear. But it is claimed that the tax is unequal in

that it is not assessed upon all property passing by will or inheritance. In Minnesota, under a constitutional provision authorizing the taxation of all inheritances, this was considered to be a fatal objection. *Drew* v. *Tifft*, 79 Minn. 175,—79 Am. St. Rep. 446; *State* v. *Bazille*, 87 Minn. 500,—94 Am. St. Rep. 718. But the equality of the constitution is an equality of right—not of enjoyment. *State* v. *Aldrich*, 70 N. H. 391; *State* v. *Dow*, 70 N. H. 286. "A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, . . . is an equal law." *State* v. *Griffin*, 69 N. H. 1, 29, 30. Whether the tax is considered as an impairment of the right of property by incumbering the right to dispose of it at death, or as a tax upon the privilege of succeeding to property at the death of the owner, it affects all citizens alike. All who own property have the same privilege of disposing of it free from any incumbrance, and the right of all to pass it to those not within the exception is subject to the same imposition. Similarly, all have an equal right to inherit if within the exception, and are equally chargeable if not.

In *Curry* v. *Spencer*, 61 N. H. 624, 631, 632, it was urged that the similar statute (G. L., *c.* 64; Laws 1879, *c.* 57, *s.* 16) could be upheld as a means of distributing the expense of maintaining probate courts; but the contention was overruled upon the ground that if the law was to be regarded as imposing taxes solely for this purpose it was unequal, because some estates were required to contribute toward this expense while others were not. As a law solely for such purpose, the law was unequal because the right then in question was the right to the privileges of the probate court for purposes of administration. If one estate was entitled to be there settled without payment of fee, all were. *State* v. *Gorman*, 40 Minn. 232,—2 L. R. A. 701. In view of the change of the constitution, it is unnecessary to consider whether the present statute could be sustained upon the ground of contribution for probate expense. There are good reasons why the passing of property to near relatives, or the gift of it to charitable purposes or directly to the public, should not be subject to an exaction by the state. *Minot* v. *Winthrop*, 162 Mass. 113, 123; *Nunnemacher* v. *State*, 129 Wis. 190. The rule in this state has been that only such property was to be taxed as was included in the description of the property required to be taxed. The reasonable exemption of certain classes of property by express language, or by its omission from the description of the property required to be taxed, has not, in the practical construction given to the constitution ever since its adoption, been considered to affect the validity of the tax upon other property. *Brewster* v. *Hough*, 10 N. H. 138, 142; *Phillips Academy* v. *Exeter*, 58 N. H. 306; *Opinion of the Court*, 58

N. H. 623; *Opinion of the Justices*, 70 N. H. 642. The exemption does not render the assessment unreasonable, and it is not suggested that on any other ground the statute violates that requirement of the constitution. As the assessment in question is neither unequal nor unreasonable, and as its disproportion to the taxation of other property, inherent in the tax itself, must have been contemplated by the people in their special authorization of this tax, the conclusion is, that in so far as the question is determined by the power of the legislature to enact a collateral inheritance tax law, the tax imposed under chapter 40, Laws 1905, is valid, and the executor is advised to make payment in conformity thereto. For the purpose of obtaining a decision of the question all objections to the form of the proceedings were waived.

Case discharged.

All concurred.

Hillsborough, Dec. 4, 1906.

TRAFTON v. OSGOOD, *Ex'x.*

Testimony is not incompetent merely because it differs from, or is inconsistent with, statements of the witness at a former hearing.

In the absence of exception, it is presumed that the evidence in a case warranted its submission to a jury, and that correct instructions were given as to the legal effect of the facts of which there was proof.

BILL IN EQUITY, to remove a cloud upon the plaintiff's real estate title. Trial by jury and verdict for the plaintiff. Transferred from the January term, 1906, of the superior court by *Peaslee*, J..

The defendant claimed title by virtue of a levy against one Tuttle. While the levy was in progress the plaintiff brought a bill to enjoin the same, which upon hearing was dismissed without prejudice. Two lots were involved. At the hearing upon the bill for an injunction, the plaintiff testified, among other things, that she purchased the lots of Tuttle, and that at that time there was a house partially erected on each lot; that she mortgaged one house and lot for $1,400 and the other for $2,600, and with the money so obtained she in each instance paid a balance due on the purchase and the cost of completing the house. In the present bill it was alleged that the plaintiff had paid for the property in the same way and in the same amounts as she had tes-

tified at the former hearing. At the trial in this case she offered to testify that the property cost a large sum in addition to $1,400 and $2,600, as it in fact did, and that she paid the additional sum from money which she borrowed, or earned and saved. The defendant objected that her allegation in the bill was of the smaller sum. The plaintiff's motion to amend the bill by inserting the larger sum was allowed and her testimony as to the cost was admitted in evidence, to all of which the defendant excepted.

Charles A. Perkins, for the plaintiff.

Alpheus C. Osgood and *Almon F. Burbank*, for the defendant.

PARSONS, C. J. The allowance of the amendment to the plaintiff's statement of her case in the bill is not subject to exception. The question of justice involved is one of fact. Objection to the decision of the fact by the superior court does not present any question for consideration here.

If the plaintiff had admitted that she committed perjury at the former hearing, such an admission would not prevent her testifying to the truth when again called as a witness to the matter. Such fact, if admitted or proved, would have affected the credibility—not the competency—of her testimony. P. S., *c.* 224, *s.* 26; *Wilson* v. *Russell*, 61 N. H. 354: *Demeritt* v. *Miles*, 22 N. H. 523, 528; *People* v. *O'Neil*, 109 N. Y. 251, 266. So far as *Behr* v. *Insurance Co.*, 4 Fed. Rep. 357, cited by the defendant, tends to support the objection urged against the plaintiff's testimony, the holding appears to be made in deference to a peculiarity of the law of Tennessee which the opinion concedes is not the rule elsewhere. *Ib.* 368; 1 Gr. Ev., *s.* 210; 1 Wig. Ev., *s.* 525, *et seq.*

The evidence excepted to was competent. The effect of the evidence, tending to show that the plaintiff's claims and testimony upon a former occasion differed from or were inconsistent with her claims and testimony in this case, is a question not raised by the exceptions taken to the allowance of the amendment, to the admissibility of her testimony as now given, or to her competency as a witness. It must be assumed that the whole evidence presented matter properly for the jury, and that it was submitted to them with correct instructions as to the legal effect of the facts of which there was proof, no exception having been taken on either point.

Exceptions overruled.

All concurred.

Hillsborough,
Dec. 4, 1906.

BAKER *v.* BOSTON & MAINE RAILROAD.

A common carrier of milk is bound, in the full performance of its public duty, to provide reasonable facilities and accommodations for the reception and delivery of the commodity, including care during transportation.

The question whether facilities and accommodations furnished by a railroad company to a shipper constitute a reasonable compliance with the carrier's public duty is one of fact.

A contract whereby a shipper of milk agrees to provide men to care for the commodity during its transportation and to indemnify the carrier against claims for personal injuries sustained by such employees is unreasonable and void, if an opportunity for transportation according to the carrier's full duty has not been afforded the shipper as an alternative and no reduction of rates has been made as a consideration for the limitation of liability.

An agreement between a shipper and his employee engaged to care for freight during transportation, which provides that the latter shall not prosecute any suit against the carrier for personal injuries received during his employment and which is based upon an invalid indemnity contract between the employer and the carrier, is not available as a defence to an action by the employee for injuries resulting from the carrier's negligence.

CASE, for negligence. Transferred from the January term, 1906, of the superior court by *Stone*, J. The questions of law are raised by the plaintiff's demurrer to the plea or brief statement filed by the defendant, the material parts of which are as follows:

"At the time of the collision in the declaration complained of, the defendant, a corporation duly established by law and operating a railroad between various points in the states of New Hampshire and Massachusetts and elsewhere, was engaged in hauling for D. Whiting & Sons of Boston, Massachusetts (the firm in the declaration mentioned), certain special cars furnished by the defendant for the sole use of said firm in the carriage of milk, accompanied by certain of the firm's employees, from various points in New Hampshire to Boston aforesaid, over lines of railroad operated by this defendant, said employees riding in said cars for the purpose of taking care of and handling the milk and performing work incidental thereto for said firm. The car in which the plaintiff was at the time aforesaid was being so used by said D. Whiting & Sons, and solely for their accommodation, and the same was one of said special cars; and the plaintiff was then riding therein as one of their said employees. The defendant, in furnishing and hauling said cars as aforesaid, was engaged in performing an agreement between itself and said D. Whiting & Sons, entered into upon the

faith of, and partly in consideration of, the indemnity contract hereinafter mentioned. By the terms of the first mentioned agreement, the defendant was to make no charge (apart from said agreement) for carrying said employees, they being allowed to ride in the cars free for the purpose aforesaid; and the plaintiff, at the time of this collision in the declaration alleged, was, in pursuance of said agreement and subject to the provisions of said indemnity contract, being carried by the defendant free of charge. In consideration of the furnishing and hauling of said cars by said defendant, said D. Whiting & Sons paid to said defendant an agreed sum of money and executed the indemnity contract hereinafter set forth. At the time of the execution of all the agreements herein mentioned, large quantities of milk were produced by individual farmers living along the line of said defendant's railroad. The quantity was such that it was more economical and more advantageous to all parties —producers, distributors, and consumers— to have it transported in special cars furnished with icing facilities than to have it carried in ordinary cars. The said D. Whiting & Sons were engaged in the business of buying and selling milk, buying it of the individual producers and distributing it at various points and at Boston on the line of said defendant's railroad. Practically all the milk so produced along the line of said road was taken by said D. Whiting & Sons and by them distributed as aforesaid. The defendant furnished no other special cars for the transportation of milk on said road except those furnished to said D. Whiting & Sons. The ice used in cooling the milk during transportation was furnished and applied by D. Whiting & Sons, whose employees, riding in said cars as aforesaid, did all the work incident to caring for and handling the milk. In and by a contract in writing (herein called the 'indemnity contract'), made and entered into by and between this defendant and said D. Whiting & Sons, and made as a part of the transaction and agreement whereby the defendant undertook as aforesaid to furnish and haul said special cars, it was provided and agreed as follows: 'In consideration of one dollar and other valuable considerations to us paid by the Boston & Maine Railroad, we, D. Whiting & Sons of Boston, Massachusetts, hereby agree to indemnify and hold harmless the Boston & Maine Railroad, its servants and agents, should any claim be made by any of our employees on account of personal injury or damage to property received while on the cars or premises of said railroad; and we further agree to indemnify and hold harmless the said Boston & Maine Railroad, its servants and agents, should any claim be made by any person on account of injury received, or by reason of any damage to property of any person, at the hands of us, or of our employees or appliances.'

"In May, 1901, the plaintiff was employed by said D. Whiting & Sons to work on said milk cars, as one of the employees of said Whiting & Sons whom the defendant under the agreement first mentioned was required to carry free, said employment being for no definite time. In September, 1901, subsequent to the making of said indemnity contract, and while the same and said agreement in relation to furnishing and hauling special cars with employees of the firm therein were in force, and pursuant thereto, the plaintiff was requested, as a condition of his continuing in the employment of said Whiting & Sons, to sign a contract in writing, herein called the 'contract of release.' Said further employment was understood by both the plaintiff and said D. Whiting & Sons to be furnished in consideration of the plaintiff's executing and delivering to the said D. Whiting & Sons this contract, which was in terms as follows: 'Whereas, as one of the employees of David Whiting & Sons, I am allowed by the Boston & Maine Railroad to ride upon its cars, and work in and about its depots, buildings, and premises, free and exempt from any charge therefor; and whereas, said David Whiting & Sons are required by said Boston & Maine Railroad to bind themselves to indemnify and hold it harmless against claims that may be made by any of their employees on account of personal injuries or damages to property received while on the cars or premises of said railroad; and whereas, I have agreed, so long as I remain in the employ of said David Whiting & Sons, to be insured against accident and death or disability therefrom, by policies of insurance issued in my favor, in part at the expense of my said employers and in part at my own expense; and whereas, it is my desire and purpose to indemnify and save harmless the Boston & Maine Railroad against liability on account of injuries that may be sustained by me in my person or property in the course of my said employment, and likewise to protect said David Whiting & Sons against all claims that may be made by said Boston & Maine over against them on account of such injuries to me: Now, therefore, I do hereby covenant and agree with said David Whiting & Sons, their successors and assigns, and also with said Boston & Maine Railroad, that for a good and valuable consideration to me paid (the receipt whereof is hereby acknowledged), and especially in view and in consideration of a contribution by said David Whiting & Sons to the premiums for my said insurance, I will not at any time hereafter make or prosecute in any manner, at law or otherwise, any claim against the Boston & Maine Railroad for or on account of injuries that may be sustained by me during the period of my employment by said David Whiting & Sons, their successors or assigns, against all liability which they are or may be under to answer over to the

Boston & Maine Railroad on account of claims made or presented by me for injuries sustained as aforesaid. In witness whereof I have hereunto set my hand and seal, as also to a duplicate hereof, this twenty-seventh day of September, 1901. Fred L. Baker.' The continuation of said employment of the plaintiff by D. Whiting & Sons was understood by the parties thereto to constitute, and the same did in fact constitute, the 'good and valuable consideration,' the receipt of which is in terms acknowledged by the said contract of release. The plaintiff continued in said employment from said September 27, 1901, to the time of the collision aforesaid. Pursuant to the agreement and indemnity contract hereinbefore referred to, it was the intention of said D. Whiting & Sons and said defendant that all employees of said D. Whiting & Sons should sign similar contracts of release, and practically all did so sign or leave said employment. The further consideration mentioned in the contract of release, namely, a contribution to premiums for accident insurance, was in fact paid by said D. Whiting & Sons according to the arrangement recited in that contract, and the plaintiff received a duly executed policy of insurance in the Fidelity and Casualty Company of New York. The policy therefor, issued originally in September, 1901, was kept alive by a premium paid annually (in part by said D. Whiting & Sons and in part by the plaintiff), and the insurance was still in force at the time of said collision.

"On the 21st of July, while in their employ, the plaintiff was severely injured, as he claims, by the negligence of the Boston & Maine Railroad, in a collision between an express train and the milk train in which the plaintiff was riding in the course of his said employment, and while he himself was in the exercise of ordinary care. Thereafter, at once and while ignorant of his legal rights, the plaintiff made inquiries as to the amount due him under said policy, and the insurance company forwarded to him a blank for proof of claim. On advice of counsel this blank was never filed with said insurance company, and said company was immediately notified that no benefits from said policy would be accepted by the plaintiff to the prejudice of his rights against said Boston & Maine Railroad, and the plaintiff then brought this suit.

"All of the agreements and contracts aforesaid were in full force and effect and binding upon the respective parties thereto at and during the time of the occurrences in the plaintiff's declaration referred to; and the plaintiff's presence at the time of said collision, in the car in which he alleges that he received the personal injuries complained of (said car being one of the special cars above mentioned), was due solely to his said

employment by D. Whiting & Sons, under the circumstances and subject to the agreements and contracts hereinbefore specified. He was then and there engaged solely in performing the duties of his said employment as one of the employees whom the defendant had agreed as aforesaid to transport free of charge. He was being transported, not as a passenger, but in virtue of said first mentioned agreement between D. Whiting & Sons and this defendant, and subject to the provisions of said indemnity contract and contract of release, respectively. The plaintiff by his said contract of release did agree that the same should inure to the benefit of this defendant, and did thereby release and discharge this defendant from all claims for liability of any nature or character whatsoever, on account of any personal injuries that he might receive while traveling over the defendant's lines of road in said employment or service. And the defendant says that because of said contract entered into by the plaintiff as a condition of his employment, and because of the agreements and release therein contained inuring to the benefit of this defendant, the plaintiff cannot maintain this action. Wherefore the defendant will claim that judgment in said action be in its favor, and for its costs."

Taggart, Tuttle, Burroughs & Wyman, for the plaintiff.

Burns & Burns and *Johnson, Clapp & Underwood* (of Massachusetts), for the defendants. It is submitted that the service which was furnished to D. Whiting & Sons was outside of and beyond anything which they had a right to demand, or which the railroad company, apart from its special agreement, was bound to supply. There is nothing in the present case to show that the defendant railroad company ever carried any milk in other than ordinary cars before its arrangement with D. Whiting & Sons, or received milk for carriage accompanied by employees of the shipper, or that it ever held itself out as ready to undertake the carriage of milk in any other way than by transit in ordinary freight cars. So far as appears, the arrangement entered into with D. Whiting & Sons was the first and only one of the kind ever made by the company.

It is clear that it was not the railroad's duty to supply the special cars referred to. Neither the common law nor any provision of statute requires it to do more than furnish ordinary cars in the transportation of milk. The case does not show that it would have been unreasonable to refuse to furnish cars provided with icing facilities, but merely that the use of such cars is somewnat more economical and advantageous. The defendant railroad has simply seen fit, in order to facilitate the distribution and market-

ing of milk, to go beyond the requirements made by the law, subjecting itself to an extra burden; and to say that it cannot, as a condition or consideration for undertaking to perform the unusual and extra service, which includes the maintenance of what is practically a traveling workshop for use of the shipper's employees, insist that the milk contractor shall indemnify the road against claims which may be made by his employees against the railroad for injuries received, is to increase the company's liability without allowing it any corresponding benefit. No public policy, we submit, can be sound which prohibits an indemnity contract under such circumstances.

In most of the decided cases which establish the general proposition that a carrier, in performing service which it is required as a carrier to perform, cannot exempt itself from the consequences of negligence, one ground on which the decisions go is that the passenger or shipper and the company do not deal on a basis of equality; the one has the other to a great extent in its power; there is no fair dealing with each other at arm's length. That element is entirely lacking in this case. In the first place, the plaintiff had no dealings with the railroad itself; he dealt solely with the obvious real defendant in the case—D. Whiting & Sons. Transportation was not the purpose of his being on the train; he was not seeking to go from one place to another; his being carried was only incidental to his presence in the car. He was there primarily to attend to his employer's business, was subject to the employer's orders, was paid by the employer, and was under the employer's sole control. Further, his position may fairly be likened to that of a Pullman porter, of which it is said in *McDermon* v. *Company*, 122 Fed. Rep. 669, that such positions are much sought for, and that in consideration of them persons are willing to agree, as a condition of their employment, to assume all risks involved in riding upon the train; and the court adds: "I can perceive no interest of public policy that should prevent him [the plaintiff] from obtaining such position on his voluntary acceptance of the conditions imposed by his employer." As was well said in *Baltimore etc. R. R.* v. *Voigt*, 176 U. S. 498: "If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting. . . . Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

It is obvious that it is a matter of indifference to the defendant railroad whether the contract signed by Baker is held valid or not, for the company is protected by a contract made by a responsible firm of milk contractors. The real defendant in this case is the

firm of D. Whiting & Sons, and we submit there is no sound public policy which prevents them from requiring their employees, as one of the considerations for being in the firm's service, to assume the risk involved in working in its traveling workshop. As we believe, reason and policy alike make for the validity of the Baker contract; and to avoid circuity of action that contract should be treated in the case at bar as a release inuring to the benefit of the railroad company itself.

A majority of the drover cases have been cited by the plaintiff. An examination will show that in almost every case the drover himself accompanied the cattle, that the railroad was engaged in the regular business of transporting cattle, that the cattle were carried on the regular and usual cars of the company provided for the purpose, that the rate was the regular, established rate, and that the drover was accompanying the cattle as a part of the regular and usual system of the railroad in connection with the transportation of such cattle. The release, therefore, was something demanded by the railroad in connection with the performance of its regular business of a common carrier transporting cattle. As shown, the defendant company in the case at bar never held itself out as engaged in the business of supplying special milk cars. Moreover, it seems to us that there is an obvious difference between what the shipper of live stock, which require feeding and care, and what a contractor purchasing and forwarding milk may reasonably demand of a carrier.

The decisions in the circus, express messenger, and Pullman porter cases are uniform in upholding an agreement of indemnity and release, the exemption from liability being required as a condition of furnishing services which the railroad as a common carrier is not bound to furnish. *Bates* v. *Railroad*, 147 Mass. 255; *Robertson* v. *Railroad*, 156 Mass. 525; *Hosmer* v. *Railroad*, 156 Mass. 506; *Louisville etc. Ry.* v. *Keefer*, 146 Ind. 21; *Russell* v. *Railway*, 157 Ind. 305; *Blank* v. *Railroad*, 182 Ill. 332; *Coup* v. *Railway*, 56 Mich. 111; *Chicago etc. Ry.* v. *Wallace*, 66 Fed. Rep. 506; *McDermon* v. *Company*, 122 Fed. Rep. 669; *Long* v. *Railroad*, 130 Fed. Rep. 870; *Baltimore etc. Ry.* v. *Voigt*, 176 U. S. 498.

The plaintiff has cited several cases relative to the transportation of postal clerks, but these do not involve the question raised in the present case. In these postal clerk cases the railroad claimed that inasmuch as the clerk rode free he was not a passenger, and therefore could not recover against the railroad for negligence; but the court properly held that he rode there as a part of a contract with the government, *having no provision for indemnity*, and therefore was a passenger. *Hammond* v. *Railroad*,

6 S. C. 130; *Arrowsmith* v. *Railroad*, 57 Fed. Rep. 165; *Gleeson* v. *Railroad*, 140 U. S. 435. See, also, *Seybolt* v. *Railroad*, 95 N. Y. 562; *Delaware etc. R. R.* v. *Ashley*, 67 Fed. Rep. 209.

As bearing on our contention that the service which the defendant corporation contracted to perform for the firm, which is the real defendant herein, was beyond the scope of the carrier's duty, the following observations and cases are deemed worthy of consideration: Primarily, a common carrier is not obliged to receive and transport freight on passenger trains nor passengers on freight trains. If a railroad company is asked as a part of the performance of its public duty to carry a proper person upon passenger trains, and such person agrees to release the railroad company from liability from accidents, such contract is void, because the railroad company is bound so to transport such passenger and deliver him safely. If, on the other hand, a person asks to be carried upon a freight train, ordinarily the railroad company is under no obligation so to carry him, and we submit that it is wholly consistent with good public policy to allow the carrier to demand, as a consideration for such unusual service, an agreement making the passenger under such circumstances assume all the risks of accident. See *Elkins* v. *Railroad*, 23 N. H. 275; *Murch* v. *Railroad*, 29 N. H. 9.

The defendant therefore submits that the agreement of the plaintiff—"I will not at any time hereafter make or prosecute in any manner, at law or otherwise, any claim against the Boston & Maine Railroad for or on account of injuries that may be sustained by me during the period of my employment by said David Whiting & Sons, their successors or assigns"—is not against public policy, is valid, and deprives the plaintiff of the right to recover in this action.

BINGHAM, J. The defendants are engaged in the carrying trade, as common carriers of freight and passengers. Whiting & Sons are milk contractors who buy and sell milk, buying it of the producers on the line of the defendants' road and distributing it at different points along the same. In consideration of the defendants agreeing to furnish Whiting & Sons with cars provided with icing facilities for the transportation of their milk, Whiting & Sons agreed to pay them a stipulated sum, to furnish the ice, to provide men to do the work incident to handling and caring for the milk while in transit, and to indemnify the defendants against the claims of any of the employees of Whiting & Sons "on account of personal injury or damage to property received while on the cars or premises" of the road. In view of the provisions of this contract, and in consideration of his future

employment and other considerations, the plaintiff, an employee of Whiting & Sons engaged to handle and care for the milk, agreed with Whiting & Sons not to make or prosecute any claim against the defendants on account of injuries received by him during his employment and to indemnify Whiting & Sons against all liability on account of any such claim. The plaintiff was injured through the defendants' negligence, while on their train in the performance of his duties under the contract; and the question we are called upon to consider is whether these contracts are valid and constitute a defence to this action.

The defendants say that both contracts are valid, and that they should be permitted to avail themselves of the benefits of the plaintiff's contract with Whiting & Sons to avoid circuity of action. But whether they can avail themselves of the provisions of that contract to avoid circuity of action depends upon whether their contract with Whiting & Sons is one the law will recognize and enforce. The defendants do not dispute the proposition that common carriers cannot by contract relieve themselves from liability arising from their own negligence in the performance of duties imposed upon them by law. Their first contention is, that upon the facts disclosed in the plea the shippers could not demand as of right that the defendants should furnish the cars called for in the contract for the transportation of milk; that neither the common law nor any provision of statute required them to do more than furnish ordinary freight cars for that purpose; that this service was something which they were under no public duty to perform; and that in undertaking to render it they were private carriers and could lawfully impose such terms as they deemed proper as a condition to its performance.

Were the defendants common carriers of milk? Our statutes provide that "Every railroad corporation which shall contract with any person for the transportation of milk in large quantities over any portion of its road shall establish a tariff for the transportation of milk by the can over the same portion of its railroad with fairly proportionate advantages and facilities in every respect." P. S., *c.* 160, *ss.* 21, 22, 23; Laws 1881, *c.* 81. And it would seem that when the defendants entered into the contract with Whiting & Sons, they thereupon and by force of the statute became common carriers of milk and were required to establish a tariff for its transportation. The same conclusion would be reached if we applied the principles of the common law as laid down in *McDuffee* v. *Railroad*, 52 N. H. 430, 454. It was there said: "A railroad corporation carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses." But it is unnecessary to

further consider this question, as the defendants in their plea do not deny the allegation of the plaintiff's declaration that they are common carriers of milk, and in their brief practically concede this fact. Their contention as to this matter is simply this: that the furnishing of cars without icing facilities would have been a full compliance with their public duty as common carriers; and that Whiting & Sons, as shippers of milk, could not have required them to furnish cars with icing facilities for its transportation. In answer to this it may be said that, as incident to their business of common carriers of milk, it was the defendants' public duty to provide reasonable facilities for its reception and delivery, including care during transportation. *Flint* v. *Railroad*, 73 N. H. 141, 144; *Sayer* v. *Railroad*, 31 Me. 228; *Steinweg* v. *Railway*, 43 N. Y. 123; *Welsh* v. *Railroad*, 10 Ohio St. 65; *Beard & Sons* v. *Railway*, 79 Ia. 518, 520; *Potts* v. *Railway*, 17 Mo. App. 394; *Merchants' Dispatch Co.* v. *Cornforth*, 3 Col. 280; 2 Hutch. Car. (3d ed.), *ss.* 495–497; Ray Fr. Car., *s.* 4, and cases there cited. "A railway company is bound to provide cars reasonably fixed for the convenience of the particular class of goods it undertakes to carry. It is the duty of the carrier to provide suitable means of transportation adapted in each case to the particular class of goods he undertakes to transport. He must protect his goods from destruction or injury by the elements, from the effects of delay, from any sources of injury which, in the exercise of care and ordinary intelligence, may be known or anticipated." Ray Fr. Car., *supra*. He must "provide all suitable means of transportation and exercise that degree of care which the nature of the property requires." *Smith* v. *Railroad*, 12 Allen 531, 534. In addition to the duty imposed upon the defendants by the common law, our statutes provide that "the proprietors of every railroad shall furnish to all persons reasonable and equal terms, facilities, and accommodations for the transportation of persons and property over their railroad, and for the use of depots, buildings, and grounds in connection with such transportation." P. S., *c.* 160, *s.* 1; *McDuffee* v. *Railroad*, 52 N. H. 430, 457.

Inasmuch, therefore, as the defendants were common carriers of milk, and as it was their public duty to furnish all persons desiring to ship that commodity with reasonable facilities and accommodations for its transportation, this contention of the defendants resolves itself into the inquiry whether their plea states facts from which it can be inferred that the furnishing of cars with icing facilities was under the circumstances more than they could reasonably be required to do in the fulfilment of their public duty; for the question what facilities and accommodations were a reasonable compliance with their public duty—or, to state the proposition in another way, whether the cars furnished were more than

their public duty required them to do—is a question of fact. *Boothby* v. *Railroad*, 66 N. H. 342, 344. The plea does not allege that it would have been reasonable, in view of the defendants' public duty, for them to have refused to furnish the Whitings with cars provided with icing facilities for the transportation of the large quantity of milk which they were daily desiring to ship, nor facts from which such an inference could reasonably be made. On the contrary, it is alleged in the plea that "at the time of the execution of all the agreements herein mentioned, large quantities of milk were produced by individual farmers living along the line of said defendant's railroad. The quantity was such that it was more economical and more advantageous to all parties—producers, distributors, and consumers—to have it transported in special cars furnished with icing facilities, than to have it carried in ordinary cars." The only reasonable deduction to be made from this allegation is that cars with icing facilities were reasonably necessary, and that those furnished did not afford greater facilities than the defendants' public duty required.

It is further contended that the defendants could not have been required to carry the shippers' servants in milk cars, and that when they agreed to carry them in these cars they undertook to do more than their public duty required, and on this account could lawfully demand of the shippers the contract of indemnity which they did. But this contention is not supported by the facts in the case. As already stated, it was the defendants' duty to provide suitable cars in which to transport the milk. It was also their duty to proyide men to handle and care for it while being transported. *Beard & Sons* v. *Railway*, 79 Ia. 518; *Boscowitz* v. *Company*, 93 Ill. 523; *Chesapeake etc. Ry.* v. *Bank*, 92 Va. 495; and cases above cited. But by the terms of the special contract the duty of providing men to handle and care for the milk was imposed upon the shippers; and this being so, it would not seem that the defendants were undertaking more than their public duty called for when, by the contract, they required the shippers to perform a part of their public duty—a part the performance of which necessitated the presence of the shippers' servants upon the cars. But however this may be, it is the policy of the law that common carriers should be ready and willing at all times to contract with shippers for the full performance of their public duty; and in cases where this phase of the question has been presented, it has generally been held that a contract limiting a carrier's common-law liability is unreasonable and void when transportation according to the carrier's public duty is not afforded the shipper as an alternative, and no reduction of rates is made as a consideration for the limitation. If carriers could maintain limitations or exemp-

tions of their common-law liability in cases where the shipper was not afforded the opportunity of making a contract without them, the result would be that such contracts would be universal—that the carrier's duty would be dispensed with, and the policy of the law be defeated. *Illinois etc. R. R.* v. *Insurance Co.*, 79 Miss. 114; *Louisville etc. R. R.* v. *Gilbert*, 88 Tenn. 430; *Illinois etc. R. R.* v. *Craig*, 102 Tenn. 298; *Little Rock etc. Ry.* v. *Cravens*, 57 Ark. 112,—18 L. R. A. 527, note: *Atchison etc. R. R.* v. *Mason*, 4 Kan. App. 391; *Lewis* v. *Railway*, 3 Q. B. Div. 195; Ray Fr. Car., *ss.* 45, 48, 181; 4 Elliott R. R., *s.* 1504; Redman Car. (2d ed.) 68; 6 Cyc. 392–401.

In this case it does not appear that the shippers were afforded the opportunity of having the defendants perform their full duty and handle and care for the milk. There is no allegation in the defendants' plea, or provision in the contract of shipment, to that effect; and in view of the absence of such an allegation or provision, and of the defendants' contention that they were under no duty even to provide cars with icing facilities for shipping the milk, it is to be inferred the shippers were not afforded such an opportunity, and that the defendants refused to provide the cars for the milk unless the shippers would furnish the men to handle and care for it and would indemnify the defendants against all liability for damages to the men and their property. In such case it is clear that we must hold that the shippers' contract of indemnity is unreasonable and void, and that the plaintiff's contract with the shippers, which is based upon the indemnity contract, cannot be availed of by the defendants as a defence to this action.

The plaintiff was upon the cars at the time of the accident with the defendants' consent. His passage was not free. The consideration for it was the service he rendered in caring for the milk, or the charge against his employers in shipping it. And as the defendants cannot, on the facts disclosed in the plea, avail themselves of the plaintiff's agreement with the shippers, it was the defendants' duty to use due care for the plaintiff's safety; and if they or their servants were negligent, and he was injured in consequence thereof, they are liable in damages.

Whether the agreements relied upon in the plea would have been enforceable if the defendants had been ready and willing for a reasonable compensation to perform their full duty as carriers and had afforded the shippers the opportunity of having the milk carried without restriction or limitation of their public duty, and the shippers, instead of requiring the defendants to perform their full duty, had voluntarily agreed, in consideration of a reduced rate, to furnish the men to handle and care for the milk and to indemnify the defendants against liability for loss occasioned the

person or property of the men by the negligence of the defendants or their servants, we are not called upon to decide. It may be said, however, that it has been held in this state that common carriers cannot relieve themselves from the consequences of their own wrongful acts by special contract (*Peerless Mfg. Co.* v. *Railroad*, 73 N. H. 328; *Durgin* v. *Company*, 66 N. H. 277; *Duntley* v. *Railroad*, 66 N. H. 263; *Merrill* v. *Company*, 62 N. H. 514), and that these decisions may be sustained upon the broad ground that it is against the policy of the law to permit any one, be he common carrier or not, to relieve himself by contract from the performance of his common-law duty to use ordinary care to avoid injuring those with whom he knew or should have known his business would bring him in contact. *Nashua etc. Co.* v. *Railroad*, 62 N. H. 159, 161; *Johnson* v. *Railroad*, 86 Va. 975. But whether common carriers may under some circumstances contract for a release from liability for the negligence of their servants in respect to acts which do not pertain to the performance of non-delegable duties, is a question that has never been decided in this jurisdiction and is not now considered.

Demurrer sustained.

PARSONS, C. J., and WALKER and YOUNG, JJ., concurred: CHASE, J., doubted.

Cheshire,
Dec. 4, 1906.

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STATE v. FRAZIER.

Whether a jury shall be interrogated as to the grounds upon which they proceeded in arriving at a verdict, and whether a verdict shall be set aside because instructions were disregarded, are questions of fact determinable by the trial court.

INFORMATION, for a second offence in illegally keeping for sale spirituous liquor. Trial by jury and verdict of guilty. Transferred from the April term, 1906, of the superior court upon a bill of exceptions allowed by *Pike*, J.

The state submitted evidence of the keeping for sale and of the prior conviction. The jury were instructed that they must acquit the defendant unless they were satisfied of his guilt beyond a reasonable doubt by a consideration of the testimony relating to the keeping for sale. After the jury rendered the verdict and before they left their seats, the defendant's counsel moved that the court

inquire of them whether they had considered the former conviction as evidence of the subsequent offence charged in the information, but offered no testimony in support of the motion other than his assertion that he thought so. The court declined to make the inquiry, and the defendant excepted.

Subsequently, after the jury had been discharged from further attendance at the term, the defendant renewed his motion and also moved that the verdict be set aside, and submitted the affidavit of his counsel, in which were the following statements: "I overheard some of the matters discussed by the jury while considering the case. . . . I overheard the following words: 'Well, now, there is the first conviction.' . . . I believe that in the finding . . . . they considered as evidence the fact that Joel Frazier was previously convicted of the offence of illegally selling liquor." The motions were denied, and the defendant excepted.

Orville E. Cain, solicitor, for the state.

Joseph Madden, for the defendant.

CHASE, J. The defendant's exceptions are to decisions of the superior court upon questions of fact, and raise no questions of law. *Dearborn* v. *Newhall*, 63 N. H. 301. The case differs from *Winslow* v. *Smith*, *ante*, 65, in that the court exercised his discretion, and, so far as appears, properly. It cannot be held as matter of law that the testimony contained in the affidavit submitted to the court outweighed all the other testimony that was before him, especially in view of its indefiniteness and the manner in which it was obtained.

Exceptions overruled.

All concurred.

Coös,
Dec. 4, 1906.

HESS & a. v. SHURTLEFF.

Whether a witness offered as an expert is qualified to testify in that capacity is a question of fact determinable by the trial court.

In an action to recover the price of goods sold, the plaintiff is not entitled to a verdict if he fails to establish the contract of sale alleged by him, although the evidence may be insufficient to support the defendant's contention that he received the merchandise on consignment.

ASSUMPSIT, for goods sold. Trial at the April term, 1906, of the superior court by *Wallace*, C. J., who ordered a verdict for the defendant, subject to the plaintiffs' exception.

The plaintiffs are wholesale fur dealers in New York. June 11, 1904, their salesman made a contract with the defendant, a retail dealer in Whitefield, by the terms of which goods of the value of $320.50 were to be shipped to him on consignment, the defendant to sell what he could and return the balance before the holidays, payment for the goods sold to be made December 1–10, 1904. The salesman had authority only to solicit orders for the sale of goods and to transmit them to the plaintiffs for acceptance or rejection. He informed the defendant that he was a traveling salesman for the plaintiffs, but the defendant had no knowledge of his want of authority to agree to consign goods. The salesman sent the order to the plaintiffs as an order for unconditional purchase. September 1, the plaintiffs shipped the goods to the defendant and sent him a bill of them as though sold outright, calling for payment December 1–10. In November, the defendant, having sold goods amounting to $134.16, shipped the unsold balance to the plaintiffs by express and notified them that the merchandise was returned in accordance with the agreement upon which it had been consigned to him. The plaintiffs refused to receive the goods and demanded payment for the whole. The defendant subsequently paid for the goods sold by him.

The contract set up by the defendant is not an unusual one in the wholesale fur trade, nor is it unusual in such a case for a bill of the goods to be sent as though they were bought absolutely. Such contract and action is in accord with the ordinary usages of business in the fur trade. These facts were found upon the testimony of several retail dealers in furs of many years' experience, who were found to be qualified to testify as to the ordinary usages of business between wholesale and retail fur dealers. The plaintiffs excepted to the evidence, claiming "that the merchants who testified to having several transactions with fur dealers, in which

they sometimes bought goods and at other times took them upon consignment, and had no further knowledge as to the ordinary usages and customs in the wholesale fur trade, were incompetent witnesses by whom to prove what were the ordinary usages and customs in the wholesale fur business." The plaintiffs further claimed "that the witnesses were not legally qualified to testify as to the usages, etc., but that the facts testified to do not furnish a legal basis from which it can be legally found that it was the ordinary usage and custom to consign goods or authorize their agents to consign them."

Kellogg & Bowker, for the plaintiffs.

Drew, Jordan, Shurtleff & Morris, for the defendant.

PARSONS, C. J. Whether the witnesses who were permitted to testify to the usage of business in the fur trade possessed the requisite qualifications to authorize the admission of their testimony was a question of fact for the trial court. *Pattee* v. *Whitcomb*, 72 N. H. 249, 253; *Stewart* v. *Stearns*, 63 N. H. 99, 107. As neither the evidence upon which they were found qualified nor the facts testified to by them are reported, the only question as to the sufficiency of the evidence to authorize the findings made arises from the fact that the witnesses were all retail dealers. It is obvious that knowledge of the usage of trade between wholesale and retail dealers would not be confined to wholesale dealers, but must be equally known to the other parties to the contracts to which the usage relates. It cannot, therefore, be held as matter of law that retail dealers might not have such knowledge of the usage in question as would qualify them to testify, or that their testimony might not be sufficient to authorize the conclusion as to the existence of the usage found by the court.

It does not appear that the plaintiffs' claim as to the ground of their exceptions correctly states the evidence. But if it be assumed that the evidence did not establish the plaintiffs' knowledge of the usage, and that it was insufficient as matter of law to bind them by a contract or consignment such as the defendant set up, the verdict for him will not be affected. The plaintiffs alleged a contract of sale, and could recover only by showing that the defendant agreed, expressly or by implication, to buy the goods. Whether the evidence authorized a finding that the plaintiffs were bound by the contract set up by the defendant was immaterial, and no such finding was made. The failure of the plaintiffs to establish the contract set up by them requires the verdict which was rendered, without regard to the insufficiency of the evidence

to establish the contract set up by the defendant. If there was in fact no contract, no agreement as to sale or consignment, the plaintiffs could not recover.

Exceptions overruled.

All concurred.

Coös,
Dec. 4, 1906.

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[74 436

HOBBS, *Adm'r*, *v.* GEORGE W. BLANCHARD & SONS CO.

It is the duty of the owner of premises to so conduct his business as not to actively render unreasonably dangerous the situation of trespassers or bare licensees whose presence is known to him.

Evidence that a servant in charge of dynamite placed sticks of the explosive in an exposed situation, where strangers unacquainted with its properties and unaware of its presence were liable to walk, may warrant a finding that the master's business was conducted in an unnecessarily dangerous manner.

A trespasser who is justifiably ignorant of a dangerous situation caused by the landowner's active intervention is not guilty of contributory negligence for not conducting himself as though he knew of the danger.

CASE, for negligence. At the April term, 1906, of the superior court, a nonsuit was ordered upon the defendants' motion by *Wallace*, C. J., subject to exception, at the close of an opening statement in substance as follows:

Tommy Corbin, the deceased, was a bright, active boy nearly fourteen years old. December 26, 1904, he was killed by an explosion of dynamite at Camp 38, on the premises of the defendants in the unincorporated town of Success, near Berlin. The defendant corporation conducted extensive lumbering operations in Success, covering thousands of acres, and in the course of their business saw fit to have entire families living there, many of them with children. There was no highway for horses to the lumber camps, and the company's railroad furnished the only means of access to the premises. It was the practice for friends to visit at the various camps and ride thereto on the company's trains without paying fare. The company knew of this practice and made no objection thereto. About four years before the accident the Corbin family lived on this same property, and their friends visited them without objection. Only a week before Tommy's death his parents walked up the track and took dinner at one of the camps. The superintendent in charge of the lumbering operations, called

the walking boss, was Joe Durant. He had invited the Corbin family, including Tommy, to visit at the camp, and Tommy had spent a night there that very winter. On Christmas day, 1904, Durant dined with the Corbins in Berlin and invited the family to visit at the Blanchard camps. He invited Tommy particularly; and Chivari, boss of Camp 38, said Tommy might sleep in his bed. Tommy went up to Camp 38 on Christmas afternoon and slept with Chivari, who went off in the morning and left the boy abed.

The defendants' business required them to use dynamite, which was stored in a safe place some distance from camp. Lacombe, the employee who handled the dynamite, knew that it was dangerous and ought to be stored where people would not come in contact with it. Lacombe saw Tommy in camp the morning of the accident, and when he started to leave camp Tommy followed him. Lacombe sent the boy back, and then proceeded to the place where the dynamite was stored, took five sticks, used two of them, and threw the other three down beside a tree within fourteen feet of the door of the office in which Tommy was. Tommy went to the blacksmith shop and got a hammer to use in making a sled, and then returned to the office where Lacombe was sitting and asked for nails. At that time he had the hammer and some barrel staves in his hands. Lacombe said he had no nails, and Tommy left the office. Lacombe knew that the dynamite was lying unprotected within fourteen feet of the office, but he took no precautions for Tommy's safety, although he knew the boy was starting out that way with a hammer, looking for nails to make a sled. Four or five minutes later the dynamite exploded, and soon after the boy was found lying dead. There was smoke about the place, and a hole in the ground where the dynamite had been. The dynamite and the hammer had disappeared, with the exception of a small piece of the explosive found near by. Tommy laid nine or ten feet from the place where the dynamite had been left, and about six feet from the office door. His right hand was blown off, his head was injured on one side and the top lifted up, his face was badly disfigured, the front of his body was lacerated and bruised, and his clothing was burned and torn.

The plaintiff offered to prove further that dynamite is inherently dangerous and may explode without any jar or concussion; that it is likely to explode with the slightest jar, shock, or concussion; that there was no eye-witness of the accident; and that, so far as known, the Corbin boy had never seen dynamite.

Henry F. Hollis, *Thomas H. Madigan, Jr.*, and *Edmund Sullivan*, for the plaintiff.

Drew, Jordan, Shurtleff & Morris and *Rich & Marble*, for the defendants. The terms "active misconduct" (*Frost* v. *Railroad*, 64 N. H. 220, 221), "active intervention" (*Shea* v. *Railroad*, 69 N. H. 361, 363; *Mitchell* v. *Railroad*, 68 N. H. 96, 118), "positive wrongful act" (*Cleveland etc. Ry.* v. *Ballentine*, 84 Fed. Rep. 935, 938), "willful or affirmative acts" (*Gibson* v. *Leonard*, 143 Ill. 182), are used to indicate that the acts complained of bring the case within the meaning of the term "wantonly or intentionally inflicted." Active intervention is a necessary element in the series of events which cause the injury, but not every act which may be classed under the head of active intervention after the presence of a trespasser is known will create a liability; as, for instance, dangerous situations created in the regular pursuit of business operations (*Buch* v. *Company*, 69 N. H. 257; *Hughes* v. *Railroad*, 71 N. H. 279; *Metcalfe* v. *Company*, 147 Mass. 66; *Heinlein* v. *Railroad*, 147 Mass. 136; *Leonard* v. *Railroad*, 170 Mass. 318), or when the negligence of the plaintiff is the last event in the series which caused the injury, or when it, at the latest point of time, is concurrent with the negligence of the defendant. *Nashua etc. Co.* v. *Railroad*, 62 N. H. 159. The real inquiry in each case is: Was the injury "wantonly or intentionally" inflicted?

A careful study of the language of the opinions in *Leavitt* v. *Shoe Co.*, 69 N. H. 597, and *Davis* v. *Railroad*, 70 N. H. 519, and of the dissenting opinion in *Brown* v. *Railroad*, 73 N. H. 568, leads us to believe that the words "wantonly" and "intentionally" are used with reference to the same situations, with little or no shade of difference in their meaning; but it will probably serve no useful purpose to split hairs on the nice distinctions applicable to the terms mentioned. Resting the discussion on broader grounds, we believe that the active intervention required to warrant a finding that an injury is wanton and intentional must be such, in case the presence of the trespasser is unknown, as to constitute culpable ignorance; or in case his presence has been discovered, as to constitute willful injury,—for illustration, failure to act after the trespasser's danger from the active misconduct complained of is actually discovered and realized.

Applying these principles to the case under discussion, we call attention first to the fact that Lacombe, when he laid the dynamite down, had not seen the boy since morning. The boy was not there in sight. It cannot be said that such an act, under the circumstances, was done willfully or intentionally, realizing the danger to the boy. The situation was created when the presence of the boy was unknown. It seems to us that this was not "actively bringing force to bear upon the trespasser," as it is necessary to

do to make the landowner liable within the meaning of the language used in the article of Jeremiah Smith (11 Harv. Law Rev. 349), or in 1 Thomp. Com. Neg., *s.* 948.

It cannot be said that Lacombe's ignorance of the fact that the boy was still upon the premises was *culpable*, because it was not a part of Lacombe's duties to watch the movements of every chance trespasser or person around the camp. In this particular his employment differed from that of an engineer in running his train, who is supposed at all times to be watching the track ahead. A person's ignorance of the presence of a trespasser can be held culpable only when, from the nature of his employment, he owes a duty to others to discover such trespasser. One committing a wrong cannot in his own right demand that a watch be set to follow his movements, or a guide be furnished for his safe conduct.

It is not sufficient to indicate an *intentional* injury that Lacombe had reasonable ground (if such were the fact) to expect that the result was within reasonable probabilities; otherwise, a violation of the duty to exercise ordinary care would of itself be sufficient to make an injury intentional. The danger of inflicting a personal injury upon Corbin by Lacombe must be such as to reasonably permit of a belief that Lacombe either contemplated producing it, or, being conscious of the danger that it would incur, imposed that danger upon Corbin in utter disregard of the consequences, to warrant saying that the circumstances indicate an intentional injury.

We contend that the duty owed to a trespasser after discovery is not the same as the duty owed to one rightfully on the premises, and that the difference finds expression most frequently through the use of the terms "intentional injury" in the one case, and "ordinary care" in the other; and that unless this distinction is to be wiped out, and such cases as *Buch* v. *Company* overruled, the plaintiff cannot recover in the present action.

WALKER, J. The deceased was not, in a legal sense, the guest of the defendant. He was not present in Camp No. 38 upon the defendant's invitation, either express or implied. The fact that it may be chargeable with knowledge that strangers frequently came upon the premises, and were suffered to remain there without actual objection, is not sufficient evidence that the camp boss was authorized by the defendant to charge it with the legal responsibility of a landowner to his guest, by inviting his friends to come to the camp, not for any benefit or advantage to the defendant in its business, but simply for their enjoyment or pleasure. The boy was evidently there to gratify his curiosity and to have "a good time," and not, in the slightest degree, to promote the interests of the defendant. There is, therefore, no reason upon which to base

the inference that the camp boss represented the company, or could legally assume that authority, when he invited the boy to visit the camp. The deceased was not the defendant's invitee.

Whether the deceased was technically a trespasser or a bare licensee, it was competent for the jury to find upon the facts disclosed that the defendant knew of his presence in the vicinity of the camp at the time of the accident. Knowing that he was there, as well as that strangers were frequently upon the premises with the passive acquiescence of the defendant, it was bound not to actively render his situation unreasonably dangerous. It owed him some duty with reference to his personal safety. "Reasonable men might . . . find that, having reason to anticipate a human being might be in a position to be seriously injured by the action contemplated, men of ordinary prudence, having regard to their general obligation to so conduct their lawful business as not to injure others, would not set in motion forces which might have that result, without taking some precautions to prevent it. This would be true, whether the persons who might be injured were in legal definition trespassers, licensees, or invitees." *Minot* v. *Railroad*, 73 N. H. 317, 321. Other cases decided upon that general principle are *Mitchell* v. *Railroad*, 68 N. H. 96; *Hughes* v. *Railroad*, 71 N. H. 279; *Myers* v. *Railroad*, 72 N. H. 175; and *Brown* v. *Railroad*, 73 N. H. 568. In the last case it is said (*p.* 573) that "the defendants would be responsible for negligently injuring the deceased through their active intervention, even if she were a trespasser, provided at the time of the accident she was in the exercise of ordinary care, and they knew of her presence in a dangerous situation, or failed to exercise due care to discover her presence in such a situation when circumstances existed which would put a person of average prudence upon inquiry. Her presence upon their premises would then be a mere condition and not a contributing cause."

Whether Lacombe's act of putting the sticks of dynamite on the ground at the foot of the tree was negligence, due to the defendant's "active intervention," is principally a question of fact. Lacombe while in the performance of his work as the custodian of the dynamite represented the defendant,—he was in law the defendant for that purpose with reference to third parties,—and the defendant is bound by the legal consequences of his act in that respect. As tending to prove that there was active intervention by the defendant which resulted in the boy's death, it is inferable from the case that leaving dynamite upon the ground in a logging camp, where strangers are liable to be, who are unacquainted with its use or its explosive properties and who are not notified of its presence where they are liable to walk, is not only

a careless act, indicating a disregard of human life, but an unnecessary and unusual act in the reasonable prosecution of lumbering operations. A finding that the defendant was not carrying on its business "in the usual and ordinary manner" (*Buch* v. *Company*, 69 N. H. 257, 259; *Hughes* v. *Railroad*, *supra*, 285), but in an unnecessarily dangerous and extraordinary manner, would seem to be supported by the reported facts, and to authorize the conclusion that the ordinarily prudent man, having regard for the safety of others, though trespassers upon his land, would not expose them to such exceptional dangers, created at the time and for no reasonably necessary purpose. A man's dominion over his land is not absolute, but is qualified by the principle of reasonably necessary user (*Horan* v. *Byrnes*, 72 N. H. 93); and while he is not answerable to others for damages caused by using his land in such a way as is reasonable and necessary for the proper prosecution of his legitimate business, no reason is apparent why he should escape liability, when the injury results from his doing upon his land unusual and dangerous acts, which the ordinarily prudent man would not do in the proper prosecution of the same business under the circumstances. This principle is doubtless otherwise expressed when it is said that the landowner is not liable to a trespasser or bare licensee for the careless use of his land, in the absence of his active intervention. See 11 Harv. Law. Rev. 349, 360–366. In this case the defendant's negligence or breach of duty to the deceased consisted in creating upon the land a concealed danger, not justified or required by the business it was ostensibly carrying on, when it knew of the boy's presence and of his probable ignorance that the danger existed. It performed at the time an unnecessary affirmative act which it knew was likely to result in serious harm to the deceased and to others similarly situated. The exigencies of its business do not appear to justify such a dangerous mode of procedure, even as against a trespasser or bare licensee.

The fact that "so far as known the Corbin boy had never seen dynamite" is assumed to mean, that he did not know what it was when he saw it, and, of course, that he would not appreciate its explosive character. There is nothing in the case indicating that the defendant had reason to suppose he was acquainted with dynamite, or that he knew that any of it was on the ground at the foot of the tree. It is not improbable that it was partially concealed in the snow and would not attract the attention of one who was not looking for it. Under such circumstances, no duty rested on the boy with reference to the dynamite. If he did not know of its presence and was in no fault for not knowing it was there, it was not incumbent on him to conduct himself as though he was informed of the danger. His ignorance of the danger and the

explosion may show that he was not guilty of contributory negligence. If, however, he understood the danger of his position and that a slight jar might produce an explosion, it would be necessary for the plaintiff to produce further evidence that he was exercising due care. The duty of care involves some conception of the danger likely to result from its non-observance. The circumstances attending the catastrophe, as related in the plaintiff's opening statement, warrant the inference that the boy was guilty of no negligence contributing to his death, and that the sole cause thereof was due to actionable negligence of the defendant.

Exception sustained.

PARSONS, C. J., and CHASE and BINGHAM, JJ., concurred: YOUNG, J., concurred in the result.

Rockingham, Jan. 1, 1907.

STATE v. COTE & a.

Where the breach of a liquor dealer's bond is claimed to be an illegal sale by an agent of the licensee, an affidavit which does not deny the sale or the agency does not disclose a defence to an action on the bond.

Defects in proceedings before the license commissioners for the cancellation of a license for the sale of liquor are not a defence in an action by the state upon the bond of the licensee.

DEBT, on a bond signed by Cote as principal and the United States Fidelity and Guaranty Company as surety, and given under chapter 95, Laws 1903, Cote having secured a license under said chapter for the sale of intoxicating liquor. In support of his motion for a continuance under Rule 29 of the superior court, Cote filed an affidavit setting forth grounds of defence, as follows;

"It is not claimed on the part of the state that any sale of liquor was made by me in violation of the law, but the claim . . . is that a sale was made by one M. J. Marchand, who is deemed to have been my clerk. I did not personally make such sale alleged, and I am informed by Marchand that he did not make such sale. I desire also to use said Marchand as a witness in answer to said allegation and in denial of said sale."

The second ground of defence alleges that "at the trial of the case before the court of license commissioners" the proceedings were "informal, irregular, and illegal," details the matters claimed

to be objectionable, and concludes: "I desire to bring a writ of *certiorari* to maintain my right to a trial by jury, either before the court of license commissioners or before the superior court. I make this request in good faith, and if granted an opportunity will bring my petition for a writ of *certiorari* immediately."

At the April term, 1906, of the superior court it was ruled by *Chamberlin*, J., that the affidavit set forth no legal ground of defence to the action, and the defendants excepted.

Edwin G. Eastman, attorney-general, for the state.

Goss & Tardivel, for Cote.

Rich & Marble, for the United States Fidelity and Guaranty Company.

PARSONS, C. J. "The defendant shall be entitled to a continuance at the first term, upon satisfying the court, by affidavit, that he has probable ground of defence, the nature of which shall be disclosed in the affidavit, and that he intends in good faith to try the case." Rule of Court No. 29, 71 N. H. 680. The questions of fact involved in an application for a continuance under this rule are for the superior court, and the matter of continuance merely would present no question for this court (*Hutchinson* v. *Railway*, 73 N. H. 271, 272, 273); but any question of law passed upon by the court in deciding such a motion may be excepted to and, being transferred, is open here. In this case the court ruled that the facts disclosed in the affidavit did not set forth a defence to the action. The correctness of this ruling is the only question involved.

The state could have established a breach of the bond by proof of a violation of the terms of the license by Cote, or of the provisions of the act at the place designated in the license by the holder thereof, or by his agents, servants, or some person in charge of the premises. Laws 1903, *c.* 95, *s.* 8, *cl.* 9; *Ib.*, *s.* 14; *State* v. *Corron*, 73 N. H. 434. A defence to the state's claim must include a denial of all the acts any one of which might constitute a breach of the bond. The affidavit alleges that the breach charged is a sale made in violation of law by one Marchand, who is deemed to be the licensee's agent. While the affidavit denies such sale by the licensee, it does not deny that Marchand was his agent or servant, or in charge of the premises at the time of the alleged sale, nor does it deny that Marchand in fact made the alleged sale. It alleges that the affiant Cote, one of the defendants, had been informed by Marchand that he did not make the sale, but does not

even affirm the belief of either of the defendants that the statement was true, or that Marchand would persist in such statement under oath. As the first paragraph sets up the claim of the state to be an illegal sale by the licensee's agent, and does not deny the fact of such sale, no defence to the action is therein set out

The purpose of the allegations in reference to "the trial of the case before the court of license commissioners" does not seem to be clear. If the affidavit can be construed to allege that the question tried before the license commissioners was involved in this suit, it is not suggested that the commission adjudicated this or any question. It is alleged that the proceedings before the commissioners were "informal, irregular, and illegal." As it is not said that any action adverse to the defendants resulted from the alleged informal, irregular, and illegal action of the commission, it is difficult to see upon what ground error in the proceedings before the commissioners was considered material in this suit.

But if it be assumed that the affidavit was intended to allege that a proceeding was brought before the license commission for the cancellation of Cote's license; and that the same facts relied on in this suit as a breach of the bond were then relied upon by the state as a ground for the cancellation of the license; and that the question of fact thereby raised was litigated before the commission by the parties and judicially determined adversely to the defendants; and that the proceedings in which such determination was made were informal, irregular, illegal, and void; and these facts were all set out in the affidavit; and the special facts alleged were sufficient in law to establish the invalidity of the commissioners' judgment, the affidavit would still be insufficient. The state could maintain this action if no action had been taken for the purpose of cancelling the license. *State* v. *Corron*, 73 N. H. 434, 446. The action is equally maintainable if the proceedings to cancel the license are invalid or void. This suit is not an action on a judgment rendered by the commissioners, but an original suit upon the bond.

It may be that the defendants' purpose was to obtain delay for the purpose of attacking evidence which they feared the state might introduce against them. Upon such application, the questions whether the defendants were in fault for not earlier commencing proceedings to attack the judgment, and whether the facts alleged as legal error were such that the validity of the judgment ought to be investigated in a direct proceeding, would be presented. While the questions would be mainly for the superior court, a direct ruling upon the materiality of the objections urged to the judgment of the commission would have presented legal questions which could have been transferred here. But no such

ruling has been made, and no such application was necessary. Under the rule, if the defendants had alleged facts constituting a defence they would have been entitled to a continuance, during which they could have taken the steps necessary to enable them to present their case; but in no event would an application for delay have been entertained in the absence of facts disclosing a defence. As the validity of the objections alleged to the commissioners' proceedings were not directly passed upon by the superior court and are not involved in the ruling made, nothing would be gained by giving them any consideration.

Exception overruled.

All concurred.

Strafford,
Jan. 1, 1907.

STATE v. YORK.

An indictment is not objectionable because the words descriptive of the offence are not identical with those used in the statute, if they are equivalent in meaning and import.

A jury may be permitted to find that ordinary whiskey is spirituous or distilled liquor, as a matter of common knowledge and without specific proof.

In a prosecution under chapter 116, Laws 1905, it is not necessary to allege in the indictment or prove at the trial that spirituous or distilled liquors or wines kept for sale in violation of the statute are in fact intoxicating, or that they contain more than one per cent of alcohol.

INDICTMENT, for illegally keeping liquor for sale in a license town. Trial by jury and verdict of guilty. Transferred from the February term, 1906, of the superior court by *Pike*, J.

The indictment alleged that the defendant, not being a licensed dealer in intoxicating liquor, unlawfully and criminally kept for sale "liquors, namely, one bottle of wine, one bottle of whiskey, and one jug of cider." The court limited the charge to the keeping for sale of wine and whiskey, and instructed the jury that a keeping for sale of cider, or any beverage other than wine and whiskey, would not justify a verdict of guilty.

It appeared that the liquors alleged to have been kept for sale were ordinary wine and whiskey. After the state had rested, the defendant moved that a verdict of not guilty be directed, upon the ground that the state had introduced no evidence that the wine and whiskey were intoxicating, and also because it did not

appear that the liquors contained more than one per cent of alcohol. The motion was denied, and the defendant excepted.

Dwight Hall, solicitor, for the state.

Walter W. Scott, for the defendant.

BINGHAM, J. "If any person, not being an agent of a town or city for the purpose of selling spirit, shall sell or keep for sale in any quantity spirituous or distilled liquors, rectified spirits, vinous, fermented, brewed, or malt liquors, wines, or any beverage, by whatever name called, containing more than one per cent of alcohol by volume at sixty degrees Fahrenheit, he shall be fined," etc. P. S., *c.* 112, *s.* 15, as amended by Laws 1905, *c.* 116. The defendant was indicted under this statute for unlawfully keeping for sale wine and whiskey.

No objection was taken to the form in which the charge was made, and it would seem that none could have been. *Tefft* v. *Commonwealth*, 8 Leigh 721. If the terms used in the indictment to describe the offence were not the same in every particular as those used in the statute, they were equivalent in meaning and import; and where such is the case, the fact that the words of the statute are not followed is not error. *State* v. *Gove*, 34 N. H. 510, 516; *State* v. *Munger*, 15 Vt. 290; *State* v. *Williamson*, 21 Mo. 496; *State* v. *Heckler*, 81 Mo. 417; *State* v. *Dengolensky*, 82 Mo. 44; *State* v. *Effinger*, 44 Mo. App. 81.

No exception was taken at the trial that the proof adduced was not sufficient to warrant the jury in finding that the whiskey kept for sale by the defendant was spirituous or distilled liquor; but if such an objection was open to the defendant, it might be said in answer to it that courts will take judicial notice of a fact which everybody is supposed to know, and that jurors may be permitted to find such fact from their common knowledge, without specific proof. It is within the common knowledge of all men that whiskey is spirituous or distilled liquor; and this being so, the jury were warranted in finding from their knowledge upon the subject that the whiskey in question was spirituous or distilled liquor. *State* v. *Goyette*, 11 R. I. 592; *State* v. *Rush*, 13 R. I. 198; *Adler* v. *State*, 55 Ala. 16; *Watson* v. *State*, 55 Ala. 158; *Wall* v. *State*, 78 Ala. 417; *Downey* v. *State*, 90 Ala. 644; *Freiberg* v. *State*, 94 Ala. 91; *State* v. *Schaefer*, 44 Kan. 90; Black Intox. Liq., *ss.* 1–19.

It is a recognized rule in the interpretation of statutes that where an act expressly prohibits the sale or keeping for sale of a particular liquor or class of liquors it is not necessary to allege in

an indictment thereunder, or to prove upon the trial, that the particular liquor or class of liquors, the sale of which is forbidden, is intoxicating. *State* v. *Thornton*, 63 N. H. 114; *State* v. *Jenkins*, 64 N. H. 375; *State* v. *Rush*, 13 R. I. 198; *State* v. *McKenna*, 16 R. I. 398; *Hatfield* v. *Commonwealth*, 120 Pa. St. 395; *Reyfelt* v. *State*, 73 Miss. 415; *Kettering* v. *Jacksonville*, 50 Ill. 39; *State* v. *Liquors*, 76 Ia. 243.

In *State* v. *Thornton* and *State* v. *Jenkins*, *supra*, the defendants were indicted under a statute prohibiting the sale or keeping for sale of "lager beer or other malt liquors." The charge in the first case was for keeping for sale lager beer, and in the second for keeping for sale malt liquor, to wit, ale. It was held that, as the keeping for sale of those articles was expressly prohibited by the statute, the state need not allege or prove that either liquor was intoxicating.

In *Reyfelt* v. *State*, *supra*, the defendant was indicted for selling "vinous or alcoholic liquor," under a statute which prohibited any person from selling "any vinous, alcoholic, malt, intoxicating, or spirituous liquor, or intoxicating bitters or other drinks which, if drunk to excess, will produce intoxication." It appeared that the defendant had sold domestic wine made from grapes and blackberries. His testimony and that of his witnesses was that it would not intoxicate, and he requested the court to instruct the jury to render a verdict of acquittal if they believed his evidence. The request was denied, and the jury were told to convict if the sale of wine was proved. An appeal being taken, it was held that inasmuch as the statute made it unlawful to sell "vinous and alcoholic liquor," the charge of the court was correct. In the course of the opinion it was said: "The legislature, believing in chemistry and that the process of the fermentation of the juice of the grape will produce alcohol, has seen fit to prohibit the sale of such product, and, regardless of the opinion of the witnesses that this prohibited article would not intoxicate, the sale was unlawful, for the legislature prohibited such sales because it thought that alcoholic wines would in some instances intoxicate."

And so in the statute here under consideration, we are of the opinion that the legislature prohibited the sale or keeping for sale of "spirituous or distilled liquors, rectified spirits, vinous, fermented, brewed, or malt liquors, [and] wines," because it believed these liquors contained more than one per cent of alcohol and in quantities sufficient to intoxicate; that it further prohibited the sale or keeping for sale of "any beverage, by whatever name called, containing more than one per cent of alcohol," as a class by itself, because it believed that beverages containing more than that quantity of alcohol, if drunk to excess, would intoxicate; and that

it did not intend that a violation of the statute should depend upon whether any liquor or beverage, the sale of which was there prohibited, was in fact intoxicating.

Exception overruled.

All concurred.

Hillsborough, Jan. 1, 1907.

WRIGHT, *Adm'x*, *v.* BOSTON & MAINE RAILROAD.

The circumstances of an accident may warrant a finding of due care on the part of a person injured, in the absence of direct evidence tending to prove his negligence.

In an action to recover damages for personal injuries alleged to have been caused by the defendant's negligence, it is incumbent upon the plaintiff to prove by a preponderance of evidence, either direct or circumstantial, not only that the defendant was guilty of negligent acts adequate for the infliction of the injury complained of, but also that the person injured was in the exercise of ordinary care under the circumstances.

A legal presumption establishing the burden of proof upon a given issue is not, also, evidence to be considered by the jury.

The "instinct of self-preservation" alone does not warrant a finding that a pedestrian who was killed by a locomotive at a grade crossing was in the exercise of due care.

It cannot be inferred that a plaintiff performed his duty to exercise the care of the ordinarily prudent man, in a given situation, in the absence of evidence, direct or circumstantial, of what he in fact did at the time of his injury.

CASE, for negligence in consequence of which Harlie C. Wright, the plaintiff's intestate, was killed at a grade crossing in Nashua. Trial by jury and verdict for the plaintiff. Transferred from the January term, 1906, of the superior court by *Stone*, J., on the defendants' exception to the denial of their motion for a nonsuit.

There was evidence tending to prove the following facts: On March 5, 1905, at about nine o'clock in the evening, Wright, who was on foot and alone, attempted to pass over the defendants' tracks at the Elm-street crossing, where there are three tracks running east and west. Just before the accident Wright was seen by a woman who was approaching the crossing from the opposite side, and he had then passed over the first track and was walking

toward her. She saw an engine and a single car approaching on the third track—the one nearest her—and waited for it to pass. After it had passed she did not see Wright, who was evidently killed by the engine at the crossing. There was also evidence tending to show negligence on the part of the defendants in not having a flagman at the crossing, and in not ringing the bell or blowing the whistle before the engine reached the crossing. It was also claimed by the plaintiff that the view of the track was somewhat obstructed by cars.

Doyle & Lucier and *Wason & Moran*, for the plaintiff.

Burns & Burns and *Hamblett & Spring*, for the defendants.

WALKER, J. In *Huntress* v. *Railroad*, 66 N. H. 185, 190, the court say: "A person of ordinary prudence, exercising the caution and vigilance which the law has adopted as the test of duty, might make an extremely hazardous attempt to cross a railroad in front of a train. From the mere fact of great danger, it does not necessarily follow that he exposed himself recklessly and consciously. When there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from the circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk." The argument seems to be that, because a man may, while in the exercise of ordinary care and while governed by an instinctive desire to avoid danger, attempt to do a very dangerous thing, it may be found by the jury as a fact that a particular man killed at a railroad crossing was not negligent. That reasoning applied to this case would justify the jury in concluding that the deceased saw the approaching engine and, for some undisclosed and in fact undiscoverable reason, consistent with ordinary care, attempted to cross the track in front of it. Granting that that may possibly be the explanation of the cause of his fatality, is it not just as probable that it was due to acts on his part not consistent with ordinary care? It may be that he miscalculated the speed of the engine or its distance from him, or it may be that, without such miscalculation, he decided to incur the hazard and trust to his agility to carry him safely over. In short, he may have been negligent, or he may not have been.

The natural desire to avoid pain, suffering, and death may have caused him to take a view of the situation when he was in a place of safety, and it may have prevented him from hurling himself

directly in front of the engine; but it did not necessarily invest him with all the qualities of an ordinarily careful man in deciding whether it was prudent to cross in front of the train—it did not urge him when in a place of safety to attempt to cross when he saw the train approaching. No emergency had arisen which threatened him with peril. If he had found himself in a perilous situation, his acts might be justified though they were dangerous and ill-advised. *Folsom* v. *Railroad*, 68 N. H. 454. But he was not in such a situation. Until he stepped upon the third track, he knew, if he saw the train, that he was in no peril. He knew that he was perfectly safe if he remained there until after the train passed. *Central of Georgia Ry.* v. *Foshee*, 125 Ala. 199, 215. There was nothing urging him to cross. It does not appear that his business was of an urgent character requiring great haste and expedition, or that there was any excuse for his hazardous attempt. The instinct of self-preservation would have suggested delay in a safe position, instead of haste to get into an unsafe one.

When it is said that he may have miscalculated the distance and speed of the train, caused in part by the omission to ring the bell, it is sufficient to reply that, in the absence of evidence of the fact, he may have realized the nearness of the train and attempted to prove his fleetness by running onto the track in front of it. This is not equivalent to saying that he may have "recklessly and consciously" jumped upon the track. His natural desire to protect himself from harm would probably prevent him from consciously committing suicide, while it would not prevent him from negligently attempting to cross the track. If negligence were the willful, conscious recklessness of a man in a given situation, the desire to protect life and limb might constitute sufficient evidence, in the absence of all direct affirmative evidence, that he was not negligent. "Doubtless, the jury might infer that the deceased was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death; but that men are careless and subject themselves thereby to injury is the common experience of mankind, and when injured, no presumption exists in the absence of proof that they were exercising due care at the time." *Reynolds* v. *Railroad*, 58 N. Y. 248, 252. It may be conceded that it is a well-nigh universal characteristic of human nature, that men have an instinctive impulse to avoid physical pain and death; but it must be remembered that neither this, nor any other universal instinct, prevents them from being careless. Very few men intelligently seek death; but very many are guilty of negligence leading to fatal results. If the question in this case were, whether the deceased consciously threw himself upon the track or wished to commit suicide, it might be legitimate

to infer that he did not knowingly seek that fatality. But because that may be a proper deduction, it does not follow that he also used ordinary care, or was not negligent, in seeking to preserve his life while running across the track in front of the engine. His purpose undoubtedly was to get across in safety; the attempt may have been a foolhardy one, one of which the ordinarily prudent man would not have been guilty, and still it may not have involved the element of conscious recklessness. As before suggested, he may have trusted in his agility to preserve him from being overtaken by the locomotive. In short, he may have been negligent without being willfully reckless. Hence it follows, that while the instinct of self-preservation may be evidence that he did not willfully commit suicide, it does not prove that he was not negligent.

To say that he miscalculated the nearness of the engine, because some men have made that mistake, is to give the plaintiff the benefit of pure speculation as evidence of his careful conduct. It is no more probable that he observed the locomotive and estimated that he had sufficient time to safely cross to the opposite side of the track, than that he was lost in reverie, or for some other reason did not see or try to see whether a train was approaching, or that, having observed the engine, he negligently took the chance of getting across in front of it. If men in general do not go upon railroad grade crossings without ascertaining in some way whether a train is approaching, they do not, after having ascertained that it is approaching, attempt to protect themselves from personal injury by rushing in front of it, upon a hasty calculation of chances as to its speed or nearness. The great majority of men do not try experiments of that character; consequently, the great majority of men are not maimed or killed while attempting to cross railroad tracks in front of approaching trains. Such fatalities are comparatively rare; and that fact, so far as it authorizes any inference in a given case as to the care exercised by the deceased, does not show that he was in the exercise of that degree of care which ordinarily prudent men exercise under similar circumstances. Though prudent men sometimes expose themselves to danger through mistakes of judgment, it cannot be inferred in all cases that such is the explanation of their conduct when the evidence is wholly silent upon the subject. In such a case, it is pure conjecture whether the deceased exercised the care of an ordinarily prudent man to avoid the fatal catastrophe, or whether he did not. The only possible solution of the question depends upon a mere calculation of chances. One answer is as liable to be right as the other. He may have been reasonably careful, or he may have been unreasonably careless. Which alternative is the more probable is susceptible of no logical proof and can be only tentatively

ascertained by the merest guessing. A man who is ordinarily prudent may in a particular instance be negligent.

In some cases the deceased's care may be reasonably inferred or found from the circumstances attending the accident. When a passenger, for instance, seated in a passsenger car, is killed by a collision with another train, little doubt can be entertained that he is in the exercise of due care; and in an action by his administrator no further evidence upon that point would be required in the first instance. Other similar illustrations might be suggested, indicating conclusively that the care required of the plaintiff in an action for negligence may be proved by circumstantial evidence; that direct affirmative proof may be dispensed with, when upon the competent evidence reasonable men exercising their judgment upon the subject could say, from the manner in which the injuries were inflicted, that it is more probable than otherwise that the deceased was in the exercise of due care, or that no amount of care on his part would have prevented his injury. "It is well settled in cases of this character that direct affirmative evidence that the plaintiff was exercising due care is not necessary; it may be inferred from all the circumstances attending the accident and from the lack of evidence indicating carelessness on his part." *Stevens* v. *Company*, 73 N. H. 159, 173.

In *Lyman* v. *Railroad*, 66 N. H. 200, the motion for a nonsuit was denied because there was evidence that the deceased, who was attempting to cross the track riding on a horse-rake, had before taken special precautions to protect himself from injury at this crossing; and it was held that this fact was evidence from which it might be inferred he was exercising due care at the time of the accident. Besides, the circumstance that he was driving a horse might have a material bearing upon the question of his care (*Folsom* v. *Railroad*, 68 N. H. 454, 460), while a person on foot about to cross a track has no forces to control except his own voluntary and intelligent actions. The decision in *Lyman* v. *Railroad* does not hold that the instinct of self-preservation alone is sufficient evidence that the deceased was careful or not negligent, for it was unnecessary to so hold. When it is said that a person's careful conduct may be inferred from the circumstances, it is not intended to announce the doctrine that the jury may find the fact by guessing. The circumstances must be logically such that the jury may deduce the fact from them by some process of human reasoning. And in all analagous cases in this state some special circumstances have appeared from which reasonable men might logically find the fact of due care. With the possible exception of *Huntress* v. *Railroad*, *supra*, no case has been put on the ground of the instinct of self-preservation. Some evidence of care, either direct or indirect,

has appeared, when it has been held that the plaintiff sustained the burden of disproving contributory negligence. See *Nutter* v. *Railroad*, 60 N. H. 483; *Evans* v. *Railroad*, 66 N. H. 194; *Lyman* v. *Railroad*, *supra*; *Davis* v. *Railroad*, 68 N. H. 247; *Folsom* v. *Railroad*, 68 N. H. 454; *Smith* v. *Railroad*, 70 N. H. 53; *Gahagan* v. *Railroad*, 70 N. H. 441; *Waldron* v. *Railroad*, 71 N. H. 362; *Tucker* v. *Railroad*, 73 N. H. 132; *Brown* v. *Railroad*, 73 N. H. 568. It is at least significant that the court, in denying the motion for a nonsuit in cases where the plaintiff's intestate was killed at a railroad crossing, and there was an entire absence of direct evidence showing what his acts in fact were, has based its decision on some circumstance connected with the accident, and not on the instinct of self-preservation, which in the Huntress case was deemed to be sufficient evidence of care.

In cases where there was active participation by the deceased in bringing about the dangerous situation, and the duty rested upon him, as well as upon the defendant, of actively and vigilantly exercising ordinary care under the circumstances, the absence of all evidence of what he did at the time cannot be supplied by conjecture, or by a theory which is as liable to be false as true. The instinct of self-preservation may furnish an explanation or excuse for his careless acts after he got into a place of danger, but it is not evidence that his acts were the acts of an ordinarily prudent man before the danger became imminent. Standing two or three feet from a railroad track when a train is about to pass is not ordinarily a dangerous situation for a man to occupy (*Waldron* v. *Railroad*, 71 N. H. 362, 365), and his protection from harm does not then depend upon acts suggested by an instinctive impulse to avoid danger, but upon his intelligent exercise of ordinary care. If from that position he runs upon the track and is killed, never having before shown signs of mental derangement, are the jury to be allowed to find that he was exercising due care, because they may think he was anxious to avoid being killed and may possibly have miscalculated the speed of the train? If his acts so far as known were as likely to be negligent as careful, it is strange logic to hold that a presumption that he desired to avoid death shows he was guilty of no negligence.

The fallaciousness of this position seems to be recognized by the courts that sustain it, when they restrict the operation of the presumption to cases where there is no direct evidence of what the deceased's acts were, as in *Newport etc. Co.* v. *Beaumeister*, 102 Va. 677; *Reynolds* v. *Keokuk*, 72 Ia. 371; *Ellis* v. *Leonard*, 107 Ia. 487, 489; *Gay* v. *Winter*, 34 Cal. 153, 164. If the presumption is of sufficient evidentiary value to sustain the burden of proving due care when there is no direct evidence on the subject,

it is difficult to understand why it has no probative force when the evidence is conflicting or inconclusive. Why may it not outweigh the testimony of a prejudiced or ignorant witness; or why, if it is sufficient to prove the due care of a dead man, may it not be equally useful for a live man? That the only witness who could explain the matter is dead, does not make that evidence, which, if he were alive, would not have that character.

Since the jury are not permitted to find material facts without sufficient legal evidence (*Deschenes* v. *Railroad*, 69 N. H. 285; *Carr* v. *Electric Co.*, 70 N. H. 308; *Dame* v. *Car Works*, 71 N. H. 407; *Reynolds* v. *Fibre Co.*, 73 N. H. 126, 131), the inquiry arises at this point, upon the motion for a nonsuit, whether the burden of proving that the deceased was reasonably careful is upon the plaintiff, or whether it is for the defendant to prove that he was careless. If the former is the rule to be applied, it would seem that the plaintiff must be nonsuited; if the latter rule is followed, the plaintiff has made out a *prima facie* case and is entitled to go to the jury. There is a great conflict of authority upon this subject. 1 Thomp. Com. Neg., *ss.* 364–369. But in this jurisdiction it has been uniformly held that the plaintiff, in an action to recover damages for personal injuries alleged to have been caused by the defendant's negligence, must prove by a preponderance of evidence, not only that the defendant was guilty of negligent acts adequate for the infliction of the injury received, but also that he exercised ordinary care for his own safety under the circumstances, or, in other words, that he was free from fault contributing to cause his injury. "From the fact of injury no presumption arises as to the guilt or innocence of either party. The plaintiff is, therefore, in suits for injury upon a railroad crossing, as in all cases for negligence, bound to prove that his injury was not due to his own fault, but was caused by the fault of the defendant. . . . Hence the plaintiff, to entitle him to submit his case to the jury, must produce evidence sufficient to render reasonable a finding that he was free from fault." *Gahagan* v. *Railroad*, 70 N. H. 441, 444. Some text-writers have inaccurately stated the New Hampshire rule otherwise. See 1 Thomp. Com. Neg., *s.* 366; Beach Cont. Neg., *ss.* 426, 440.

Whether, therefore, the plaintiff should have the burden of proving his carefulness in such a case, or whether he has made out a *prima facie* case by submitting sufficient evidence of the defendant's negligence only, leaving it for the latter to prove the plaintiff's carelessness as a matter of defence, are questions whose discussion at this time would serve no useful purpose. To hold in substance that the plaintiff sustains this burden by submitting no evidence of it, except conjecture and speculation, is little less

than an entire change of our procedure in such cases, and the substitution of the rule which throws the burden of proving the issue of the plaintiff's conduct upon the defendant. It is an apparent contradiction of terms to say that the plaintiff may sustain the burden of proof by presenting no evidence except the bare fact that the deceased was killed by a locomotive at a grade crossing. It would be much more consistent and logical to adopt the language of Mr. Beach (Cont. Neg., *s.* 426) where he says that, under the rule imposing the burden of proof upon the defendant, "the plaintiff has made his case when he has shown injury to himself and negligence on the part of the defendant which was a proximate cause of it. It then devolves upon the defendant to allege and prove contributory negligence as a matter of defence, the presumption being in favor of the plaintiff, that he was at the time of the accident in the exercise of due care, and that the injury was caused wholly by the defendant's negligent misconduct." In other words, it would be better to change our rule relating to the burden of proof in such cases, than, nominally retaining it, to indirectly deprive it of all vigor or force.

Thompson (2 Com. Neg., *ss.* 1622, 1623), in discussing this question, recognizes that the presumption of right-acting on the part of a plaintiff does not apply in jurisdictions where the burden of showing carefulness is on the plaintiff, and he says (*s.* 1623): "We may conclude this discussion by saying that, in those jurisdictions where the rule obtains that the person killed or injured is presumed to have been in the exercise of due care, and where the burden of showing the contrary is on the defendant, the question whether the circumstances attending the death of a traveler killed at a railway crossing are such as to warrant the presumption that the traveler, prompted by the instinct of self-preservation, exercised the care which the law demands of travelers in such cases,—there being no witness to the accident and no evidence speaking upon the question of the manner in which the deceased approached and went upon the track,—will be a question of fact for the jury." The whole difficulty seems to result from the different rules employed to determine the question of the burden of producing evidence upon the issue of the plaintiff's care. Where the law is that that burden is upon the plaintiff, as in this state, it is overlooked or disregarded by holding that he is not obliged to submit evidence, either direct or indirect, of his conduct, but may satisfy the rule by invoking a presumption of right-acting. Cases, therefore, decided upon a different theory of the burden of proof, which seem to enforce that presumption (*Cleveland etc. R. R.* v. *Rowan*, 66 Pa. St. 393; *Weiss* v. *Railroad*, 79 Pa. St. 387; *Northern etc. Ry.* v. *State*, 29 Md. 420; *Southern Ry.*

v. *Bryant*, 95 Va. 212; *Petty* v. *Railway*, 88 Mo. 306; *Atchison etc. R. R.* v. *Hill*, 57 Kan. 139), cannot be useful authorities in this jurisdiction. See, also, *Continental etc. Co.* v. *Stead*, 95 U. S. 161, 164; *Texas etc. Ry.* v. *Gentry*, 163 U. S. 353, 356; *Baltimore etc. R. R.* v. *Landrigan*, 191 U. S. 461, 473.

Legislation may establish a rule of procedure and require a defendant to prove in the first instance the contributing negligence of the plaintiff. See *Foss* v. *Baker*, 62 N. H. 247, 250; *Walsh* v. *Railroad*, 171 Mass. 52. It may perhaps even go so far as to make the injury received evidence for the plaintiff of the defendant's negligence, throwing the burden upon the latter of proving his freedom from fault. But whatever the rule may be as to the burden of proof, or as to the duty of producing evidence in the first instance to prove or disprove a fact in issue, it cannot itself be evidence to be weighed with other evidence in ascertaining the ultimate fact. The burden of going forward with proof is not a species of evidence for the consideration of the jury. It is merely a rule of law, based in part on expediency and convenience in the trial of cases, and in part, in some instances, on a presumption of law derived from a conception of the conduct of men in general. But as said by *Doe*, J., in *Lisbon* v. *Lyman*, 49 N. H. 553, 563: "A legal presumption is not evidence. In civil cases, it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative."

In his Treatise on Evidence, Professor Thayer says (*p.* 314): "Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence." And on page 337 this language occurs: "While it is obvious, then, that a presumption, *i. e.*, the assumption, intendment, taking-for-granted, which we call by that name, accomplishes, for the moment at any rate, the work of reasoning and evidence, it should be remarked, as I have said before, that neither this result, nor the rule which requires it, constitutes, in itself, either evidence or reasoning. This might seem too plain to require mention if it were not for the loose phraseology in which courts sometimes charge the jury, leaving to it in a lump 'all the evidence and the presumptions,' as if they were capable of being weighed together as one mass of probative matter."

If there is a legal presumption that the ordinary man performs his duty and is not negligent, it is no more competent as evidence to prove the fact in a particular case, in the absence of other proof, than are other rules of law, including the presumption of innocence in criminal cases.

The views thus far expressed seem to be abundantly supported by the cases that are in point. In *O'Reilly* v. *Railroad*, 82 N. Y. App. Div. 492, a case very similar to the present, the court say (*p.* 495): "In fine, the record does not show that the deceased took any precautions whatever, and it does tend to show that, if he had done so, he would have seen the approaching car and escaped it, for the witness Shanley saw it rapidly approaching, lighted by electricity, and with the usual rumble of such a vehicle. I think that the plaintiff did not meet the obligation to show the absence of contributory negligence of her intestate. . . . Even where the evidence upon such question points neither way, the plaintiff fails."

In *Wiwirowski* v. *Railway*, 124 N. Y. 420, it was held that, while want of contributory negligence on the part of a person killed at a railroad crossing may be established by inferences from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. In *Cordell* v. *Railroad*, 75 N. Y. 330, 332, it is said: "When a person has been killed at a railroad crossing, and there are no witnesses of the accident, the circumstances must be such as to show that the deceased exercised proper care for his own safety. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited. The presumption that every person will take care of himself from regard to his own life and safety cannot take the place of proof; because human experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety." *Reynolds* v. *Railroad*, 58 N. Y. 248, is to the same effect.

In *Walsh* v. *Railroad*, 171 Mass. 52, 56, the court say: "There is nothing to show that the plaintiff's intestate, as he approached the crossing, looked, or listened, or took any precautions to ascertain whether a train was coming. It is true that he may have been misled somewhat by the absence of the statutory signals, if those were not given, and by the open gates and the want of a light, and that, if he had looked, his view of the approaching train might have been obscured by trees, fences, and buildings. But whether he was misled, or whether he looked or listened, or tried to look or listen, is all a matter of conjecture. . . . And the circumstances do not appear to have been such as to excuse him

from exercising the care which every traveler is bound to exercise as he approaches a railroad crossing." See, also, *Livermore* v. *Railroad*, 163 Mass. 132, 133; *Moore* v. *Railroad*, 159 Mass. 399, 403.

In *McLane* v. *Perkins*, 92 Me. 39, 46, it is said: "But in all cases the plaintiff's freedom from contributory negligence in the particular case must affirmatively appear in evidence, or at least by some legitimate inference from the evidence. It is not to be presumed. If sought to be established by inference, it must be by inference from facts in evidence in the case. It cannot be inferred from . . . the argument that men are likely to be careful in danger. It is as true that men are careless as that they are careful. It is as true that men negligently contribute to their own injury, as that they do not." See, also, *Chase* v. *Railroad*, 77 Me. 62; *Day* v. *Railroad*, 96 Me. 207.

When the question is what a man did under a given state of facts, it is not often proved by showing or assuming what men in general would have done. What the average man would probably have done may furnish a standard by which to determine the legal duty of the man whose conduct is in question. When it is known what in fact he did, the question whether he performed his duty arises, which often, especially in cases for negligence, depends upon the conduct which the average man might be expected to disclose under similar circumstances. But this rule or principle which determines the degree of care which the law requires cannot also be used as evidence, to prove that the conduct in question was that of the ordinarily prudent man. It does not furnish both the measure and the thing measured.

The physical actions of a man, which are subject to his volition and control, cannot ordinarily be determined by presumptions based upon our general knowledge of human nature. We may be able to say that a machine will act in a certain way when subject to known forces, and so far as man is a machine we can calculate with some degree of certainty how he will act under known conditions. But so far as his actions are governed by his will, intelligence, and judgment, we cannot know what his specific acts were in a special situation, unless it is true that all men would act alike in the same situation. If the question is whether A used good judgment in a business transaction with B, there is no presumption that he did what men in general would do under the circumstances, because it was his privilege to do differently. The fact that the great majority of minors are not emancipated is not evidence where the fact of the emancipation of a particular minor is in issue. *Lisbon* v. *Lyman*, 49 N. H. 553. The fact that the great majority of men pay their debts is not evidence of payment in an action of assumpsit upon a contract. *Kendall* v. *Brownson*,

47 N. H. 186. The fact that the great majority of mankind regard a certain religious doctrine as absolutely irrational and false is no evidence that a particular person entertained that opinion. *Spead* v. *Tomlinson*, 73 N. H. 46, 63. If there is a presumption of the sanity of a party, in the absence of evidence to the contrary, because most men are sane (*State* v. *Pike*, 49 N. H. 399, 408, 444), it relates to a mental state or condition independent of volition and not controlled or produced by intelligent mental effort. Upon the same ground it may be inferred that a person's senses of sight, hearing, and feeling are ordinarily acute. But the proposition that a man acted in one of several different ways in a specific instance, because a jury may happen to think that an ordinarily prudent man would have so acted, is illogical and substitutes pure conjecture for proof. As a matter of substantive law, he is bound to exercise ordinary care; but that legal duty does not become legal evidence that he was free from fault. A plaintiff who has the burden of presenting evidence of that fact does not prove it, in the absence of direct evidence, by a legal presumption. The burden of proof cannot be shifted in that way upon the defendant. Nor as a practical proposition is such a method of reasoning logical. To infer that the plaintiff's intestate exercised the care which the average man of ordinary prudence would probably have exercised, from the mere fact that he belonged to the human species, is to guess that he was, in respect to carefulness of conduct at a particular time, the equivalent of the average man of ordinary prudence, and from this to infer that his voluntary acts were careful and prudent. The minor premise in the syllogism is pure conjecture; hence the conclusion is worthless.

Since, therefore, it was incumbent on the plaintiff to present some evidence for the consideration of the jury tending to show that the deceased was exercising due care at the time he received his fatal injury, and since the instinct of self-preservation, if deemed evidence for any purpose, does not explain how or why he got upon the track in front of the approaching engine, and since legal presumptions of right-acting have no probative, evidentiary force, the motion for a nonsuit should have been granted. Whether the fact that the deceased in this case was traveling on foot, while in the Huntress case the deceased was riding in a team, constitutes an important distinction between the two cases, it is unnecessary to inquire. If it does not, the Huntress case must be overruled. This result makes it unnecessary to decide whether there was sufficient evidence of the defendant's negligence.

Exception sustained.

All concurred.

Belknap,
Feb. 5, 1907.

74 140
74 321

MOON v. FLACK & a.

A threat by one member of a fraternal order to kill another furnishes probable cause for the institution of proceedings for the expulsion of the declarant, under a by-law providing that punishment for those guilty of "improper conduct."

Where members of a fraternal order have probable cause for believing a fellow-member to be guilty of misconduct, they are not liable for a conspiracy merely because they confederate together to procure the imposition of a penalty provided by the by-laws.

Members of a fraternal order who are charged with the duty of trying a fellow-member for an offence within the jurisdiction of the lodge are judicial officers, and are not liable in damages for wrongs committed by them while acting in that capacity.

CASE, for libel, malicious prosecution, and conspiracy to unlawfully expel the plaintiff from a lodge of Odd Fellows, of which all the parties were members. At the close of the plaintiff's evidence the defendants' motion for a nonsuit was granted, subject to exception. Transferred from the November term, 1905, of the superior court by *Chamberlin*, J.

The count for libel was abandoned. The second count is for malicious prosecution in the lodge under its code of laws and rules, in which Moon was charged with conduct unbecoming an Odd Fellow in that he had threatened to shoot the defendant Clement. The third count alleges a conspiracy to institute the prosecution above referred to, and the prosecution of the same without probable or justifiable cause, in consequence of which the plaintiff was expelled and excluded from the lodge for a long time. It avers that the plaintiff was not guilty of any offence under the laws of the lodge, and that the lodge and its tribunals had no jurisdiction in the premises, but were induced to take unlawful cognizance and jurisdiction by the false show of authority and pretended performance of duty by the defendants, who were then officers of the lodge.

The constitution of the order provides that "any member found guilty of conduct unbecoming an Odd Fellow may be fined, reprimanded, suspended, or expelled, as the lodge of which he is a member may determine." The by-laws provide that "any member who shall be guilty of improper conduct in or out of the lodge . . . shall be subject to a fine, suspension, or expulsion." The rules of procedure provide for the appointment of a committee of five members for the trial of offences, who shall be "dis-

interested in the result of the controversy and not prejudiced against either of the parties to the proceeding." The accused may challenge not exceeding three of the committee.

The evidence tended to show that the plaintiff and the defendant Clement had some trouble, as a result of which the plaintiff filed charges against the latter in the lodge; and at a trial thereon the plaintiff said that Clement should never be Noble Grand, for he would shoot him first. Clement was acquitted. Subsequently the defendant Flack filed a written complaint against the plaintiff, charging him with conduct unbecoming an Odd Fellow in making the threat above referred to. The plaintiff, being duly notified of the complaint and of the time for the hearing, appeared and said he was ready for trial. Flack as the Noble Grand and Clement as the Vice Grand appointed the committee. The defendant Fogg was appointed on the committee, and at first declined to serve on the ground that he should vote to expel Moon; but upon being urged to serve by Flack, he consented to do so. The plaintiff was asked if he had any objection to the committee and said he had none, but that he thought it was a "put-up job." When the committee met for the trial the plaintiff was not present, but he wrote a letter saying the committee could go on, "as the Noble Grand can of course prove his charges." Eight witnesses testified to the language used by the plaintiff. It did not appear that the committee was sworn, as provided in the by-laws. A majority of the committee reported that the accused was guilty as charged and recommended expulsion; one member of the committee recommended suspension for three years. Both recommendations were at first rejected, but subsequently a vote for expulsion was passed. The plaintiff appealed to the grand lodge and was restored to membership. There was other evidence showing that the defendants entertained hostile feelings toward the plaintiff.

Napoleon J. Dyer and *David F. Dudley*, for the plaintiff.

Frank M. Beckford, *Walter S. Peaslee*, *Charles B. Hibbard*, and *Oscar L. Young*, for the defendants.

WALKER, J. One count charges the defendants with malicious prosecution in instituting and carrying on a proceeding in the lodge, of which all the parties are members, for the expulsion of the plaintiff. In order to sustain an action of this character, it is necessary for the plaintiff to show that the defendants instituted the prosecution against him, without having probable cause to believe he was guilty of the offence charged. *Cohn* v. *Saidel*, 71 N. H. 558, 566. To say that a threat by one member of a frater-

nal order to kill another would not furnish probable cause for the latter to believe that the former was guilty of "improper conduct," or conduct "unbecoming" a member, within the meaning of a by-law providing for the expulsion of members so offending, would be to deprive language of its obvious and ordinary meaning. The plaintiff admitted that he used the threatening language, but claims that it constituted no offence under the by-laws. Evidently, the defendants were justified in believing that it did have that character and in submitting the question to the lodge, the proper tribunal to pass upon it. In the absence of evidence that they believed it was no offence, it cannot be said that they had no probable cause to believe the plaintiff was guilty of a violation of the by-law. The action under this count cannot be sustained.

The other count, upon which the plaintiff bases his right to recover, alleges a conspiracy on the part of the defendants in carrying on a prosecution against him in the lodge for his expulsion, without having probable cause to believe he was guilty. The charge alleged against him was the threatening language referred to in the other count; and for the reason above suggested, the defendants, even though they may have confederated together to bring about the plaintiff's expulsion from the lodge, are not liable for a conspiracy, since they had probable cause to believe he was guilty. In such a case it is unimportant how bitter and hostile the defendants' personal feelings were against the plaintiff, or how persistent they were in conspiring to cause his expulsion. 1 Cool. Torts (3d ed.) 210.

If this count may also be construed to include a conspiracy to induce the lodge to wrongfully take jurisdiction of the complaint and to vote for the plaintiff's expulsion, little doubt can be entertained upon the evidence that the lodge had jurisdiction. Upon the filing of the complaint, in accordance with the by-laws, alleging a violation by the plaintiff of a regulation of the order intended to promote friendly relations among the members, the lodge possessed the power to determine in the first instance the matter in issue, and to expel the respondent if found guilty. It follows, therefore, that the plaintiff's contention reduces itself to the proposition that the defendants, acting as officers of the lodge and charged with the duty of trying the plaintiff upon the complaint regularly filed against him, are liable in this action because they were prejudiced against him and proceeded in an irregular manner. But it is a sufficient answer to this position to say that they were judicial officers in the performance of that duty, and as such are not responsible in damages for their acts in that respect. To hold otherwise would be to violate fundamental principles relating to the administration of justice and the due and orderly settlement of private contentions.

The acts of Flack and Clement, as officers of the lodge, in appointing the committee, and the committee's acts in investigating the charge against the plaintiff, though irregular and reprehensible in many respects, were essentially judicial acts (Niblack Ben. Soc., s. 55), authorized by the contract of membership. Moreover, the plaintiff was duly notified of the hearing, was present, and did not object to any of the proceedings of which he now complains. His contract of membership, and his acquiescence in and practical submission to the tribunal as constituted, amounted to a waiver of any valid objection he might have had to the committee as a judicial board. *Sperry's Appeal*, 116 Pa. St. 391, 397; *Pitcher* v. *Board of Trade*, 121 Ill. 412, 420, 421. The members of the committee occupied the position of arbitrators whose appointment was agreed to by the plaintiff (*Jones* v. *Brown*, 54 Ia. 74), or of jurors selected with his assent. If they were so biased against the plaintiff and acted in such disregard of his rights, that upon appeal to the grand lodge, or upon proper proceedings in a court of law, their report or verdict would be set aside, it does not follow that they would be personally liable for the damages he may have suffered in consequence of their irregular or wrongful acts. If the plaintiff had not been reinstated by an order of the grand lodge, and he had applied by *mandamus* or some appropriate remedy to be restored to membership in the lodge, the right of the court to grant the relief would not involve the question here presented. He might succeed in such a proceeding and still have no right of action againt the officers of the lodge for damages. His failure in this respect would be due to the rule of public policy (2 Cool. Torts, 3d ed., 793) which protects judicial officers and those exercising judicial functions, having jurisdiction, from liability in actions of tort for wrongs committed by them when acting in that capacity. "It has been repeatedly decided in this state, that where an officer or a board is called upon to pass upon evidence and decide, their conclusion cannot be collaterally attacked, and that they are not liable to answer in a suit for their action. The reason given in the cases is that such action is judicial." *State* v. *Corron*, 73 N. H. 434, 455; *Jordan* v. *Hanson*, 49 N. H. 199; *Burnham* v. *Stevens*, 33 N. H. 247; *Greene* v. *Mead*, 18 N. H. 505; *Yates* v. *Lansing*, 5 Johns. 282; *Sidener* v. *Russell*, 34 Ill. App. 446; *Jones* v. *Brown*, 54 Ia. 74, 77, 78; *Turpen* v. *Booth*, 56 Cal. 65.

The ruling of the court directing a nonsuit was correct.

Exception overruled.

All concurred.

Merrimack,
Feb. 5, 1907.

STEVENS v. KING & a., & Trs.

Where the estate of one sued as trustee is settled in the insolvent course, the claim of the principal defendant against the estate is barred if not presented to the commissioner within the time limited, in which event the trustee must be discharged.

MOTION, by the plaintiff, for leave to prosecute the claim of the principal defendant against the trustees, the estate of the deceased trustee being administered in the insolvent course. The suit was begun in the lifetime of the deceased trustee, and upon his death the executors were summoned in. This claim was not presented to the commissioner, for the reason that the plaintiff was ignorant of the pendency of the insolvency proceedings until the present term and after the commissioner's report had been accepted by the probate court. The motion was granted, and the executors excepted. Transferred from the April term, 1906, of the superior court by *Peaslee*, J.

Joseph S. Matthews, for the plaintiff.

Mitchell & Foster, for the executors.

WALKER, J. Ordinarily, when an administrator is sued as a trustee and the estate is settled as insolvent, the case is continued on the docket until the plaintiff has presented the principal defendant's claim to the commissioner and obtained a report thereon and a decree showing what amount the administrator had in his hands, when his deposition may be taken and a judgment rendered against him. *Chapman* v. *Gale*, 32 N. H. 141; *Rollins* v. *Robinson*, 35 N. H. 381. This is the interpretation put upon section 24, chapter 208, Revised Statutes, by the court in the cases cited, which in effect is like section 4, chapter 245, Public Statutes, which provides that "if a trustee dies pending the proceedings against him, his executor or administrator may be summoned in as a party, and he shall be liable as if the action had been brought against him as trustee." But it was held that if the claim is not presented to the commissioner before the close of the commission, section 15, chapter 163, Revised Statutes, prevents the trustee from being charged; that is, the claim of the principal defendant against the trustee is barred. And since section 18, chapter 193, Public Statutes, is substantially similar to that statute, it follows upon the authority of the cases cited that the plaintiff cannot charge the trustee in this action.

While conceding that this result is correct as the law stood

when *Chapman* v. *Gale* was decided, it is argued that section 7, chapter 191, Public Statutes, gives the court discretionary power to allow the question of the trustee's liability to be tried by a jury when, as in this case, the claim has not been filed with the commissioner and the time for such filing has passed. This section of the statute is as follows: "No action shall be begun against an administrator after the estate is decreed to be administered as insolvent; and no action against the deceased or his administrator pending in court when such decree is made shall be further prosecuted therein, unless by leave of the court in which it is pending. If an action is thus prosecuted and judgment is rendered for the plaintiff, the judgment shall be certified to the judge of probate, and the amount thereof shall be added to the list of claims." This statute took the place of section 8, chapter 161, Revised Statutes, which reads as follows: "No action shall be commenced or prosecuted against an administrator, where the estate is decreed to be administered as an insolvent estate; but the cause of action may be presented to the commissioners and allowed, with the costs of any action pending at the time of such decree."

In *Chapman* v. *Gale*, *supra*, it was held that the latter statute did not apply where an administrator is sued as a trustee; that it had reference to suits in which the administrator was the principal defendant. *Rollins* v. *Robinson*, 35 N. H. 381. Under that ruling, all suits of that character abated upon a decree ordering the estate to be settled as insolvent. *Clindenin* v. *Allen*, 4 N. H. 385; *Hawkins* v. *Learned*, 54 N. H. 333. But by virtue of the other provisions of the statute trustee suits did not abate, and the liability of the administrator as trustee was determined after a hearing before the commissioner. The law as found in section 8, chapter 161, Revised Statutes, continued in force with a slight change in phraseology (G. L., *c.* 198, *s.* 8) until 1881, when the following was substituted in its place: "No action shall be commenced against an administrator after the estate is decreed to be administered as insolvent. Actions and suits at law or in equity against said administrator or the deceased, commenced before such decree and then pending in court, may be referred to a referee under section 10 of chapter 231 of the General Laws. The judgment of the court upon the award of the referee, if in favor of the creditor, shall be certified to the judge of probate, and the amount recovered by the creditor, including costs, shall be added to the list of claims, as in case of appeals from the commissioner: *Provided*, however, that nothing herein contained shall be construed to deprive either party of the right of trial by jury." Laws 1881, *c.* 34, *s.* 1. Upon the revision of 1891, the statute upon this subject took its present form. P. S., *c.* 191, *s.* 7, above quoted. The

various revisions and amendments of the statute since the Revised Statutes afford no evidence of a legislative intention to so broaden its scope as to make it apply to trustee suits in which an administrator is sued as trustee; and in view of the holding in *Chapman* v. *Gale* and *Rollins* v. *Robinson*, with which subsequent legislatures were presumably familiar, it is plain that such has not been the intention. The mere fact that it may not be incorrect to say that when an administrator is sued as trustee an action is pending against him, is not of such evidentiary importance as to outweigh the evidence of a contrary legislative intention with reference to trustee suits. There is no substantial reason why the kind of "action" which, under the original statute, abated upon the institution of insolvency proceedings, was any different kind of action than that covered by the subsequent statute which allows it to be prosecuted "by leave of the court in which it is pending." See *Edgerly* v. *Hale*, 71 N. H. 138, 141.

Upon the death of the trustee the executors were properly summoned in, and they became "liable as if the action had been brought against" them as trustees. P. S., *c.* 245, *s.* 4. When the decree of insolvency was made, the plaintiff's claim, if any, against the executors became subject to section 18, chapter 193, Public Statutes, which provides that "all demands against an estate which might have been presented to the commissioner and were not so presented, and all demands so presented and rejected, and not allowed upon appeal, shall be forever barred." The liability of the executors depended upon the question whether the estate was indebted to the principal defendant, and that question the plaintiff had a right to have adjudicated by the commissioner. He was entitled to present his demand in this respect to that tribunal; but as he did not, the statute provides that it "shall be forever barred." Whether the statutory procedure in such cases is the best that might be devised, it would be useless to consider, since the legislature has clearly pointed out the course to pursue and the consequences resulting from a neglect to pursue it. Nor would it be useful to consider in this case what bearing the plaintiff's ignorance of the insolvency proceedings might have had, if it had been induced by the bad faith of the executors. "It is clearly not the duty of the administrator to present the claims against the estate, and if it is barred without fault on his part, he must be discharged. The principal debtor owes no duty to his creditor to present the claim, and he may have no interest to present it. The creditor had no course to protect himself but to present the claim." *Rollins* v. *Robinson*, *supra*, 383.

Exception sustained.

YOUNG, J., dissented: the others concurred.

Merrimack,
Feb. 5, 1907.

DREW *v.* BOW.

A town is not liable for injuries caused by ice which has accumulated in the traveled part of a road by reason of a defective gutter at the side of the highway.

PETITION, under section 8, chapter 76, Public Statutes, for leave to file a statement of claim for damages resulting from a defect in a highway. The defendants negligently permitted a gutter at the side of a highway to remain in such condition that water accumulating therein overflowed the roadway and froze, thus causing the defect complained of. At the April term, 1906, of the superior court, the petition was dismissed by *Peaslee*, J., on the ground that the defendants were not liable for injuries which the plaintiff sustained by slipping on ice in the traveled part of the highway, and the plaintiff excepted.

Martin & Howe, for the plaintiff.

Taggart, Tuttle, Burroughs & Wyman, for the defendants.

YOUNG, J. "The changes introduced into the statute [P. S., *c.* 76, *ss.* 1, 2, by Laws 1893, *c.* 59] indicate a purpose to greatly limit liability; . . . for no liability can arise at any portion of the highway other than those enumerated, and not then because the obstruction renders the highway unsuitable, unless the matter complained of constitutes an obstruction, defect, insuffiency, or want of repair in a structure the defect in which is made a ground of liability." *Wilder* v. *Concord*, 72 N. H. 259, 262; *Wentworth* v. *Pittsfield*, 73 N. H. 358, 360; *Miner* v. *Hopkinton*, 73 N. H. 232; *Owen* v. *Derry*, 71 N. H. 405; *Boyd* v. *Derry*, 68 N. H. 272. If the defect in the structure complained of must be the immediate (*Farnum* v. *Concord*, 2 N. H. 392; *Ford* v. *Braintree*, 64 Vt. 144)—not the proximate—cause of the plaintiff's injury, he cannot recover, for the immediate cause of his injury was the ice in the road—not the condition of the gutter. It will not be necessary, however, to decide that question, for the gutters at the sides of the ordinary highway are not sluiceways within the meaning of section 1, chapter 59, Laws 1893, if the language the legislature used is given its ordinary meaning. A sluiceway is an artificial channel made to draw off water, either naturally or artificially collected. Cent. Dict. If this is the sense in which the legislature used that word, and there is nothing to show they intended to give

it any other meaning, the water-course intended must be one either in (*Welsh* v. *Franklin*, 70 N. H. 491), or across, a highway; for the statute only makes towns liable for injuries happening to a person traveling upon—not near—a defective sluiceway. The fact that the structures common to all highways for collecting surface water and keeping it out of the traveled part of the road are usually called ditches or gutters tends to the same conclusion; for it is probable that if the legislature had intended to make towns liable for injuries caused by the condition of such structures, they would have used apt words to express that intention, and would not have spoken of them by the name commonly used to describe structures intended to dispose of such water after it has been collected.

Exception overruled.

BINGHAM, J., dissented: the others concurred.

Cheshire,
Feb. 5, 1907.

ASHUELOT NATIONAL BANK v. KEENE.

Whether a right of entry upon real estate before breach of a condition subsequent is transferable by will or deed, *quære*.

Where a proposition to donate real estate for a library building and public park is accepted by the municipality, a provision in the deed that the conveyance is made "upon the express condition" that the premises shall be held and used for the purposes specified does not constitute a condition subsequent, a breach of which renders the estate liable to forfeiture, when it is apparent from a consideration of all the competent evidence that the parties contemplated a conveyance upon trust, and that the words of condition were used solely to declare the purposes to which the land should be devoted.

WRIT OF ENTRY, to recover the possession of a lot of land in Keene. Trial before *Peaslee*, J., at the October term, 1905, of the superior court. The plaintiff excepted to the denial of a motion for a verdict in its favor, and also to the general verdict for the defendants.

May 7, 1890, Henry O. Coolidge, then a resident of Keene, made the following proposition to the city: "I will purchase the Perry place, so called, of the Rev. William O. White, upon the

terms agreed upon between said White and myself, and pay him for said premises the sum of $15,500, and convey said real estate to said city by good and sufficient deed, to be by said city forever owned, held, and used for the purpose of erecting and maintaining a public library building thereon and for utilizing so much thereof as is not used for library purposes for a public park, and for no other purpose whatever. Said city to take possession of said property immediately, and take and enjoy the rents and income therefrom till such reasonable time as the same shall be devoted to the uses aforesaid, provided said city will pay to me during my life, and to my wife, Emily B. Coolidge, during such time as she shall survive me, four per cent per annum upon said sum of $15,500, payable semi-annually on the first day of July and January of each year during the time aforesaid. I will also pay to said city the sum of $4,500 in money, to be by said city invested and the income therefrom used as the officers of said city may direct, until such time as it may be properly used to defray a portion of the expense of constructing a library building upon the premises aforesaid, for the purchase of books for said library, or for purchasing furniture for said library building when constructed, the same to be used for no other purpose whatever, upon condition that said city will pay me during my life, and to my wife, Emily B. Coolidge, during such time as she shall survive me, four per cent per annum upon said sum of $4,500, payable semi-annually on the first day of July and January of each year during said term. All the payments aforesaid to be made free of taxes."

On the same day the city accepted the foregoing proposition by the following joint resolution: "Resolved by the city councils of the city of Keene, as follows: That said city accept from Henry O. Coolidge his deed of the Perry place, so called, to be purchased by him of Rev. William O. White for the sum of $15,500, conveying said property to the city for the purpose of erecting and maintaining a public library building thereon and for the purpose of a public park and for no other purpose whatever. That said city also accept from said Coolidge the sum of $4,500, to be invested and eventually used by said city for the purpose of defraying a portion of the expense of constructing said library building, for the purchase of books for said library, or for furnishing said building when constructed, and for no other purpose whatever. And in consideration of said conveyance and the payment of said $4,500, said city hereby agrees to pay to said Coolidge during his life, and to his wife, Emily B. Coolidge, during such time as she shall survive him, four per cent per annum upon said sums of $15,500 and $4,500, payable on the first day of July and January,

agreeably to the terms and conditions of the proposition in writing of even date herewith made by said Coolidge to said city. And the mayor and city treasurer are hereby authorized, empowered, and instructed to execute and deliver to said Henry O. Coolidge, upon receipt of said deed and the payment of said money, the written obligation of the city of Keene to pay to him during his life, and to said Emily B. Coolidge during such time as she shall survive him, the sum of $800 per annum, free from taxes, payable semi-annually on the first day of July and January each year."

May 12, 1890, Coolidge conveyed the premises to the city by warranty deed containing, after the description of the land, the following: "Provided, however, and this deed is made upon the express condition, that said premises shall be forever held and used for the purpose of erecting and maintaining a public library building thereon and for utilizing so much thereof as is not used for library purposes for a public park, and for no other purpose whatever, said grantee to take and enjoy the rents and income therefrom until such reasonable time as the same shall be devoted to the purposes aforesaid. To have and to hold the said granted premises with all the privileges and appurtenances to the same belonging, to the said grantee and its successors, to their only proper use and benefit forever, subject to said conditions." The city accepted the deed, thereupon took possession of the premises, and has ever since held the same.

Coolidge died February 29, 1896, leaving a will in which he made the plaintiff in this action residuary legatee. The will contains no specific reference to the demanded premises. March 17, 1904, a reasonable time having elapsed within which the city should have devoted the realty to the purposes specified in the deed, the plaintiff entered upon the demanded premises for breach of condition and made demand upon the city to deliver up possession, which it refused to do. Emily B. Coolidge, widow of Henry O., is living. There was no waiver by the plaintiff of any right it possessed to enforce a forfeiture. The Perry place, so called, named in the proposition and joint resolution, is the land described in the writ in this action and therein demanded.

Charles H. Hersey, for the plaintiff.

John E. Allen, for the defendants.

BINGHAM, J. The contention of the plaintiff is that the land was conveyed to the city upon the condition that the grantor and his heirs might enter and enforce a forfeiture if the city failed

within a reasonable time to devote the property to the purposes specified in the deed; and that as the city has failed in this respect, the plaintiff, as residuary legatee under the will of Mr. Coolidge, can enforce the forfeiture the same as he might have done if living. This contention is based upon the assumption that the land was conveyed subject to a condition subsequent, and upon the legal proposition that a right of entry before breach of condition is an interest in land and assignable.

If the land was conveyed upon condition subsequent, it is at least doubtful whether a right of entry before breach is transferable by will or deed. The theory of the common law was, that when an estate in fee simple was granted upon condition subsequent, the entire estate vested in the grantee; that until entry by the grantor for breach of condition, the grantee had both the possession and right of possession; that until then the grantor had no reversionary right or interest in the granted premises and could convey none; that he had a mere possibility, capable of being exercised by him in his lifetime if the condition was broken, or by his heir upon whom after his decease it devolved as his representative, and not by way of inheritance. *Dewey* v. *Williams*, 40 N. H. 222, 227; *Dow* v. *Edes*, 58 N. H. 193; *Peaslee* v. *Tower*, 62 N. H. 434; *Hooper* v. *Cummings*, 45 Me. 359; *Guild* v. *Richards*, 16 Gray 309; *Nicoll* v. *Railroad*, 12 N. Y. 121; *Towle* v. *Remsen*, 70 N. Y. 303; *Fonda* v. *Sage*, 46 Barb. 109; *Upington* v. *Corrigan*, 151 N. Y. 143; *Southard* v. *Railroad*, 26 N. J. Law 1, 21; *Cornelius* v. *Ivins*, 26 N. J. Law 386; *Freeman* v. *Bateman*, 2 B. & Ald. 168; Gray Perp., *ss.* 12, 30, 31; 2 Wash. R. P., *s.* 955; Co. Lit. 202 a; Lit. Ten., *ss.* 325, 347. This view of the common law has been generally recognized and applied in this country. Cases *supra*. The single exception which has come to our notice is in Massachusetts, where the court in a case decided in 1827, and apparently without discussion of the nature of the right, held that it could be transferred by will (*Hayden* v. *Stoughton*, 25 Pick. 528); while the same court in later decisions has held that it could not be transferred by deed. *Rice* v. *Railroad*, 12 Allen 141; *Guild* v. *Richards*, 16 Gray 309. See, also, *Austin* v. *Cambridgeport Parish*, 21 Pick. 215.

But it will be unnecessary to determine the nature of the right in this case, if the conveyance was upon trust, and the words of condition in the deed were used to specify the purposes to which the land was to be devoted and not to determine the estate upon failure of the city to devote the property to those purposes. It has been held in the case of a devise of land upon condition that the devisee pay certain legacies, that the words "upon this express condition" did not create a condition for breach of which the heir

might enter, but created a trust which the devisee, taking the legal estate, would in equity be bound to perform. *Wright* v. *Wilkin*, 2 B. & S. 232. It has also been held that "a gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is . . . a charitable trust. *Goodman* v. *Saltash*, 7 App. Cas. 633. See, also, *Brown* v. *Concord*, 33 N. H. 285; *Attorney-General* v. *Nashua*, 67 N. H. 478; *Rolfe and Rumford Asylum* v. *Lefebre*, 69 N. H. 238.

The New Jersey court has said that "words of express condition are not inapt as introductory to a declaration of trust. Every conveyance for a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is taken and held, to be given effect to, not by the forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts." *Mills* v. *Davison*, 54 N. J. Eq. 659. And this court, in construing a deed, has said that words of condition "will not be held to have that arbitrary and technical effect and meaning, if such effect and meaning shall be found to be contrary to the intention of the parties and the policy of the law. The form of language will not necessarily control the sense, but will receive such an interpretation as circumstances and equity under those circumstances may require." *Hoyt* v. *Kimball*, 49 N. H. 322, 325. It would seem, therefore, that the question whether the conveyance was upon condition subsequent, or not, is wholly one of construction, and that its answer is to be found in the ascertainment of the intention of the parties, as expressed in the deed and the contract in pursuance of which the conveyance was made. *Weed* v. *Woods*, 71 N. H. 581.

The contract is embodied in the written proposition of Mr. Coolidge to the city and the joint resolution of the city councils accepting it. There is nothing in his proposition or its acceptance indicating an intention that the conveyance of the land or the gift of the money should be subject to forfeiture upon the failure of the city, within a reasonable time, to devote the same to library and park purposes. On the contrary, it is as manifest as language can make it that it was the wish of Mr. Coolidge that the city should use the land for its own purposes and have the benefit of the income from the money for such time as might be deemed reasonable, and that thereafter the land and the money should be held by it, not for its own corporate use and benefit, but for the benefit of the public and devoted to library and park purposes. This construction of the contract is sustained by the decision in

Troy v. *Haskell*, 33 N. H. 533, where the court was called upon to construe a deed of land to a town, in which after the description of the land was inserted the following clause: "Said land is to be for the use and benefit of the public, and to be improved for a public common, and no other purpose." It will be seen that the language used in that deed does not differ materially from that used in the contract between Mr. Coolidge and the city; and it was there held that the conveyance vested the legal estate in the town as trustee for the benefit of the public, and that the town took no beneficial interest in the land, but was the "instrument for carrying out the intention of the grantor."

The fact that between the description of the land and the *habendum*, in the deed to the city, there was inserted a clause providing that the conveyance was made "upon the express condition that said premises shall be forever held and used for the purpose of erecting and maintaining a public library building thereon," does not necessarily militate against the construction we have placed upon the contract and disclose a different intent. It is at most but a circumstance to be considered with the other circumstances in the case in arriving at a proper solution of the question. If the plaintiff's interpretation of the contract were right, and the words of condition in the deed were inserted for the purpose of rendering the land liable to forfeiture, the conveyance would not be in compliance with the terms of the contract, for the parties to that instrument did not so understand it. Then, again, the money given to the city was not, under the terms of the contract, subject to forfeiture, but according to its provisions might be used toward defraying the expense of constructing a library building upon the land; and if the land could be forfeited for failure of the city to use the building when constructed for library purposes, the money as well as the land would be subject to forfeiture. These circumstances, taken in connection with the further circumstances in the case,—that the conveyance was made to the city in fee, to be held by it forever, not for its own benefit, but for the use and benefit of the public, except for such time as was allowed preliminary to devoting the property to the uses designated,—that no language was used in the deed declaring that the conveyance should be void in case the purpose for which the land was conveyed should not be complied with,—and that no right was reserved to the grantor or his heirs, upon the happening of that event, to reënter and resume possession,—disclose that the conveyance was not upon condition but upon trust, and that the words of condition were inserted simply for the purpose of declaring the uses for which the land was to be held. *Hoyt* v. *Kimball*, *supra*; *Greene* v. *O'Connor*, 18 R. I. 56.

What proceedings in equity may be had against the city for enforcing the trust and to require it to devote the property to the purposes declared in the deed, we are not now called upon to consider. This action cannot be maintained. The plaintiff's exceptions are overruled.

Judgment for the defendants.

All concurred.

Sullivan,
Feb. 5, 1907.

74 154
174 444

HICKS v. CLAREMONT PAPER CO.

The failure of a master to warn his servant concerning an obvious danger of the employment does not constitute actionable negligence.

In an action by a servant to recover for a personal injury resulting from the master's negligent failure to give proper warning or instruction, it is incumbent upon the plaintiff to affirmatively show the existence of a special danger not apparent to the observation of an unskilled workman, or that special skill was required to enable one to do the work in safety.

CASE, for personal injuries alleged to have been caused by the defendants' negligence. Trial by jury and verdict for the plaintiff. Transferred from the November term, 1905, of the superior court by *Chamberlin*, J., upon the defendants' exception to the denial of their motion for an order of nonsuit.

The testimony tended to prove the following facts: February 20, 1905, the plaintiff was employed by the defendants as third hand for one of the paper machines in a room of their paper mill, and continued in the employment until his injury on April 30, 1905, working during the daytime and the nighttime of alternate weeks. He was about twenty-seven years old, of average intelligence, and had never worked in a paper mill before. The hands for each machine were a machine tender, a back tender, and a third hand. A foreman for the room had oversight of the business and control of the employees. The duties of the third hand were to pick up broken paper, sweep the floors, wash the screens, assist in removing paper from the back end of the machine, do up the paper for shipment, and carry it to another room. The paper machine to which the plaintiff was assigned was sixty to seventy feet long, and comprised several parts, among which were three sets of press

rolls, each set consisting of the following rolls supported in horizontal positions in a suitable frame: a wooden roll about eight inches in diameter, located at the front end of the frame about three feet above the floor of the room; another wooden roll of the same diameter, located about three feet back of the first one and at a slightly higher elevation; a wooden roll of greater diameter in the middle than at the ends, called the spread roll, located directly in front of the second roll; two rolls about eighteen inches in diameter, known as press rolls, located twelve to fifteen inches back of the second wooden roll, placed one above the other, and running so near together as to pinch the felt belt and paper passing between them, the upper roll being made of brass and the lower one of rubber or some material covered with rubber; and several other rolls, some located further back than the press rolls, and some further forward but in a lower plane. An endless felt belt passes from the first wooden roll, over the spread roll and the second wooden roll, to and between the press rolls, and thence over the other rolls back to the first wooden roll. When the machine is running this belt is taut, and receives the paper from a preceding part of the machine and carries it forward between the press rolls to the next succeeding part. The press rolls revolve inwardly toward the front of the machine and press the paper as it passes between them.

It is necessary to wash and turn the felt belt from time to time. Preparatory to so doing, the spread roll is taken out, the tension of the belt is further loosened by an adjustment of a portion of the machine designed for the purpose, and the speed of the belt is reduced. An employee standing at the front side of the machine, opposite the space between the two wooden rolls, and another standing on the other side, simultaneously push the edges of the belt toward its median line, thereby bunching or "roping" it up. When this is accomplished, water is poured on the belt for about ten minutes. Then the employee at the front of the machine grasps from the upper side the edge of the belt farthest from him and pulls toward himself, while the other employee, putting his hands under the belt and grasping the other edge, pulls toward himself. As the belt passes around in its course it is turned by several pulls made in that way. The operation, from beginning to end, occupies from twenty-five to thirty minutes.

Shortly after eleven o'clock in the evening of Saturday, April 30, the foreman called the plaintiff to assist him in roping, washing, and turning the belt of the first set of press rolls. The machine was short one hand at the time, and the crew were hurrying to finish work before midnight. The plaintiff had never assisted at

that kind of work previously, excepting on one occasion, when he operated the lever to reduce the speed of the machine so that the belt could be turned over; and at that time he stood in such a position that the press rolls were between him and the other employees and interfered with his view of the operation. He had assisted once in putting in a new belt, but the machinery was stopped and partially taken apart at the time. He had seen belts of the other paper machine roped, washed, and turned on two or three occasions, but paid no particular attention to the process. He had assisted in taking the paper from the driers to the stacks at the back end of the machine, while the paper was passing "through a number of rolls." On the night of the accident the foreman sent the back tender to do the work which the plaintiff ordinarily did, and ordered the plaintiff to go to the back side of the machine and raise the spread roll, so it could be taken out. This was done; and thereupon the plaintiff, in compliance with the foreman's direction, assisted the latter in roping the belt. Water was then allowed to flow upon the belt for about ten minutes. The foreman then took hold of the far edge of the belt from the upper side and pulled, and told the plaintiff to take hold of the other edge from the under side and pull. The plaintiff did as he was directed, his hand being under the belt where he could not see it and the belt hanging upon his arm. His hand was drawn over the second wooden roll and on between the press rolls, and was injured.

The place was well lighted. The plaintiff was not warned of any special danger. He could see the rolls. He knew that they were moving, that the felt belt was moving "fairly fast," and that if he got his hand between the press rolls it would be injured. He kept hold of the belt until his hand was caught by the press rolls. There was nothing which attracted his attention to the liability of injury. The only negligence relied upon by him was the defendants' failure to warn him of the danger of his hand being drawn between the rolls, which he claimed he did not know of and appreciate.

Frank H. Brown and *Albert S. Wait*, for the plaintiff.

Hosea W. Parker and *Streeter & Hollis*, for the defendants.

CHASE, J. This case so closely resembles *O'Hare* v. *Cocheco Mfg. Co.*, 71 N. H. 104, that it must result as that case resulted. In this, as in that case, the only negligence with which the defendants are charged is their failure to warn the plaintiff of the dan-

gers incident to his service. As in that case, so in this, the dangers were obvious; and if the plaintiff did not know of and appreciate them, the fact was due to his want of ordinary care.

The plaintiff was a man of mature age and average intelligence. He had worked about the machine which caused his injury ten weeks. Although his duties did not pertain to the particular part of the machine where he was injured, he must have acquired a general knowledge of the machine and its operation. His description of them upon the witness stand shows this. If this knowledge, together with the knowledge acquired from his observation of the process of washing and turning the belts of press rolls on two or three occasions, and from his experience in assisting in putting in a new belt, were not sufficient to inform him of the dangers attending the process of turning belts, it is inconceivable that he could have failed to learn of such dangers as he stood by the machine the night of his injury and attempted to assist in the process, unless he failed to make such use of his senses and faculties as a person of average prudence would make under such circumstances. If he exercised ordinary care, he must have acquired knowledge of the dangers before he took hold of the belt to assist in turning it. The place was well lighted. The belt was moving "fairly fast" toward and between the revolving rolls which pinched it as it passed. This was taking place directly before, and within three or four feet of, his eyes. He knew that the belt and press rolls were in motion, and that his hand would be injured if it was caught by the rolls. Although he could not see his hand when under the belt, he could not have been unconscious of the fact when it moved toward the rolls. He must have known that the belt would carry his hand to the rolls if he held on to it, and that the only way to escape injury was to release his hold seasonably. There is no evidence that it would be difficult to do this, or that special precautions were necessary. Nor is there any definite evidence as to the speed of the belt, so that it could be inferred therefrom that one taking hold of it could not subsequently let go in season to avoid injury.

If there was special danger in the process not apparent to the observation of an unskilled workman, or if special skill was required to enable one to do the work in safety, the defendants' failure to warn or instruct the plaintiff might be found to be the cause of the injury. But the burden of proof was upon the plaintiff, and the absence of evidence in relation to these matters does not sustain that burden. The mere fact of injury does not establish the defendants' fault. If the absence of proof is due to mistake or misfortune, justice can hereafter be done upon proper proceedings in the superior court; but the possibility of evidence cannot sus-

tain a verdict rendered without evidence upon an essential point. As the evidence stands in the record, there was no concealed danger in the operation. The defendants could not have told the plaintiff anything about the danger which he did not learn from his observation, or would not have learned if he had exercised ordinary care. The machine itself, by the character and motion of its parts, continuously warned him of the dangers to which it exposed him, as fully and forcibly as human language could have done. The plaintiff, by his contract of service with the defendants, took upon himself the risk of injury from these dangers, and consequently has no right of action against them for the injury he has suffered therefrom. The defendants' motion should have been granted.

Exceptions sustained: verdict set aside.

YOUNG, J., dissented: the others concurred.

Sullivan,
Feb. 5, 1907.

MAXFIELD v. WHITE RIVER LUMBER CO *& a.*

Actual possession of land under an invalid tax collector's deed is sufficient to support an action of trespass *quare clausum*, as against one who has no legal title and cannot prove prior possession of the premises by himself or those under whom he claims.

TRESPASS, for breaking and entering the plaintiff's close situated in the town of Goshen. Trial by the court and verdict for the defendants. Transferred from the May term, 1906, of the superior court by *Wallace*, C. J.

George R. Brown and *Hosea W. Parker*, for the plaintiff.

Jesse M. Barton and *Edwin G. Eastman*, for the defendants.

BINGHAM, J. This is an action of trespass *quare clausum fregit*. The plaintiff's claim of title rests upon a collector's deed for the tax assessed upon the land for the year 1894, and upon his entry into the possession of the land under his deed in 1896. The defendants' claim of ownership is based upon the following facts: Franklin Pierce owned the land in 1863. In December of that year he conveyed it to one Clark, upon trust to hold, manage, and

improve the same and pay nine fiftieths of the income to Andrew Pierce, Jr., three fiftieths to Thomas W. Pierce, three fiftieths to George Bacon, and the balance in various proportions to some twelve other persons. There was supposed to be a lead mine upon the land, and it was worked by Clark for a short time after the conveyance was made to him. February 25, 1890, Andrew Pierce quitclaimed to one Page all the interest he had in the land, either individually or as surviving partner of a firm composed of Thomas W. Pierce, George Bacon, and himself. On the same day he quitclaimed to Page all the interest of the firm in the land, in pursuance of a power of attorney from Horace and Olivia Bacon authorizing him to close up its affairs and sell its real estate. In the summer of 1904, Page's interest in the land came through mesne conveyances to the defendants; and in the fall of that year, and while the plaintiff was in possession under his tax deed, the defendants entered, claiming to own the land, and committed the acts of trespass for which this suit was brought. There was a verdict for the defendants, and the plaintiff excepted upon the ground that the evidence failed to show that the defendants had any title to the land.

The plaintiff recognizes that in order to prevail in this suit he must rely upon the strength of his own title and not upon the weakness of the defendants'. His position is that he has the better title, even if his tax deed is for some reason invalid; that his entry upon and possession of the land under his deed gave him title sufficient to maintain an action against a trespasser; and that the defendants at the time of their entry were trespassers—that they had neither the legal title nor a prior possession. This contention, so far as it involves a statement of law, is undoubtedly correct. All title rests on possession, actual or presumed. No possession is presumed in favor of any person but the state; and when a person does not trace his title from the state, he must either show actual possession in himself, or in some person through whom he claims. *Newcastle* v. *Haywood*, 68 N. H. 179; *Bell* v. *Peabody*, 63 N. H. 233, 239; *Cushing* v. *Miller*, 62 N. H. 517, 525; *Tilton* v. *Stanyan*, 57 N. H. 489; *Graves* v. *Company*, 44 N. H. 462; *Richardson* v. *Palmer*, 38 N. H. 212; *Woods* v. *Banks*, 14 N. H. 101.

The case finds that the plaintiff was in the actual possession of the land at the time of the defendants' entry in 1904; and according to the foregoing principles of law, unless the defendants owned the legal title with an immediate right of possession, or unless they or those under whom they claim had a prior possession, the verdict in their favor cannot be sustained. There is no finding that the defendants, or those under whom they claim, ever had actual possession of the land prior to the plaintiff, and the facts reported

show that they never had the legal title. Their title does not start with Franklin Pierce, but with Andrew Pierce; and if he is the "Andrew Pierce, Jr.," who is mentioned as one of the beneficiaries in the deed to Clark, neither he nor the others there named owned the legal title to the land. The deed to Clark only gave these parties the income of the property. It did not vest the legal title in them, but in Clark, in whom it still remains so far as this case discloses. As the plaintiff has the better title, his exception is sustained. The verdict for the defendants is set aside.

Verdict and judgment for the plaintiff.

All concurred.

Rockingham, March 5, 1907.

74 160
74 406

KIDD *& a. v.* NEW HAMPSHIRE TRACTION CO. *& a.*

Officers appointed by a board of directors to execute a written contract in behalf of a corporation are representatives of the company, and not agents of the directors; and their authority is not *ipso facto* abrogated by the election of new directors prior to the signing of the agreement.

Where the directors of a corporation dispose of all its property in accordance with the terms of a written agreement which the officers of the company are instructed to execute and deliver, the transaction is not void on the ground of constructive fraud merely because persons under the control of the vendee are substituted for the original directors prior to the manual execution of the contract.

A sealed contract of sale and a contemporaneous parol agreement binding the vendor to make additional expenditures as a consideration for the vendee's execution of the deed do not together constitute a single indivisible contract; and the fact that the parol agreement is void, or voidable at the option of the vendor, does not affect the validity of the vendee's title under the deed.

An issue of intentional fraud raised by bill and answer, but not passed upon by the superior court, will not be determined by the supreme court upon the reversal of a decree based entirely upon constructive fraud.

A motion to dismiss a bill in equity for lack of sufficient evidence to support its allegations should be made at the close of the plaintiff's evidence, before the issues are submitted upon their merits.

The relation existing between common stockholders who have entire control of the corporation and preferred shareholders without voting power is that of trustee and *cestui que trust.*

All stipulations by parol prior to or contemporaneous with a written agreement are merged in the writing, which is conclusively presumed, in the absence of fraud or mistake, to contain the matter as to which the minds of the parties met; and where the final expression and purpose of the parties is by a writing under seal, all other matter in writing is parol and is merged in the sealed instrument, which cannot be altered or contradicted by a prior or contemporaneous document of less degree.

A trustee *ex maleficio* is in any event chargeable with the value of the trust estate at the time it came into his possession; and upon the question of value, subsequent developments of the property are evidence, but not conclusive.

BILL IN EQUITY, by two holders of preferred stock in the Massachusetts Construction Company Incorporated, in behalf of themselves and all other stockholders of the corporation, alleging in part, in substance, that as a result of fraud all the assets of the corporation have passed into the possession and control of the New York Security and Trust Company, one of the defendants, and praying for an accounting by the latter company. This is the same suit reported in 72 N. H. 273. There was a trial by the court. A general decree was made in favor of the plaintiffs against the Trust Company, and the bill was dismissed without costs as to the other defendants. The facts and rulings upon which the decree was based, together with the defendants' exceptions thereto, were transferred from the October term, 1905, of the superior court by *Peaslee*, J.; and so far as material to the disposition of the case, they are stated in the opinion.

Roger F. Sturgis (of Massachusetts) and *Streeter & Hollis*, for the plaintiffs.

William B. Hornblower and *J. Norris Miller* (both of New York) and *Sargent, Remick & Niles*, for the New York Security and Trust Company.

Storey, Thorndike, Palmer & Thayer and *Samuel W. Emery* (all of Massachusetts) and *Sargent, Remick & Niles*, for the New Hampshire Traction Company.

Burnham, Brown, Jones & Warren, for the Massachusetts Construction Company Incorporated and Wallace D. Lovell.

CHASE, J. Wallace D. Lovell, a promoter and builder of street railways, doing business in the name of incorporated companies whose stock he owned and whose affairs he controlled, borrowed money of the plaintiffs from time to time, beginning in 1897, to

such an extent that in the fall of 1901 he and his company were owing the plaintiff Kidd about $179,000, and the plaintiff Whitcomb $65,000. In October, 1901, the Massachusetts Construction Company Incorporated (Connecticut Company) was formed under the general laws of Connecticut, and took the assets and assumed the liabilities of the Massachusetts Construction Company (Massachusetts Company), in whose name Lovell had previously conducted the business. The Connecticut Company's capital stock is $500,000, of which $250,000 is preferred, both as to the payment of dividends and the par value of the stock upon liquidation, and has no voting power, that being wholly lodged in the owners of the common stock. Lovell induced the plaintiffs to surrender the notes and collaterals which they held for their loans and to take in payment preferred stock of the Connecticut Company, Kidd taking 1,790 shares and Whitcomb 650 shares. The plaintiffs now hold this stock.

Lovell borrowed of the defendant, the New York Security and Trust Company (Trust Company), in 1900 and 1901, large sums of money upon notes secured by pledges of stocks and bonds of the railway corporations whose roads he and his corporation constructed. The Trust Company also purchased bonds of some of these railway corporations in the summer of 1900. By a contract, dated November 12, 1901, the Massachusetts Company and the Connecticut Company sold and conveyed to the Trust Company all their interests in large blocks of the stocks and bonds of the railway corporations. The contract provided that the Trust Company should organize, or cause to be organized, under the laws of this state, a holding corporation, to which the stocks and bonds received by the Trust Company under the contract, with certain exceptions, should be sold upon the terms set forth in the contract; and that the Massachusetts Company and the Connecticut Company should be paid for their equity in the stocks and bonds so sold to the Trust Company, by portions of the stock and bonds to be issued by the holding corporation. The Trust Company thereupon caused the New Hampshire Traction Company (Traction Company) to be organized, and the sale was made to it as provided in the contract.

Another contract under seal, dated December 28, 1901, between the Construction Companies, the Trust Company, and Lovell was prepared, by which the Construction Companies sold and conveyed to the Trust Company, and the Trust Company purchased of the Construction Companies, all their right, title, and interest in and to the stock and bonds of the Traction Company received under the contract of November 12, and in and to certain railway stocks, bonds, and claims, in consideration of $639,163.75 in cash (to be

used in the payment of the debts of the Construction and Railway Companies), debenture bonds of the Traction Company amounting to $375,000, a certificate of the Trust Company providing that 2,375 shares of the Traction Company's stock should be delivered to the Connecticut Company, January 1, 1907, and certain covenants of the Trust Company. The Construction Companies covenanted that their indebtedness and that of the railway corporations together did not exceed $639,163.75, and pledged the debenture bonds and interest in stock received by them under the contract to secure this covenant. The Trust Company agreed to furnish money to complete certain railways and to cause Lovell to be retained in and about the construction of the same for the term of two years, at an annual salary of $6,000 and necessary disbursements. The Construction Companies agreed that all construction might be done in the name of the Connecticut Company,—the Trust Company to pay all bills incurred with its consent, and to indemnify the Connecticut Company for all expenses, costs, and liabilities arising from any act, contract, or omission of the company while its control was in the Trust Company as provided in the contract. The Trust Company further agreed to sell and assign to the Traction Company the stock and bonds received and to be received by it under the contract, upon certain terms. The contract also provided for the substitution of persons desired by the Trust Company for the officers and directors of the Construction Companies then in office, as is hereinafter stated,—the officers and directors so substituted to have the right to make such changes in the by-laws as they might think desirable. Lovell was to furnish stock to qualify the officers and directors so substituted, and was to deposit with parties named certificates for all the common stock of the Connecticut Company, indorsed in blank, as security for the faithful performance by him and the Construction Companies of the covenants, terms, and conditions of the contract. By the twelfth article of the contract, it was "expressly understood and agreed that in so far as the Trust Company is concerned this contract shall not take effect until the examination now being made by the representatives of the Trust Company of the properties, rights, privileges, and franchises of the various companies shall be completed, and shall not then take effect unless the report of the engineers and accountants making such examination shall be entirely satisfactory to the said Trust Company."

This contract was laid before the directors of the Connecticut Company at a meeting held December 31, 1901, and the action was taken which appears later in this opinion. Immediately following this action, three of the five directors resigned, and Trust Company nominees were elected in their stead.

January 3, 1902, the Trust Company wrote Lovell, as president of the Construction Companies, as follows: "Referring to the agreement of December 28, 1901, between [naming the parties], we beg to advise you that the examinations made by us under article XII of said contract have been completed; that the results of said examinations are satisfactory to us, and that we are prepared to accept said contract upon the express understanding and agreement on the part of the Massachusetts Construction Company and the Massachusetts Construction Company Incorporated that they will furnish and pay for the work, materials, and machinery necessary for the entire completion of the high tension service on all of the roads now constituting the New Hampshire Traction Company, including rotaries, wiring, etc., and that there shall be no claim whatsoever against the New Hampshire Traction Company . . . on account of the completion of said high tension service." To this the Construction Companies, by their president, Lovell, replied in their corporate names, under the same date, "that the same is in all respects entirely satisfactory to the Massachusetts Construction Company and the Massachusetts Construction Company Incorporated, the said companies agreeing to furnish and pay for all the work, materials, and machinery necessary for the said high tension service." There was no other acceptance of the modified contract, except by implication from action subsequently taken under it. The sale was of all the assets of the Connecticut Company.

The Trust Company subsequently sold to the Traction Company the securities mentioned in the contract. These securities represented an outlay by the Trust Company of $1,247,163.75; and it received therefor from the Traction Company bonds, apparently worth at that time $1,958,945.47. This shows a profit of $711,781.72; and the Trust Company was required by the court's decree to account to the plaintiffs for this sum, so far as necessary to satisfy their claims as holders of preferred stock of the Connecticut Company. It was also found that the value of these securities, if determined by subsequent developments, was never as much as the Trust Company paid for them.

The Trust Company's title to the securities in question depends upon this contract of December 28. The company says it acquired a legal and absolute title to these securities by virtue of this contract and its subsequent acts in fulfilment of the provisions of the contract. This claim must be sustained if the contract was duly executed and is not void or voidable for any reason. The plaintiffs, in their bill, do not question the due execution of the contract, but allege that it is void because it was procured from the Construction Companies by means of a conspiracy to defraud the

plaintiffs, in which the Trust Company was an active party. Briefly stated, the plaintiffs' claim as alleged in their bill is, that although the contract was executed—signed, sealed, and delivered—by the parties, it is void because it is the product of conspiracy and fraud participated in by the Trust Company. The defendants, in their answers, deny the conspiracy and fraud, and the issue thus raised appears to have been the one that was tried. But in the view which the superior court took of the facts and the law applicable thereto, it was deemed by him to be unnecessary to pass upon the issue of intentional fraud, and he did not do so. He disposed of the case on the sole ground that the contract was voidable by the plaintiffs because of constructive fraud, or fraud in law. He made the following findings and ruling with reference to this matter: "From the time of its organization, the Traction Company was merely an agency controlled by the Trust Company. The same thing has been true of the Connecticut Company since December 31, 1901, at least. The so-called contract of December 28, as modified by the Trust Company January 3, if ever agreed to by the Connecticut Company, was so ratified after the Connecticut Company was controlled by the Trust Company. Taking the property in this way, the Trust Company is chargeable as trustee, and must account for the interest of the non-assenting preferred shareholders of the Connecticut Company." The Trust Company excepted to these findings of fact, because, as it alleges, the findings are not justified by the evidence. It also excepted to the ruling of law, and moved to set aside the decree in the plaintiffs' favor because of errors covered by these exceptions. The motion was denied, subject to exception.

As the court did not pass upon the question of intentional fraud, it must be regarded as a fact, for the present at least, that the Trust Company's apparent title under the contract of December 28 is not jeopardized or in any way affected by such fraud. If it is invalid, it must be wholly because of constructive fraud. The ruling of law excepted to seems to be based upon the idea that all the contractual provisions set forth in the instrument of December 28 and in the letters of January 3 together constitute a single, indivisible contract,—"the so-called contract of December 28, as modified by the Trust Company, January 3,"—which was never actually agreed to by the Connecticut Company, but, at most, was only ratified by the company by acquiescence and compliance with its provisions after it was supposed to be in effect, and this only after the company was controlled by the Trust Company. The Trust Company says the contract is not of this single, indivisible character, but is composed of a main contract evidenced by the instrument dated December 28 and a supplemental or col-

lateral contract evidenced by the letters. While it says that both contracts were executed by the Connecticut Company by agents thereto duly authorized, and denies that such execution was induced by its control of that company, it further says that any infirmity that may exist in the contract evidenced by the letters, whether arising from want of Lovell's authority to make the contract in behalf of the Connecticut Company, or from the Trust Company's control of the company at the time, cannot invalidate the main contract.

It must be borne in mind that the control found by the superior court has existed only since December 31, 1901, "at least." If the qualifying words "at least" imply that the control may have existed from an earlier date, they certainly do not imply that it did exist earlier. That was the day when a majority of the directors of the Connecticut Company resigned and Trust Company "nominees" were elected in their stead. It does not appear that the persons so elected were stockholders or officers of the Trust Company, or had any connection whatsoever with it other than being its nominees. Nor does it appear that they were hostile to the Connecticut Company, or had personal interests adverse to it or its stockholders. The significance of the term "nominees" appears from a consideration of the article in the contract of December 28, by which it is provided that "the present officers and directors of the Construction Companies shall resign, and there shall be elected as their successors such persons as the Trust Company may desire, who shall remain in office, at the pleasure of the Trust Company, until the final completion and carrying out of all the matters and things provided for in and by this contract." There is nothing in this provision which requires the directors elected in accordance with it to disregard or wrongly perform the duties which, under the law, they would owe the Connecticut Company and its stockholders, as directors. If the contract had not then been executed and gone into effect, as seems to be admitted, this change in the directors was obviously made provisionally, in expectation that it would soon become the contract of the parties. Another finding of the superior court is, that by the contract of December 28, the control of the Connecticut Company was turned over to the Trust Company,—evidently referring in part to the same provision of the contract. It appears from these findings that the control which the court made use of in applying the doctrine of constructive fraud to the case resulted from the contract; the contract did not arise from the control. Until the contract was understood to be in force, there was no control. If the contract was executed December 31, the control begun on that day; if it was not executed until January 3, the control would

not begin until that date. In the latter event, the directors elected December 31 as "Trust Company nominees" did not hold their positions, between that date and January 3, for the purpose of carrying the provisions of the contract into effect, for there was no contract. It does not follow, as matter of law, from the sole fact that they were "Trust Company nominees,"—such persons as the Trust Company desired,—that during this interval of time they were disqualified to act as directors upon matters pending between the Connecticut Company and the Trust Company, even if they would be so disqualified after the contract was executed and went into effect. The presumption, in the absence of all evidence to the contrary, is that they would act in the office of director in good faith and according to law. This presumption certainly is not weakened by the fact that the "nominees" were lawyers and, so far as appears, lawyers in good standing in their profession. If it appeared that they were elected for the purpose of controlling the Connecticut Company's discretion or will in the making of the contract, or that they were so far controlled by the Trust Company as to be subservient to its will, it might be that the law would regard them as disqualified even to the extent of being counted as directors in matters pending between the two corporations. But nothing of this kind appears in the record. Furthermore, it does not appear that they took any part whatsoever in negotiating for, or executing, the contract.

Recurring to the record of the meeting of the Connecticut Company directors held December 31, it appears that the directors present at the meeting were Lovell (the president of the corporation), Pride, and Barter, a majority of the board of five members. It is not found that these directors or either of them were controlled by the Trust Company, or were directors or stockholders of the company. Lovell was the owner of the common stock of the corporation. His interests, like the plaintiffs', and more vitally than theirs, were adverse to those of the Trust Company; for his rights in the Connecticut Company, as the owner of its common stock, were subordinate to those of the plaintiffs. The record of the meeting, after setting forth the fact that Lovell had been in negotiation with the Trust Company relating to the matters, stated that he laid before the directors "an agreement dated the 28th day of December, 1901, by and between [the parties, naming them], being as follows." Then follows a copy of the agreement in full. Thereupon, it was unanimously resolved by the directors that the officers of the company "be and they hereby are authorized and directed to make, execute, and deliver the said contract"; "that the execution of the said contract by the officers of this corporation in its name be and the same is hereby ratified

and confirmed and adopted as the valid and binding act of this corporation"; and "that the officers of this company be and they hereby are authorized and directed to do each and every and all of the things necessary or desirable in order to give full force and effect to the intention of the said contract, executing the transfers and delivery of the securities therein set forth." Thus it is seen that the corporation acted directly upon the contract through its directors. The directors themselves wholly exercised the discretion and will of the corporation in respect to the making of the contract. The only power or authority delegated by them to others was the authority to perform the ministerial acts of executing and delivering the contract. This authority did not include authority for an exercise of discretion by the officers to whom it was delegated, for they were expressly directed by the votes to execute and deliver the contract. It is difficult to imagine a more emphatic and complete execution of the powers of a corporation by its directors than was this action of the Connecticut Company. The by-laws of the corporation provided that "the property affairs and business of the corporation shall be managed by the directors, who may exercise all such powers of the corporation as are not by law or by the charter or by-laws required to be otherwise exercised, subject however to the control of the common stockholders; but no action by the common stockholders shall invalidate any prior act of the directors." There is no provision in the charter or elsewhere in the by-laws requiring the powers exercised in the making of contracts to be exercised otherwise than by the directors. The common stockholders could not by subsequent action, if they would, invalidate the directors' action in this case. In fact, Lovell, the owner of the common stock, appears from the record of the directors' meeting to have been the originating, moving, and guiding spirit in the transaction. These by-laws are in harmony with the law as to the powers of directors. P. S., *c.* 149, *s.* 3; *Charlestown etc. Co.* v. *Dunsmore*, 60 N. H. 85; *Wait* v. *Association*, 66 N. H. 581, and authorities cited; *Goodwin* v. *Company*, 24 Conn. 591; 2 Cook Stock & Stockh., *ss.* 708–712; 10 Cyc. 758; 21 Am. & Eng. Enc. Law (2d ed.) 863. It further appears that the authority and direction thus given the officers of the corporation were exercised and followed. The contract is signed "Massachusetts Construction Company Incorporated, by W. D. Lovell, president,—Attest, Edwin L. Pride, secretary," and a seal is attached to the signature. Pride was secretary of the corporation, and according to the by-laws had the custody of the corporate seal. That the corporation's power to make such a contract was ample distinctly appears from its certificate of incorporation, which, after setting forth that the corporation was organized for

the purpose of constructing and equipping railroads, street railways, electric light and power plants, and other works of public and private utility, and of purchasing, holding, selling, pledging, or otherwise disposing of stocks, bonds, and securities of corporations, etc., etc., contains the following provisions: "To allow or cause the legal estate and interest in any business or property acquired, established, or carried on by the corporation to remain, to be vested or registered in the name of, and carried on by, any individual, or by any foreign or other corporation or company formed or to be formed, and either upon trust for, or as agents or nominees of this corporation, or upon any other terms or conditions which the board of directors may consider for the benefit of this corporation," and "to carry out all or any of the foregoing objects in any part of the world, as principals or agents, and alone or in partnership with, or for the joint account of, the corporation and any corporation, company, firm, or association or person, and to do all such other things as are incident or conducive to the attainment of the above objects." These powers are sufficiently comprehensive to include the making of a contract like that under consideration, even if the contract constituted the Connecticut Company the agent of the Trust Company to complete and carry out all the matters and things provided for by it, as therein stipulated.

In view of these facts, it must be held that the contract of December 28 was made and executed by the corporation, even if, as the parties seem to agree, it was not in fact executed until January 3, unless the change in directors, December 31, *ipso facto* abrogated the authority delegated to the officers of the corporation just before the change, or unless the contract is so intimately and inseparably connected with the agreement contained in the letters of January 3 relating to the high tension service that any infirmity there may be in that agreement also exists in the sealed instrument.

The officers appointed by the directors, December 31, to execute the contract of December 28 became thereby agents of the corporation—not agents of the directors. It is true that the directors were at liberty, if they saw fit, to withdraw the corporation's assent to the contract any time before it was agreed to by the Trust Company, and to revoke the authority delegated to the officers of the corporation in respect to the execution and delivery of the contract. But, as has been previously suggested, the mere fact that the new directors elected December 31 were Trust Company nominees did not, as matter of law, disqualify them from holding the office between that time and the execution of the contract, although the subject of making the contract was pending. There were five

directors during this time,—a full board,—two whose independence of the Trust Company is not questioned and the three Trust Company nominees. The corporation certainly was not disabled from acting by the want of a sufficient number of directors to constitute a quorum. *Non constat*, that the new directors, as well as the two holding over (Lovell and Pride), did not act in good faith and in fulfilment of their legal duties as directors, by omitting to take steps to have the action of December 31 reconsidered. The action of the majority of the old board of directors in resigning would justify the new directors in the belief that the corporation intended, at least, to give the Trust Company a reasonable time in which to act upon the contract, and not to withdraw its assent thereto in the meantime. It is a fair inference from the omission of the directors to take steps to reconsider the votes passed December 31, that they, the same as the directors who passed the votes and the same as the plaintiffs after they learned of the contract, considered the contract advantageous to the Connecticut Company and its stockholders. There is certainly nothing in this omission having a tendency to prove bad faith on the part of the directors, or control of them by the Trust Company. If the contract was not formally executed until January 3, the corporation was then, and during all the intervening time, provided with directors capable of exercising its will and discretion, and, so far as appears, not disqualified to act. The change in directors, December 31, did not, as matter of law, abrogate the authority and direction which the officers of the corporation had just received to execute the contract of December 28; but such authority and direction continued in force until they were exercised and followed, whether on January 3 or earlier. Such execution of the contract bound the Connecticut Company and rendered any other acceptance of the contract unnecessary.

The question remains, whether the contract evidenced by the sealed instrument is so intimately and inseparably connected with the agreement contained in the letters of January 3 that it must fall if that falls. Assuming, as the parties practically agree, that the contract of December 28 was delivered completely executed and the letters were exchanged at one and the same time on January 3, the question is, whether they form a single, indivisible contract. The answer depends upon the intention of the parties as shown by the terms and formal character of the documents which they used to express their intention, when read in the light of the circumstances under which the documents were made: 4 Wig. Ev., *ss.* 2430 *et seq.*, 2442. In other words, the court is called upon to interpret the documents. This is a question of law, the decision of which is reviewable in this court. *Prescott* v.

Hayes, 43 N. H. 593; *Kendall* v. *Green*, 67 N. H. 557, and numerous authorities there cited. Referring to the formal character of the documents, the contract of December 28 is a sealed instrument,—a specialty or deed,—while the letters are not under seal, and the promise evidenced by them is a simple contract merely. If the letters had been exchanged prior to the execution of the deed, the presumption would be strong, if not conclusive, that the promise contained in them was finally merged in the deed. But if the deed and the letters were exchanged at one and the same time, this presumption is not so strong. If a merger had been intended, there would be no need of the letters. The fact that they were exchanged at the time the execution of the deed was completed has a strong tendency to prove an intention that they, as well as the deed, should have effect. Although the letters specifically refer to the deed, they do not purport to be a part of it, or to vary its provisions in any respect. The deed could be altered or modified only by an instrument of as high nature as itself; it could not be altered by a parol agreement such as the letters constituted. *Wendell* v. *Bank*, 9 N. H. 404, 419; *McMurphy* v. *Garland*, 47 N. H. 316, 321, and authorities. The Trust Company's letter, after stating that the results of its examinations were satisfactory to it, says: "We are prepared to accept said contract [deed] upon the express understanding and agreement" on the part of the Construction Companies that they will complete the installation of the machinery and appliances necessary for a high tension service on the railways of the Traction Company. The Trust Company was prepared "to accept" the contract—that is, to admit and agree to it, to accede to or assent to it. It was prepared to agree to the contract as drawn up—not in some modified form. The proposition was, not that the deed should be changed or modified in any particular, but that the Construction Companies should make an additional or supplemental agreement in consideration of the Trust Company's agreeing to the deed. It relates to the execution of the deed—not to the provisions contained in the deed. The plain import of the language of the letters is, that if the Construction Companies would make the desired agreement relating to the instrumentalities for a high tension service, the Trust Company would become a party to the deed. It is immaterial whether this proposition of the Trust Company arose from dissatisfaction with the results of the examinations made under the provision of the deed, by which the deed was not to take effect as to that company unless the results were satisfactory, or whether it arose from some other cause. If it arose from this cause, and the expression of satisfaction in the letters was intended to be conditioned upon the making of the promise proposed, the deed would have to be

modified, or a supplemental contract would be necessary, to comply with the proposition. The deed itself did not provide for such contingency, otherwise than that in such case it should not be effective as to the Trust Company. This provision is in the nature of a condition subsequent, by which the deed might be defeated for the cause named. Anson Cont., *ss.* 356 *et seq.* It does not provide for a change in the terms of the deed that will secure satisfactory results. That matter is left open for future negotiation and contract, if the parties would avoid a defeasance of the deed. Lovell, as president of the Construction Companies, assuming to act for them, made the proposed agreement, and the Trust Company executed the deed. It thereby agreed to accept the deed, and bound itself to its provisions.

Nor does the evidence tend to prove that the parties intended to merge the deed in a single simple contract covering all the subjects contemplated by them, if the law would allow such merger,—a point that has not been considered. *Hydeville Co.* v. *Company*, 44 Vt. 395; *Canal Co.* v. *Ray*, 101 U. S. 522; Bish. Cont., *ss.* 133, 136. If such had been the intention, it is inconceivable that the parties would take pains to execute the contract of December 28 by itself, as a deed. It would have been a simple matter to adopt in the letters the terms of that instrument, expressed in full or by reference, and thereby avoid the execution of the deed and consequent liability to a misunderstanding of their intention. The acceptance and execution of the contract as a deed is well-nigh, if not absolutely, conclusive evidence that it was not intended to be merged in a simple contract. If corroborative evidence were necessary, it is found in the fact that the persons who acted as agents of the corporations in executing the deed were different from the persons who took part in the correspondence,—the agents of the Connecticut Company who executed the deed being Lovell and Pride, while Lovell alone signed the letter, and the agents of the Trust Company who signed the deed being O. W. Bright, second vice-president, and L. Carroll Root, secretary, while the letter in behalf of that company was signed by A. M. Hyatt, vice-president. This evidence has a strong tendency to prove that the acts were in fact several.

The deed is complete in and of itself. The plaintiffs challenge this proposition because of the provision by which the contract was not to take effect as to the Trust Company until the examinations in progress by the company's agents were completed, and not then unless the report of the examiners should be entirely satisfactory to the company. This provision postponed the time when the contract was to take effect, but it does not affect the completeness or validity of the contract. By it, the Trust Com-

pany reserved the right to defeat the contract if the examiners' report was not satisfactory. It reserved no right to defeat it for any other reason. It could not exercise this right arbitrarily and without reasonable cause. But if, as seems agreed, the sealed contract and the letters were signed and delivered at the same time, the contract became complete at that time, according to the plaintiffs' theory, since the report had then been made and the Trust Company's letter expresses its satisfaction therewith. The subject of the high tension service is not treated of or referred to in the deed. This subject is wholly independent of the subjects of the provisions therein contained. It seems to have been an afterthought, occurring after the preparation of the deed. The letters cover this subject completely, in and of themselves. It is true that a compliance by the Connecticut Company with the promise contained in the letters would reduce its net assets, after the satisfaction of its obligations, below what they would be if the deed had been the only contract between the parties; but this fact has no probative force in proving that the promise was intended to be included in the deed. Such would be the result, alike whether all the contractual provisions were incorporated in a single contract, or in a main and supplemental contract. Suppose the agreement relating to the installation of machinery and appliances for a high tension service had been made directly with the railway corporations, and the Trust Company had declined to accept the deed until it was made: Could there be any doubt that such agreement would be collateral to the deed? It is not perceived how the fact that it was made with the Trust Company renders it any the less collateral in character.

The inherent natures of the documents, their terms, and the mutual independence of the subject-matters of their respective provisions have a very strong, if not conclusive, tendency to prove that the parties understood and intended the agreement evidenced by the letters to be supplemental to the deed. No evidence has been pointed out, or has been discovered, of sufficient weight to overcome this evidence. It is, therefore, held that the contracts together do not constitute a single, indivisible contract, as seems to have been held by the superior court, but they are two contracts,—a main contract evidenced by the deed and a collateral or supplemental contract evidenced by the letters,—the consideration of the latter being the execution of the former by the Trust Company.

Contracts so associated and related are not unknown to the law, and are held to be valid. *Hersom* v. *Henderson*, 21 N. H. 224; *Quimby* v. *Stebbins*, 55 N. H. 420; *Hutt* v. *Hickey*, 67 N. H. 411; *Proctor* v. *Wiley*, 55 Vt. 344; *Carr* v. *Dooley*, 119 Mass. 294;

Durkin v. *Cobleigh*, 156 Mass. 108; *Rackemann* v. *Company*, 167 Mass. 1; *Drew* v. *Wiswall*, 183 Mass. 554; *Chapin* v. *Dobson*, 78 N. Y. 74; *Shughart* v. *Moore*, 78 Pa. St. 469; *Welz* v. *Rhodius*, 87 Ind. 1; *American etc. Ass'n* v. *Dahl*, 54 Minn. 355; *Morgan* v. *Griffith*, L. R. 6 Exch. 70; *Erskine* v. *Adeane*, L. R. 8 Ch. 756; *Angell* v. *Duke*, L. R. 10 Q. B. 174; *DeLassalle* v. *Guilford*, [1901] 2 K. B. 215; Steph. Ev., *art.* 90. In *Durkin* v. *Cobleigh*, *supra*,—a case that may be taken as a fair sample of all the cases cited,—the plaintiff took from the defendant a deed of land described as bounded upon a street on the defendant's land, referring to a plan which showed the street, but the deed contained no covenant that the defendant would build the street or cause water to be introduced into it. The plaintiff alleged that, to induce him to buy the lot, the defendant orally promised to grade and build the street and to cause the city water to be put into it within a specified time. It was held that the alleged promise was an independent agreement, collateral to the deed, which, if proved, would entitle the plaintiff to recover damages for a breach of it. So, in this case, to induce the Trust Company to accept the contract of December 28, Lovell, in the names and behalf of the Construction Companies, promised the Trust Company that they would complete the machinery and appliances necessary for supplying the railways of the Traction Company with a high tension service. For a breach of this promise, the Trust Company might maintain an action of assumpsit (*Hutt* v. *Hickey*, *supra*), but not an action of debt or covenant broken, founded upon the deed.

The contract of December 28 having been duly executed by the Connecticut Company, and the agreement evidenced by the letters of January 3 forming no part of it, but being an independent, supplemental, or collateral agreement having no connection with it other than in the matter of consideration, and the Trust Company's title to the securities for which it is asked to account being dependent upon the validity of the main contract only, it is unnecessary to consider whether the collateral agreement is valid and binding upon the Connecticut Company or the plaintiffs. If this agreement is voidable by the Connecticut Company or the plaintiffs because Lovell had no authority to make it, or if it is void because of fraud, the fact does not affect the validity of the main contract and of the Trust Company's title. Nor is it necessary to consider the questions raised by the case relating to ratifications of the contract by the corporation or its stockholders, and relating to acquiescence therein by the plaintiffs or laches on their part, since its execution by the Connecticut Company through the agency of officers clothed with full authority in the premises renders all these questions immaterial. It may be remarked however,

in passing, that it appears the plaintiffs were informed of the contract of December 28 in the following January and considered it advantageous to them, and they expected the Trust Company would carry it into effect. If they did not understand its scope, it was their own fault. They appear to be business men of sound minds, and it must be presumed that they understood the contract when they read it. Although they did not expressly consent to the contract, it would seem that they acquiesced in it, knowing that the Trust Company was relying upon and acting under it.

The question, what remedy, if any, the Trust Company would be entitled to if the Connecticut Company attempted to disaffirm the collateral contract on account of Lovell's want of authority to make it, or on account of fraud, is also immaterial. If by reason of fraud, or accident and mistake, the Trust Company would have a right in such case to rescind the main contract, on the ground that the consideration for the company's becoming a party to it had failed (*Dow* v. *Harkin*, 67 N. H. 583; *Rackemann* v. *Company*, 167 Mass. 1), the Connecticut Company would have no such right, and the Trust Company might actively or passively waive its right. No attempt at rescission has been made; and it is extremely doubtful, to say the least, whether the Trust Company is now in a position in which it could exercise the right, if it ever had the right, the securities which it received under the contract having been converted into other property so that it cannot now restore them to the Connecticut Company and place the company *in statu quo*, actually or substantially.

As before stated, the general decree in favor of the plaintiffs is based altogether upon the court's findings and rulings relating to constructive fraud. The Trust Company's exceptions to these rulings are sustained, and consequently the decree must be set aside.

After the decree and findings had been filed, the Trust Company moved that the decree be set aside as against the law and the evidence, and that the bill be dismissed because there is no evidence upon which a decree for the plaintiffs, or either of them, can be sustained. The motion was denied upon the ground that there was evidence to support the decree, and the Trust Company excepted. While the motion was sufficiently broad in its terms to include the proposition that there was no evidence of intentional fraud that would support a decree for the plaintiffs, it is obvious that the court did not take that view of the motion. He states in his findings that he had not found it necessary to pass upon the issue of intentional fraud; and the case conclusively shows that his decree in favor of the plaintiffs is based altogether upon constructive fraud. He denied the defendants' motion because he

found and ruled that the evidence before him was sufficient to support the decree on that ground. Furthermore, a motion to dismiss the bill for want of sufficient evidence to support its allegations would properly come at the close of the plaintiffs' evidence, before the issues were submitted upon their merits. If it was denied and the defendants excepted, the decision would be reviewable upon its transfer to this court. But in this case the motion was not made until after the case had been submitted and decided, and it was not passed upon then. It would be a departure from the usual practice to take up and consider the question under these circumstances, and justice does not seem to require such course. According to the record, the question of intentional fraud is still before the superior court undecided. It is not before this court.

PARSONS, C. J., *concurring.* The decree for the plaintiffs rests upon the legal proposition that the defendants are bound to account as trustees to the plaintiffs for the property of the Massachusetts Construction Company Incorporated received by them. The defendants' main contention, under their exceptions to the decree, is that they received the property in question under and in accordance with the terms of a valid contract with the corporation in which the plaintiffs are stockholders, and therefore cannot be compelled to account except as provided in that contract. This question lies at the foundation of the plaintiffs' case, and is, briefly stated, whether there is error of law in the ruling of the trial court, that upon the facts the defendants are bound to account as trustees for the property involved.

The plaintiffs are preferred stockholders without voting power in the Massachusetts Construction Company Incorporated, a corporation organized under the laws of Connecticut. The plaintiffs alleged in their bill that, through the fraudulent coöperation of all the defendants, all the assets of the plaintiffs' corporation were taken from it and the plaintiffs' interest therein rendered valueless. Upon these allegations the parties went to trial, and a decree was ordered for the plaintiffs against the Trust Company. Upon request of the defendants, the facts found upon which the decree was based are stated. It appears therefrom that the question of fraud in fact, which was, on the pleadings, the question tried and submitted to the trial court, has not yet been decided. The court adds to this statement, which would obviously, by itself, be fatal to the decree, other facts and rulings upon which the decree is based. In this situation the question is, whether the facts stated authorize the decree; and it cannot be assumed by the general decree that facts sufficient to authorize it were found. *Noyes* v.

Patrick, 58 N. H. 618; *Concord Coal Co.* v. *Ferrin*, 71 N. H. 33; *Allen* v. *Association*, 72 N. H. 525, 527; *Jaques* v. *Chandler*, 73 N. H. 376.

The bill charged that the defendants' fraudulent purpose was effected by means of two contracts between the Connecticut Company and the Trust Company, dated November 12 and December 28, 1901. The findings made relate entirely to the contract of December 28. There is much evidence, and findings are made, as to transactions between the parties antedating the contract of December 28 and the formation of the Connecticut Company. But although these matters may be of great importance upon the question of actual fraud, in discussing the ground upon which, in the present posture of the case, the decree can be sustained, if at all, it is only necessary to consider the findings as to this contract. Although the bill alleged fraud in fact, it appears that at the trial the plaintiffs took a further position. They claimed "that the transfers by the Connecticut Company to the Trust Company, under the agreements dated November 12 and December 28, 1901, were fraudulent in fact; or, if not made with wrongful intent, were mere bargains of the Trust Company with itself, as represented by its agents, and therefore it must account." Upon the issue of fraud in fact, the character of the contract, whether fair or "grossly inequitable," would be material and important; but if the facts disclose a situation in which the law conclusively presumes fraud, the fairness of the contract would be no answer to the charge. As there is no finding on the issue of actual fraud made by the pleadings, no facts as to the character of the contract, whether inequitable or otherwise, are reported, and no question in relation thereto is involved in the case. The defendants deny the charge of fraud in fact; but the questions which might be presented upon this issue are not now before the court.

Upon the second claim, the defendants say that "all contracts were made between independent parties." They do not contend in argument that if the contract involved in the finding was a mere contract of the Trust Company with themselves, made by their agents on both sides, the plaintiffs would be bound. That the same person cannot at the same time be the buyer and the seller of property to which he holds a fiduciary relation, is elementary. See authorities cited in *Pearson* v. *Railroad*, 62 N. H. 537; *Fisher* v. *Railroad*, 50 N. H. 200, 205. The question, therefore, upon the primary issue of liability, is whether it is found that the contract of December 28 was a contract of the Trust Company with themselves. The formal execution of and subsequent action under this contract—an instrument under seal—by the parties thereto was alleged in the bill and admitted in the answers. By

its terms, the interest of the Connecticut Company in certain securities and railways was sold and transferred to the Trust Company, and the parties entered into various engagements in relation to the securities and the construction and completion of the various railways. The plaintiffs do not claim anything under the contract; but the contention is, that because of the invalidity suggested no title to the property purported to be conveyed thereby passed to the Trust Company, and that therefore they must account therefor as trustees and cannot discharge themselves in accordance with the terms of the contract. The question, therefore, is merely whether the Trust Company acquired title to the property of the Connecticut Company by virtue of this contract.

The plaintiffs had no voting power in their corporation. The common stockholders having entire control of the corporation involving their own interests and those of the plaintiffs, the relation of trust between them and the preferred stockholders with an interest, but no voice, in the corporate management more clearly appears, than in the relation of the majority to the minority stockholders who have the right to take part in the meetings of the corporation. But in this respect it is said "the majority stand in much the same attitude toward the minority that the directors sustain toward all the stockholders." 2 Cook Stock & Stockh., *s.* 662; 1 Mor. Corp., *s.* 529; *Farmers' etc. Co.* v. *Railway*, 150 N. Y. 410, 430, 431. The relation, therefore, between the two classes of stockholders in this corporation is plainly one of trust. Any transactions of the common stockholders in violation of the duty imposed upon them by the trust relation would be a fraud upon the preferred stockholders. The relation between the common stockholders and the other party to a contract attempted to be made by them in behalf of the corporation might be such that the law would conclusively presume the transaction to be a fraud upon the preferred stockholders, without any investigation of its fairness, as, for instance, if Lovell, owning all the common stock, had attempted, through directors chosen by him for the purpose, to transfer all of the corporate property to himself. Or such a transaction might be in fact a fraud upon the non-voting stock if the parties having control of the corporation, induced because of private advantage to themselves, attempted to contract on behalf of the corporation upon terms "grossly inequitable" to the corporation, as, for example, if Lovell, because of the $6,000 salary secured to himself, attempted to transfer or have transferred the corporate property to the Trust Company for less than it was worth. A transaction of this character might be avoided for fraud; but the fraud which would avoid it would be fraud in fact, such as the plaintiffs alleged in their bill, but which has not yet

been found to exist. If the Trust Company, by their influence over Lovell, or by any means, induced him to fail in performance of his duty as trustee toward the plaintiffs, and to exercise his control over the corporation in the interests of the Trust Company instead of in behalf of the Connecticut Company, such a transaction would involve fraud in fact, which if it can be found on the evidence, has not been. Whether or not the evidence has any tendency to prove control in this way is not material to the present discussion.

The contract in question is set out in the record. It was drawn up on its date, but was executed "some days later." The precise date does not appear. It is not necessary to recite the contract in full. A brief reference to some of its provisions only will be sufficient. It provided, as already stated, for the sale of securities and railroad rights to the Trust Company. For these the Trust Company were to pay cash, and debentures of and stock in the New Hampshire Traction Company, a holding company organized and controlled by the Trust Company. The cash, debentures, and certificates were to be retained by the Trust Company. The cash was to be used to pay debts of the Construction Company which that company guaranteed did not exceed the amount of cash the Trust Company were to pay, and the debentures and certificates of stock were pledged to secure any excess indebtedness. The Trust Company were to furnish funds to complete the railways, and were authorized to carry on the construction in the name of the Construction Company, and were to have control of that company for that purpose. Such persons were to be chosen officers of the company as the Trust Company might desire, to remain in office at the pleasure of the Trust Company until the final completion and carrying out of all matters and things provided for in and by the contract, Lovell agreeing to furnish stock to qualify the directors and that he would, pending the carrying out of all the terms and conditions of the agreement, deposit with parties named certificates for all the common stock of the company indorsed in blank, as security for the faithful performance of the terms of the contract by himself and the Construction Company. The contract also provided for the employment of Lovell in and about the construction of the railways for the term of two years at a salary of $6,000 a year. It was further provided that the contract should not bind the Trust Company until an examination then being made by engineers and accountants representing the Trust Company was completed, and not then unless their report was entirely satisfactory to the Trust Company. December 31, the draft of the contract was laid before the directors of the Connecticut Company, at a meeting regularly called and held. By for-

mal vote, the officers of the company were authorized and directed to make, execute, and deliver the contract. The directors further voted that the execution of the said contract by the officers of the corporation in its name be and the same hereby is confirmed and adopted as the valid and binding act of the corporation. The officers were further directed by vote of the meeting to do whatever was necessary to give force and effect to the contract. None of the directors, or officers, or common stockholders of the Construction Company were, so far as the findings go, or so far as there is any evidence which has been pointed out, at this time stockholders, officers, or agents of the Trust Company. There is nothing in the findings or evidence establishing any fact which, in the absence of fraud in fact, invalidates as matter of law the assent of the plaintiffs' corporation given in this formal manner to the contract in question. The corporate assent, formally given without fraud, binds all the stockholders.

If the corporation in its entirety is not bound, it can only be because of something subsequent to the formal assent of the directors to a contract which, under the charter and by-laws of the corporation, they had power to make. It does not, as before stated, appear when the actual execution of the contract by the officers of the corporations took place. It appears to be conceded in argument that this was done January 3, 1902, when the result of the examination by the Trust Company's engineers and accountants was communicated to Lovell, as president of the Construction Companies. If it had not been understood that the formal execution would, or might, precede the completion of such examination, the provision of the contract that it should not be binding upon the Trust Company until then seems superfluous; but such provision may have been inserted out of abundant caution. Between the assent given by the directors and the passing of the letters of January 3, it appears that, December 31, three of the five directors of the Connecticut Company resigned, and Trust Company nominees were elected in their stead; and it is found that since December 31, at least, the Connecticut Company was merely an agency controlled by the Trust Company.

January 3, 1902, the Trust Company addressed to Lovell, as president of the Construction Companies, a letter stating that the examinations made under the contract have been completed, "that the results of said examinations are satisfactory to us, and that we are prepared to accept said contract upon the express understanding and agreement on the part of the" Construction Companies that they will pay the entire expense of the completion of the high tension service upon all of the roads now constituting the New Hampshire Traction Company. Lovell replied on the same

day, as president of both companies, agreeing in behalf of the companies to bear all the expense necessary for the high tension service. It was argued that none of the agreements entered into, or attempted to be entered into, between the corporations could become binding until January 3; that, as it is found that at that date the Connecticut corporation was merely an agency controlled by the Trust Company, any contract consummated after December 31 is invalid as matter of law. But the finding must be construed in the light of the evidentiary facts upon which it is based, the use made of it, and the other findings in the case. It is clear it was not intended to find such control existed at the time the directors gave the corporate assent to the instrument dated December 28, for no attempt is made to support the decree by any ruling that such votes were not effective in law as corporate acts. The finding "since December 31, 1901, at least" implies that if there was evidence tending to establish such relation at an earlier date, it was considered insufficient to establish the fact. The only fact reported as occurring subsequent to the vote of the directors and before January 1, at which date the agency relation is found to exist, is the substitution of nominees of the Trust Company for a majority of the existing board of directors. The finding is a statement of the legal result of this act, as understood by the trial court. But assuming that the three directors then chosen were so related to the Trust Company as to be incapacitated legally to represent the Construction Company in any dealings between the two corporations, there is no finding or evidence that these directors acted in any way as representatives of either party in the matter. If the corporation could not act through them, their dual relation did not prevent the corporations from acting. The remedy awarded in *Pearson* v. *Railroad*, 62 N. H. 537, was not an injunction restraining the corporations from contracting with each other while the same persons remained as directors of both corporations, but was the appointment of a trustee to manage so much of the business of the plaintiff's corporation as the existing directors were disabled to conduct. The incapacity in such cases relates not to the corporations, but to the officers. That this was the understanding of the finding by the trial court is clear from the subsequent ruling. It was not ruled that the agreements entered into January 3 were void because of the control then had by the Trust Company over the Construction Company; but after setting forth the action of the directors, December 31, and the letters, the court says "there was no other acceptance of the modified contract, except by implication from action subsequently taken under it," and the rule upon which the liability of the defendants is made to depend is further stated as follows: "The

so-called contract of December 28, as modified by the Trust Company January 3, if ever agreed to by the Connecticut Company, was so ratified after the Connecticut Company was controlled by the Trust Company. Taking the property in this way, the Trust Company is chargeable as a trustee." The only use made of the control found is to prevent acquiescence and action in carrying out the terms of the contract, by the persons then in control of the Construction Company, operating as a corporate estoppel against that company. It is further found that "by the contract of December 28, the control of the Connecticut Company was turned over to the Trust Company."

It seems clear that the agency of the Connecticut Company for the Trust Company is found to result from the provisions of the contract of December 28, and that it was not intended to find that the contract of December 28 or January 3 resulted from, or was tainted by, such control. The corporate assent to that contract was given by a board of directors legally capable of representing the corporation. The officers who performed the manual execution and delivery, whenever that was done,—Lovell, president, and Pride, secretary,—were not incapacitated by any relation to the Trust Company. Their act in so doing was purely ministerial, and in so acting they represented the corporation; and having been legally authorized to perform the act, their power to do so as representatives of the corporation was not affected by any vacancy or change in the board of directors. 1 Mor. Corp., s. 534. Taken by itself, it is clear that the agreement of December 28, executed with due formality by both parties, is valid and binding upon the plaintiffs' corporation.

The sole remaining question on this branch of the case is whether the letters of January 3 rendered the agreements of either or both of the parties contained in the sealed instrument nugatory and void. By that instrument the Connecticut Company sold and the Trust Company bought the property for which the plaintiffs seek to charge the Trust Company as trustees. The defendants' title is valid under that instrument, and they cannot be compelled to account except according to its terms, in the absence of fraud in fact, only because of the legal effect of the letters exchanged January 3 between the vice-president of the company on one side and the president of the companies on the other. The theory of the trial court appears to have been that these letters, with the agreements previously reduced to writing and at some time adopted under seal, constituted a new contract which Lovell, as president, had no power to make, and because of Lovell's want of power to bind the corporation as to the stipulation in reference to the high tension service, no contract was in fact

made and no title passed; and that the only legal principle by which the Connecticut corporation could be held to be bound was that of ratification by subsequent action or acquiescence. It may be conceded that the control found prevents, as matter of law, such corporate ratification as would otherwise result from the facts found, and that Lovell, as president, did not have power to bind the corporation to pay for the high tension service, as his letter of January 3 purported to do. The defendants do not assent to the latter proposition. In the view that has been taken, it is not necessary to decide the question of Lovell's authority in the matter, but it may be remarked that such authority does not attach to the office of president *Wait* v. *Association*, 66 N. H. 581. If there is evidence tending to show that the entire management of the corporation and of all its business had been entrusted to Lovell (*Jones* v. *Williams*, 139 Mo. 1,—37 L. R. A. 682), there is no finding to that effect, and the evidence does not establish the fact as matter of law. Whatever authority Lovell might have had under the general vote of the directors of November 11, 1901, to which attention has been called, in the absence of the specific authorization of December 31, the latter vote prescribed the terms upon which the officers were authorized to convey the property specified in the contract, constituting all the remaining assets of the corporation, and abrogated any authority to convey them upon other or different terms, if such authority could be found in earlier votes or other prior action. But conceding that Lovell had no authority to bind the corporation by his promise that it should pay for the high tension service, and that he did not do so by his letter of January 3, the conclusion of the trial court, that for that reason there was no contract between the corporation and the Trust Company, and that the Trust Company took the property without any title, is nevertheless erroneous. Upon the whole transaction, giving full effect to the stipulations of the letters, it is clear the Construction Company agreed to sell and the Trust Company agreed to buy the property. In the negotiations the Trust Company attempted to secure an agreement from the Connecticut Company that that company would pay for the high tension service. The discussion is hampered by the paucity of the facts reported as to the execution and delivery of the sealed instrument dated December 28. If this paper was executed and delivered, as might be inferred from its terms, in advance of the completion of the examination of the Trust Company's engineers and accountants, it became binding at once upon the Connecticut Company, and binding upon the Trust Company upon the completion of such examination, if the reports of such examination were entirely satisfactory to the Trust Company. In such situation, the contract

became binding upon the Trust Company by force of the acknowledgment contained in the Trust Company's letter of January 3, that the examinations provided for by the contract had been completed and that the results of such examination were satisfactory to them. Upon such a state of facts, the attempt of the Trust Company to add an additional stipulation to a contract already completely executed and binding upon them would have been entirely ineffectual, and Lovell's assent thereto, if otherwise effective as the act of the corporation, would be invalid for want of consideration. But if the expression of satisfaction contained in the Trust Company's letter, because of the stipulation as to a further agreement by the Construction Companies, must be interpreted as a limited or qualified satisfaction which would not of itself render the contract binding upon the Trust Company, it nevertheless appears from the pleadings and admitted facts that the Trust Company did accept the contract, took the property thereunder, and proceeded to deal therewith in accordance with its terms.

It is to be noticed that the parties executing the sealed instruments in behalf of the several corporations—Bright, second vice-president, and Root, secretary, for the Trust Company, and Lovell, president, and Pride, secretary, for the Construction Companies—are not the same individuals who represented the parties in the transactions of January 3—Hyatt, vice-president, for the Trust Company, and Lovell alone, for the Construction Company. This evidence would have a tendency to establish that the formal execution of the different papers was not contemporaneous. There is other evidence reported which, with the terms of the paper itself, tends to show that the formal execution of the sealed instrument was earlier than January 3. If this were so, the contract became binding upon the Trust Company when they proceeded to act under it, whether their satisfaction with the reports of their engineers and accountants resulted entirely from the reports themselves, or from the additional fact that Lovell, as president of the Construction Companies, had agreed for them that they should pay the high tension expense. If the contract was executed and passed before the completion of the examinations, the Connecticut Company, upon proof of the completion of such examinations and that their results were "entirely satisfactory" to the Trust Company, could have required the Trust Company to take the property and proceed with the execution of the contract, or pay damages for the breach. But the Trust Company having taken the property and proceeded to execute the contract, the question of satisfaction by which it was to become binding upon them is entirely immaterial.

But since it may have been found that the execution of the sealed instrument was contemporaneous with or subsequent to the letters, it must be concluded the fact was so found if such finding will tend to support the conclusion of the trial court. *Jaques* v. *Chandler*, 73 N. H. 376; and authorities *supra*. It is therefore necessary to consider the transactions upon the supposition that the contract dated December 28 was not executed by the Trust Company and exchanged between the parties until the time of, or after, the exchange of the letters of January 3. The letter of the Trust Company expressed their willingness to accept the contract already drawn up and assented to by the Connecticut Company, "upon the express understanding and agreement" that the Construction Companies would pay for the high tension service. The argument appears to be that the Connecticut Company has never entered into a valid agreement to pay for the high tension service; hence the Trust Company has never accepted the contract, and therefore there was no contract and no sale. But even if the Trust Company proposed as a condition of its entering into the contract that the Construction Companies should by a valid agreement bind themselves to pay the cost of the high tension service, such a proposition did not necessarily prevent the Trust Company from accepting, becoming a party to, and attempting to carry out the contract without such agreement on the part of the other companies.

If the Connecticut Company never bound itself to meet the expense of the high tension service, it is equally clear that the Trust Company definitely accepted the contract of December 28 by formally executing the same, by affixing its seal and the signatures of the proper officers, and by proceeding to carry it into execution. If the Trust Company was misled into so doing by mistake or misrepresentation as to Lovell's authority in the premises, the contract of sale would not be void, even if it might be avoided by an election of the party misled to rescind the contract and return what had been received under it. But as under such circumstances the contract would not be void, the Trust Company acquired a valid title to the property, good until it should elect to rescind and return it. But it is difficult to find legal ground for such rescission. The Trust Company dealt with the plaintiffs' corporation through its president as its agent. They knew that as president, merely, he had no implied power to bind the corporation. While suggesting that they required the express agreement of the Construction Company as a preliminary to their acceptance of the contract, they did accept it upon the assurance of the president and waived the corporate action which was necessary to make the agreement asked for binding upon the corporation. In the shape matters then stood,

it may be clear why, as a practical proposition, the assent of Lovell, the common stockholder, was considered sufficient; but nothing appears upon which it could be found that the Trust Company accepted the contract upon the mistaken belief that the corporate assent of the Construction Company had been given to the installation of the high tension service at its expense. There is no suggestion of any representations by Lovell as to his power in the matter by which they could have been misled. If the Trust Company cannot rescind the contract because of the refusal of the Connecticut Company to recognize Lovell's authority to modify the terms of the sealed instrument, it is very clear the Connecticut Company cannot do so; and even if on any ground the Trust Company could rescind, until they did so the contract would be binding upon the other party. *Butler* v. *Northumberland*, 50 N. H. 33, 39; *Willoughby* v. *Moulton*, 47 N. H. 205, 208. "The right to abandon a contract vests only in the party who has been guilty of no default." 1 Chit. Cont. (5th Am. Ed.) 741; *Greeley* v. *Wyeth*, 10 N. H. 15; *Bryan* v. *Bancks*, 4 B. & Ald. 401; *Clough* v. *Railway*, L. R. 7 Exch. 26, 34. The Connecticut Company agreed to sell their property to the Trust Company upon the terms embodied in the sealed instrument. If they did not agree and are not bound to pay the high tension expense, they get full relief by a discharge from the obligations of that agreement.

In addition to what has been said, there is a technical reason fatal to the conclusion of the trial court, assuming that the exchange of letters was anterior to or contemporaneous with the execution of the sealed instrument. When parties engage in negotiations by parol looking to the making of a contract, and do make such contract in writing, all stipulations by parol anterior to or contemporaneous with the written agreement are merged in the writing, which is conclusively presumed, in the absence of fraud or mistake, to contain the matter as to which the minds of the parties met. Where the final expression of the purpose of the parties is by specialty,—a writing under seal,—all other matter in writing is in parol and merged in the sealed instrument. Whatever the parties may have proposed orally or in writing as to the terms of their proposed treaty, the final expression of their agreement is the writing under seal, which cannot be contradicted or altered by any anterior or contemporaneous writing of less degree. This is not merely a rule of evidence, but a rule of substantive law. 4 Wig. Ev., *ss.* 2400–2455; Stark, Ev. (3d Am. Ed.) *995. The defendants suggest that an agreement which is collateral to, or independent of, the stipulations of the written or sealed instrument may be proved, even if the proof rests in parol. *Hutt* v. *Hickey*, 67 N. H. 411, 417; *Durkin* v. *Cobleigh*, 156 Mass. 108;

Morgan v. *Griffith*, L. R. 6 Exch. 70; and numerous authorities cited by them. The question in these cases is as to the proof or binding effect of the collateral agreement, which may be proved and enforced if collateral or independent, but if otherwise is merged in the written agreement which is not affected by a parol agreement which is not capable of proof. If the defendants are wrong in their contention that the stipulation of the letters is independent of, or collateral to, the stipulations of the sealed instrument, the only result would be the legal conclusion that the sealed instrument contains the entire matter to which the parties finally agreed; while if they are right, and the matter of the letters is open, the evidence that the Connecticut corporation did not become bound thereby would establish one of the steps necessary to a rescission by the Trust Company, but would not, as has been seen, render the contract void or voidable by the Connecticut Company. Whether, therefore, the stipulation of the letters is collateral or independent is not material, for neither conclusion would render the sealed instrument void.

As legal assent binding upon the plaintiffs' corporation was duly given to the taking by the Trust Company of the property in question, the conclusion of the trial court that the Trust Company is bound to account as trustee for the property so taken cannot be sustained; and the decree resting upon that conclusion of law must be set aside and the case stand in the superior court for a finding upon the undecided issue now before that court. The error in the finding lying at the foundation of the decree renders the consideration of the other objections urged by the defendants unnecessary at this time. If considered, the only decision that could be made would be as to their validity, or otherwise, as an answer to the decree upon the ground upon which it was placed. If the main question presented by the pleadings is decided in favor of the plaintiffs, the facts upon which such finding may be based may be material and important upon the other questions which have been suggested. It is not advisable to consider them at present, further than to say that the finding that if the defendants "are chargeable only for the value as determined by subsequent developments, then the property was never worth as much as they paid for it" is not understood to be a finding that the defendants paid full value for the property. If the defendants are obliged to account for the property, they would in any event be chargeable with its value when they took it. Subsequent developments would be evidence, but not the only evidence, on this question. Whether there is any evidence of actual fraud does not appear to be one of the questions transferred, and is not properly considered by this court while the question of fact remains

open in the trial court to which it was submitted without any objection of this character.

Case discharged.

WALKER and BINGHAM, JJ., concurred in the foregoing opinions: YOUNG, J., dissented.

Strafford,
March 5, 1907.

CLARK & a. v. MIDDLETON.

The fact that property is assessed for purposes of taxation at more than its fair market value is not sufficient to sustain the owner's petition for an abatement, in the absence of evidence that such valuation is disproportionate to that placed upon other property in the taxing district.

Where a petitioner for an abatement of taxes establishes the over-valuation of his own estate, but produces no evidence as to the appraisal of other property in the taxing district, he is not entitled to a finding that such other property was assessed at its fair market value, by force of the presumption of a performance of duty by public officers.

The rule that an objection which may be cured at the time by further evidence or action is waived unless the ground of objection is specifically stated, applies equally upon a motion to dismiss, where the ground of the motion could readily have been obviated if the objection had been made known.

PETITION, for an abatement of taxes. Trial by the court and decree for the plaintiffs. Transferred from the September term, 1906, of the superior court by *Stone*, J., upon the defendants' exception to the denial of their motion to dismiss the petition.

George E. Cochrane and *James A. Edgerly*, for the plaintiffs.

John Kivel and *George T. Hughes*, for the defendants.

PARSONS, C. J. The plaintiffs alleged as the ground upon which they asked an abatement of the tax assessed against them, that the valuation of their property upon which the tax was assessed was not in proportion to the valuation of other property. Upon competent evidence, at the trial it was found that the fair market value of the plaintiffs' property, appraised at $5,000, was $2,000; but there was no evidence of the valuation of any other property, or that the valuation of $5,000 placed by the selectmen

upon the plaintiffs' property was disproportionate to the valuation placed by them upon other property. There was, therefore, a failure of direct evidence tending to establish a point made essential by the pleadings, and which was material as matter of law. *Winnipiseogee etc. Co.* v. *Laconia*, *ante*, 82; *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 200. The decree for the plaintiffs appears to have been based on the assumption, or finding, that other property in the town was appraised at its fair market value. In the absence of direct evidence upon this point, the decree cannot be sustained; and the motion to dismiss should have been granted unless there are facts in evidence from which such inference could properly be made. It was the duty of the selectmen to appraise all property at its fair market value. P. S., *c.* 58, *s.* 1. If there is a presumption that public officers have performed their duty, sufficient in the absence of any evidence to sustain the burden of proof in favor of one relying upon the regularity and validity of their proceedings (*Cross* v. *Brown*, 41 N. H. 283, 289), such presumption will not aid the plaintiffs here, because they have by direct evidence established that all the property in Middleton, as to the appraisal of which there was evidence, was appraised at two and one half times its value.

The appraisal of other property has heretofore become material in tax abatement cases upon the claim of the plaintiffs that such property was appraised at less than its value. In this case the plaintiffs appear to concede that such property was not so appraised. The question, therefore, is not material unless it is claimed by the defendants that the other property in the town, as well as that of the plaintiffs, was appraised in excess of its fair market value. It does not appear that the defendants, in making their motion to dismiss, made such claim or stated the ground upon which they relied. It is a general rule that an objection which may be cured at the time by further evidence or action is waived unless the ground of the objection is specifically stated. *Blodgett* v. *Webster*, 24 N. H. 91; *Whitehouse* v. *Bickford*, 29 N. H. 471, 481; *Hayward* v. *Bath*, 38 N. H. 179, 183; *Ossipee Mfg. Co.* v. *Canney*, 54 N. H. 295, 314, 315; *Haines* v. *Insurance Co.*, 59 N. H. 199; *Edgerly* v. *Railroad*, 67 N. H. 312, 317; *Emery* v. *Railroad*, 67 N. H. 434, 435; *Matthews* v. *Clough*, 70 N. H. 600, 602; *Wheeler* v. *Railway*, 70 N. H. 607, 615. The principle has been applied, in the cases cited, to exceptions to evidence and to instructions to the jury; but it applies equally upon a motion to dismiss, where the ground of the motion could readily have been obviated at the time if the objection had been made known. *Baldwin* v. *Wentworth*, 67 N. H. 408; *Elwell* v. *Roper*, 72 N. H. 585, 587.

Upon the plaintiffs' concession that other property was appraised at its full value and the absence of claim that it was appraised at a higher rate, it may have been inferred that such was conceded to be the fact. Such conclusion may have been amply justified by the course of the trial, and if well founded would support the decree. If it were clear that the objection now insisted upon was not taken at the trial, the exception would be overruled; but although the ground of the motion to dismiss is not expressly stated, the character of the findings has some tendency to show that the question now raised may have been presented at the trial. Justice therefore requires that the case should be discharged for judgment for the plaintiffs according to the decree, unless the defendants at the trial based their motion to dismiss upon the ground that the property in the town other than the plaintiffs' was appraised in excess of its true value. If this was the defendants' contention at the trial, the motion should be granted on the evidence reported. Should the plaintiffs ask to reopen the case and for an opportunity to introduce evidence as to the appraisal of other property, the superior court has power to grant such request should justice require.

Case discharged.

All concurred.

Hillsborough,
March 5, 1907.

ROY v. HODGE.

A servant who has full knowledge of a danger which the master has promised to remedy cannot recover for an injury resulting therefrom, in the absence of evidence that such promise induced him to continue in the employment.

A servant is chargeable with appreciation of the danger of his employment if he realized that he was liable to receive substantial injury from abnormal conditions which were known to him; it is not necessary that he should have anticipated the precise manner of his injury.

CASE, for personal injuries alleged to have been caused by the defendant's negligence. Trial by jury, resulting in a disagreement. Transferred from the May term, 1906, of the superior court by *Pike*, J., upon the defendant's exception to the denial of his motion for a nonsuit.

The evidence tended to prove the following facts: The plaintiff, who was a man of ordinary intelligence and experienced in doing such work, was employed by the defendant to run a bench saw. He stood at the left of the saw to do his work, and threw

the edgings he made on a pile at the right of the bench. This pile was sixteen feet long and eight feet wide, and was separated from the bench by posts extending about fifty-four inches above the top of the bench. About a week before and again on the day before the accident, the plaintiff asked the defendant to remove the edgings because he feared they would fall on the bench and saw. On both occasions the defendant said he did not have time to attend to it then, but would do so "as soon as he got around to it." At the time of the accident the pile was about forty-two inches above the top of the bench at the front and higher at the back. The plaintiff attempted to throw an edging on the pile. The end caught on its rough face and in some unexplained way brought his hand in contact with the saw, thus causing the injury complained of.

Branch & Branch, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendant.

YOUNG, J. There is no evidence that the plaintiff was induced to remain in the defendant's service by reason of the latter's promise to remove the pile of edgings. *Bodwell* v. *Company*, 70 N. H. 390. Consequently the defendant's motion should have been granted unless there was evidence from which it can be found that the plaintiff did not appreciate the risk of his hands being brought in contact with the saw, incident to the unusual height of the pile of edgings; for the cause of the plaintiff's injury was the condition of the defendant's instrumentalities (*McLaine* v. *Company*, 71 N. H. 294, 296), and it is the rule in this state that servants whose injuries are caused in that way cannot recover from their master unless the cause of their injuries is a danger which he did and they did not know was incident to using his instrumentalities. *Demars* v. *Company*, 67 N. H. 404.

The first question, therefore, is whether there is any evidence from which it can be found that the plaintiff was not "chargeable with a knowledge of the material conditions which were the immediate cause of his injury"; or if he is, that he did not appreciate "the danger produced by the abnormal conditions in question." 1 Labatt M. & S., *s.* 279a. He admits that he knew of the material conditions which produced his injury, but claims he did not fully appreciate the danger incident thereto. *Demars* v. *Company*, *supra*. The test to determine that question is not to inquire whether he anticipated being injured in the precise way the accident happened (*Stevens* v. *Company*, 73 N. H. 159; *English* v. *Amidon*, 72 N. H. 301; *Slack* v. *Carter*, 72 N. H. 267; *Boyce* v. *Johnson*,

72 N. H. 41; *Lapelle* v. *Company*, 71 N. H. 346; *Whitcher* v. *Railroad*, 70 N. H. 242, 247; *Lintott* v. *Company*, 69 N. H. 628), but whether he knew he was liable to receive a substantial injury because of the unusual condition, if it was permitted to continue. *Shaw* v. *Railway*, 73 N. H. 65; *Murphy* v. *Railway*, 73 N. H. 18.

To apply that test to the facts in this case, it will be necessary to inquire whether there is any evidence from which it can be found that the plaintiff did not know that the unusual height of the pile of edgings increased the risk of his being injured by the saw. The only evidence on that issue is the fact that he asked the defendant to remove the edgings because he was afraid they would fall on the bench and on the saw. The question of whether he appreciated the risk of his injury therefore resolves itself into one of what he feared when he asked the defendant to remove the edgings: Was it the pile of edgings, or the saw? It is clear that he feared the saw, for he must have known that he had nothing to fear from the edgings, even if they fell on the bench while he was working at the saw; but he knew that if one fell upon the saw, or if his hands were brought in contact with the saw in any other way, he would be injured. So although he may not have known that if the end of an edging caught against the rough face of the pile his hands would be brought in contact with the saw, he knew the saw would cut his hands if they came in contact with it, whether the cause of their coming in contact with it was an edging falling from the pile, or the end of one he was trying to throw upon the pile striking its rough face. He also knew that the height of the pile of edgings increased the chances of something of this kind happening. So it cannot be found that the cause of the injury was a danger peculiar to the service, of which the defendant did and the plaintiff did not know; for there is nothing to show that the defendant either knew or ought to have known anything more in respect to the dangers incident to doing the work than the plaintiff did, or that the plaintiff did not know that the height of the pile of edgings increased the liability of something happening which would bring his hands in contact with the saw, even if he did not know just what that something might be. Although the plaintiff did not anticipate being injured in the precise way the accident happened, there is nothing to show he did not know that his hands would be cut if they came in contact with the saw, and that the unusual height of the pile of edgings increased the risk of something occurring that would bring his hands in contact with the saw.

Exception sustained: judgment for the defendant.

All concurred.

Cheshire,
March 5, 1907.

WELLS *v.* PARKER.

While a parol grant of an easement may constitute merely a revocable license, possession thereunder for twenty years by the grantee claiming to be the owner, with the acquiescence of the grantor, will establish title in the grantee by prescription.

In such case, if it is doubtful upon the evidence what the understanding of the parties was as to the character of the grantee's possession, the question must be submitted to the jury.

TRESPASS *quare clausum*, for passing to and from a spring of water on the plaintiff's land, across the road from the defendant's house, and taking water therefrom. Trial by jury. The defendant pleaded a prescriptive right to the use of the spring. Transferred from the April term, 1906, of the superior court by *Pike*, J.

Some time before 1850, one Willard owned both the Wells and the Parker land, and conveyed the Parker place to Mason, who built the house now occupied by the defendant. After various transfers, the title to this place was acquired in 1864 by Mrs. McCollister, who continued to own it until 1886, when the title passed from her and finally vested in the defendant in 1900. There was evidence tending to show that for fifty years or more the owners of the Parker place had used the spring in question. Mrs. McCollister testified that when she went to live in the Parker place the family got their water from the spring or well opposite the house; that some three years later they dug a well about two rods from the other one and on the same land, and used the water from it while she owned the place; that Willard, the owner of the Wells place, gave "us permission to dig it," that "he gave me a right to use water there," that he said: "You have a perfect right to use water from that well; I give you permission"; that she supposed she had a right to the new well, but did not claim a right to the old one.

The plaintiff moved that a verdict be directed in his favor, on the ground that there was no evidence from which the jury could properly find that the use made of his premises by any one under whom the defendant claims, from 1864 to 1886, was adverse. The court granted the motion, and the defendant excepted.

John E. Allen, for the plaintiff.

Cain & Benton, for the defendant.

WALKER, J. The evidence of adverse possession is not sufficient to show that a prescriptive right to the easement accrued before 1850; for up to that time for many years both places were owned by the same person. One cannot gain a title by prescription in his own land. *Stevens* v. *Dennett*, 51 N. H. 324, 330. Hence the adverse possession, if any, had not been maintained for the necessary period of twenty years in 1864, when Mrs. McCollister bought the Parker place, nor had it matured when she dug the new well and ceased to use, or abandoned, the old one. In fact, it appears from her testimony that she made no claim of ownership in the old well, but confined her claim to the new one. It is therefore unnecessary to consider the effect of her possession or that of her grantors in the old one.

The defendant's position is, that Mrs. McCollister entered into the enjoyment of the water-easement in question under a claim of right, which was inconsistent with a revocable license and adverse to the title of Willard, who then owned the servient estate; and that she persisted in that claim, in connection with her undisturbed possession, for more than twenty years. If the evidence is sufficient in law to authorize the jury to find the necessary facts involved in the defendant's position, the court erred in directing a verdict for the plaintiff, though the burden of proving title by adverse possession was upon the defendant.

It is argued in behalf of the plaintiff, that if the evidence authorizes an inference of fact that there was a parol grant of the spring or its use, it was in law merely a revocable license, which necessarily measures the extent of the grantee's claim and proves that it was not of an adverse character. *Taylor* v. *Gerrish*, 59 N. H. 569, is relied upon in support of this position. That was an action of trespass *quare clausum*. One defence was that the defendant had acquired a right to the easement in question by prescription. The facts were reported by a referee, who found a verdict for the plaintiff; and the question was whether upon the facts the verdict could be sustained. It appeared that in 1833 the owner of the premises by parol gave the defendants' grantor the right to the spring, saying that "if she would dig it out, and stone it up, and lay a pipe to convey water to her house, she might have it in welcome." She constructed the well and water-course, and continued in the use and occupation of it until 1874. There was no direct evidence what her claim was as to the ownership of the spring, but her grantees insisted that, notwithstanding the verdict for the plaintiff, the facts showed that she acquired a title by prescription as a matter of law. The question was not whether there was sufficient evidence of adverse possession to sustain a verdict for the defendants, as in the present case, but whether it

conclusively appeared that the referee erred in his application of the law in returning a verdict for the plaintiff. The arrangement between the parties in 1833, in view of the situation of the property and other competent circumstances, was evidence upon the question of the character of the possession. It might show to the trier of the fact that it was understood that the donee of the easement was to enter upon the enjoyment of it as an owner, though without a technical deed, and hence that her possession was adverse to the donor's title; or it might authorize a finding that she entered under a merely revocable license, and hence that it was not adverse, but in subordination to the superior title. The verdict seemed to establish the fact that her entry and possession were of the latter character, from which it resulted as a matter of law that she acquired no title by prescription. The court say: "From 1833 to 1858, when Ladd parted with his title, the user was permissive, and therefore, down to 1858, neither the defendants nor their grantors had acquired a title by prescription." If the general finding had been for the defendants, it would have been proper to say that the user was, as a matter of fact, adverse and not in accordance with, or in subordination to, the license, which was the legal effect of the arrangement. While no estate passed for want of a deed, the parties may have treated the transaction as having that effect; and if they did, the donee's subsequent uninterrupted possession might reasonably be deemed to exist under a claim of ownership, with the knowledge and acquiescence of the donor. The legal effect of the transaction did not preclude the parties from claiming that it had a different effect, which, if persisted in for a sufficient length of time and attended with an uninterrupted possession, would give the donee a title equivalent to a title by deed. It is thus apparent that it was not decided in *Taylor* v. *Gerrish*, that when A undertakes orally to give B an undefined right to an easement in land, it would not be competent for a jury to find, in the absence of direct evidence, that B entered claiming in fact to be the owner of the easement, with the knowledge or acquiescence of A; but that when it is found by the trier of the fact that B's entry was understood by both parties to be under, and by virtue of, A's revocable license, and that no different claim had been entertained by them during the period of A's occupation, the latter acquired no prescriptive title,—a holding that is in accord with the weight of authority. See cases cited in *Taylor* v. *Gerrish*; also, *Sumner* v. *Stevens*, 6 Met. 337; *Stearns* v. *Janes*, 12 Allen 582; Bus. Lim., *s.* 267; Wood Lim., *s.* 260. The intention in accordance with which the possession was given and received, though different from the legal effect of the transaction, is the important thing; and when it is

evidenced by the testimony of witnesses from which different inferences may be drawn, it can only be found as a fact, and does not rest on legal presumptions.

In the present case the question is whether the defendant adduced evidence sufficient to support a verdict in her favor. It is insisted by the plaintiff that Mrs. McCollister's testimony does not tend to show that she ever claimed to own the spring, or that Willard ever had notice that she made such a claim. She testified, in substance, that Willard gave her permission to dig the well and a perfect right to use the water at the well. Whether the parties intended that Mrs. McCollister should thereby enter and use the water as an owner or as a tenant at sufferance, is not clear; the duration or extent of the right given is not defined; but the inconclusiveness of her testimony does not lead to the result that, when weighed in connection with the circumstances attending the transaction, it would not warrant a finding that she entered, when she dug the well, claiming to be the owner of it, with the knowledge of Willard. If that is found to be the fact, her continued occupation for more than twenty years, without objection or interruption by Willard or his grantees, would perfect her prescriptive title. His knowledge of her claim need not be proved by actual notice, but may be inferred from the circumstances attending the original transaction. No reason is apparent why one may not as well claim to be the owner of land in his possession under a parol gift, as under a deed which for some defect in execution conveys no title. In both cases it might be held that the occupant was in law merely a tenant at sufferance; but that conclusion of law would not prevent his claiming to be the owner in the former case, any more than it would have that effect in the latter case. And when, as in this case, the parties employ language whose meaning is doubtful unless considered in connection with all the attendant circumstances, the question of their understanding of its effect, or their mutual claims in regard to it, should obviously be left to the jury. A finding upon that issue does not qualify or contradict the legal effect of the transaction at the time, but it may establish the original fact from which title by prescription results, in the absence of any assertion by the grantor of his legal right during the prescribed period of twenty years. The ruling of the court was, therefore, incorrect, and the verdict must be set aside.

Exception sustained.

All concurred.

Cheshire,
March 5, 1907.

O'NEIL *& a. v.* WALPOLE.

74 197
74 279
74 460

In a proceeding under the statute authorizing the selectmen of a town situate on the Connecticut river to contract with the officers of a contiguous town in Vermont for the purchase of the real estate, easement, or franchise of a bridge or ferry corporation, if in their opinion the public good requires a highway to be laid out over said property (P. S., *c.* 67, *s.* 12), the proposed highway is laid out and legally established when the selectmen, acting in pursuance of a vote of the town, enter into such a contract and effect a purchase of the property for highway purposes.

The statute providing that the expense of rebuilding or repairing a highway may be apportioned among towns greatly benefited thereby (P. S., *c.* 73, *s.* 4) applies to existing highways and authorizes an apportionment of the expense of future maintenance.

A petition of a town for the apportionment of highway expense among other towns is not necessarily invalidated because it was filed directly with the county commissioners, instead of in the superior court.

To confer authority upon the superior court to award an apportionment of highway expense, it should appear that towns other than that in which the highway is located will be "greatly" benefited thereby.

PETITION, for a highway in the defendant town over the Tucker toll-bridge across the Connecticut river. Transferred from the April term, 1906, of the superior court by *Pike*, J., upon an agreed statement of facts.

At the annual town-meeting of Walpole, held March 8, 1904, resolutions were adopted under a proper article in the warrant for the meeting, one of which authorized, instructed, and directed the selectmen to unite with the selectmen of the town of Rockingham, Vermont, "and contract with them for the purchase of the real estate, easement, and franchise of the Tucker toll-bridge, so called, owned by the Bellows Falls Canal Company, and to contract with said town of Rockingham as to the proportion of expense to be borne by each town in such purchase and in the construction and maintenance of a highway over the Connecticut river at the place where said toll-bridge is located, and as to the proportion which each town shall contribute toward payment of damages to third persons injured in the use of said highway." The town of Rockingham, at a meeting held March 1, 1904, under a proper article in the warrant authorized and instructed its selectmen to unite with the town of Walpole in purchasing the real estate, easement, and franchise of the Tucker toll-bridge at an expense to the town of Rockingham not exceeding $6,666.66 nor one third of the cost of

the property, and to agree with the town of Walpole in respect to the portion of the cost and the future expense of keeping the bridge in repair, etc., to be borne by each town. Subsequently, the Bellows Falls Canal Company conveyed to the towns of Walpole and Rockingham and their successors, by warranty deed, "the Tucker bridge, so called, extending over the Connecticut river from the village of Bellows Falls in said Rockingham to said Walpole, with the abutments and the land upon which the same stand, and all the rights and privileges thereto granted by the state of New Hampshire or otherwise."

At the October term, 1905, of the superior court, the plaintiffs' petition was referred to the county commissioners, who appointed January 25, 1906, as a day of hearing and duly notified the parties thereof. January 4, 1906, the selectmen of Walpole presented to the commissioners a petition setting forth that the expense of laying out and maintaining the highway described in the original petition would be excessively burdensome to Walpole and that the towns of Alstead, Acworth, and Langdon would be greatly benefited thereby, and praying that a part of the expense of the highway be assigned to those towns and that the commissioners adjudge what proportion of the expense of the future maintenance of the bridge and highway should be borne by each of said towns, if the highway was laid out. The commissioners appointed a hearing upon this petition, to be held at the same time and place as that upon the original petition, and caused due notice to be given to the towns of Rockingham, Alstead, Acworth, and Langdon. The three towns last named appeared at the hearing and objected to the commissioners considering the petition or any matter affecting their rights or interests, because, as they alleged, the commissioners had "no jurisdiction or authority to determine any question affecting such rights or interests."

At the April term, 1906, of the superior court, the commissioners filed their report, setting forth that Walpole filed a petition as above stated, that notice was given to Rockingham, Alstead, Acworth, and Langdon, and that the three towns last named appeared, etc. They laid out the highway as prayed for in the original petition. They further reported that "Walpole would be excessively burdened by the building and maintaining of said highway and that Alstead, Acworth, and Langdon would be benefited thereby," that the substantial part of the making of the highway is the maintenance of a bridge, and that they therefore found "that Walpole shall bear one third of two thirds of the expense, Alstead one third of two thirds, Acworth one sixth of two thirds, and Langdon one sixth of two thirds." They further reported that, inasmuch as the town of Rockingham owned one

third of the bridge and was ready and willing to enter into a contract to bear one third of the expense of maintaining it, they made provision "only for two thirds of the expense of such maintaining, leaving the one third to be provided for by Rockingham."

Charles H. Hersey and *John E. Allen*, for the plaintiffs.

Thomas E. O'Brien, for the town of Walpole.

Edward M. Smith and *Ira Colby & Son*, for the towns of Alstead, Acworth, and Langdon.

BINGHAM, J. "Highways are only such as are laid out in the mode prescribed therefor by statute, or as have been used as such for public travel thereon, other than travel to and from a toll-bridge or ferry, for twenty years." P. S., *c.* 67, *s.* 1. One method prescribed by statute for laying out highways is by petition and hearing before the selectmen of the town in which the proposed highway is situated. P. S., *c.* 67, *s.* 2; *State* v. *Morse*, 50 N. H. 9. This method is of general application and includes within its scope the laying out of highways within the limits of any town in the state.

Another and different method is provided for laying out highways in towns bordering on the Connecticut river and where the proposed highway crosses that river. P. S., *c.* 67, *ss.* 12, 13; *Stearns* v. *Hinsdale*, 61 N. H. 433, 435. By this method, a town situated on the Connecticut river may, at any legal town-meeting, authorize its selectmen to unite with the selectmen or other proper officers of any contiguous town or towns in Vermont, and contract with them for the purchase of any real estate, or the privilege, easement, or franchise of any bridge or ferry corporation, if in their opinion the public good requires a highway to be laid out over said property. P. S., *c.* 67, *s.* 12. In a proceeding under this statute, a proposed highway is laid out and established when the selectmen, acting in pursuance of a vote of the town, enter into a contract with the officers of the adjoining town or towns in Vermont, and purchase the real estate, or the privilege, easement, or franchise of a bridge or ferry corporation, for the highway; and the questions of public good and the location of the highway are determined by the selectmen when they enter into the contract and purchase the necessary property. It was under this statute that the vote of Walpole was passed; and it follows as a necessary consequence, that when its selectmen, in pursuance of the vote, entered into the contract with the selectmen of Rockingham and purchased the Tucker toll-bridge property, the

road over that bridge became a public highway, and nothing remained to be done by way of petition or hearing, either before the selectmen or the commissioners, for its legal establishment.

It seems, however, that after the contract was made and the bridge was purchased the plaintiffs filed a petition with the selectmen of Walpole, requesting them to lay out a highway over the bridge, and upon its being denied took an appeal to the superior court, that the court referred the petition to the county commissioners, and that while the proceeding was pending before them, the selectmen of Walpole, in behalf of the town, petitioned the commissioners (in accordance with sections 11, 12, and 13, chapter 69, of the Public Statutes) for an apportionment between it and the towns of Alstead, Acworth, and Langdon of the future expense of repairing and maintaining the highway; and it is contended in behalf of these towns that, inasmuch as the commissioners were without authority to lay out a highway where one already existed, they could not lawfully apportion the future expense of repairing and maintaining the bridge. But the fact that over the route petitioned for there was an existing highway does not preclude the town of Walpole from having an apportionment of the future expense of maintaining it. In section 4, chapter 73, of the Public Statutes, it is provided that "when the expense of rebuilding or repairing a highway would be excessively burdensome to the town in which it is situate, and another town is greatly benefited by the highway, the supreme [now superior] court, upon petition and proceedings thereon as in the case of laying out a highway, may order a portion of the expense to be paid by such other town." This statute applies to existing highways (*Pittsburg* v. *Clarksville*, 58 N. H. 291); and while it does not in express terms authorize an apportionment of the future expense of maintaining such highways, it has been construed to confer such authority. *Campton* v. *Plymouth*, 64 N. H. 304, 308. In proceedings under it, the petition should be filed in the superior court and by it referred to the county commissioners, and not filed directly with the commissioners, as was done in this case. But the course here pursued does not necessarily render the proceedings invalid. It would seem that the parties had been fully heard before the proper tribunal, and if this is so, the petition of Walpole may be considered as though it had been filed in court in the first instance; at least, the superior court may so treat it if in its opinion justice requires that it should be.

There is one other matter that remains to be considered. In the report of the commissioners it is stated that Walpole would be excessively burdened by maintaining the bridge, and the other towns named benefited thereby. To give the superior court

authority to award an apportionment, it should appear that the other towns are "greatly benefited." P. S., *c.* 73, *s.* 4; *Langley* v. *Barnstead*, 63 N. H. 246. If the omission of the word "greatly" in the report is due to a clerical error in printing the case or in drafting the report of the commissioners, such steps may be taken in the superior court as will obviate this objection. It is further suggested that the contract between the towns of Walpole and Rockingham relating to the purchase of the bridge, and defining their rights and obligations as owners therein, should be reduced to writing and filed as a part of the record in this case. When these things are done and an order is made allowing the above amendment, the report of the commissioners, so far as it relates to the laying out of the highway, should be dismissed; but so far as it pertains to the apportionment of the future expense of maintaining the bridge across the river, it should be sustained and a decree entered accordingly.

Case discharged.

All concurred.

Cheshire,
March 5, 1907.

HOLBROOK, *Trustee*, *v.* HOLBROOK *& a.*

Where a corporation declares a special dividend out of its surplus earnings and gives its members the privilege of taking the same in cash or paying for an additional issue of shares therewith, the transaction is not a stock dividend, either in form or effect.

Where a will provides that the income of corporate stock shall be paid to a beneficiary during his life, the question whether a given dividend upon the shares is capital or income is to be determined by an inquiry as to its actual nature and source, in the absence of an express provision upon the subject in the trust instrument. In so far as a dividend represents surplus earnings which accrued after the trust went into effect, it is income and belongs to the life tenant, whether the distribution be made in cash, or stock, or subscription rights to new shares; but in so far as it represents earnings which accrued prior to the creation of the trust, or natural growth and increase in the value of the corporate plant and business, whenever the same may have taken place, it is capital and belongs to the *corpus* of the trust.

BILL IN EQUITY, by the trustee under the will of Susan J. Holbrook, praying for instructions as to the execution of the trust. Transferred from the October term, 1906, of the superior court by *Peaslee*, J.

John E. Allen and *Edward F. Cate* (of Massachusetts), for the life tenant.

Charles H. Hersey, for the remaindermen.

BINGHAM, J. The petitioner is the trustee under a will and asks to be instructed as to the disposition to be made of certain trust funds. By the fifteenth clause of the will, the testatrix provided that forty-six shares of the capital stock of the Keene National Bank and thirty shares of the Park National Bank should be held in trust, and that the trustee should pay the income thereof as it became due to the testatrix's nephew during his life. The trustee was not to dispose of any of the stocks comprising the trust fund, nor make any new investment from the proceeds of stock sold, without the written consent of the life tenant. It was further provided that in case any of the stocks were disposed of before the decease of the testatrix, an amount equal to the proceeds should be invested by the trustee, with the written consent of the life tenant, and placed with the remainder of the original trust fund. Upon the termination of the life estate there was a provision disposing of the property to remaindermen. The testatrix died in 1900. February 14, 1905, the directors of the Keene National Bank declared a special dividend of one hundred per cent, and on the same day its stockholders voted to double its capital stock, giving the stockholders the privilege of subscribing for the new stock at par and of paying for the same with the special dividend. It was the purpose of the bank to increase its fixed capital and thus enable it to make larger loans. All the stockholders, including the trustee, took the new stock. It was found that the above transaction constituted a distribution of the surplus earnings of the bank, a part of which accumulated after the trust went into effect.

The remaindermen contend that the transaction was in substance a stock dividend, and that, notwithstanding the foregoing finding, the new stock is capital and not income; also, that the testatrix's will discloses that she intended the life tenant should receive as income only such earnings as were declared as ordinary dividends. But we are of the opinion that their contention cannot be supported. The votes of the corporation left the stockholders at liberty to take and retain the cash dividend, or to take the new stock and treat the dividend as payment for it; and where such is the case it cannot be said to be a stock dividend, either in form or effect. *Davis* v. *Jackson*, 152 Mass. 58, 60. The testatrix made no distinction in her will between ordinary and extraordinary dividends in the distribution of the income.

Whatever was income of the trust fund she declared should be paid by the trustee to her nephew during his life, without regard to the form in which it was distributed. Nothing was said showing that she intended that any of it should go to the remaindermen. As the dividend that was declared was a cash dividend and issued out of surplus earnings, the material question is: What constituted the trust fund, the earnings of which, upon a distribution to stockholders, belonged to the life tenant as income?

In *Lord* v. *Brooks*, 52 N. H. 72, this was the very question before the court; and it was held that the surplus earnings of a corporation that were not divided at the date of the trust deed belonged to the *corpus* of the trust as a part of the capital of the trust fund, and that dividends declared out of surplus earnings that had accrued since the date of the trust deed were income for the life tenant. This result was reached by construing the trust deed and ascertaining the intention of the creator of the trust. The construction placed upon the deed in that case applies with equal force to the provisions of the will here under consideration. Moreover, the will furnishes additional evidence leading to the same conclusion, for it provides, in case of a sale of any of the stock before the testatrix's decease, that an amount equal to the "proceeds from said stocks" shall be invested "and placed with the remainder of the original trust fund." This provision clearly indicates that the testatrix intended that profits representing earnings made prior to the creation of the trust should be added to and form a part of the *corpus* of the trust.

While it is found that the bank's action constituted "a distribution of the surplus earnings of the bank, a part of which accumulated after the trust went into effect," it is not found what that part is. Upon a further hearing this fact may be ascertained. The trustee should then be directed to make such a division of the stocks or their proceeds as will give the life tenant such part of the stocks or proceeds as is equivalent to his interest in the surplus earnings that accrued subsequent to the creation of the trust. The balance should be added to the *corpus*. *Lord* v. *Brooks*, *supra*; *Peirce* v. *Burroughs*, 58 N. H. 302, 303.

We are also of the opinion that if the action on the part of the bank was a declaration of a stock and not of a cash dividend, our conclusion would not be different, in view of the finding that a part of the dividend came out of surplus earnings which accumulated after the trust went into effect. As we have seen, the method pursued by this court in determining whether a given dividend is capital or income, there being no express provision as to the matter in the trust instrument, is to inquire into the actual nature and source of the dividend. If it is found to represent

surplus earnings of the business that have accrued since the creation of the trust, it is to be regarded as income and as belonging to the life tenant. If it is found to represent earnings that accrued prior to the creation of the trust, it is capital and belongs to the *corpus* of the trust. *Lord* v. *Brooks*, *supra*. And if it is found, in whole or in part, to represent the natural growth and increase in the value of the corporate plant and business, whether that growth and increase took place before or after the trust was created, it is also to that extent capital. *Jones* v. *Railroad*, 67 N. H. 234, 241; *Van Blarcom* v. *Dager*, 31 N. J. Eq. 783, 794; *Hite's Devisees* v. *Hite's Ex'r*, 93 Ky. 257, 267. As the court in making the inquiry concerns itself with the substance of the transaction, and not the form in which the corporation has seen fit to clothe it, the fact that a dividend is distributed in cash or in stock is of little, if of any, importance in determining whether it is income or capital. The inquiry is largely one of fact, and the dividend is capital or income as the fact discloses into which of the above enumerated classes it falls. This is the logic of the decision in *Lord* v. *Brooks*, and is supported by the great weight of authority in this country. *McLouth* v. *Hunt*, 154 N. Y. 179; *Ashhurst* v. *Field's Adm'r*, 26 N. J. Eq. 1; *Earp's Appeal*, 28 Pa. St. 368; *Smith's Estate*, 140 Pa. St. 344; *Thomas* v. *Gregg*, 78 Md. 545; *Hite's Devisees* v. *Hite's Ex'r*, 93 Ky. 257, 264; *Pritchitt* v. *Trust Co.*, 96 Tenn. 472. If the decision in *Quinn* v. *Madigan*, 65 N. H. 8, so far as it relates to this question, cannot be supported on other grounds than those suggested in the opinion, it is conflict with *Lord* v. *Brooks* and with the decision in this case, and is overruled.

In 1903, the Park National Bank increased its capital stock one half, and gave its stockholders the right to subscribe, at $300 a share, for one share of new stock for every two shares of the old owned by them. The right to subscribe for a share of the new stock was worth upwards of $100, and surplus earnings to an amount greater than the value of all of the rights had accumulated since the creation of the trust and before 1903. The trustee subscribed for the fifteen shares of new stock to which the trust was entitled, took the certificate in his name as trustee, and borrowed the money to pay for the stock on a note signed by him as trustee. Three thousand dollars has been paid on the note out of the income belonging to the life tenant. This was done with the consent of the life tenant. The remaindermen contend that the rights to the new stock are capital and belong to the *corpus*.

It has been held in this state, in the absence of evidence showing the fact, that there is a presumption that the right to take new stock, if of value, is capital and belongs to the *corpus* (*Peirce*

v. *Burroughs*, 58 N. H. 302; *Law* v. *Alley*, 67 N. H. 93; *Walker* v. *Walker*, 68 N. H. 407); also, that there is a presumption that dividends made payable in cash are income (*Walker* v. *Walker*, *supra*), and that stock dividends are presumptively capital. *Law* v. *Alley*, *supra*. Whether there is any reason for invoking a presumption in any of these cases, other than one of convenience, we need not inquire; for if there is a presumption that the right to take new stock is capital and belongs to the *corpus*, it is of no consequence in this case, since it is found that the rights in question represent surplus earnings that have accrued since the trust arose. By reason of this finding, it would seem that the presumption was not only of no consequence in this case, but that the value of the rights was not due to surplus earnings that accrued prior to 1900, or to actual growth and increase in the value of the corporate plant and business. If this interpretation of the case is correct, it is difficult to see why the giving of the rights to stockholders should not be considered a distribution of income, the same as the giving of stock is in the case of a stock dividend, provided it is shown that the rights represent net earnings that have accrued during the term of the life tenant. And when the distribution is in the form of stock rights, the argument that it may be difficult to ascertain whether they in fact represent income or capital is of no greater weight than when the distribution is in the form of a stock dividend. The object of the inquiry in each case is to do justice by the parties and effectuate the intention of the creator of the trust. If this interpretation of the case is incorrect, and upon a further hearing it should be made to appear that some part of the value of the rights was due to surplus earnings that accrued prior to the creation of the trust, or to natural growth and increase in the value of the corporate plant and business, then the trustee should be directed to make such disposition of the stocks or their proceeds as will repay the life tenant for the sums advanced by him in purchasing the stock and such further sum as any value in the rights is due to surplus earnings that accrued between 1900 and 1903, and the balance should be held by him as a part of the *corpus*; otherwise, the trustee should be directed to deliver the stock to the life tenant upon payment of the balance due on the note.

We are aware that the conclusion reached on this branch of the case is not in accord with the decisions in many jurisdictions. *Atkins* v. *Albree*, 12 Allen 359; *Greene* v. *Smith*, 17 R. I. 28; *Brinley* v. *Grou*, 50 Conn. 66; *In re Kernochan*, 104 N. Y. 618, 630; *Smith's Estate*, 140 Pa. St. 344; *Hite's Devisees* v. *Hite's Ex'r*, 93 Ky. 257, 267; 2 Cook Corp. (2d ed.), s. 559. But the principle involved in the equitable doctrine of looking at the sub-

stance rather than the form of the transaction is of general application, and logically includes within its scope the ascertainment of the rights of life tenant and remaindermen in corporate distributions when made in the form of stock rights, as when made in cash or stock.

In Pennsylvania, the courts have applied the equitable doctrine in determining the rights of life tenants and remaindermen in cash and stock dividends, but it would seem that they have failed to apply it in its integrity where subscription rights were involved. The decision in *Biddle's Appeal*, 99 Pa. St. 278, however, may be in harmony with the decision in this case; for although the subscription rights there in controversy were of value and represented surplus earnings, it was not shown that any of those earnings accrued between the date of the death of the testatrix and the granting of the subscription rights. In *Moss' Appeal*, 83 Pa. St. 264, the same finding was wanting, but the reasons advanced for holding the rights to be capital and not income were such as one would expect to find in jurisdictions where the courts look to the form and not the substance of the action of the corporation. The justice who delivered the opinion in that case seemed to think that the decision in *Earp's Appeal*, *supra*, proceeded upon the ground that the corporation recognized the transaction (the issuing of a stock dividend) as a "distribution of profits," and that that was the crucial distinction between that case and the one he was considering. But this is the argument of courts in jurisdictions that look to the form and not the substance of the act of the corporation. In *Wiltbank's Appeal*, 64 Pa. St. 256, it was held that the value of the rights was income. This decision proceeded upon the ground that if the value of the rights represented profits that accrued after the trust arose, the issuing of the rights was in substance a distribution of profits; and that, as the value of the old stock at the time the trust came into existence was not diminished by the issuing of the new stock, the rights necessarily represented profits and were income. But it seems to us that this decision overlooks one important feature, and that is that while the rights may represent profits since the trust arose, those profits are not necessarily surplus earnings, but may to some extent represent the natural growth and increase of the corporate plant, in which case, as we have seen, they would to that extent be principal and not income.

Case discharged.

All concurred.

Sullivan.
March 5, 1907.

GLIDDEN *v.* NEWPORT.

Where one loans money at interest and takes as security for the loan an absolute deed of real estate, giving a bond to the borrower to convey the realty to him upon payment of the loan, the lender is taxable for the money loaned, under clause 5, section 7, chapter 55, of the Public Statutes.

In such case the money loaned is not merged in the real estate, so that the taxation of the real estate to the lender is the taxation of the money.

PETITION, for abatement of taxes. Trial before *Wallace*, C. J., at the May term, 1906, of the superior court. Upon a consideration of the facts hereinafter set forth, the court dismissed the petition, subject to the plaintiff's exception.

In November, 1903, Edson W. and Julius E. Harvey were in possession of a farm in Newport under a bond for a deed from one Fletcher. Fletcher was pressing them for the payment of $1,350 due upon the bond, and they applied to the plaintiff for a loan of the money. The plaintiff agreed to loan them the money, he to have a deed of the farm and to give them a bond conditioned that he would convey the farm to them upon the payment of the $1,350 and interest. November 25, 1903, the plaintiff took a deed of the farm from Fletcher, paid him $1,350, and gave a bond to the Harveys, binding himself, his heirs, executors, and administrators, in the sum of $5,000, as follows: "Whereas the above bounden Emery J. Glidden has this day agreed to sell to the said Edson W. Harvey and Julius E. Harvey the following described tract of land [describing it], on condition that the said obligees shall pay the said sum of thirteen hundred and fifty dollars in manner following, to wit, by yearly payments of fifty dollars, the first of said payments to be paid on or before the 25th day of November, 1903, and annual interest on the principal to be paid on or before the 25th day of November of each year: Now the condition of this obligation is such that if the said Edson W. Harvey and Julius E. Harvey shall pay the said sum of thirteen hundred and fifty dollars and interest in manner above described, and shall in the meantime pay all taxes on said premises, keep the buildings reasonably insured for the benefit of the said Emery J. Glidden as his interest shall appear, . . . and the said Emery J. Glidden shall on the completion of the said payments and interest, and the performance of the other agreements and covenants by the said obligees to be performed, make, execute, and deliver, or cause to be made, executed, and delivered, a good and sufficient warranty deed to the said obligees of said premises, and the said obligees shall carry on the said farm in a husbandlike manner and shall

keep the buildings on said premises in reasonable repair, then this obligation shall be null and void, otherwise to remain in full force and virtue."

In December, 1904, one Thatcher requested the plaintiff to loan him $500 with which to purchase the Cutting farm in Newport. The plaintiff agreed to do so if Thatcher would convey the farm to him and allow him to retain two acres of it, the plaintiff to give Thatcher a bond for a deed of the remainder of the farm. Thatcher purchased the farm and conveyed it to the plaintiff on December 31, 1904, for $515 paid him by the plaintiff, who at once gave Thatcher a bond binding himself, his heirs, executors, and administrators in the penal sum of $1,000 to convey said remainder to Thatcher upon the payment of $500 and interest, etc. The condition of the bond is substantially like that of the Harvey bond, excepting that it contains a provision by which the obligor is to allow the obligee to have full possession and control of the premises while the payments are being made.

The Harveys have been in possession of the farm mentioned in their bond ever since its date. Thatcher took possession of the farm described in his bond immediately upon its execution, and he and his assigns have been in possession since. Both farms were taxed to the plaintiff in 1905,—the first one at $2,000 and the last one at $500,—and he or the obligees paid the taxes. Payments of principal and interest have been made and have been indorsed upon the bonds. No note or other obligation was taken by the plaintiff from the obligees. One purpose of the plaintiff in taking the papers in the form described was to avoid being taxed for the $1,350 and $500 paid by him. Another reason was his belief that this course gave him better security than a mortgage would give, and still another reason in the latter case was the obtaining of the two acres of land. The court found that these transactions were in effect mortgages, aside from the fact that in the last case the plaintiff obtained two acres of land for little or nothing. The plaintiff was also taxed in Newport in 1905 for $1,500, money at interest. It was this portion of the tax that he asked to have abated.

Frank O. Chellis, for the plaintiff.

Jesse M. Barton, for the defendants.

CHASE, J. It is assumed that the money at interest for which the plaintiff was taxed is a portion of the money which he paid when the farms were conveyed to him; otherwise there would be no question of law before the court. One question for consideration, therefore, is whether this money was money at inter-

est within the meaning of the statute, which subjects to taxation "money on hand or at interest more than the owner pays interest for, including money . . . loaned on any mortgage, pledge, obligation, note, or other security, whether on interest or interest be paid or received in advance." P. S., *c.* 55, *s.* 7, *cl.* 5. This statute makes money at interest a distinct class of taxable property. The court's finding, that the transactions were in effect mortgages, implies that the sums of money advanced by the plaintiff upon the conveyances of the real estate to him were in fact loans upon interest, and that the real estate was conveyed to him as security for the payment of the loans. This implication is confirmed by his dismissal of the petition, which necessarily shows that he found that the transactions were loans of money upon interest, or at least that the plaintiff, upon whom the burden of proof rested, had failed to make it appear that they were not such loans. Viewing the deed and the bond of each case in the light of the circumstances under which they were made, it is difficult to see how any other conclusion could be reached, so far as the question of taxation is concerned. Although the money was not loaned on a mortgage, strictly speaking, and no note was taken, it was loaned, according to the court's findings, upon a promise which, if only oral, was a legal obligation and clearly comes within the provision of the statute above quoted. If it were held that the provisions of the bonds do not amount to promises by the obligees to pay the money and interest, as therein set forth, the bonds as written evidences of the transactions would not exclude other evidence of such promises, in this action to which a third party is the defendant. *Libby* v. *Company*, 67 N. H. 587, 588; *State* v. *Newman*, *ante*, 10.

"In this state, the taxability of money at interest is not an open judicial question. Whether the assessment of money at interest is a process of ascertaining the lender's or the borrower's just share of the public expense, or an exceptional, double, or otherwise wrongful taxation of the borrower, . . . permitted, not required, by an erroneous constitutional construction established by legislative usage and judicial recognition, we need not inquire. If the assessment of a creditor for his interest-bearing loan of money is, in effect, either a double taxation of his debtor, or a taxation of the debtor for property which, by conveyance or destruction, has ceased to be his, . . . such taxation is sustained by the authority of precedent . . . too firmly established to be overthrown by any other authority than that of making law." *Morrison* v. *Manchester*, 58 N. H. 538, 551, 552. It would seem that, by the transactions under consideration, the borrowers of the money (obligees) are not doubly taxed, in any sense, since the

rate of interest they are to pay on the loans (apparently, that fixed by law) appears to have been agreed upon with the understanding that taxation of the money would be avoided. If the money escapes taxation, they will gain nothing by the fact, and if it does not escape, they will lose nothing; their interest charges will be the same in either event. The tax falls upon the plaintiff where, according to the law, it belongs.

The plaintiff further says the money is not taxable because the real estate he holds as security for its payment was taxed to him, and the taxation of the money would duplicate this tax. Real estate also is a distinct class of property specifically subjected to taxation. P. S., *c.* 55, *s.* 2. It is taxable to "the person claiming the same, or to the person who is in possession and actual occupancy thereof, if such person will consent to be taxed for the same." P. S., *c.* 56, *s.* 14. The taxes upon the real estate described in the plaintiff's bonds were properly assessed against him, as he held the title; but as the obligees were in possession, the taxes might lawfully have been assessed directly against them with their consent. By the terms of the bonds, the obligees are bound ultimately to pay the taxes, and it is of little consequence to them or the plaintiff whether the assessment is made against the one or the other. If the taxes are assessed against the plaintiff and he pays them, he does so not on his own account, but on account of the obligees, and has a claim against them for reimbursement. He pays what are in reality their taxes—not his. His money was not merged in the real estate, but in the obligee's promises secured by conveyances of the real estate. Taxation of the real estate to him was not taxation of his money, nor was the taxation of the money taxation of the real estate. As found by the superior court, the relations between him and the obligees, so far as they concerned taxation, were in effect like those between a mortgagee and mortgagor in ordinary mortgages of real estate. The taxation of mortgaged real estate and of the loan secured by the mortgage is not double taxation (*Nashua Savings Bank* v. *Nashua*, 46 N. H. 389, 399, 408; *Morrison* v. *Manchester*, 58 N. H. 538; *Sawyer* v. *Nashua*, 59 N. H. 404, 406; *Boston etc. R. R.* v. *State*, 62 N. H. 648); and the reasons for this holding lead to the same conclusion when applied to the facts of this case. The plaintiff is not doubly taxed in fact, unless the taxation of money at interest is in all cases double taxation, in which case, as has been seen, the legality of the tax is not an open question. *Morrison* v. *Manchester*, *supra*. He is not in position to set up the plea of double taxation on other grounds with any degree of legal or moral force.

Exception overruled.

All concurred.

Strafford,
April 2, 1907.

TWOMBLY *v.* LORD.

The exclusion of competent and material evidence under a plain mistake of fact furnishes sufficient cause for setting aside a verdict.

TRESPASS *quare clausum et de bonis.* Trial by jury and verdict for the plaintiff. Transferred from the September term, 1905, of the superior court by *Chamberlin*, J.

The controversy was as to the location of the divisional line between the parties. It was agreed that the line began at the obtuse angle of Lot 3 in the first division of lots in Middleton, at the intersection of the Hare road, so called, with the main road in Middleton, and thence running southerly by the first check line in the town, which line was the division line between Lots 1 and 3. The defendant offered in evidence what purported to be a plan of the town of Middleton in a volume of the State Papers. Because of immaterial printed matter likely to mislead the jury, the plan was excluded, subject to exception.

William S. Pierce and *John Kivel*, for the plaintiff.

Forrest L. Marsh and *Arthur L. Foote*, for the defendant.

PARSONS, C. J. The sole ground upon which the plan offered by the defendant was excluded was that it contained "immaterial printed matter likely to mislead the jury." The only suggestion made in support of this finding is that the plan was self-contradictory. It is said that the length of the side line of the town, found by the multiplication of the width of each lot as stated in the printed matter on the plan by the number of lots on the line, is much less than the length of the line as stated on the plan. Hence, it is argued, it is uncertain whether the width of the lots, which appears to have been a material matter, is the distance stated on the plan or the greater distance obtained by dividing the length of the side line by the number of lots. An examination of the copy found in Volume 28, State Papers, which was made a part of the case, shows the suggestion to be unfounded, because the lots on the side line are stated to be of different widths, ten of the length employed by counsel for the plaintiff in their computation and ten of greater width. Making the computation according to the width of the lots as stated on the plan, there is no discrepancy between the stated and computed length

of the side line, and no contradiction in the evidence as to the width of the lots furnished by the plan.

The finding of fact upon which the evidence was excluded thus appears, upon the only ground urged in its support, to have been a plain mistake. No other ground being suggested or appearing upon which the finding can be sustained, it must be set aside. *Norris* v. *Clark*, 72 N. H. 442. The evidence furnished by the plan, no objection being made to the authenticity of the original or of the copy, was competent and it appears to have been material. Its exclusion was due to a mistake of fact and was error. This result is reached without considering whether the fact found, if sustainable, would have authorized as matter of law the entire exclusion of the evidence furnished by the plan, or whether the printed matter on the plan was as matter of law immaterial. Nothing appears in the case from which it could be found that the exclusion of material, competent evidence was not prejudicial to the objecting party. The verdict against the party objecting must therefore be set aside.

Exception sustained.

All concurred.

Belknap, April 2, 1907.

DAME v. WOOD.

The fact that a litigant's failure to act was due to a mistake of his counsel warrants a finding that he was prevented by accident, mistake, or misfortune.

MOTION, by the plaintiff, to be relieved from the agreement on which this case was submitted when it was previously before the court (73 N. H. 222, 391). Hearing before *Stone*, J., by whom the case was transferred from the November term, 1906, of the superior court.

Although both the plaintiff and his counsel knew of the facts which they say show that "the parties understood that the plaintiff's performance of the contract was accepted from day to day as the work progressed," the plaintiff acted by advice of counsel, and neither of them knew, or ought to have known, that those facts were material to a recovery. Subject to the defendant's exception, the court ordered that the plaintiff be relieved from the agreement.

George B. Cox and *Walter S. Peaslee*, for the plaintiff.

Jewett & Plummer, for the defendant.

YOUNG, J. It can be found from the fact that a person fails to act because of a mistake of his counsel, that he was prevented from acting by accident, mistake, or misfortune (*Grout* v. *Cole*, 57 N. H. 547; *Bolles* v. *Dalton*, 59 N. H. 479, 480; *Kelsea* v. *Manchester*, 64 N. H. 570; *Harvey* v. *Northwood*, 65 N. H. 117; *Cossar* v. *Truesdale*, 69 N. H. 490; *Parsons* v. *Durham*, 70 N. H. 44; *Gunnison* v. *Abbott*, 73 N. H. 590, 592); so there was evidence to sustain the court's finding, which is the only question of law raised by the defendant's exception.

Exception overruled.

All concurred.

April 2, 1907.

PETITION OF HENRY E. MŒBUS.

A question determined adversely to the petitioner by a judgment rendered in *habeas corpus* proceedings cannot be again litigated as a matter of right upon his subsequent application.

An escaped convict is not entitled to a trial after recapture, except upon the issue of his identity; and his refusal to litigate this question when opportunity is afforded him is an admission that he is the person the state alleges him to be.

Repeated applications for a writ of *habeas corpus* introducing no new facts material to the issue will ordinarily be summarily disposed of.

PETITION, for a writ of *habeas corpus*, filed December 28, 1906. It alleges substantially the same facts set forth in *Petition of Mœbus*, 73 N. H. 350, and claims (1) "that under the extradition laws of the states of New York and New Hampshire, I was entitled to a hearing before my committal to the state prison, no matter on what charge my extradition had been obtained, and no matter on what other ground or for what other reason the authorities of the state of New Hampshire purposed to hold me, and no matter whether or not I was the individual named in the extradition papers"; (2) "that having been extradited on the charge of breaking prison (P. S., *c.* 285, *s.* 13), I was entitled to a hearing on that charge, and no hearing having been had, I am entitled to

be liberated unless a hearing can now legally be had on that charge, when then all the questions of fact involved, including the question of identity, could be submitted to the decision of a jury"; and (3) that "I am not the man Mark Shinborn, who is alleged to have made his escape from the state prison in 1866, but I refuse now, as heretofore, to submit the question of identity to the decision of a judge, under any summary proceeding, on the ground that I was entitled to a trial by jury upon an indictment found by the grand jury on the specific charge of crime on which I was extradited from the state of New York."

The warden of the state prison filed an answer, stating, in substance, that the petitioner is in fact one Mark Shinborn, who was convicted at the October term, 1865, of the supreme judicial court for the county of Cheshire of the crime of breaking and entering and stealing, and was sentenced to confinement in the state prison for the term of ten years; that on February 27, 1866, he was committed to the prison to perform the sentence; that on December 3, 1866, he escaped from the prison and fled from the state; that upon extradition proceedings he was brought from the state of New York, and on November 8, 1900, was recommitted to the prison to serve the unexpired term of his sentence, which has not yet expired; and that the warden holds the petitioner by virtue of the original process of commitment.

Henry E. Mœbus, pro se.

Edwin G. Eastman, attorney-general, for the state.

WALKER, J. In this proceeding the petitioner seeks to raise the question whether he was legally committed to prison after he was brought to this state upon extradition. The facts and allegations now before the court do not materially differ from those arising upon his former petition, reported in 73 N. H. 350, in which the court denied his application. It is not alleged that anything has occurred since that decision affecting his legal status; so that the question presented upon this petition, having been determined against him by the former judgment, cannot be again litigated as a matter of right. He declined then, as he does now, to litigate the question of his identity on a petition for *habeas corpus*, insisting that it is immaterial, if, as he claims, he was forcibly brought to this state and lodged in the state prison without a judicial hearing. It is apparent, however, that if he is Shinborn he is legally held in prison under the original sentence for breaking and entering, as is alleged in the answer, without regard to the regularity or legality of the extradition proceedings

(*Pettibone* v. *Nichols*, 203 U. S. 192); and it was expressly so decided in the former case. The question of his identity seems to be in fact the only material one. See *Ex parte Mœbus*, 148 Fed. Rep. 39. But "his refusal to litigate the question of his identity is an admission that he is Shinborn, and it follows that he is legally confined in the state prison unless his term of imprisonment has expired." *Petition of Mœbus*, 73 N. H. 350, 352.

The petitioner is bound by that decision, which is followed and reaffirmed, with the suggestion that repeated applications for a writ of *habeas corpus* introducing no new facts material to the issue will ordinarily be summarily disposed of.

Petition denied.

All concurred.

Hillsborough,
April 2, 1907.

LITTLE, *Trustee*, v. COLMAN *& a.*

Where a will gives to daughters of the testatrix "the use" of real estate during their lives, the beneficiaries take directly as life tenants, without the intervention of a trustee or other agency.

A bequest of "the income" of an estate is not sufficient to create a trust in the property from which it is derived, in the absence of language or circumstances indicating such an intention.

BILL IN EQUITY, for directions in respect to the execution of a will. The bill was taken *pro confesso*, and was transferred without a ruling from the September term, 1906, of the superior court by *Peaslee*, J.

The material allegations of the bill are as follows: Mary Dyson died testate in 1898, and her will has been duly proved and allowed. In 1905, the plaintiff was appointed trustee by the probate court, to hold certain property and estate described in the will. Besides certain provisions in favor of the husband of the testatrix during life, the will contained the following: "II. I give and bequeath, upon the death of [my] husband, the use of my farm in Vassalborough, . . . during the term of her natural life, to my daughter, Emily F. Colman, of Vassalborough, Maine. III. I give and bequeath, upon the death of my husband, the use of my house and lot where I reside and which is the family homestead, during the term of her natural life, to my daughter, Lottie B. Ring, of Manchester aforesaid. . . . V. I give and bequeath to my

daughters aforesaid, and to the survivor of them, the income from all the rest of my real estate and personal property in equal shares during the terms of their natural lives. VI. I give, bequeath, and devise to the children now living, or who may be hereafter born to my daughter, Lottie B. Ring, all the rest, residue, and remainder of my estate of every kind." The husband of the testatrix died in 1899. The estate consists of the farm in Vassalborough and the family homestead in Manchester mentioned in the second and third clauses of the will, and of two lots of land with buildings upon them in Manchester.

The plaintiff, as trustee, has taken possession of the real estate last mentioned, collected the rents, paid the expenses of maintenance, and divided the net income between Emily F. Colman and Lottie B. Ring. He is in doubt concerning his duties and liabilities in the premises, and prays for advice and direction upon the following questions: (1) Are the provisions of the will sufficient to create a trust in any property of the testratrix? (2) If so, in what portion?

Cyrus H. Little, for the plaintiff.

CHASE, J. The testatrix, by the second and third clauses of the will, gave to one of her daughters during life "the use" of the Vassalborough farm, and to the other daughter during life "the use" of the family homestead. Obviously, "the use" intended was to be direct,—of the property itself, without the intervention of a trustee or other agency. Each daughter took a life estate in the real estate of which she was to have the use, and the plaintiff, as trustee, has no duty to perform in respect to such real estate.

By the fifth clause of the will, the testratrix gave to her daughters and the survivor of them, during life, "the income from all the rest" of her real and personal estate. "The rest" consists of two lots of land in Manchester having buildings upon them. The income from these lots is the gain or profit which comes in or arises from the use of them, either directly by the owner in person, or indirectly by tenants. The use of the term "income" in the connection in which it appears in this clause would be proper if the intention was that the property should be held in trust by a third person, and the gain or profit arising from its use was to be paid over to the legatees. But if such were the intention, it would seem as if the idea would be fully expressed and a trustee would be nominated to hold the property. "Income" is also used when the intention is that the legatee or grantee of it shall have the possession and control of the property from which it arises,

without the intervention of a trustee. In *Walker* v. *Hill*, 73 N. H. 254, the provision in the will considered was, "I do also give to my said wife the income of the remainder of my estate during her natural life"; and it was held that the provision did not create a trust in respect to the property from which the income would arise, but gave the wife a life estate in the property. One reason for the holding was the absence of any mention in the will of a trust estate or a trustee. See, also, *McClure* v. *Melendy*, 44 N. H. 469; *Wood* v. *Griffin*, 46 N. H. 230, 234; *Merrill* v. *Baptist Union*, 73 N. H. 414.

This case very closely resembles *Walker* v. *Hill*. The will contains nothing, aside from the employment of the word "income" instead of "use," having a tendency to prove an intention to create a trust. This change from the term used in the preceding clauses may have arisen from the understanding of the testatrix that the legatees would not be likely to use the property in person, as they would that mentioned in the preceding clauses. No circumstances are disclosed in the case having a tendency to show why the testatrix should prefer a trust to a life tenancy. A life tenancy would as effectively secure to the daughters the income of the property as would a trust. If they could not manage it themselves, they could employ an agent to manage it for them. The remainderman would also be as fully protected in the one way as in the other. On the whole, it does not seem probable the testatrix intended that the property mentioned in the fifth clause of the will should be held in trust; and the plaintiff is so advised.

Case discharged.

All concurred.

Sullivan,
April 2, 1907.

ROBERTS v. CLAREMONT RAILWAY & LIGHTING CO.

Adjacent riparian proprietors are joint owners of the right to divert the stream for power purposes, and either may have the water divided and his share thereof assigned in severalty, if such division can be effected without unreasonably interfering with the other's rights.

A common owner of the right to use a stream for power purposes is bound to account to his cotenants for their equitable portion of the benefit derived by him from a use of their share of the water.

PETITION, for an injunction. Transferred from the May term, 1906, of the superior court by *Wallace*, C. J.

The case is the same as that reported in 73 N. H. 121. After the decision in *Claremont etc. Co.* v. *Putney*, 73 N. H. 431, the plaintiff filed a motion in the superior court, asking that the defendants be enjoined from drawing water from Sugar river through their canal, and that the amount he is entitled to recover from them because of their use of his share of the water be determined; and the defendants filed a motion in the nature of a petition for partition, alleging that the parties are common owners of the right to use the water of the stream which divides their land and that the defendants can use their share most advantageously by drawing it through their canal, and praying the court to divide the water in a way that will permit such use by them.

After a hearing on the motions, the court found the following facts: The parties have been the common owners of a waterfall on Sugar river since 1902. The defendants own the land on both sides of the river above the fall, and the plaintiff is the owner of land on both sides below the fall. The interest of each party in the water is that incident to the ownership of the opposite banks of the stream. Prior to August 1, 1903, the defendants built a dam across the river on their land above the fall, by means of which they are enabled to divert all the water ordinarily flowing in the stream through a canal to their power-house, and return it to the stream just above the point where the plaintiff owns the land on both sides of the river. When the defendants begun to build the dam they supposed their charter authorized them to take the water; but they knew before the dam was used (August 1, 1903) that the plaintiff disputed their right, and they have continued the use since it was decided that they had no such right. The plaintiff had no use for the water, and the only loss he has sustained because of the defendants' action is that incident to their invasion of his legal right. The defendants begun to use the water on August 1, 1903, were using it at the time of the hearing, and have received a benefit of $500 a year from their use of the plaintiff's share.

The court denied the defendants' motion and enjoined them from drawing water from the river through their canal, except for the use of their steam plant, and assessed the plaintiff's damages at one dollar. The defendants excepted to the denial of their motion and to the injunction, and the plaintiff to the assessment of damages.

Herman Holt and *Streeter & Hollis*, for the plaintiff.

Frank H. Brown and *John M. Mitchell*, for the defendants.

YOUNG, J. The plaintiff is trying to prevent the defendants from using their share of the water without his consent, even if that may be done without trespassing on his land or interfering in any way with his making a like use of his share of the water, and they are seeking to avoid paying for the benefit they have received from their use of his share. The rule that riparian proprietors have a right "to insist that the stream shall continue to run *uti currere solebat*" (*Tillotson* v. *Smith*, 32 N. H. 90), on which the plaintiff seems to rely, is subject to the limitation that the owners of the land through which it runs may divert it from its channel for any lawful use, provided they do not detain the water unreasonably, do not overflow the land of the next upper proprietor, and return it to its channel above the land of the next lower proprietor in substantially the same condition as when it reached their land. Ang. Wat., *ss.* 90–95. So if the plaintiff and the defendants elect to do so, they lawfully may divert the whole of the water from the river, if they return it to its channel above the land of the next lower proprietor; in other words, they are the joint owners of the right to divert the water for power purposes. The question raised by the defendants' exception to the dismissal of their motion, therefore, is whether they have a legal right to have the water divided and their share assigned to them in severalty, if that can be done without unreasonably interfering with the plaintiff's rights. It is clear they have such a right if the same rule is to be applied to both improved and unimproved water powers; for it is settled that the court has power to make such orders in respect to the way the several owners shall exercise their rights in the common property as will be for the best interest of each of them, in so far as that can be done without any unreasonable interference with the rights of the others. *Conn. River Lumber Co.* v. *Company*, 65 N. H. 290, 390. Consequently, the defendants should be permitted to draw one half the water from the river above the plaintiff's land, if that would be a reasonable exercise of their right to use the water and can be done without injury to the plaintiff. *Horne* v. *Hutchins*, 71 N. H. 128; *Fowler* v. *Kent*, 71 N. H. 388; *State* v. *Sunapee Dam Co.*, 70 N. H. 458; *Blanchard* v. *Baker*, 8 Me. 253,—23 Am. Dec. 504; *Patten Paper Co.* v. *Company*, 70 Wis. 659; Ang. Wat., *ss.* 98–101. It is obvious that it can; for if the defendants are ordered to make a spill-way in their dam or to maintain a head-gate to their canal which will cause half of the water to return to the river above the plaintiff's land, and he is permitted to attach a dam to the defendants' land or to adopt some other means by which he can exercise his rights as fully and completely as though they were not permitted to divert their share of the water from the stream, he will have no

cause for complaint. Consequently, there should have been a decree for the defendants, dividing the water upon condition that they permit the plaintiff to attach a dam to their land, or to adopt some other course which will make the use of his right practicable, whenever he desires to do so in order to use his share of the water for any lawful purpose.

Although the owners of the land are not, strictly speaking, the owners of the water which flows in a natural channel over it, nor is the owner of either bank the owner of that part of the water which flows over his land, still the owners of the banks are the owners of the right to use the water for any lawful purpose—each owning an undivided half of that right. Consequently, their rights and liabilities in respect to the use of the water are those of tenants in common in respect to common property. Although they are not the common owners of the water, they are of the right to use it. If either uses it, his rights and his liabilities to the other owners will be the same as though they were tenants in common of the water. Since this is so, no reason can be given why a different rule should be applied when one of the owners is asked to account to the other for any benefit he has received from his use of more than his fair share of the water, from that applied in the case of an accounting between the common owners of any other property.

It is settled in this state that when a common owner uses more than his share of the common property,—in this case the common right to use the water,—he must account to his cotenants for their equitable share of the benefit he received from his use of their share. *Gage* v. *Gage*, 66 N. H. 282. Consequently, no question being raised as to the form of action, there should have been a decree that the plaintiff recover, at the rate of $500 a year from August 1, 1903, the benefit which it is found the defendants have received from their use of his share of the common property. The defendants' exception to the dismissal of their motion and to the injunction, and the plaintiff's to the assessment of damages, are sustained.

Case discharged.

All concurred.

Grafton,
April 2, 1907.

CASSIDY *v.* RICHARDSON.

A declaration is demurrable when it is impossible to ascertain from it the nature of the action or the ground upon which it proceeds.

In an action for breach of covenant for the quiet enjoyment of leased premises, the covenant should be set out in the declaration and its breach alleged.

ACTION AT LAW. The declaration is as follows: "In a plea of the case, for that the said defendant, on December 13, 1894, leased to the said plaintiff a part of the Northern Hotel, so called, situated on Main street in said Littleton, as a boarding-house; that in October or November, 1905, the said lease was continued for one year, supplemented by some minor agreements on the part of each (a copy of which lease the plaintiff does not have); that on June 15, 1906, because of the willful and malicious conduct of the said plaintiff, on divers times during said lease, in breaking and entering the tenements of the said defendant, assaulting and viciously treating occupants thereof, making slanderous and brutal assaults upon the said plaintiff, and constantly trespassing willfully upon the premises and rights of the said plaintiff; and because of the damages and dangers to the said plaintiff occasioned and threatened thereby, the said plaintiff was obliged to and did quit the said premises and abandoned the said lease; that because of the conduct on the part of the said defendant and the quitting of the premises and abandonment of the said lease by the said plaintiff, all as aforesaid, the said plaintiff suffered great damages, in loss of trade and profits from the boarding-house business which she carried on in said hotel, and had during term of said leases; in loss of the summer trade in said business for the season of 1906, and the profits to accrue therefrom; and in loss of peace and comfort and health of mind and body."

The defendant's demurrer was overruled by *Chamberlin*, J., at the September term, 1906, of the superior court, subject to exception.

Harry L. Heald, for the plaintiff.

Batchellor & Mitchell and *Smith & Smith*, for the defendant.

BINGHAM, J. The demurrer should have been sustained. It is impossible to ascertain from the declaration the nature of the action

or the ground upon which it proceeds. It is wholly a matter of conjecture as to what is relied upon as the ground of complaint. It may be that the action is for trespass to the person, or that it is for trespass to land with aggravated damages on account of the plaintiff's eviction and exclusion from the land by the defendant (*Shaw* v. *Hoffman*, 25 Mich. 162), or, as suggested in the plaintiff's brief, her action may be founded upon a covenant, express or implied, for the quiet enjoyment of certain leased premises, and the breach of the covenant by the defendant by reason of his entering upon and evicting her from the premises prior to the termination of the tenancy. If the last ground is the one relied upon, the plaintiff should have set out the covenant in her declaration and alleged its breach in accordance with the legal requirements in such actions. *Skally* v. *Shute*, 132 Mass. 367; *Brown* v. *Company*, 152 Mass. 463; *Beebe* v. *Swartout*, 3 Gilman 162, 179–181; *Keating* v. *Springer*, 146 Ill. 481; *Sanderson* v. *Berwick-upon-Tweed*, 13 Q. B. Div. 547, 551; 1 Tay. L. & T. (9th ed.), *ss.* 308, 309, 309a; 2 Chit. Pl. (16th Am. ed.) 200, 201; 5 Enc. Pl. & Pr. 362–373.

Exception sustained.

All concurred.

Rockingham, May 7, 1907.

74 222
74 525.

PORTSMOUTH SHOE CO. *v.* PORTSMOUTH.

A vote of city councils exempting from taxation the manufacturing establishment of A does not operate as an exemption of real estate owned by B, but leased to A and used by the latter for the purposes of the exempted business.

PETITION, for an abatement of taxes. Transferred from the April term, 1906, of the superior court by *Chamberlin*, J., upon an agreed statement of facts. The case is now before the court upon the plaintiffs' motion for a rehearing.

Early in 1903, the Gale Shoe Manufacturing Company, a Massachusetts corporation, desired to come to Portsmouth and there engage in the manufacture of shoes. On April 27, 1903, the city councils voted to exempt that corporation from taxation for ten years upon "the manufacturing establishment, factory, and plant occupied by it, with its property and assets, and the capital to be used in operating the same." The Gale Company then leased for

the term of five years the shoe factory and machinery owned by the plaintiffs, and covenanted to pay all taxes assessed upon the leased premises. In 1904, the assessors levied a tax upon the leased property against the plaintiffs, for which they seek an abatement. They are entitled to such abatement if the property was legally exempted; otherwise, they are not. If the exemption is not sustained, the case is to be discharged.

Page & Bartlett, for the plaintiffs.

John L. Mitchell, for the defendants.

WALKER, J. "Towns may by vote exempt from taxation, for a term not exceeding ten years, any manufacturing establishment proposed to be erected or put in operation therein, and the capital to be used in operating the same, unless such establishment has been previously exempted from taxation by some town." P. S., *c.* 55, *s.* 11. It is argued that this statute authorized the city councils of Portsmouth to pass the vote of April 27, 1903, by which it attempted to exempt the Gale Shoe Manufacturing Company from taxation upon "the manufacturing establishment, factory, and plant occupied by it, with its property and assets, and the capital to be used in operating the same," and that this vote covered the property in question, which it subsequently leased of the Portsmouth Company. One question presented, therefore, upon the plaintiff's contention, is whether the city councils could exempt the Portsmouth Company's property from taxation under the vote exempting the Gale establishment. Did the legislature intend to confer authority upon towns to exempt property owned by A, but leased to B and used by the latter in his exempted establishment? Until the property was turned over to the lessee, it was taxable in Portsmouth. Its owner held it subject to that burden. And after the lease it remained taxable to the owner, if it was taxable at all. It could not be taxed to the lessee without the latter's consent. P. S., *c.* 56, *s.* 14. In short, it remained the property of the lessor, whose claim is, in effect, that it is not legally taxable as the owner of it, because it is used by the lessee whose property is exempt. But unless a somewhat liberal construction of the statute is to be adopted, this conclusion cannot be sustained. "The language of the statute strongly supports this conclusion, and so does the uniform current of authority, that taxation being the rule and exemption the exception, the exemption is to be strictly construed, and will never be permitted to extend, either in scope or duration, beyond what its terms clearly require."

Boody v. *Watson*, 63 N. H. 320. See, also, *New London* v. *Academy*, 69 N. H. 443; *Williams* v. *Park*, 72 N. H. 305, 311.

It is certain that the language of the statute does not clearly disclose an intention to allow the exemption of one man's property from taxation, because it is used by another under some contractual arrangement between them, in a business which enjoys an exemption. If the mere use of the property, without regard to its ownership, had been intended to be the test to determine whether it could be exempted under the statute, it would be natural to expect more explicit language indicating such a purpose. The "manufacturing establishment" referred to in the statute means, or relates to, the property of the proprietors of the industry, who receive the benefit conferred by the statute, and not the property of others having no interest in the prosecution of the business. The city councils of Portsmouth had no power to vote to exempt the property of the plaintiff upon the condition that it should lease it to another manufacturing company. Though the vote did not directly take that form, that is the practical effect of it, as claimed by the plaintiff. A construction of the statute supporting such a transaction would be an encouragement, not of manufacturing industries, which is the fundamental purpose of the statute (*Opinion of the Court*, 58 N. H. 623), but of the business of leasing manufacturing property. Any benefit derived by the lessee in such a case from the exemption would be indirect and remote depending, not upon the statute, but upon the leasing contract. As said by the court in *County* v. *Bell*, 43 Minn. 344, 345: "The lessors claiming the benefit of the exemption in this case are mere private owners of the property, and the exemption is not for the lessees, . . . and it can only be claimed *arguendo* to be for their benefit in an indirect and collateral way." Evidently, under the usual rules for the construction of tax-exempting statutes, the legislative purpose to relieve property from the tax burden cannot be found by indirection and surmise. The plaintiff's property was legally taxable. The fact that the Gale Shoe Company agreed in the lease to pay the taxes does not affect the question of the statutory exemption. *People* v. *Assessors*, 32 Hun 457; *Black* v. *Brooklyn*, 51 Hun 581; *Humphries* v. *Little Sisters of the Poor*, 29 Ohio St. 201, 207; *Travelers' Ins. Co.* v. *Kent*, 151 Ind. 349; *Douglas County Society* v. *County*, 104 Wis. 429; *Laurent* v. *Muscatine*, 59 Ia. 404; *Armand* v. *Dumas*, 28 La. An. 403. This result makes it unnecessary to consider other arguments in support of the legality of the tax.

Case discharged.

All concurred.

Carroll,
May 7, 1907.

HUTCHINS v. BERRY & a.

Where the extent and capability of a reservoir upon which mills are dependent for power have been determined by judicial decrees in proceedings to define the rights of the various proprietors, a refusal by the superior court to reopen the question, upon the petition of one owner for interlocutory orders as to the use of the water, presents no question of law.

Whether a petition by a mill-owner for orders respecting the use of water from a reservoir should be so amended as to present for adjudication the question of his right to employ the power for a different purpose, is a matter determinable by the superior court.

A grant of the water used by a certain mill does not limit the manner or objects of the use, unless such an intent is clearly disclosed.

PETITION, for interlocutory orders in the controversies as to water rights previously before the court in the cases reported in 71 N. H. 117, 72 N. H. 211, and 73 N. H. 310, 603. Transferred from the June term, 1906, of the superior court by *Chamberlin*, J.

The plaintiff alleged that, not desiring to use the water of the reservoir below the four-foot point at this time, he proposes to change the physical condition of dam A so that no water can be drawn below the four-foot point, and to substitute gates above the four-foot point for those heretofore in use, and asked the court to fix and determine the size of the proposed gates. Under this allegation the plaintiff proposed to retry the question of the capacity of the reservoir, claiming that with the gates and physical conditions as they were in 1854 it was not possible to draw the amount of water now required to be drawn from the reservoir, namely, 130 cubic feet per second. Subject to exception, the court refused to retry the question of the capacity of the reservoir, to revise the order as to the draft of water, to hear evidence as to the physical condition at dam A prior to the improvements made by lowering the outlet of the reservoir, or to determine the size of gates, but ruled that the plaintiff might make such changes as he wished which would not interfere with existing orders as to the draft from the reservoir. The court found that the experience under the existing order was not sufficient to determine whether the amount required to be daily drawn was greater or less than the capacity of the reservoir in the average year. The plaintiff also alleged that the existing orders as to the use of water at dam C were in conflict with the opinions of the supreme court, and that

the third order, filed December 14, 1903, was not now in force as matter of law. Subject to exception, the court refused to make any change in those orders.

The plaintiff offered evidence that he now intends to remove the gristmill machinery, to put in machinery for the making of excelsior, and to use all the water the gristmill wheels can now use,—about sixty-nine cubic feet per second,—and asked leave to amend his petition by alleging his present intention to use the gristmill for other purposes. The defendants were not prepared to try such questions of fact as might be necessary to determine the rights of the parties as to the proposed use of the gristmill, and the court declined to order the defendants to a trial of these questions. The court refused to rule upon the right of the plaintiff to use the gristmill power otherwise than for a gristmill, and the plaintiff excepted.

James A. Edgerly, *Arthur L. Foote*, *Felker & Gunnison*, and *Charles B. Hibbard*, for the plaintiff.

Leslie P. Snow, *Sewall W. Abbott*, and *Oscar L. Young*, for the defendants.

PARSONS, C. J. Upon trial of the question of the extent of the defendants' reservoir right, that right has been found to be a reasonable use of the reservoir until it is drawn down four feet below the top of the dam; and such reasonable use has been found to consist in letting down not exceeding 130 cubic feet per second for ten hours each working day until that point is reached. *Berry* v. *Hutchins*, 72 N. H. 211, 214, 215; *S. C.*, 73 N. H. 310, 312; *Hutchins* v. *Berry*, 73 N. H. 611, 613–616. Upon the trial of that question of fact, evidence as to the amount of water that could be drawn under previously existing conditions as the limit of practicable use was approached would be competent; but if the parties were engaged in a trial of the fact as to the capability of the reservoir right attached to the Pickering dam, the exclusion of evidence of measurements of the flow of the stream under a claimed reproduction of conditions existing prior to the Lake Company improvements would not be error of law. *Cook* v. *New Durham*, 64 N. H. 419. The difficulty of ascertaining all the conditions which might have then affected the flow of the stream, and of determining whether they had been correctly reproduced, might be so great that an attempted investigation of the collateral question would tend to confuse rather than elucidate the issue between the parties.

Even, therefore, if the question as to the flow of the stream had

been under investigation, the refusal of the court to fix and determine the size of gates such as existed in 1854 would not present anything for consideration here. But if the law were otherwise, the extent and capability of the reservoir having been already determined, error of law cannot be predicated upon the refusal of the court, upon the facts stated, to reopen the question and grant the plaintiff a new trial, which it is found was the object of the motion, and which must of necessity have been its purpose if any result was expected to follow the desired investigation. *Hutchinson* v. *Railway*, 73 N. H. 271, 284; *Ela* v. *Ela*, 72 N. H. 216. The plaintiff has the right, as was ruled by the superior court, to make any changes he desires which will not prevent the letting down of the amount of water which it has been determined represents the capacity of the original reservoir. While the latter finding stands, any change made by him which prevents the flowing of that amount of water, it must be conclusively presumed, is the creation of a condition different from what originally existed. As to whether there should now be a further trial and the reception of additional evidence, experimental or otherwise, the fact has been found against the plaintiff. Such finding is conclusive.

The plaintiff excepted to the refusal of the court to change the orders made and now in force for managing the water or wheels of the different mills. The only order to which objection has been made here is the third order, filed December 14, 1903. That order is objected to so far as it modifies order No. 1, filed July 25, 1902, which limited the Berry privilege to thirty-eight cubic feet per second when the water did not run over the wasteway. The modification objected to provided that the limitation of the Berry privilege should not take effect until the water fell eighteen inches below the top of the wasteway. In the original brief, the plaintiff bases his objection to the modification upon the preferential right of the gristmill. As the owner of the gristmill was not a party to the proceedings in which the order now objected to was made, and as it has since been determined that the gristmill has the right to require all the mills to shut down when the water falls six inches below the top of the wasteway (*Hutchins* v. *Berry*, 73 N. H. 603, 611, 613), the order does not affect the gristmill and there is no occasion to modify it for the protection of the gristmill right. In a brief filed since the hearing, the plaintiff objects to this modification as an invasion of his right as the owner of the leather-board mill, heretofore called the box-factory privilege.

Horne v. *Hutchins*, 72 N. H. 77, was a bill in equity to determine to what extent and in what manner water was actually used at the box factory, October 26, 1872, such use having been held to be the measure of the box-factory right. *Horne* v. *Hutchins*, 71

N. H. 128, 137. In the former case it was found that, as between the sawmill and the box factory, there was no preference; that the water-wheel in the sawmill could use thirty-eight cubic feet of water and the penstock of the box factory could deliver seventeen cubic feet of water per second when the water in the pond stood at the level of the wasteway. The amount to which the Horne privilege was entitled having been determined in another case to be thirteen cubic feet per second, it was ordered that the gates to the respective penstocks be set so as to permit only thirteen, seventeen, and thirty-eight cubic feet respectively to be drawn when the water stood at the top of the dam and did not run over the wasteway. Both parties excepted to these findings, orders, and decrees. The exceptions were overruled. The decrees therefore are judgments establishing the rights of the parties. The order of December 14, 1903, removing the limitation upon the use by the Berry privilege until the water fell eighteen inches below the top of the wasteway, also provided that the stops on the Hutchins wheel or gate should remain as before. The occasion for this modification does not appear. As there was no preference between the sawmill and box factory, the plaintiff cannot complain in behalf of his leather-board mill that the sawmill is permitted to draw down the water in the pond; but if, as seems to be the effect of the existing order, the sawmill is permitted to draw down the water below the top of the wasteway without limitation as to the amount, while the plaintiff's gate is set so as to draw only seventeen feet when the water is at the top of the wasteway, it is manifest that the plaintiff will as the water falls receive less than the seventeen feet to which it has been adjudged he is entitled, and that the sawmill will receive more. In the absence of any findings sustaining the change ordered December 14, 1903, the same appears to be erroneous, and the exception to the refusal to change the same to accord with the judgment in *Horne* v. *Hutchins*, 72 N. H. 77, is sustained. As the relative right between the leather-board mill and sawmill is determined to be in the ratio of seventeen to thirty-eight, it is immaterial to the plaintiff Hutchins whether the amount taken as the measure of the rights of the two —seventeen plus thirty-eight cubic feet—is excessive as against the right of the Horne privilege.

Whether justice required that the plaintiff should be permitted to amend his petition, so as to present for adjudication his right to use the water at the gristmill for other purposes, is a question of fact. The denial of the motion presents no question of law.

It was said in *Hutchins* v. *Berry*, 73 N. H. 603, 604,—a bill in equity brought by the plaintiff to determine the gristmill right,—that "in the absence of a definite specification of the amount of

water excepted or the manner of its application to produce power, it must be understood the parties contracted with reference to the manner and extent the water was then at the date of the deed actually used for the purpose specified." It appears to be well settled that when a right exists to use a certain quantity of water, a change in the mode and objects of the use without increasing the quantity is no violation of the right. *Fuller* v. *Daniels*, 63 N. H. 395; *Dow* v. *Edes*, 58 N. H. 193, 194; *Wiggin* v. *Wiggin*, 43 N. H. 561, 566; *Whittier* v. *Company*, 9 N. H. 454, 458; *Johnson* v. *Rand*, 6 N. H. 22. The sole question, then, is whether by the reservation in the Colby deed the parties understood the matter reserved was merely a right to operate a gristmill, and not the right to use a certain part of the water for power. It was said in *Fowler* v. *Kent*, 71 N. H. 388, 394, that "it would require very explicit language to overcome the natural inference that a person would not accept a deed of a mill privilege subject to the condition that his water rights should become forfeited if any change was made in the manner, purpose, or place of use." But whether the question is simple or difficult, the interpretation of the Colby deed is not now before the court. The superior court has ruled that the defendants ought not now to be compelled to litigate the question. This court cannot assume that there may not be some evidence which the parties can present which will aid the interpretation. Neither can they assume that all the facts bearing upon the question have been presented in the numerous cases between the present and other parties, involving this water-power, that have been before the court. If that fact could properly be assumed, the court would not take the time to search the voluminous record in these cases, which presents many other questions, for facts that may be material upon this. If the question is to be intelligently considered, it should be presented upon a record which contains in itself all the facts which either party conceives to be material. The evidence as to the modification of the original order regulating the flow of water to the Berry privilege should have been received; and unless facts appear authorizing a change, the original order should be restored.

Case discharged.

YOUNG, J., did not sit: the others concurred.

Merrimack,
May 7, 1907.

MINOT, *Adm'r*, *v.* BOSTON & MAINE RAILROAD.

A verdict cannot be ordered for the defendants in an action for negligence, on the ground of demonstrated falsity of the testimony adduced by the plaintiff, unless the evidence in behalf of the defendants is so certain and conclusive that reasonable men, upon a consideration of all the proof, must unanimously decide the issue adversely to the plaintiff.

Requested instructions are properly denied if they give undue prominence to portions of the testimony, if they are argumentative, or if they divert attention from evidence in the case and the conclusions reasonably to be drawn therefrom.

Where the customary movement of a railroad train during a certain season is a material question, evidence as to its movements for five years prior thereto is relevant as matter of law; but whether in such case the testimony should be limited to a briefer period, is a question determinable by the trial court.

CASE, for negligently causing the death of the plaintiff's intestate, Catherine Fitzgerald. Trial by jury and verdict for the plaintiff. The action has been before the court upon a former transfer. See 73 N. H. 317. Transferred from the October term, 1906, of the superior court by *Pike*, J.

The decedent, a woman sixty-three years old and in full possession of her faculties, was run over and killed about one o'clock in the afternoon of August 7, 1902, while crossing the tracks in the defendants' yard at Cherry Mountain, by a train which was backing over a siding. The passenger station at Cherry Mountain is located northerly of the defendants' main line running from Whitefield Junction in an easterly direction to Berlin, in the angle formed by this line and their branch line running from it in a northeasterly and northerly direction to Jefferson Hill. The station is surrounded by a platform elevated slightly above the level of the rails and extending to the main track on the south, the branch track on the north, and nearly to the junction of the two tracks on the west. A side track runs from a point in the branch line north of the station in a westerly direction, to a point in the main line 1,000 to 1,200 feet distant, with a slightly descending grade toward the station. There are side tracks southerly of and connected with the main line. A foot-path leads from a point southerly of all the tracks, in a northerly direction across the tracks and the platform westerly of the station, to a point northerly of the branch siding.

The plaintiff's testimony tended to prove the following additional facts: The foot-path had been used by the public and the defendants' employees for many years. The decedent resided some 200 feet southerly of the Cherry Mountain station, and habitually observed the movements of trains there. She was accustomed to use the foot-path, and had used it on previous occasions when the Jefferson Hill train stood on the branch siding. A passenger train was due to arrive at the station from Jefferson Hill ten minutes before one o'clock in the afternoon of each week day. This train, consisting of a locomotive numbered 807 and a combination passenger and baggage car, customarily pulled onto the branch siding after its passengers had alighted, and remained there until some time between four and five o'clock, when it returned to Jefferson Hill by backing up the branch line. The train or its locomotive did no shifting or other service in the meantime. Five witnesses produced by the plaintiff testified, in substance, to these facts, representing that they had opportunities for observing them. One of them testified that before returning to Jefferson Hill a Pullman car was added to the train. On the day of the accident, the decedent promised to go to the house of a neighbor residing northerly of the branch siding as soon as the Jefferson Hill train had run upon the siding out of the way. The train came in a little before one o'clock. After its passengers had alighted at the station it backed up the branch line and pulled in on the branch siding, where it stopped long enough to permit the coupling of the forward end of the locomotive to a freight car loaded with ties there standing and the releasing of the car brake, and then it backed down the siding, the combination car being ahead, the locomotive next, and the freight car in the rear. No warning was given before or as the train began to back, and there was no one upon the combination car. The decedent started from her house about one o'clock and walked over the foot-path toward the neighbor's house. She walked from a point on the platform to the branch siding without stopping or looking to the right or left, and was there struck by the backing train and was killed. When she stepped from the platform the train was thirty-five to forty-five feet distant. It began to back about that time, and moved with little noise at the rate of four to six miles an hour. There was no time after the decedent left the house when she could not see the train and observe whether it was at rest or in motion. One of the defendants' rules required all trains and engines at that station to run "very carefully and under control within yard limits." Another rule required the engine bell to be rung when the engine was about to move.

The defendants introduced in evidence their train dispatcher's

orders relating to the movements of locomotive 807 between June 24 and August 7, 1902, during the hours of the day between one and five o'clock in the afternoon, the train sheets kept in the regular course of business, showing such movements, and the record of the movements made by the conductor as they occurred. It appeared from these orders, etc., that the locomotive was engaged in service away from the Cherry Mountain station during these hours, from half an hour to an hour on fifteen days, from one to two hours on six days, and from two to three hours on six days,—leaving the station between one o'clock and twenty minutes past one on thirteen days, between twenty minutes past one and fifty minutes past one on six days, and later than two o'clock on the other days. The defendants also produced as witnesses the trainmen of the Jefferson Hill train and the station agent at Cherry Mountain, whose testimony tended to prove the following facts: Locomotive 807 did more or less shifting of cars in the yard at Cherry Mountain. It never went on the branch siding to remain until after it had done its extra work and shifting. Whenever the combination car was set on the branch siding, a passenger car was with it. These cars were sometimes placed on this siding and sometimes on a siding south of the main line. They and the locomotive were placed and remained on the branch siding a good many times during the summer of 1902, both on days when the locomotive did extra work and when it did none. They were usually placed on that siding when no cars were in the way, and were backed onto it from its westerly end. The locomotive and car never backed up the branch line and pulled in on the siding from its easterly end before the day of the accident. Whether the cars and locomotive were set upon this siding during the hours of the day above mentioned so frequently that it could properly be said they were set there customarily, was doubtful. As soon as the locomotive was coupled to the freight car on the day of the accident, the fireman looked back and saw the decedent standing about midway of the station platform, facing across the Jefferson Hill branch and siding. Upon starting, he struck the bell and turned around toward the freight car to see if it was coming, and did not look again before the decedent was struck. The engineer was on the side of the locomotive farthest from the decedent, and did not see her. The train backed 100 feet or more before striking the decedent, at such rate of speed that it could have been stopped within twenty feet. It was twenty to thirty feet from the middle of the station platform to the place of collision. It appeared as if the decedent did not see the train and was not conscious of its approach. When she stepped on the siding, she turned so as to face from the train. Some portions of the defend-

ants' other evidence conflicted more or less with the plaintiff's evidence.

At the close of the testimony the defendants moved for an order directing a verdict in their favor. The motion was denied, and they excepted. They raised the same question by exceptions to the denial of their requests for similar instructions to the jury in the charge. They also excepted to the denial of their requests for other instructions, and to certain rulings relating to the testimony and examination of witnesses. These exceptions and the facts pertaining to them appear in the opinion.

Sargent, Remick & Niles, for the plaintiff.

Mitchell & Foster and *Streeter & Hollis*, for the defendants.

CHASE, J. The defendants, in their argument in support of the exception to the denial of their motion for an order directing a verdict in their favor, place much reliance upon the character and weight, as testimony, of the orders, train sheets, and records put in evidence by them, relating to the movements of the locomotive of the Jefferson Hill train. They say that this testimony demonstrates the falsity of the plaintiff's testimony relating to the customary movements and location of the train during the afternoon hours, and consequently the falsity of the proposition that the decedent was exercising ordinary care in attempting to cross the tracks as she did. In their brief, they freely admit that "if . . . the testimony of the plaintiff's witnesses were opposed merely by the testimony of the defendants' trainmen, the conflict would be for the jury to determine"; that it would then be "the common case of one set of men contradicting another, and, so far as the court could see, either might be right, and reasonable minds could conceivably differ as to which was right." In the consideration which they have given to these orders, etc., they seem to have overlooked the fact that the orders, etc., specifically relate to the locomotive alone. Assuming, for the purpose of the argument, that this testimony, by reason of its character, inherently and conclusively implies verity, it proves only that the locomotive moved about as shown by it. It does not prove that the combination car, alone or in connection with another car, was taken with the locomotive while performing outside service, or that it did not customarily stand upon the branch siding during the afternoons. It does not prove that the locomotive was used in shifting cars in the yard at Cherry Mountain after its arrival there. Indeed, the testimony introduced by the defendants themselves tended to prove that the cars and the locomotive, one or all of them, so fre-

quently stood upon this siding during portions of the afternoons that it was doubtful whether it could not properly be said that they customarily stood there. The defendants were at liberty to argue to the jury that they had shown by conclusive testimony that the plaintiff's witnesses were not entitled to credit; but the jury were not obliged to find, because the witnesses were in error as to some particulars, that they were false or in error as to all. They were at liberty to find, if upon a consideration of all the testimony such appeared to them to be the fact, that the plaintiff's witnesses were mistaken or misrecollected as to some of the movements of the locomotive, but were entitled to credit as to other matters. They might reasonably believe that there would be more or less unintentional errors in the testimony of witnesses—whether called by the one side or the other—given after the lapse of four years from the time when the transactions occurred as to which they testified. Furthermore, the question of the decedent's care did not necessarily depend upon the fact that the Jefferson Hill train, without change in its make-up, pulled onto the branch siding immediately after its passengers alighted, and stayed there during the remainder of the afternoon. If the train, with or without the additional passenger car, was frequently placed on the siding at some time during the afternoon and usually remained there after being so placed until four or five o'clock, a jury might reasonably find that the decedent, familiar with such custom, would not be wanting in due care if she assumed that the train which caused her death, having gone onto the siding, would not back out immediately. *State* v. *Railroad*, 52 N. H. 528. As was said in *Smith* v. *Railroad*, 70 N. H. 53, 85, "familiarity with the manner in which the railroad is operated and the times when trains pass over it might excuse a traveler, under some circumstances, from looking or listening for a train when about to pass over the crossing."

The plaintiff's testimony on the question of the decedent's care was certainly as full and definite as it was at the former trial, which, it has been decided, was sufficient to require the submission of the question to a jury. *Minot* v. *Railroad*, 73 N. H. 317. The defendants' testimony, while conflicting with the plaintiff's in some particulars, tended to confirm it in other particulars. There was no such certain and conclusive verity and preponderance in it as would enable one to say with confidence that reasonable and impartial men, upon considering and weighing it in connection with the plaintiff's testimony, would not differ in their judgments, but must unanimously come to the conclusion that the decedent's death was due, in part at least, to her own want of due care.

Deschenes v. *Railroad*, 69 N. H. 285; *McGill* v. *Granite Co.*, 70 N. H. 125, 129.

The defendants cite *Gahagan* v. *Railroad*, 70 N. H. 441, and urge the proposition that this case is on all fours with it. That case was taken from the jury "because upon the evidence there is no disputed question of fact to be determined." *Ib.* 446. Gahagan "walked upon a railroad crossing within a railroad yard, over which he knew trains and shifting engines were frequently passing." *Ib.* 445. According to the plaintiff's evidence in this case, Mrs. Fitzgerald's knowledge as to the use of the defendants' railroad yard was that no shifting was done in it during the afternoon hours; or, in other words, the fact within her knowledge was the direct opposite of that which was within Gahagan's knowledge. This case also differs essentially from *State* v. *Harrington*, 69 N. H. 496, and *Boston & Maine R. R.* v. *Sargent*, 72 N. H. 455, cited by the defendants. In the first case there was no conflict in the testimony upon the point as to which the verdict was ordered; and in the second case there was an estoppel arising from a prior judgment which entitled the plaintiffs, as a matter of law, to a verdict upon the point as to which it was ordered. Nor does *Arnold* v. *Prout*, 51 N. H. 587, support the defendants' position. In that case, the court, after noting that there was no evidence tending to prove that the delivery of the ale in suit was to be in this state under the contract for its sale,—the point on which the verdict was ordered,—said: "The counsel for the defendant are right in their position that if there was any evidence, though slight, tending to rebut the position that the delivery was in New York, the question ought to have been submitted to the jury." The defendants' exceptions to the denial of their motion for an order directing a verdict in their favor and to the denial of their request for similar instructions to the jury stand no better than their exception to the denial of their motion for a nonsuit upon the former transfer of the case, and, like that exception, they must be overruled. *Minot* v. *Railroad*, 73 N. H. 317.

The defendants also excepted to the denial of their requests for certain other instructions to the jury. These requests were made in several different forms, but the following may be taken as a sample of one class of them: "Upon the undisputed evidence, Mrs. Fitzgerald was familiar with the course of business at Cherry Mountain station, and she walked from the platform onto the Hill siding without taking any precautions to learn whether the train was moving. In so doing she was guilty of negligence which prevents a recovery, unless an ordinarily prudent person, familiar with the course of business at that station, would have understood

that there was no danger of this engine and car backing at the time she undertook to cross. A person of ordinary prudence could not so understand, unless it was the usual practice for the engine and combination car to pull onto the Hill siding at this time of day and remain there for a considerable time. Unless, therefore, you find that it was the usual practice for the engine and combination car to pull onto this particular siding when they arrived from the Hill at 12:50 and had discharged the passengers, and to remain upon this siding for a considerable time before again moving, your verdict must be for the defendant railroad." In determining the question of the decedent's care, an important fact to be taken into consideration was the state or character of her knowledge as to the movements of the Jefferson Hill train, etc., in the Cherry Mountain yard. Would her habitual observations of these movements naturally produce (1) the impression upon her mind that the locomotive and car of the train customarily pulled onto the branch siding immediately after its passengers had alighted, and remained there until late in the afternoon; or (2) the impression that whenever in the afternoon they pulled in there they usually remained until four or five o'clock; or (3) the impression that the locomotive alone, or in connection with the car, was usually engaged for a time immediately after its arrival at the station in shifting cars about the yard, including the branch siding, and did not go upon the siding to remain, if at all, until later in the afternoon; or (4) the impression that whenever the locomotive was about to move in shifting cars or other service its bell was rung, and it moved very carefully and under control? Or, summarizing these matters in a more general form, was the decedent's knowledge such as reasonably to induce a belief that the locomotive and car pulled onto the siding to remain at this particular time, or a belief that it was engaged in shifting cars or other service? If it was such as reasonably to induce the former belief, the decedent might well be regarded as in the exercise of due care in going upon the siding as she did; but if it was such as reasonably to induce the latter belief, the jury would probably have no difficulty in finding that her conduct was wanting in the element of due care, provided they found that the bell was rung before the locomotive started. The defendants' request for instructions above quoted, besides being objectionable because it gives undue prominence to portions of the testimony and is argumentative (*Spalding* v. *Brooks*, 58 N. H. 224; *Phœnix etc. Co.* v. *Clark*, 59 N. H. 345; *Fogg* v. *Moulton*, 59 N. H. 499; *Rublee* v. *Belmont*, 62 N. H. 365; *Davis* v. *Railroad*, 68 N. H. 247, 252), is objectionable because it ignores, or, rather, decidedly diverts attention from the proposition that if the decedent's knowledge was such as is

referred to in the first (1) or second (2) of the alternatives above enumerated, and the bell was not rung as the locomotive was about to start, she might reasonably be regarded as without fault. This request and the others of the same class were properly denied.

Another of the defendants' exceptions was to the denial of their request for an instruction to the jury as follows: "If you find that the course of business was such that the movements of the engine and car, at the time of day when the accident happened, were variable and uncertain, Mrs. Fitzgerald was not justified in stepping upon the track without looking to see whether they were in motion, and the plaintiff cannot recover." An instruction of this kind would be faulty, because it would divert the jury's attention from the testimony relating to the defendants' rules as to the giving of a warning when the locomotive was about to move and its control while in motion, and the probable knowledge acquired by the decedent regarding these matters from her habitual observations. *Davis* v. *Railroad*, 68 N. H. 247. The request for this instruction was also properly denied.

The request for an instruction that the decedent was a trespasser and the plaintiff was not entitled to a verdict unless her peril was discovered by the defendants' employees in season to prevent injury to her by an exercise of ordinary care, was properly denied, for the reasons stated in the former opinion in this case. *Minot* v. *Railroad*, 73 N. H. 317, 321.

One of the witnesses called by the plaintiff was allowed to testify, subject to the defendants' exception, that the one o'clock Jefferson Hill train, for four or five years prior to the summer of 1902, was handled just the same as it was that summer. The defendants say this testimony was irrelevant and calculated to mislead the jury. It had the same relevancy to the questions on trial that the testimony had relating to the movements of the train during the summer of 1902. The uniformity of the custom for four or five years would be likely to impress the decedent, who resided near the station for some years and habitually observed the movements. It had a natural tendency to make her knowledge definite and certain. Whether the testimony should have been limited to a briefer period than four or five years was a question that was within the discretion of the court to determine, and is not open to consideration here.

The defendants' exception to the declination of the court to limit the testimony regarding the custom as to the movements of the Jefferson Hill train to the time of day immediately following its arrival at Cherry Mountain is also overruled, for the reasons above stated.

The plaintiff, upon the cross-examination of the conductor and the engineer of the Jefferson Hill train, attempted to show that certain of the defendants' rules applied to the situation as the train backed down the siding, and required certain precautions. In doing so, he read the rules to the witnesses in the hearing of the jury and asked questions concerning their application. The defendants excepted to this course. It was a dangerous course for the plaintiff to take, but it does not appear that it could possibly result in any harm to the defendants in this instance. As to two of the rules read, the witness testified, in substance, that they had no application to the situation of the backing train, and neither of them was offered in evidence. One of them was, in substance, the same as another rule that was put in evidence by the plaintiff and obviously applied to the situation, and the other was entirely immaterial and harmless. A third one was put in evidence without objection.

Exceptions overruled.

All concurred.

Hillsborough,
May 7, 1907.

GILES *v.* SMITH, *Ex'x.*

In an action for breach of contract against the promisor's executor, who does not elect to testify, the plaintiff is not a competent witness as to his conversations and dealings with the testator, nor as to the contents of his letters written in reply to those received from the decedent's agent unless it appears that the principal had not read the correspondence and could not testify concerning it.

ASSUMPSIT, for the breach of a contract of Charles G. Smith, the defendant's testator, to employ the plaintiff for one year upon the Manchester News. Transferred from the January term, 1907, of the superior court by *Peaslee*, J.

There was evidence tending to prove the following facts: At about the time Smith came into possession of the newspaper, he asked for the plaintiff's address, so that Mellows, the managing editor, might write to him with a view of employing him to take charge of the circulation department. The address was found, the plaintiff came to the News office and took charge of the circulation department, his name was placed upon the payroll at $18 per week, and he was paid off with the other persons employed

upon the paper. On one occasion when Smith was paying off the employees he said to the plaintiff: "Your case is the worst of the lot; I will try and see that you do not lose anything by it."

The plaintiff was permitted to introduce in evidence letters from Mellows to him, stating that Smith had bought the News and was in want of a circulation manager, describing the situation, and asking the plaintiff to take the place, and a letter saying, "Your terms are accepted." The plaintiff offered to show that Mellows is now of parts unknown, and then offered himself as a witness to testify to the contents of his letters in reply to those received from Mellows, and also that when he came to Manchester Smith said that Mellows was authorized to hire him. The executrix did not elect to testify. The plaintiff's testimony was excluded, subject to exception.

David W. Perkins, for the plaintiff.

Irving T. George (with whom were *Burnham, Brown, Jones & Warren*), for the defendant.

PARSONS, C. J. As the executrix did not elect to testify, the plaintiff was properly excluded as a witness to all facts occurring in the lifetime of the deceased as to which the deceased could have testified if living. P. S., *c.* 224, *ss.* 16, 17; *Parsons* v. *Wentworth*, 73 N. H. 122; *Perkins* v. *Perkins*, 68 N. H. 264. Under the settled construction of the statute, the plaintiff could not testify to what Smith did or told him; nor to the contents of the letters, if Smith had seen them and therefore could have testified to their contents. *Welch* v. *Adams*, 63 N. H. 344, 351. The plaintiff's testimony was not competent unless the contrary appeared. *Harvey* v. *Hilliard*, 47 N. H. 551; *Fosgate* v. *Thompson*, 54 N. H. 455; *Parsons* v. *Wentworth*, *supra*.

Exception overruled.

All concurred.

Hillsborough, May 7, 1907.

SIPOLA v. WINSHIP.

One who has been induced to purchase real estate by fraudulent representations as to the extent and value of the land is not entitled to a rescission of the contract when that relief would be inequitable because of great deterioration in the property, due to fault on his part after discovery of the fraud, and because of his delay in instituting suit.

In such case the court may decree a cancellation of a promissory note given by the plaintiff for the purchase price, to the extent of the damage he has suffered by reason of the defendant's fraud, if under all the circumstances equity and good conscience so require; and it is no objection to the granting of such relief that the parties will thereby be deprived of a trial by jury.

Statements by the owner of a farm as to the area of the tillage land therein, made with knowledge of their falsity, designed to induce a purchase, and relied upon by the vendee, are fraudulent representations which entitle the latter to relief.

A prospective purchaser of land, who is ignorant of the extent of an acre as it appears upon the ground, may be justified in relying upon the representations of the owner as to the number of acres in the tract.

BILL IN EQUITY, for the rescission of a sale of real estate on account of fraud, etc. Trial by the court. Bill dismissed without prejudice. Transferred from the January term, 1906, of the superior court by *Peaslee*, J.

The plaintiff purchased a farm of the defendant in 1904, for the price of $2,500, of which he paid one half in cash and gave his note secured by a mortgage of the farm for the balance, payable in annual instalments of $100 each. The first instalment having become due and its payment being refused by the plaintiff, the defendant brought a writ of entry to foreclose the mortgage, which action is pending. The bill alleges fraudulent misrepresentation as to the quantity of wood and timber on the farm and as to the extent of the tillage land, and the plaintiff's reliance upon the representations. The prayers of the bill are for a stay of the action at law during the pendency of this suit, for an injunction restraining the defendant from assigning the note and mortgage or any interest therein, for a decree rescinding the contract of sale or cancelling the note and mortgage and enjoining the further prosecution of the writ of entry, for a decree for the damages to which the plaintiff is entitled in equity, and for such other relief as may be just. The defendant's answer, besides denying the fraud and demurring to the bill on the ground that the plaintiff had a plain

and adequate remedy at law, alleges that the statements complained of were mere expressions of opinion, and were so understood by the plaintiff, who carefully examined the premises and had equal opportunity with the defendant to make accurate estimates upon those matters. The defendant alleges, in an amended answer, that the property conveyed to the plaintiff included stock and farming utensils which the plaintiff had used, worn out, and disposed of, and that he had carried on the farm in an unhusbandlike manner and consumed the crops.

The plaintiff bought the farm relying upon the defendant's assertions and offers to warrant that the wood and timber on the farm were worth $1,000. They were not worth over $600, and this the defendant knew. The plaintiff's damages on account of this fraud are $400. The defendant also represented that there were forty-five acres of tillage land, when there were in fact only eighteen acres, and the defendant well knew there were much less than forty acres. The plaintiff examined the tillage fully and had every opportunity to judge of its extent, but he had no definite idea of the extent of an acre of land. He saw and understood what land was included in the tillage sold to him. He relied upon the statement in the defendant's advertisement, that there were forty-five acres of tillage, and upon the oral assurances of both the defendant and his agent that there were forty or forty-five acres, and honestly believed that the area was as represented. The defendant intended that the plaintiff should rely upon the representations. It was found from these facts that the charges of fraud relating to the extent of the tillage were not established; and this finding was based upon the ruling that, upon the facts found, the plaintiff is not entitled, as a matter of law, to rescission or damages upon that ground. To this ruling the plaintiff excepted.

After discovering the fraud as to the wood and timber, the plaintiff continued to occupy the farm and so mismanaged that it has greatly deteriorated in value. His acts and his delay in bringing this suit were such as to make a decree of rescission inequitable. The bill was dismissed without prejudice, upon the ground that, as the case for equitable relief failed, the court has no jurisdiction to retain the bill for the assessment of damages caused by fraud. To this ruling the plaintiff excepted.

The plaintiff also excepted severally to the denial of these motions: That the defendant be enjoined from further prosecuting his action for a foreclosure of the mortgage, and be ordered to indorse $100 upon the note as of its date and to pay the plaintiff the balance of the $400 damages above mentioned and his costs; that the

defendant be ordered to indorse $400 upon the note as of its date and not prosecute his action further, and to pay costs; and that the plaintiff have leave to amend by substituting for the bill in equity a declaration in case for deceit, and thereupon have judgment for $400 and costs. The motions were denied, because to grant them would deprive the defendant of his right to a jury trial.

Sargent, Remick & Niles, for the plaintiff.

George B. French, for the defendant.

CHASE, J. The plaintiff seeks equitable relief for the defendant's fraud in making the sale of the farm to him, either by a rescission of the contract of sale, or by a cancellation of the note and mortgage which he gave in part payment for the farm, and which the defendant now holds and is attempting to enforce by an action at law. It appears that, in making the contract of sale, the defendant defrauded the plaintiff to the extent of $400 by false and fraudulent representations regarding the value of the wood and timber upon the farm. The effect of this fraud was substantial; and if the plaintiff, as soon as he discovered the fraud, had taken steps to have the contract of sale rescinded, and was able and willing to restore the defendant to his situation before the contract, no reason is perceived why the plaintiff would not be entitled to rescission. But the defendant in his amended answer set up, as a defence to the plaintiff's claim of rescission, the plaintiff's acts in consuming and disposing of portions of the property included in the sale and in carrying on the farm in an unhusbandlike manner. In other words, the defendant alleged that the plaintiff was not entitled to a rescission of the contract because by his own faulty acts he had disabled himself from restoring the defendant to his original situation. It was found by the superior court that, after discovering the fraud, the plaintiff continued to occupy the farm and so mismanaged that it greatly deteriorated in value; and, further, that the plaintiff's acts and his delay in bringing this suit were such as to make a decree of rescission inequitable. No question was transferred relating to the correctness of these findings. Consequently, they must be regarded as adequately supported by the evidence that was submitted to the court. The question of law then is, whether a party is entitled to rescission of a contract when rescission would be inequitable because of great deterioration in the property to be returned by the plaintiff, arising from fault on his part after discovering the fraud, and because of

his delay in instituting a suit for obtaining rescission. The statement of the question unerringly suggests the answer.

It is true that there are cases in which rescission has been decreed when the plaintiff had disabled himself from restoring the property received under the contract in the condition it was in when received; but in such cases it was practicable to shape the decree so as to do equity between the parties. *Thackrah* v. *Haas*, 119 U. S. 499. There is nothing in the record showing that it was practicable to make such a decree in this case. It might be inequitable to require the defendant to take the farm back, greatly deteriorated in value, even in connection with the payment of a sum of money to compensate him for the deterioration, or to take it back after so long a delay. As the case stands, it appears that a rescission, absolute or conditional, cannot be made that will be equitable between the parties. Such being the fact, law or equity does not entitle the plaintiff to rescission. Equity will not order that to be done which in and of itself is inequitable.

The cancellation which the plaintiff seeks is not cancellation to effect rescission, but cancellation notwithstanding the contract of sale stands. His position in substance is, that the note which the defendant received under the contract of sale, and which he now holds and is attempting to collect, is without consideration in whole or in part because of the defendant's fraud; and that equitable considerations require that the defendant should not be allowed to retain the note and accompanying mortgage as valid, subsisting claims against the plaintiff and the farm. Story, in discussing the subject of the cancellation of instruments independently of discovery or other equitable relief, says: "Whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest, and the jurisdiction is now maintained in the fullest extent. And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person." 1 Sto. Eq. Jur. (13th ed.), *s.* 700. In *Hamilton* v. *Cummings*, 1 Johns. Ch. 517, Chancellor *Kent* reviews the early common-law authorities upon the subject, and concludes that "the weight of authority and the reason of the thing are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are

not well founded." He says further (*p.* 523): "But while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation." See *Downing* v. *Wherrin*, 19 N. H. 9, 91, 92. "The application for this species of relief is by a bill *quia timet*, and is addressed to the sound discretion of the chancellor upon the circumstances of the particular case; and the relief will ordinarily be afforded where injury may reasonably be apprehended, and it is made to appear that the retaining of the title or claim is clearly against conscience." *Bellows*, J., in *Tucker* v. *Kenniston*, 47 N. H. 267, 270. It was held in *Strafford* v. *Welch*, 59 N. H. 46, that a bill in equity might be maintained for the surrender and cancellation of an overdue note, payment of which had been tendered to and refused by the holder. See, also, *Brooks* v. *Howison*, 63 N. H. 382, 389.

The case under consideration resembles, in some particulars, the case of *Montgomery* v. *McLaury*, 143 Cal. 83. In that case, the contract into which the fraud entered was for an exchange of farms, and included a note and mortgage given by the plaintiff to the defendant for the difference in the values placed upon the farms. There was controversy between the parties relating to the interpretation of the pleadings—whether the plaintiff's case was for a rescission of the contract, or for an affirmance of it and for the damages resulting from the alleged fraud; but it seems that there, as here, pleadings are construed liberally, and although the plaintiff evidently intended to state facts entitling him to a rescission, and also facts entitling him to a cancellation of the mortgage and to damages, for both of which he prayed, it was held that the portions of the complaint relating to rescission should be treated as surplusage, after the facts had been found showing that rescission was impossible because of the defendant's acts. So far as can be judged from the case in hand, the plaintiff's bill is not subject to the criticism made of the pleadings in that case. The material facts appear to have been set forth in the bill, and the prayers are for a rescission of the contract or for a cancellation of

the note and mortgage. No objection was made to the form of the bill, and it is not apparent that any reasonable objection could be made under the practice in vogue in this state. There is no such inconsistency between the two kinds of relief sought as would be likely to lead to confusion or uncertainty on the trial. If rescission is denied, the contract necessarily stands; and the only remedies left to the plaintiff must be based on the theory of an affirmance of the contract. This does not disable him from maintaining that his outstanding promissory note is voidable in whole or in part for want of consideration, and ought to be cancelled. The alleged fraud is ground for this relief, the same as for rescission. It was held in the California case that the note and mortgage should be cancelled; and this not affording the plaintiff adequate relief, that he should be awarded a sum equal to the additional damage he had suffered from the defendant's fraud, on the ground that equity jurisdiction having attached for one purpose, complete relief would be afforded. *Hosleton* v. *Dickinson*, 51 Ia. 244, is also a case much in point.

It appears from these authorities that, under certain circumstances, the court would have jurisdiction to cancel the plaintiff's note held by the defendant, to the extent that it represents the results of the defendant's fraud. The plaintiff moved, in effect, that the note be cancelled to the extent of $400 of its principal, by reason of the defendant's fraud relating to the wood and timber, that sum being the damage assessed by the court for the fraud. This motion was denied, for the specific reason that to grant it would deprive the defendant of his right to a trial by jury. But the court having jurisdiction to cancel the note in whole or in part, it was necessary, in exercising the jurisdiction, to determine the extent to which the note should be cancelled, or, which is the same thing, the extent of the plaintiff's damages. This the court might do directly, or by the agency of a master or a jury, in accordance with the usual equity practice. While the court may properly employ a jury to instruct his conscience regarding such questions (*Tasker* v. *Lord*, 64 N. H. 279), the parties have not a right under the constitution to a trial of them by a jury. *State* v. *Saunders*, 66 N. H. 39; *Curtice* v. *Dixon*, 73 N. H. 393. The specific reason given for the denial of the plaintiff's motion indicates that the court did not consider the circumstances with a view of determining the question whether they called for a decree cancelling the note in whole or in part. As has been seen, the power which a court of equity has in such cases "should be regulated by sound discretion as the circumstances of the individual case may dictate." If the note is not negotiable and the plaintiff's defence against it growing out of the defendant's fraud

will not be endangered or rendered unreasonably difficult,—in short, if there is no good reason why equity should interfere in the premises,—a decree of cancellation should be denied and the plaintiff should be left to make his defence in the action at law. If, on the other hand, the note is negotiable, and the plaintiff is liable to be put at a disadvantage in making a defence to it in the action at law,—if equity and good conscience require that it should be cancelled in whole or in part,—then the plaintiff should have a decree accordingly. The result is that the plaintiff's exception to the denial of the motion under consideration is sustained, provided it is found that under the circumstances of the case the note should be cancelled in whole or in part. Or, stating it in another form, the plaintiff's exception is sustained in case it is found that there is ground for granting equitable relief by a cancellation of the note in whole or in part.

Another exception of the plaintiff is to the court's ruling in regard to the defendant's representations relating to the area of the tillage land. The defendant, by advertisement, represented the area of this land to be forty-five acres, and by oral statements of himself and his agent, he represented it to be forty or forty-five acres. He well knew it was much less than forty acres. It was in fact only eighteen acres. The defendant intended that the plaintiff should rely upon these representations; and the plaintiff did so in fact, honestly believing them to be true. The plaintiff saw and fully examined the tillage land, understanding what was included in that designation, but he had no definite idea of the extent of an acre. The court ruled, in substance, that upon these facts the plaintiff is not entitled, as a matter of law, to a rescission of the contract or to damages. It would seem from the language of the case that the representations purported, and were understood, to be statements of the defendant's knowledge—not statements of his opinion or judgment regarding the matter. This inference is strengthened when it is considered that the answer specifically alleged that the statements were mere expressions of opinion, etc. If such had been the finding, one would naturally expect it would be definitely stated in the case. Whether the statements related to the defendant's knowledge, or to his opinion, is a question of fact; and, as the case is understood, it was found that they related to his knowledge. It is therefore unnecessary to consider what would be their legal effect if they were mere expressions of opinion. That, undoubtedly, would depend somewhat upon the circumstances under which they were made and the plaintiff's conduct in view of them. It is conceivable that mere expressions of opinion might be made in such manner and under such circumstances as that they would naturally throw a man off

his guard and induce action in reliance upon them, without raising an implication of want of care on his part. But questions of this kind can be more satisfactorily determined when presented in a concrete form. In this case, the defendant stated as a fact what he knew was false; and he did it with the fraudulent intent of deceiving the plaintiff and thereby inducing him to purchase the farm. This was fraud. *Shackett* v. *Bickford*, *ante*, 57. The defendant attempts to avoid responsibility for this fraud by invoking the maxim *caveat emptor*. He says that, as the plaintiff saw and examined the land and had an opportunity to ascertain its area, he was in fault for relying upon the defendant's statements regarding that matter. In *Pringle* v. *Samuel*, 1 Littell 44, the court say: "We do not remember any case where the maxim quoted [*caveat emptor*] has been used by the chancellor in such manner as to compel him to shut his ears against false representations, or to give latitude to a vendor of real estate to state facts untruly, without any responsibility." The case was a bill in equity praying for a perpetual injunction to restrain the defendant from enforcing a judgment recovered against the plaintiff upon a promissory note given in part payment for a farm. In the negotiation for the sale of the farm the defendant falsely and fraudulently represented that it contained fifty acres, when it contained only thirty-seven and a half acres; and the court held that the plaintiff was entitled to a perpetual injunction against the collection of a part of the judgment corresponding in amount with the deficiency in the land. In *Stewart* v. *Stearns*, 63 N. H. 99, 106, the court of this state, in speaking of this maxim, say: "Where the statements are of material facts, essentially connected with the substance of the transaction, and not mere general commendations or expressions of opinion, and are concerning matters which from their nature or situation are peculiarly within the knowledge of the vendor, the purchaser is justified in relying on them; and in the absence of any knowledge of his own, or of any facts which would excite suspicion, he is not bound to make inquiries and examine for himself. Under such circumstances, it does not lie in the mouth of the vendor to complain that the vendee took him at his word." *Coon* v. *Atwell*, 46 N. H. 510, was an action on the case for deceit, by which the plaintiff was induced to purchase a farm of the defendant. The deceit alleged in one count of the declaration was a representation that the farm contained 250 acres of land, when in fact it contained only 175 acres, which the defendant well knew. In support of a demurrer to the declaration, it was urged by the defendant that the representations set forth in the declaration were mere expressions of opinion not amounting to a warranty, and that with common prudence the truth might have been ascer-

tained. It was held that this count stated a good cause of action, and that the demurrer was properly overruled. In the course of the opinion the court said: "In each of these counts there is alleged a false affirmation, known by the defendant to be false, and in relation to a material matter, and by which the plaintiffs were deceived and injured, and in such a case an action lies." The law on the subject has been similarly decided in other states. *Twitchell* v. *Bridge*, 42 Vt. 68 (a case much like the present case); *Stevens* v. *Giddings*, 45 Conn. 507; *Thomas* v. *Beebe*, 25 N. Y. 244; *Starkweather* v. *Benjamin*, 32 Mich. 305; *McGhee* v. *Bell*, 170 Mo. 121. See other authorities cited in 29 Am. & Eng. Enc. Law (2d ed.) 629. The law seems to have been held differently in the earlier decisions in Massachusetts (*Gordon* v. *Parmelee*, 2 Allen 212; *Noble* v. *Goggins*, 99 Mass. 231; *Parker* v. *Moulton*, 114 Mass. 99); but in the later decisions the court have declined to extend the rule of the earlier cases, and have held in substantial accord with the law as held by the courts of other states. *Lewis* v. *Jewell*, 151 Mass. 345; *Roberts* v. *French*, 153 Mass. 60,—two cases much in point.

Upon authority, as well as upon reason, it cannot be held as matter of law that the plaintiff was not in the exercise of common prudence in relying upon the defendant's representations in this case. Being ignorant of the extent of an acre as it appears upon the ground, he was obliged to obtain information as to the area of the tillage land from others. The maxim *caveat emptor* did not prohibit him from seeking it of the defendant. The law of the present day does not assume in all cases that vendors of property are endeavoring to defraud the vendees by false and fraudulent representations, and consequently require vendees to distrust such representations and seek the information elsewhere, or suffer the consequences. If the representations, as it seems was the fact in this case, purport to be statements of facts within the vendor's knowledge, and there is nothing in the surrounding circumstances to put the vendee upon guard in relation to them, considerations of justice and public policy alike will uphold the vendee in relying upon the representations. As has been said in some of the cases cited, a contrary course would have a tendency to promote and protect fraudulent dealing on the part of vendors. Vendors certainly have no valid reason for complaining that they are held responsible for their fraudulent representations, nor for criticising their vendees for relying upon them. Of course, cases between vendors and vendees must each stand upon the facts peculiar to itself. It may appear in a case that the vendee was imprudent in relying upon the vendor's statements. If so, the maxim applies; but if, as a matter of fact, the statements are of material facts

essentially connected with the substance of the transaction, and are not mere general commendations or expressions of opinion, and if the facts stated are such as might be known to the vendor, the vendee may safely rely upon them, unless there are circumstances attending the statements having a tendency to put him upon further inquiry regarding them. It does not appear that there was anything in this case having a tendency to cause the plaintiff to distrust the defendant's statements. The plaintiff's ignorance of the extent of an acre is no justification or answer to the defendant's fraud in knowingly and intentionally deceiving him as to the quantity of land, especially since he must have known of the plaintiff's ignorance and intentionally availed himself of it to deceive the plaintiff. Although the fraud thus committed may not entitle the plaintiff to a rescission of the contract of sale, because rescission would be inequitable under the circumstances, it should be taken into consideration on the question of the cancellation of the note and mortgage, in case it turns out that equity requires cancellation. If the court's finding as to the plaintiff's mismanagement of the farm and delay in bringing this suit does not apply to the question of rescission of the contract of sale for this fraud, the plaintiff may be entitled to rescission, notwithstanding he would not be entitled to it on account of the fraud relating to the wood and timber. This would depend upon facts that do not appear in the case. The plaintiff's exception to the ruling that the facts found do not constitute fraud for which there may be rescission or cancellation is sustained *de bene esse*.

As the decision of the foregoing questions is likely to result in the disposal of the case, the question whether the plaintiff would be entitled to a decree for the damages he has suffered from the defendant's fraud, without other relief of a distinctively equitable nature, and the question whether, if the action were amended by substituting for the bill a declaration in case for deceit, the defendant would be entitled to a jury trial, have not been considered.

Case discharged.

All concurred.

Hillsborough,
May 7, 1907.

DUGGAN, *Adm'r*, *v.* BOSTON & MAINE RAILROAD.

A child nine years old, who is killed while attempting to cross a railroad track in front of a train which she knows is approaching, is not chargeable with contributory negligence as matter of law.

In an action against a railroad company for negligently causing the death of a child at a grade crossing, evidence that a train was driven at a high rate of speed at a point where children were accustomed to play, and that the engineer took no steps to discover the presence of the deceased until it was impossible to avoid the accident, warrants a finding of negligence on the part of the defendants.

CASE, for negligently causing the death of the plaintiff's intestate. Trial by jury and verdict for the plaintiff. Transferred from the May term, 1906, of the superior court by *Pike*, J., upon the defendants' exception to the denial of a motion for the direction of a verdict in their favor.

A highway in East Manchester known as the Hall road crosses the defendants' railroad at grade. The highway runs north and south. The railroad is built on a curve, but its general direction is east and west, and its grade is descending in both directions from the crossing. On the east side of the highway and north of the railroad is a large building known as the wrapper factory, its southwest corner being forty-one feet north of the northerly rail. The south line of the building, if produced, would intersect the center of the railroad 436 feet east of the crossing; but at a point eleven feet nearer the track there is an unobstructed view of the railroad toward the east for more than 500 feet.

For a long time a large number of small children had been accustomed to play on and near the crossing. The plaintiff's intestate either had joined or was about to join in a game of hide-and-seek at the crossing when she was killed. She was nine and a half years old, of average size and intelligence, but very nervous when near a moving train. She left her home, which was located north of the crossing, about seven o'clock in the evening of May 30, 1903, and went directly to the northwest corner of the factory, where she stopped a few minutes and ate some bread and butter. She was next seen at the southwest corner of the factory, where she looked down the railroad toward the east, and then, stepping a few feet nearer to the crossing, she looked down the railroad toward the west. She then started to run across the tracks, looking straight ahead, but was struck by a train from the east and killed

when nearly over the crossing. At the time she was seen looking toward the east, the engine was from 500 to 600 feet from the crossing and approaching it at a speed of from forty to fifty miles an hour. Nothing was done to notify the child of the approach of the train, nor was any effort made to check its speed until it was within a few feet of the crossing. If the brakes had been applied when the engine was 250 feet distant from the crossing, the accident would not have happened. The engineer had an unobstructed view of the crossing and the space between it and the factory, from the time the engine was within 400 feet of the crossing until the child was struck.

Burnham, Brown, Jones & Warren, for the plaintiff.

Branch & Branch, for the defendants.

YOUNG, J. As the plaintiff's intestate was but nine years old, it cannot be said as a matter of law that she was guilty of contributory negligence, even if she saw the train when she started to run over the crossing. *Warren* v. *Railway*, 70 N. H. 352; *Bisaillon* v. *Blood*, 64 N. H. 565; *Napurana* v. *Young*, (N. J.) 65 Atl. Rep. 1052; *McLarty* v. *Railway*, 127 Ga. 161.

It will not be necessary to consider whether she was rightfully or wrongfully on the crossing, for if she was wrongfully there that would not prevent the plaintiff from recovering, if "at the time of the accident she was in the exercise of ordinary care, and they knew of her presence in a dangerous situation, or failed to exercise due care to discover her presence in such a situation when circumstances existed which would put a person of average prudence upon inquiry" (*Brown* v. *Railroad*, 73 N. H. 568, 573); and it could be found from the fact that small children were in the habit of playing on the crossing that such circumstances existed. *Mitchell* v. *Railroad*, 68 N. H. 96. So the question whether there was any evidence from which it could be found the defendants were negligent resolves itself into the question whether or not it can be said as a matter of law that the ordinary man is accustomed to run a train at a speed of fifty miles an hour, over a grade crossing on which he knows small children may be playing, without doing anything to determine whether there are any children on it until he is so close to it that he can do nothing to prevent an accident; for it could be found that that was what the defendants did, on the view which they concede may be taken of the evidence. According to that view, the train was moving seven times as fast as the little girl, so she came into the engineer's field of vision when the engine was more than 300 feet from

the crossing, namely, seven times forty-five feet, the distance from the southwest corner of the factory to the point where she was killed. If he had seen her at that time and put on the brakes, or if he had put them on when the engine was fifty or even a hundred feet nearer the crossing, it could be found that the accident would not have happened. Consequently it could be found that the defendants were negligent, and that their negligence was the cause of the accident.

Exception overruled.

All concurred.

Grafton,
May 7, 1907.

74 252
74 310

PAGE *v.* HAZELTON, *Ex'r.*

Where a claimant against the estate of a person deceased puts in evidence the latter's cash book and contends that certain entries therein prove the existence of a debt due from the decedent, the executor may introduce other entries, although each exceeds $6.67, for the purpose of showing that the items relied upon by the plaintiff were payments on account.

The erroneous admission of evidence does not furnish cause for setting aside a verdict, if its only effect is to rebut an inference which could not properly be drawn if the evidence were excluded.

The fact that a claimant against the estate of a person deceased made no effort to collect the debt during the latter's lifetime, although in need of money, is competent as tending to prove the invalidity of the claim.

APPEAL, from the acceptance by the probate court of the commissioner's report allowing the plaintiff's claim against the estate of Charles G. Smith, the defendant's testator. Trial by jury and verdict for the defendant. Transferred from the September term, 1906, of the superior court by *Chamberlin*, J.

The specification contained items of cash which the plaintiff claimed were for money loaned. The testator's books of account were produced by the executor at the plaintiff's request and were put in evidence by the plaintiff. Some of the items of the specification appeared on the testator's cash book; and the plaintiff claimed that such entries and certain checks introduced in evidence and bearing the testator's indorsement were proof of loans to the testator and of a debt due at his death to the plaintiff. As

bearing upon the probability of the items found in the cash book evidencing an indebtedness to the plaintiff, the defendant was permitted to introduce other items in the cash book, each exceeding $6.67, showing an account of long standing between the plaintiff and the testator; and to this ruling the plaintiff excepted. The plaintiff also excepted to testimony of a bank cashier as to payments made by the testator to the bank upon notes signed by himself and the plaintiff.

As bearing upon the question of the existence of an indebtedness to the plaintiff from the testator at the time of the latter's death and long before, one Danforth was permitted to testify, subject to the plaintiff's exception, that in 1900 and 1901, and at different times, the plaintiff said he was unable to pay his note which the witness had signed as surety. The statements testified to were made during the lifetime of the testator and when he had sufficient property to pay all his debts.

The plaintiff claimed to recover $600, being the consideration for the sale of real estate known as the Peaked Mountain farm, with interest from June 27, 1900, and offered in evidence a deed of the premises from himself and the testator to one Hunt, in which the consideration was stated to be $600. As tending to explain the transaction, the defendant introduced in evidence a bond for a deed of the same premises, given by the testator and the plaintiff to one Andros and assigned to Hunt. It appeared that Hunt made payment to the testator, and that the testator and the plaintiff conveyed for the consideration stated in the bond, which was $600 and interest agreeably to the note of Andros for that sum, payable $50 January 1, 1895, and $100 each year thereafter. The plaintiff excepted to the admission of the bond.

Moodybell S. Bennett and *David S. Conant* (of Vermont), for the plaintiff.

Hosford & Wright, for the defendant.

PARSONS, C. J. The entries on the testator's cash book were not admissible as items of book charge in favor of his executor, because they were money items each of which exceeded $6.67. *Remick* v. *Rumery*, 69 N. H. 601; *Bailey* v. *Harvey*, 60 N. H. 152; *Rich* v. *Eldridge*, 42 N. H. 153, 158; *Bassett* v. *Spofford*, 11 N. H. 167. If the defendant could have made all the contents of the books evidence by attaching such a condition to the plaintiff's examination of them (*Wentworth* v. *McDuffie*, 48 N. H. 402; *Huckins* v. *Insurance Co.*, 31 N. H. 238), no such condition was imposed. The items offered, therefore, were not admissible as

direct evidence in behalf of the defendant. But they were not so offered or admitted. They were admitted merely as bearing upon the probability of the inference sought to be drawn by the plaintiff from the items which he put in from the same book. It is to be presumed the items of cash claimed in the plaintiff's specification and found on the deceased's cash book represent money delivered by the plaintiff to the defendant's testator, Smith. If from these items it could be inferred the money delivered was a loan, other entries in the same account rebutting that inference and tending to show the transaction was a payment on account were competent. The entries made by Smith and offered by the plaintiff were admissible as the statement of a party. Proof by one party of a statement made by the other entitles the latter to give in evidence any part of the statement which has not been already offered, which tends to qualify, limit, or explain that portion of the statement already in proof. *Wentworth* v. *McDuffie*, 48 N. H. 402; *Whitman* v. *Morey*, 63 N. H. 448; *State* v. *Saidell*, 70 N. H. 174. This principle applies to a statement made by a party in his books of account. 3 Wig. Ev., s. 2116; *Dewey* v. *Hotchkiss*, 30 N. Y. 497, 502; *Low* v. *Payne*, 4 N. Y. 247.

The entries put in by the plaintiff are not described. The precise relation between them and the entries offered by the defendant does not appear. The case, therefore, affords no opportunity for a discussion of the limitations, if any, upon the right of a party to the use of his books of account after they have been adopted as proof by his opponent. It does not appear that the books were used as evidence for any purpose except to rebut the inference sought to be drawn by the plaintiff from the items selected by him; and as the case is drawn, it must be assumed that the items relied on by the defendant legitimately tended to rebut such inference. But as the only use claimed for the books by the defendant was to rebut the inference sought to be drawn by the plaintiff, it is immaterial whether the items relied on by the defendant had such tendency, or whether they were competent for that purpose or not. "The delivery of money without other evidence of the contract between the parties raises no presumption of law that it was intended to be a loan, rather than the payment of a debt, or a gift." *Coburn* v. *Storer*, 67 N. H. 86, 87; *Fall* v. *Haines*, 55 N. H. 118. As the inference sought to be drawn from the admission of the receipt of money, contained in the books of the deceased, could not properly be drawn, it is immaterial whether the evidence admitted solely to rebut that inference was competent or not. Since the only effect the evidence could have had was to defeat an inference which could not have been drawn if the evidence had been excluded, the plaintiff could not have been harmed by its admission.

Subject to exception, the defendant was permitted to prove that at the time when the plaintiff claimed the deceased, then living and solvent, was indebted to him in a large sum, the plaintiff told a witness that he was unable to pay a note on which the plaintiff was principal and the witness surety. "Evidence is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." *Cook* v. *New Durham*, 64 N. H. 419, 420; *Cole* v. *Boardman*, 63 N. H. 580, 581; *Cohn* v. *Saidel*, 71 N. H. 558, 568; 1 Wig. Ev. 38. Evidence having any tendency, however slight, to prove a particular fact is competent to be submitted to the jury to show that fact. *Curtis* v. *Car Works*, 73 N. H. 516; *Eaton* v. *Welton*, 32 N. H. 352. The evidence objected to tended to show that the plaintiff was in need of money at a time when, according to his present claim, the deceased, Smith, had in his possession a considerable sum in cash belonging to him. The plaintiff's failure, in this situation, to demand or to attempt to collect his debt of a responsible debtor for a considerable time, and until after the death of his alleged debtor, is a circumstance which has some logical tendency to discredit his present claim. Failure to make claim when occasion therefore exists has some tendency to prove the invalidity or non-existence of the claim. *Stone* v. *Tupper*, 58 Vt. 409, 412; *Strong* v. *Slicer*, 35 Vt. 40, 43. Such failure to act may constitute "an admission by conduct" adverse to the present claim. 1 Wig. Ev., *ss.* 267 (b), 284. As the evidence was relevant, its admission was not error of law, even if it might properly have been excluded as too remote. *Pritchard* v. *Austin*, 69 N. H. 367, 369.

The testimony of the bank cashier to the payment of money by Smith upon an obligation of Smith and Page was competent. Whether the payment was available in defence would depend upon other evidence. The bond for the deed of the land conveyed by deed by Smith and Page was a part of the transaction opened by the plaintiff by the introduction of the deed and his claim to the consideration received by Smith. It was a statement under the hand and seal of the plaintiff. No objection to its competency appears, nor is it perceived in what way its admission could have prejudiced the plaintiff. If payment was made according to the terms of the bond, Smith received the money at an earlier date than the plaintiff has charged him with it. At the most, the bond, if material, was not prejudicial.

Exceptions overruled.

YOUNG, J., not having been present at the argument, took no part in the decision: the others concurred.

Strafford,
June 4, 1907.

74 256
74 450

WALLACE *v.* WALLACE.

Under section 18, chapter 175, Public Statutes, the court has power to revise and modify a decree for alimony made in accordance with a written agreement of the parties to the divorce proceeding.

PETITION, for the revision of an order of the supreme court, made September 18, 1885, granting the plaintiff $6,000 alimony upon her libel for divorce for adultery against the defendant. The defendant's answer alleged that the judgment for alimony was based upon an agreement of the parties in writing under seal, made with the approval of and adopted by the presiding justice of the court. The agreement is as follows:

Supreme Court.

Strafford, ss. September T. 1885.

In the Wallace Libel for Divorce. Nellie F. Wallace *v.* George E. Wallace.

It is agreed by the parties that the amount of alimony in said case shall be six thousand dollars, and in consideration of the same I hereby relinquish all claim for alimony, present and prospective, and all claim I have or may hereafter assert to the property of said George E. Wallace.

Nellie F. Wallace. { L. S. }

Witness:
James A. Edgerly.

Received six thousand dollars in full payment of the above.
Nellie F. Wallace.

Witness:
James A. Edgerly.

At the September term, 1906, of the superior court it was ruled by *Stone*, J., that the agreement and receipt set out in the defendant's answer did not constitute a bar to the present proceeding, and the defendant excepted.

Branch & Branch (*Oliver W. Branch* orally), *William T. Gunnison*, and *James A. Edgerly*, for the plaintiff.

Leslie P. Snow (by brief and orally) and *Streeter & Hollis*, for the defendant.

PARSONS, C. J. The defendant alleges, in answer to the plaintiff's petition for modification of a decree for alimony in her favor, that such decree was based upon an agreement in writing under seal between the parties to the divorce proceeding, *i. e.*, that the decree was an order for alimony in accordance with the agreement of the parties. It is not contended that the law required the court to order alimony as the parties agreed, or that the agreement deprived the court of jurisdiction as to alimony. It is conceded in the defendant's brief that the court had supervisory authority to ascertain whether the agreement was properly made, free from collusion or any unfairness. 1 Page Cont., *s.* 430; 2 Bish. Mar. & Div., *ss.* 702, 884; 2 Nels. Div. & Sep., *s.* 915; and other authorities cited. The invalidity of such agreements results not merely from the legal incompetency of a married woman at common law to make any contract, but because "such agreements made in advance, if sanctioned by the court without examination, would have a tendency to produce collusion between the parties with a view to the dissolution of the marriage contract between them." *Daggett* v. *Daggett*, 5 Paige 509; *Moon* v. *Baum*, 58 Ind. 194; *Hamilton* v. *Hamilton*, 89 Ill. 349; *Adams* v. *Adams*, 25 Minn. 72; *Speck* v. *Dausman*, 7 Mo. App. 165. As stated in the paragraph from Nelson cited by the defendant (*s.* 915): "The court is not bound by the agreement as to alimony; and if the amount is not considered sufficient, an additional allowance may be made, or the agreement may be ignored and an adequate allowance made for the wife." But the defendant contends that the adoption of the terms of the agreement in the decree is a conclusive determination that the agreement was fair and properly made. The agreement, so far as it was adopted by the decree, "was merged in the judgment, which, being regular on its face and . . . rendered by a court of competent jurisdiction, is supported by the conclusive presumption that every fact necessary to sustain it was properly brought before the court." *Julier* v. *Julier*, 62 Ohio St. 90, 113,—78 Am. St. Rep. 697. The decree therefore conclusively establishes, so long as it stands, that the agreement was adequate and free from collusion; for on no other grounds could a decree in accordance with the agreement have been ordered. The decree is a judgment, which, as it is found to have been regularly entered and free from fraud, cannot be successfully attacked even in a direct proceeding, like the present, except upon some principle which renders judgments respecting alimony susceptible to reëxamination and revision for reasons insufficient to authorize such action as to judgments generally.

The foundation of alimony, as known in England, was the obli-

gation of the husband to support his wife. The decree of alimony was merely the enforcement of that obligation in behalf of a wife legally permitted to live separate from her husband. As the measure of the sum required was necessarily the need of the wife and the ability of the husband, the amount decreed as an annual payment was logically affected by a change in either element. The order as to the payment of alimony was therefore regarded, not as a final adjudication, but as a determination open to revision from time to time as circumstances might require. 1 Bish. Mar. & Div., *ss.* 1385–1389; 2 Nels. Div. & Sep., *s.* 933 a. "The term 'alimony,' as used in the constitution and statutes of this state, means that provision or allowance which is made to a wife upon a divorce from the bonds of matrimony." *Sheafe* v. *Sheafe*, 24 N. H. 564, 567; *Parsons* v. *Parsons*, 9 N. H. 309, 317, 318, 319. That the judgment allowing a gross sum upon the termination of the marriage relation—the decree for alimony as understood in the early cases here—would not, in the absence of statutory provision, logically be subject to examination and revision, as was the decree for annual allowance in England, may be clear. Bish. Mar. & Div., *s.* 600; 2 Nels. Div. & Sep., *s.* 933 a.

But in 1842, it was provided by the legislature, as to alimony or any allowance for the wife or children, that "the court, upon proper application and notice to the adverse party, may revise and modify any order made by such court, and may make such new orders as may be necessary." R. S., *c.* 148, *s.* 16. This statute has been liberally construed, and the construction given has received legislative approval by repeated reënactments without change. G. S., *c.* 163, *s.* 15; G. L., *c.* 182, *s.* 15; P. S., *c.* 175, *s.* 18. "Upon proper application and notice, the court may revise and modify any order made, and may make such new orders as may be necessary respecting alimony." *Cross* v. *Cross*, 63 N. H. 444, 446. "Applications under this statute . . . may be made at any time; and when an application is properly made, it is the duty of the court to hear and consider it. . . . On an application for a revision of a decree for alimony, the right to a hearing is expressly granted by the statute, and the question is, not whether the petitioner shall be allowed a hearing, but whether, being heard, a case is made for relief; not whether the evidence shall be received, but whether, being received and considered, it calls for a modification of the decree. A revision of the decree involves a reëxamination of the evidence upon which it was made; and evidence used on the original trial, or which might have been presented by the exercise of due diligence, is not for that cause to be rejected. Whether justice requires a modification of the decree

must be determined from all the facts in the case." *Ela* v. *Ela*, 63 N. H. 116, 121, 122.

In *Cross* v. *Cross*, there was no decree or application for alimony in the original proceeding. In *Ela* v. *Ela*, the libelant was charged with perjury upon the original trial. In *Mullin* v. *Mullin*, 60 N. H. 16, $1,500 had been awarded as alimony. Upon petition it was adjudged that the libelant was not entitled to any alimony, and a writ of restitution was awarded for the amount which had been paid. In *Spofford* v. *Smith*, 55 N. H. 228, it was held that a petition for an additional allowance of alimony might be maintained by the libelant after the death of the libelee. The petition may be maintained by the libelee after a divorce granted her husband. *Sheafe* v. *Sheafe*, 24 N. H. 564. A decree for annual payments may be changed to one for a gross sum. *Sheafe* v. *Sheafe*, 36 N. H. 155, 156. The petition is maintainable although no case is made for reopening the question of divorce. *Folsom* v. *Folsom*, 55 N. H. 78.

As under the statute any order respecting alimony may be reëxamined and revised, the court has no power to except from the operation of the statute an order decreeing alimony in accordance with the agreement of the parties. If the question were at all in doubt, the liberal construction heretofore given the statute would resolve it in favor of the maintenance of the petition. It is said that there is conflict in the authorities upon the question whether, under similar statutes, the fact that a decree for alimony was rendered in accordance with a previous agreement of the parties precludes its examination and revision. 1 Page Cont., *s.* 430. As the question is the meaning of the language in a particular statute with reference to the law and practice of the particular state, these decisions do not furnish material aid upon the legislative purpose here. The only case that has been found reaching a contrary conclusion, under circumstances sufficiently identical to be of value in the present case, is *Henderson* v. *Henderson*, 37 Or. 141,—82 Am. St. Rep. 741, 48 L. R. A. 766. The court in this case refuse to follow the opposite holding in *Blake* v. *Blake*, 75 Wis. 339, upon the ground, it is said, of the strong tendency of adjudication elsewhere; but no cases are cited directly in point. The opinion concedes that the incorporation of the agreement in the decree involves "the approval of the court of its validity in good morals and as conformable to public policy, . . . and of its fairness and equability of adjustment," but apparently loses sight of the fact that the decision of these questions considered to be involved in the decree constitute judicial action, the revision of which cannot logically be excluded from the operation of a statute which authorizes the revision of any such action as to alimony.

It may be conceded that a judgment or decree rendered by agreement cannot be set aside or modified without the consent of the parties except for fraud, when the agreement does not require judicial sanction to give it validity. *Beliveau* v. *Amoskeag Mfg. Co.*, 68 N. H. 225, 229. The principle does not apply, because a decree for alimony rests, not on the agreement, but on the decision of the judicial questions raised by the presentation of the agreement. Although the decree may be based on the agreement, it is so based only in the sense that a decree may be founded on the testimony of the libelant, or other evidence. There can be no decree for alimony by agreement without the intervention of the court. The agreement is evidence submitted for the consideration of the court. The judgment is evidence, not of the agreement, but of the conclusion of the court upon all the evidence. A judgment rendered by agreement cannot be set aside without the consent of the parties, except for causes which would authorize the abrogation of the agreement, because the court cannot alter agreements which the parties have made, or make new agreements for them. If such a judgment were set aside, the agreement remaining in full force, the only result would be the affirming of the original judgment. Even under the statute, the court has no power to revise or modify the agreement as to alimony which the parties have made. The only question opened is whether the decree should follow the agreement. The statute authorizes the modification, if justice requires, of the former decision on this point. The only question now here is whether the decree can be revised. Whether it should be is a question not yet reached.

The defendant claims that by the terms of the agreement the plaintiff is precluded from applying for additional alimony. Whether this is a correct interpretation of the agreement, or not, does not appear to be very material. If the allowance already made is adequate, no increase will be allowed, even if the plaintiff did not agree to be forever content with the sum named; while if justice requires an increase, the inadequacy of the sum agreed upon as a final adjustment will be a sufficient reason for a refusal to follow the agreement. As this portion of the agreement was not incorporated in the decree, it must be inferred that the presiding justice did not approve the provision, or considered the court had no power to make such an order. *Campbell* v. *Campbell*, 37 Wis. 206. But without reference to the grounds of the former decision, all questions as to alimony which were open then are open now for decision upon all the competent evidence that may be offered, including the prior agreement of the parties, whatever it may have been.

The defendant further contends that the sealed agreement was

made after the divorce was granted and the decree had become effective, and that it is to be treated as a discharge under seal of all right to apply for a different order as to alimony. Whether subsequent to the termination of the marriage relation formerly existing between the parties the plaintiff released to the defendant all her right under the statute, whether the agreement produced supports that contention, whether if such an agreement was understandingly made it is binding, are questions the discussion of which at the present time would be mere speculation; for no claim of discharge after judgment was presented in the superior court, and no facts relating to such a claim are found. The defendant alleged in his answer that the decree was based upon the agreement in writing under seal, made with the approval of and adopted by the presiding justice. The agreement must necessarily have preceded the decree based upon it. It is prospective in its terms, as the consideration is said to be the agreement that the alimony shall be six thousand dollars, is entitled as of the case and term, and is apparently designed as a document in the case.

It is found as a fact that the parties agreed as to the alimony before the hearing. There is no finding and nothing in the record from which it can be inferred as matter of law that the parties intended, when the paper was signed, to do anything except to express in writing the terms of the oral agreement made before the hearing. If there is error in the pleading, upon amendment the facts can be found, and the questions of law presented by such finding can then be considered. As the case stands, the parties pending the divorce made an agreement as to alimony. Upon that agreement and evidence satisfactory to the court, a decree as to alimony was made. Upon a new hearing, the question will be whether a different decree should now be made.

Case discharged.

BINGHAM, J., did not sit: the others concurred.

Merrimack,
June 4, 1907.

74 262
74 468

PAGE BELTING CO. *v.* PRINCE *& a.*

Where dividends upon corporate stock are claimed by the person to whom a certificate has been issued in the capacity of trustee and also by parties who allege that the shares were pledged to them and deposited with the holder of record as their agent, and neither claim appears to be frivolous or unreasonable, the corporation may maintain a bill of interpleader against both claimants to determine the question of title.

A pledgor of corporate stock is not an indispensable party to a bill of interpleader brought by the corporation against the pledgee and the record holder of the shares, for the purpose of determining the question of title to the dividends.

BILL OF INTERPLEADER. Transferred from the April term, 1906, of the superior court by *Peaslee*, J.

Elwin L. Page, for the plaintiffs.

Burnham, Brown, Jones & Warren, for Prince.

Streeter & Hollis, for the Wallaces.

WALKER, J. This is a bill of interpleader, to which the defendant Prince, doing business under the firm name of Prince & Co., filed a demurrer, and the other defendants, representing the partnership of E. G. & E. Wallace, have filed an answer. The question now before the court arises upon the demurrer which the superior court overruled, subject to exception. The plaintiff's allegations are in substance as follows: Prince holds 435 shares of the capital stock of the plaintiff corporation, issued to him as trustee; and by virtue of his certificate he claims the dividends which have been declared upon the stock, and which the plaintiff holds in its possession. He has demanded payment of the same of the plaintiff, which it has refused to comply with. The stock in question was originally sold by the Wallaces to Coffin & Stanton, in 1894. At the same time the Wallaces employed Prince to purchase for them certain bonds of the city of Ironwood in the state of Michigan. Prince, acting as the agent of the Wallaces, on September 22, 1894, entered into a contract with Coffin & Stanton, by which they agreed to deliver to the Wallaces bonds of the city of Ironwood to the amount of $150,000, properly certified, and to deposit with Prince, as agent of the

Wallaces, the stock above referred to as security for the performance of their agreement. In pursuance of this understanding, Coffin & Stanton delivered to Prince, as agent of the Wallaces, certificates of the stock of the plaintiff corporation for 435 shares as security for their delivery of the Ironwood bonds. The bonds were never legally issued, and were never delivered or tendered to the Wallaces, or to their agent, Prince. Coffin & Stanton soon became insolvent, and a receiver was appointed, who, after the affairs of the firm were wound up, was discharged on the twenty-fifth day of August, 1905. It is claimed by the Wallaces that the pledged stock became their property upon the failure of Coffin & Stanton to deliver the bonds, and if not, that the right of Coffin & Stanton to redeem the stock has been lost, said firm having relinquished all interest in the stock in satisfaction of their breach of the contract to deliver the bonds. After the failure of Coffin & Stanton to deliver the bonds, Prince surrendered the certificates for the stock to the plaintiff and "wrongfully" took a new certificate for the same in the name of F. H. Prince & Co., trustee. Although requested, Prince has refused to deliver the certificate of the stock to the Wallaces. Both Prince and the Wallaces have demanded the payment of the dividends, but no claim for them has been made upon the plaintiff by Coffin & Stanton or their receiver. Many of the foregoing allegations appear in the answer of the Wallaces, which were incorporated into the bill by an amendment. The plaintiff filed an affidavit of non-collusion.

The general principles of justice and equity in accordance with which bills of interpleader are sustained are not doubtful. In this state they have been clearly stated in *Farley* v. *Blood*, 30 N. H. 354, where it is said (*pp.* 360, 361): "When the party would maintain a bill of the character of this one, he must allege and show that he is ignorant of the rights of the different claimants; or at least that there is doubt as to which of them is entitled to the fund or other matter which is the subject-matter of the proceeding. It can be maintained only when the same debt or duty or other thing is claimed by two or more parties, by different and separate interests, and in which the claimant [plaintiff] has no interest beyond that of a mere trustee or stakeholder, and where, from his own showing, he cannot determine the right between the conflicting claimants without hazard to himself. . . . The danger of injury to the complainant, arising out of the opposing claims and doubtful rights of the several defendants as between themselves, is the general ground of jurisdiction in the case of a simple bill of interpleader. It must appear from the complainant's own showing, that he cannot pay the debt or render the duty or other thing to either of the parties claiming the same,

without some risk of being subsequently liable for the same debt or duty to the other." This general statement of the law of interpleader is recognized as sound by the authorities (4 Pom. Eq. Jur., *ss.* 1320, *et seq.;* Macl. Interp. 10; *Salisbury Mills* v. *Townsend*, 109 Mass. 115, 121; *Crane* v. *McDonald*, 118 N. Y. 648, 655), and is not in fact questioned by the parties to this proceeding. It seems to be conceded that if the facts are sufficient in law to justify the plaintiff in entertaining a reasonable doubt as to the validity of the respective claims to the dividends, it is entitled to call upon the claimants to determine the question by interpleading.

The substantial question, therefore, for decision at this time is, whether the facts admitted by Prince by the demurrer, and claimed by the Wallaces in their answer, to be true, have a reasonable tendency to show that the respective claims of the defendants to the dividends held by the plaintiff make it hazardous for the plaintiff, in the due performance of its duty, to pay the money to either. Prince insists that as the stock stands in his name as trustee upon the books of the company, the Wallaces can make no valid or reasonable claim to it or to the dividends as against the plaintiff. As a general proposition, it may be true that the registered holder of stock is entitled to the dividends. In the absence of other facts, he has a *prima facie* right to them, but it is a right that may be defeated. 2 Cook Corp., *s* 538. In the case of the pledge of stock, it seems to be well settled that the pledgee is entitled to the dividends as against the corporation, although the transfer is not recorded on the corporate books, provided it has notice of the pledge. 2 Cook Corp., *s.* 468. As dividends paid to the pledgor by the corporation in ignorance of the pledge belong to the pledgee, who may recover them of the pledgor (*Meredith Bank* v. *Marshall*, 68 N. H. 417), there is no valid reason why he may not recover them of the corporation holding them with notice of the pledge, whether the transfer has been actually recorded or not.

Upon this view of the law the question arises, whether it might be found from the facts alleged that the Wallaces are the pledgees of the stock, which Prince holds as their agent. If that is their relation to the stock, it would follow that after notice of their claim the plaintiff would be liable to them for the dividends. Whether Prince is their agent in this respect, so far as appears from the case, is a question of fact; and as it is several times alleged that he is their agent to hold the stock for them, the demurrer admits that such is the fact. Hence it follows that the claim of the Wallaces is not frivolous or unreasonable. As their simple agent, Prince could not insist upon the payment of the div-

idends to him after his power as agent was substantially revoked by the Wallaces' demand upon him for the stock and upon the plaintiff for the dividends.

But it is urged that it is alleged that Prince's certificate shows that he holds the stock as trustee, and that he is something more than a mere agent. There is no allegation in the bill explaining what is meant by the term "trustee," as used in the certificate. Upon investigation it might be found to have no broader signification than the term agent,—a position the Wallaces may assume,—or it might appear that it was used for the protection of some *cestui que trust*, in accordance with Prince's contention. The fact of its significance is, to say the least, doubtful, and equity does not require the plaintiff to decide the question at its peril. Moreover, it is alleged that Prince "wrongfully" surrendered the original certificates pledged with him as the agent of the Wallaces and took out a new certificate in his name as trustee. It does not appear in whose name the stock stood when it was pledged. It may have been indorsed in blank by the pledgors and held under that authorization by Prince until he took out the new certificate in his name as trustee. But however that may be, for the purposes of this discussion it must be assumed that the stock was properly pledged to the Wallaces and held by Prince as their agent. Under these circumstances, he could not change the capacity in which he held it as a simple agent to that of a trustee for some stranger, without the consent or acquiescence of the Wallaces, his principals; and his attempt to do so by taking out a new certificate indicating such a change, without their concurrence, would be a violation of his duty as their agent and, as stated in the bill, wrongful. Whether his act in this respect was wrongful may be a question of fact depending upon the actual authority given him by the Wallaces. If they authorized him to do it, his act was not wrongful as against them; otherwise it probably would be.

Since the defendants respectively made two distinct and inconsistent claims to the dividends, neither of which appears to be frivolous, manifest justice and equity require that they should litigate the matter between them for the protection of the plaintiff, who is merely an indifferent stakeholder.

It is further objected to the maintenance of this proceeding, that Coffin & Stanton are indispensable parties, since they are pledgors of the stock and may have a right to redeem it. But if they pledged it to the Wallaces, and it should turn out, as alleged, that Prince was merely an agent of the Wallaces, and the plaintiff should be ordered to pay them the dividends, it is not perceived why the pledgors' rights, if any, to an accounting for the dividends so paid would be affected by the practical termination of the con-

tract of agency existing between the Wallaces and Prince. In that contract, so far as the bill alleges the situation, the pledgors have no interest which would be prejudiced, if the contention of the Wallaces should be sustained. And if, on the other hand, it should be held that the dividends should be paid to Prince as trustee, the pledgors' rights in the final disposition of the money and stock would not be affected. That is a question in which the plaintiff is not interested and which does not occasion it any inconvenience or embarrassment. It merely seeks protection in the payment of the dividends. Whether the rightful payee is the absolute owner of the money, whether his title to it is legal, or equitable, or both, with reference to third parties, or whether he is bound to ultimately account for the dividends and stock to some undisclosed *cestui que trust*, are questions whose solution is not necessary for the protection of the plaintiff, and consequently it is unnecessary to speculate upon them in the present aspect of the case. The demurrer was properly overruled, and the order must be,

Exception overruled.

CHASE, J., did not sit: the others concurred.

Merrimack,
June 4, 1907.

DUSTIN *v.* CURTIS.

Where the relation between the parties is purely contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship, or upon the negligent performance of some act provided for by the contract.

A tenant cannot maintain an action of tort against a landlord for personal injuries resulting from a mere omission of the latter to make repairs according to his agreement.

CASE, for personal injuries. Trial at the October term, 1900, of the supreme court before *Blodgett*, C. J., and a jury. A nonsuit was ordered at the close of the plaintiff's evidence, and he excepted.

The defendant owned a building occupied by several tenants, and containing a hall which was rented by a lodge of Odd Fellows of which the plaintiff was a member. Whether the lodge was

an association or a corporation did not appear. March 11, 1898, while the plaintiff was attending a meeting of the Rebekah branch of the lodge, he was injured by a fall of plastering from the ceiling. He had no knowledge of the defect in the plastering.

The hall was first let to the lodge on March 16, 1886, for a term of five years, at an annual rental of $84, the defendant agreeing to make repairs. In December, 1891, and January, 1892, there were negotiations which resulted in the lodge continuing as tenant of the hall at an annual rental of $100. If the terms of the original letting were reduced to writing, the lease could not be found. There was no definite evidence of a written lease. The plaintiff was present in 1892, when it was arranged that the lodge should continue as tenant. At the trial he was asked, "What change, if any, was made in the original rental," and he replied, "The price was raised to $100 a year."

Subject to the defendant's exception, Mrs. Dustin, a witness for the plaintiff, testified that in April, 1899, the defendant's husband, who was her agent in letting and managing the hall, told her he was to make the repairs. A short time before the accident, the defendant was informed that a portion of the plastering had fallen, and her husband sent a person to see what repairs were needed, but there was no evidence that any repairs were ever made. There was evidence that the plastering, at the point where it became detached and fell, had been wet from leakage during that winter and before, but it was not shown where the water came from.

Martin & Howe, for the plaintiff.

Streeter & Hollis, for the defendant.

BINGHAM, J. It is clear upon the evidence that the premises upon which the plaintiff was when he received his injury were in the possession and control of a tenant. It is equally clear that the plaintiff was not present at the time as a guest of the defendant, or upon her invitation. The plaintiff claims that he was there as the tenant, or as a guest of the tenant. It is doubtful whether the evidence is sufficiently definite to warrant either conclusion; but if we assume that the plaintiff was present as a tenant, that one of the terms of the tenancy was that the defendant should make all necessary repairs, and that the plaintiff's injury was due to the defendant's omission to repair, it does not follow that this action of tort for negligence can be maintained against the defendant because of her omission in this respect, unless her failure constituted the breach of a duty imposed by law, as well as the breach of an obligation created by the agreement of the par-

ties. "Actionable negligence is the neglect of a legal duty. . . . To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty. . . . The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law." *Buch* v. *Company*, 69 N. H. 257, 260, 261; *Pittsfield etc. Co.* v. *Shoe Co.*, 71 N. H. 522, 531.

In *Courtenay* v. *Earle*, 10 C. B. 73, *Jervis*, C. J., in speaking of the case of *Boorman* v. *Brown*, 3 Q. B. 511, said; "That case will be found to proceed upon the principle that where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast. . . . Before that case, it had been supposed, upon the authority of *Corbett* v. *Packington* [6 B. & C. 268], that the violation of a bare promise, without any such general duty, might be the subject of an action of tort. That clearly is not so. Without altogether destroying the well known distinction between actions of contract and actions of tort, I think we cannot hold the counts in this declaration to be well joined." In *Legge* v. *Tucker*, 1 H. & N. 500, *Pollock*, C. B., in stating the distinction between actions of contract and actions of tort, said: "Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit; but where there is a duty *ultra* the contract, the plaintiff may declare in case." And in *Tattan* v. *Railway*, 2 E. & E. 844, *Cockburn*, C. J., in considering the subject, said: "Whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on persons entering into a contract, it is impossible to refer to the cases to which our attention has been called, without seeing that they establish that a duty was imposed upon the defendants [common carriers] . . . by the custom of the realm, so soon as they entered into the contract with the plaintiff, and independently of the terms of the contract itself. The plaintiff might, had he thought fit, have brought his action on the contract; but he was also entitled to sue the defendants for the breach of their common-law duty. Having chosen the latter course, he cannot, according to the authorities, be said to have brought an action of contract. . . . The action is an action on the case, not in form only, but in substance." See, upon the same subject, *Tuttle* v. *Company*, 145 Mass. 169; *Rich* v. *Railroad*, 87 N. Y. 382; 1 Ch. Pl. (16th Am. ed.) 196.

In accordance with the foregoing authorities, it may be stated as a principle of law that where the only relation between the parties is contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done; and that the mere violation of a contract, where there is no general duty, is not the basis of such an action. This being so, and the relation between the parties to this suit being that of landlord and tenant, and it having been decided in *Towne* v. *Thompson*, 68 N. H. 317, that no duty is imposed by law upon a landlord to make repairs upon leased premises for the benefit of his tenant or a member of the tenant's family, it follows that the present action cannot be maintained because of the mere failure of the defendant to keep her agreement to repair. In fact, it is generally held that a tenant, a member of his family, or his guest, cannot sue a landlord in tort for personal injuries due to his omission to repair premises which have passed into the possession and control of the tenant, even if the landlord has agreed to make repairs. *Shackford* v. *Coffin*, 95 Me. 69; *Tuttle* v. *Company*, 145 Mass. 169; *Davis* v. *Smith*, 26 R. I. 129; *Schick* v. *Fleischauer*, 26 N. Y. App. Div. 210, 211; *Frank* v. *Mandel*, 76 N. Y. App. Div. 413; *Stelz* v. *Van Dusen*, 93 N. Y. App. Div. 358, 359; *Kushes* v. *Ginsberg*, 99 N. Y. App. Div. 417; *Sherlock* v. *Rushmore*, 99 N. Y. App. Div. 598; *Boden* v. *Scholtz*, 101 N. Y. App. Div. 1; *Feary* v. *Hamilton*, 140 Ind. 45; 1 McAd. L. & T. 438; Jones L. & T., *s.* 592; 18 Am. & Eng. Enc. Law (2d ed.) 231, 234; 24 Cyc. 1115.

The other contentions of the plaintiff may be disposed of without extended consideration. There was no evidence that would authorize a finding that the defendant repaired the defective ceiling and did the work in a negligent manner (*Edwards* v. *Lamb*, 69 N. H. 599; *Pittsfield etc. Co.* v. *Shoe Co.*, 71 N. H. 52[illegible], 533; *Gill* v. *Middleton*, 105 Mass. 477, 479; *Baird* v. *Daley*, 57 N. Y. 236; *Boden* v. *Scholtz*, 101 N. Y. App. Div. 1), nor that the water which caused the ceiling to loosen and fall was due to a roof over which the defendant retained full control and which became leaky because of her failure to repair, even if it could be said that her control of the roof would impose upon her the duty to repair. *Compe* v. *Platt*, 172 Mass. 458; *Cheeseborough* v. *Green*, 10 Conn. 318; *Doupe* v. *Genin*, 45 N. Y. 119; *Purcell* v. *English*, 86 Ind. 34; *Cole* v. *McKey*, 66 Wis. 500; Jones L. & T., *s.* 612; 18 Am. & Eng. Enc. Law (2d ed.) 218. The nonsuit was properly ordered.

Exception overruled.

WALKER, J., did not sit: the others concurred.

Hillsborough, }
June 4, 1907. }

BARKER v. HEATH.

A direct and unqualified admission by a debtor within six years prior to the commencement of an action, of a subsisting debt which he is liable and willing to pay, is sufficient evidence of a new promise to prevent the statutory bar to a recovery.

If the admission of a debt is conditional, the statute of limitations will operate so far as it may in view of the condition; and in such case it is incumbent upon the creditor to show that the condition has been fulfilled or complied with, to entitle him to the implication of a new promise.

A payment upon a promissory note by the maker, under circumstances which show that he understood it to be partial only and which do not indicate his unwillingness to pay the balance, is evidence from which, if there is nothing to control it, a jury should find a new promise.

Indorsements upon a note are not admissible as evidence of partial payments to avoid the bar of the statute of limitations, unless they are shown to be in the handwriting of the maker of the note, or their genuineness and truthfulness are otherwise established.

Evidence that the maker of a note made a partial payment thereon and stated that he would pay the balance as soon as he was able does not warrant a finding of an absolute and unconditional promise.

Where the promise of a debtor to pay as soon as she was able is relied upon to avoid the bar of the statute of limitations, evidence of an ante-nuptial contract between herself and her husband and the provisions of his will in her favor are admissible as tending to prove her financial ability.

ASSUMPSIT, upon the defendant's promissory note for $734.52, dated April 1, 1895, payable to the plaintiff on demand with interest. The writ is dated November 2, 1905. Plea, the statute of limitations; replication, a new promise within six years. Trial by jury and verdict for the plaintiff. Transferred from the September term, 1906, of the superior court by *Pike*, J.

The following indorsements are upon the back of the note: April 10, 1895, $5; September 19, 1895, $5; October 16, 1895, $5; December 16, 1895, $5; September 19, 1896, $3; August 25, 1898, $2; December 26, 1899, $2. The plaintiff testified as follows: He received the foregoing sums from the defendant at the dates mentioned, and made the indorsements in her presence. At the time of the last payment the defendant said, in substance, that it was all she could give him at that time; that she would give him more as soon as she could and would pay him just as fast as she could; that she was having a hard time, her boarders had left

her, her eyes were troubling her, and she had to go to an oculist; it was taking her money, but she would pay him as fast as she could. At the dates of the indorsements she always promised to pay as fast as she could and as soon as she was able, and wanted him to be easy with her. In a conversation subsequent to December 26, 1899, she said she had no money for him then, but would give him some just as soon as she could.

The defendant's evidence tended to prove that she did not make either of the last two payments indorsed on the note; that she did not promise the plaintiff at any time that she would pay the balance of the note, because she knew it was impossible for her to do so; and that she did not promise him on December 26, 1899, or at any subsequent date, that she would pay the note as soon as she was able, or as soon as she could, or promise anything to that effect.

At the close of the plaintiff's evidence the defendant moved for a nonsuit, on the ground that there was no evidence that the plaintiff could pay, or was able to pay, the note when the action was brought. The motion was denied, subject to exception. The defendant's offer to prove that she was physically unfit for hard labor for several years prior to November 22, 1905, was rejected, subject to exception. Upon cross-examination, the plaintiff's counsel was permitted, subject to exception, to ask the defendant whether she did not intend to keep the note alive by her payments and promises in 1897, 1898, and 1899. She replied: "I paid him what I could. I knew I never could pay it in the world, and I don't know why I should promise to pay it when I knew I never could. When he came to me for money I gave him what I could."

The defendant married early in the fall of 1905, and her husband died a few months later. The plaintiff put in evidence an ante-nuptial agreement between the defendant and her husband, in effect, that the latter would leave the defendant, by will, certain real estate, and also the provision of the husband's will by which a devise of real estate, worth $5,500 or $6,000 and incumbered for about $3,500, was made to the defendant. The defendant excepted to the testimony, on the ground that it was uncertain, under the agreement and will, whether she took a life estate or a fee in the realty. Before the evidence was closed, the court came to the conclusion that the law of this state relating to the character of the defendant's new promise was as stated subsequently in the charge to the jury. The counsel, understanding that such was the court's view of the law, made no comments in their closing arguments to the jury upon the evidence relating to the defendant's ability to pay. The defendant moved to set aside the

verdict because this evidence, not being excluded excepting by the effect of the charge, was incompetent and prejudicial. The motion was denied, subject to exception.

The court, after instructing the jury that their verdict must be for the defendant unless she, by her acts or promises, gave the plaintiff to understand within six years that she recognized the existence of the note and intended to pay it, further instructed them that the promise must be absolute, or, if conditional, that the condition must have been fulfilled; and that a promise by the defendant to pay as soon as she could, or when she was able, would be regarded by the law of this state as an absolute promise. Continuing, the court said: "So if you find that within six years she said, 'I will pay it as soon as I can,' or 'as soon as I am able,' then you will regard it as having been an absolute and unqualified promise on her part." To this portion of the charge the defendant excepted.

Wason & Moran, for the plaintiff.

Doyle & Lucier, for the defendant.

CHASE, J. It was held in the earlier cases of assumpsit, in this state, that while a simple acknowledgment of a debt would not prevent the statute of limitations from operating upon it, such acknowledgment was evidence from which, if there was nothing to rebut it, a jury might find a new promise. If the acknowledgment was accompanied by a condition, limitation, or qualification of any kind, its effect as evidence was modified correspondingly. *Stanton* v. *Stanton*, 2 N. H. 425; *Buswell* v. *Roby*, 3 N. H. 467; *Atwood* v. *Coburn*, 4 N. H. 315. Doubts were entertained whether these decisions were in accord with the real intent and purpose of the statute, and it was held that the principle of them could not be applied in actions of debt. *Rice* v. *Wilder*, 4 N. H. 336; *Exeter Bank* v. *Sullivan*, 6 N. H. 124, 133; *Downer* v. *Shaw*, 28 N. H. 151. In the later cases it has been uniformly held that a direct and unqualified admission by a debtor, within six years prior to the commencement of the action, of a subsisting debt which he is liable and willing to pay, is sufficient evidence of a new promise, and will prevent the statutory bar to the recovery of the debt. The law on this point has been so frequently and uniformly stated in the foregoing form, substantially, that the statement may be regarded as a well settled rule of law. If the admission be conditional, limited or qualified in any way or to any extent, the new promise will have a like quality, and the statute will operate so far as it may in view of the condition, limitation, or qualification.

In case there is a condition, the creditor must show that it has been fulfilled or complied with, to entitle himself to the implication of a new promise. *Russell* v. *Copp*, 5 N. H. 154; *Exeter Bank* v. *Sullivan*, 6 N. H. 124, 135, 136; *Manning* v. *Wheeler*, 13 N. H. 486, 487; *Ventris* v. *Shaw*, 14 N. H. 422; *Butterfield* v. *Jacobs*, 15 N. H. 140; *Downer* v. *Shaw*, 28 N. H. 151, 153; *Dodge* v. *Leavitt*, 59 N. H. 245; *Stowell* v. *Fowler*, 59 N. H. 585; *Holt* v. *Gage*, 60 N. H. 536; *Pickering* v. *Frink*, 62 N. H. 342; *Gage* v. *Dudley*, 64 N. H. 271, 275; *Engel* v. *Brown*, 69 N. H. 183, 184; *Mooar* v. *Mooar*, 69 N. H. 643; *Rossiter* v. *Colby*, 71 N. H. 386, 387. A partial payment of a promissory note by the maker, under circumstances which show that he understood it was partial only, and which do not indicate an unwillingness on his part to pay the balance, is evidence from which, if there is nothing to control it, a jury should find a new promise. Indorsements upon a note will not be received as evidence of such payments unless shown to be in the handwriting of the maker of the note, or there is other evidence of their genuineness and truthfulness. *Exeter Bank* v. *Sullivan*, 6 N. H. 124; *Kenniston* v. *Avery*, 16 N. H. 117; *Chapman* v. *Boyce*, 16 N. H. 237; *Jones* v. *Jones*, 21 N. H. 219; *Brown* v. *Latham*, 58 N. H. 30; *Engel* v. *Brown*, 69 N. H. 183.

According to the plaintiff's testimony, the defendant made a payment of two dollars upon the promissory note in suit within six years of the time when the action was brought, and said, in substance, at the time of making the payment, that it was all she could then pay,—that she would pay more as soon as she could,—would pay just as fast as she could on the note. This testimony, if credited by the jury, would justify them in finding that the defendant understood she was making a partial payment upon a promissory note which she regarded as a subsisting debt that she was liable to pay, and was willing to pay as fast as she could or was able. Her statements relating to losing her boarders, and to the extraordinary expenses to which she was subjected by reason of the trouble in her eyes, tend to prove that her willingness to pay was conditional and depended upon her future pecuniary ability. In effect, she promised that she would make payments on the note as fast as her pecuniary ability would enable her to do so. The later statement in evidence was to the same effect.

In *Butterfield* v. *Jacobs*, 15 N. H. 140, 141, the court said: "Where a person, on being applied to for payment of a debt, declares his inability to pay it, but promises to pay it when he shall become able, the happening of the contingency is, in its nature, susceptible of being proved. His pecuniary ability is a

matter of fact, no more indefinite nor uncertain than most facts ordinarily in controversy. Such a promise is clearly conditional, dependent on the happening of a future event. Evidence of the promise and of the pecuniary ability has, therefore, been held sufficient to take a case out of the operation of the statute." The defendant in that case promised that, if he was not arrested in an action upon the note as was threatened, he would go to work at his trade and would pay the debt as fast as he could; and it was held that his language was too uncertain and indefinite to constitute a conditional promise to pay when he should be able, and that the promise was absolute. To the same effect is *First Cong. Society* v. *Miller*, 15 N. H. 520. The reasoning by which these decisions were reached is not satisfactory. It is difficult to understand why the principles stated in the foregoing quotation from the opinion in the first case—which are believed to be sound—did not apply to the facts of the cases, and why they should not have governed the decisions. The mere omission of the debtors to expressly state their inability to pay the debts presently does not seem sufficiently to differentiate the cases from the case described in the quotation. While it is possible that the debtors may have had in mind, as the condition of their promises, their convenience in view of their other obligations, or in view of contemplated speculations or purchases, it is highly probable that pecuniary ability to pay the debt was the contingency they intended to attach to their promises, the same as would have been apparent if they had expressly declared their present inability. However this may be, it is quite clear that if the plaintiff's testimony in the present case is believed, the defendant's willingness to pay the balance of the note depended upon her pecuniary ability to pay it. Recent cases fully justify this view. *Stowell* v. *Fowler*, 59 N. H. 585; *Rossiter* v. *Colby*, 71 N. H. 386. See, also, *Atwood* v. *Coburn*, 4 N. H. 315, 318; *Betton* v. *Cutts*, 11 N. H. 170; *Manning* v. *Wheeler*, 13 N. H. 486. The defendant's exception to the charge of the court must, therefore, be sustained.

The testimony introduced by the plaintiff relating to the antenuptial agreement between the defendant and her late husband, and the provision of the husband's will in her favor, had a tendency to prove that she possessed pecuniary ability. The nature of the estate was material only as showing the extent of such ability. The testimony was relevant to the issue and competent. It, in connection with the other evidence introduced by the plaintiff, justified the denial of the defendant's motion for a nonsuit. The foregoing views of the law render immaterial the exception to the denial of the defendant's motion to set aside the verdict.

No error is perceived in the ruling relating to the rejection of

the defendant's offer to prove her physical condition prior to November, 1905, or to the ruling relating to the defendant's cross-examination. It would seem, at least, that the court, in the exercise of his discretion, might properly rule as he did.

Exceptions sustained in part: verdict set aside.

All concurred.

Hillsborough,
June 4, 1907.

WILKINS *v.* MANCHESTER.

Where house-lots have been sold in accordance with a recorded plan which shows an intersecting street, a subsequent grantee of the street location is entitled to only nominal damages upon an appropriation of his land for highway purposes.

APPEAL, from the assessment of damages for land taken for a highway. Transferred from the September term, 1906, of the superior court by *Pike*, J., upon an agreed statement of facts.

Before 1895, the owner of a tract of land in Manchester plotted it and recorded the plan, which showed the lots into which it had been divided and a proposed street called Brooklyn avenue. Prior to November 11, 1895, he sold all the lots but one, bounding them by that avenue, and on that day sold the last lot together with the location of the avenue to the plaintiff's ancestor in title. After the plaintiff bought the property, the mayor and aldermen laid out Brooklyn avenue as a highway and awarded him one cent as damages. He appealed, and the commissioners gave him the same damages. When this report was filed, he asked to have his damages assessed by a jury. "Upon the foregoing facts, if the plaintiff cannot maintain his action his appeal is to be dismissed; otherwise to stand in order for trial."

Henry N. Hurd and *John Gage*, for the plaintiff.

George A. Wagner, for the defendants.

YOUNG, J. If the question intended to be transferred is whether the plaintiff is entitled to a jury trial, the answer is yes, for that right is given him by statute. P. S., *c.* 68, *s.* 10; Laws 1897, *c.* 13. But if the question is the measure of his damages,

the answer is that he can recover no more than the commissioners awarded him, if the agreed case contains all the evidence bearing on that question, for this case cannot be distinguished from *Walker* v. *Manchester*, 58 N. H. 438.

Case discharged.

All concurred.

Hillsborough, June 4, 1907.

74 276
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KLINEINTIE v. NASHUA MANUFACTURING CO.

Where a servant seeks to recover for injuries resulting from an unsuitable condition of the premises due to ordinary wear or to the negligence of fellow-servants, it is incumbent upon him to prove his own ignorance of the defect complained of and that the master knew or ought to have known of it in season to have prevented the injury.

CASE, for personal injuries. Trial by jury. Transferred from the January term, 1907, of the superior court by *Stone*, J., upon the plaintiff's exception to an order directing a verdict for the defendants.

The plaintiff's evidence tended to prove that she stepped on some oil which had been spilled on the floor of the room in which she worked, fell, and broke her arm. She was at the place of the accident forty-five minutes and again five minutes before she fell, and saw no oil on the floor at either time.

Ivory C. Eaton, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. When the cause of the servant's injury is a condition of the master's instrumentalities produced either by ordinary wear or by the negligence of fellow-servants, he must show either that his master did and he did not know, or that his master was and he was not in fault for not knowing, of the defect in time to prevent the accident. *St. Pierre* v. *Foster*, *ante*, 4. In this case there is no evidence from which it can be found that the defendants either knew or ought to have known of the condition of the floor before the accident; consequently there is no evidence from

which it can be found that they failed to perform any duty the relation of master and servant imposed on them for the plaintiff's benefit.

Exception overruled.

All concurred.

Coös,
June 4, 1907.

HARRIMAN v. MOORE & a.

Evidence that a highway of record became a public highway by reason of twenty years user is not objectionable on the ground that it is secondary proof.

Land thrown open or dedicated to the public will not become a public highway, however long it may be used, if the travel upon it is limited to travel to and from a toll-bridge or ferry; but if it is employed for general public travel, although not exclusively utilized for that purpose, it may become a public highway by twenty years user.

Evidence that a road was used for general public travel for more than twenty years, during which time the town kept it in repair, warrants a finding that it became a public highway by user.

One who places an obstruction in a highway cannot escape liability to a traveler injured by collision therewith, on the ground that the latter's horse was frightened and beyond control, if the fright of the animal ought reasonably to have been anticipated and some provision made for the contingency.

The plaintiff in an action for negligence is not required to prove that his injury was due solely to the fault of the defendant, if his own conduct in no way contributed thereto.

CASE, for personal injuries alleged to have been caused by the obstruction of a public highway in the town of Gorham, upon which the plaintiff was traveling with her daughter. Trial by jury and verdict for the plaintiff. Transferred from the December term, 1906, of the superior court by *Stone*, J.

The evidence tended to prove the following facts: The defendants were engaged in putting in a system of water-works under a contract with the town of Gorham, and had made excavations near the scene of the accident for the purpose of laying water-pipes. At the time of the accident the plaintiff's horse had become frightened at locomotives on the tracks of the Boston &

Maine Railroad in the vicinity, and had shied to the right. The plaintiff's daughter, who was driving, was unable to prevent the horse from shying, or from passing to the right of teams directly ahead. She guided the horse between the first team and a line of rocks lying on the right-hand side of the road, and probably would have safely passed the second team if the right-hand wheel of the wagon had not struck a large rock which laid nearer the center of the road than those previously passed, and which had been unlawfully left in the traveled part of the highway by the defendants. Up to the moment of the accident, the plaintiff's daughter was doing her best to manage the horse. There was evidence that the highway in question had been used for general public travel for about thirty-seven years, during which time the town had kept it in repair. It also appeared that at the time of the accident the plaintiff's horse had become frightened, was beyond control, and was actually running away.

At the close of the plaintiff's evidence the defendants moved for a nonsuit, on the ground that the plaintiff had failed to establish the existence of a legal highway at the point where the accident happened. The motion was denied, and the defendants excepted. The defendants also excepted to the denial of their request for the following instructions to the jury:

(1) The defendants were not obliged to guard against some extraordinary condition not foreseen, in consequence of which the road became too rough or too narrow to meet all the exigencies of the situation. If the highway was in suitable condition for ordinary travel conducted in the ordinary manner, the plaintiff cannot recover.

(2) If you find that the plaintiff's horse had taken fright at a locomotive, and at the time the accident occurred was running away, then the plaintiff cannot recover, although the alleged obstruction was within the limits of the road as traveled and used.

(3) It is necessary, in order to enable the plaintiff to recover, that the alleged obstruction in the highway should have been the sole cause of the accident, no other cause contributing thereto. If, before the accident, the horse from any cause became actually uncontrollable and was so when the accident occurred, the defendants are not liable, even though the rock in question may be found to have been within the limits of the traveled way.

(4) Momentary loss of control by the driver means no more than loss of control due to the shying or sudden starting of the horse. Therefore, in order for the plaintiff to recover on the theory that the horse was only momentarily out of her control, the jury must be satisfied that the horse did not practically pass beyond the control of the plaintiff, except for an instant. In

other words, unless you believe, upon all the evidence, that the driver could have immediately regained control of the horse but for the coming in contact with the rock, your verdict must be for the defendants.

Jesse F. Libby, for the plaintiff.

Rich & Marble, for the defendants.

BINGHAM, J. The defendants contend that the verdict should be set aside for the following reasons: (1) That the plaintiff was permitted to show that the highway in question was a public highway, by evidence of general public travel for twenty years or over, without first showing that it was not a highway of record; or if it was, that the record could not be produced; (2) that if the evidence was competent, it was not sufficient to warrant a finding of a public highway, because it did not appear that the public travel may not have included travel to and from a toll-bridge or ferry; and (3) that certain requested instructions were improperly denied.

1. "Highways are only such as are laid out in the mode prescribed therefor by statute, or as have been used as such for public travel thereon, other than travel to and from a toll-bridge or ferry, for twenty years." P. S., *c.* 67, *s.* 1.

Two methods, at least, are prescribed by our statutes for laying out highways. One is by petition and hearing before the selectmen of the town in which the proposed highway is situated. P. S., *c.* 67, *s.* 2; *State* v. *Morse*, 50 N. H. 9. The other is where the selectmen of a town on the Connecticut river, "acting in pursuance of a vote of the town, enter into a contract with the officers of the adjoining town or towns in Vermont and purchase the real estate, or the privilege, easement, or franchise of a bridge or ferry corporation, for the highway." *O'Neil* v. *Walpole*, *ante*, 197; P. S., *c.* 67, *ss.* 12, 13.

But from time immemorial we have had highways by user. Such highways are not established according to certain prescribed statutory methods, but arise from the uninterrupted use of the land for public travel and the continued recognition by the town and the landowner of the right to make such use; and the provisions of section 1, chapter 67, Public Statutes, relating to highways of this character, simply define what shall be competent and conclusive evidence of their existence.

In *Stevens* v. *Nashua*, 46 N. H. 192, 199, it is said: "When our statute required twenty years user to make a highway public, even though it might have been dedicated and accepted long before that

time expired, we think it was intended that such public use for that length of time should be sufficient, not only to be conclusive against the landowner, but against the town or city in which such highway is located. In case of a dedication, such user is conclusive evidence of an acceptance; and in case there is no evidence of any express dedication, yet such use for that time, if uninterrupted, continuous, and adverse, would be conclusive evidence of a right thus to use it as a public highway, both against the landowner and the city or town."

As we have highways of record and highways by user, each dependent upon distinct methods of proof, and as the same highway may in some instances be both a highway of record and by user, such fact does not deprive proof by the latter method of its original character and render it an attempt to prove a highway of record by secondary evidence.

2. The second contention of the defendants is evidently based upon an erroneous conception of the meaning of section 1, chapter 67, of the Public Statutes. This statute was first enacted in 1842. It then read as follows: "No highway that has not been laid out agreeably to statute law shall be deemed a public highway, unless the same has been used by the public for a term of time not less than twenty years; and no highway thrown open to the public, the use of which would not be necessary for public travel, excepting for the purposes of travel over a toll-bridge, shall ever be deemed a public highway, unless the same shall be laid out agreeably to statute law." R. S., *c*, 53, *s*. 7.

The language of the statute was not changed until the revision of 1867. It then assumed its present form. C. S., *c*. 57, *s*. 7; G. S., *c*. 68, *s*. 8. But from the marginal note appended to the section by the commissioners in their report to the legislature, it appears that while different language was made use of from that previously employed, it was not the intention to change the meaning of the law. Comm'rs' Rep. G. S., *p*. iv; *Ib*., *c*. 69, *s*. 8. This fact, taken in connection with the settled rule of construction that "the mere change of phraseology shall not be deemed a change of the law, unless such phraseology evidently purports an intention of the legislature to work a change" (*Jewell* v. *Holderness*, 41 N. H. 161, 163; *Stewart* v. *Harriman*, 56 N. H. 25, 27; *Sleeper* v. *Insurance Co*., 56 N. H. 401, 406), and there being nothing in the present statute indicating a change of intention so far as the effect of travel to and from a toll-bridge or ferry upon the establishment of a highway is concerned, it follows that the law is to be construed as meaning the same as when first enacted. This being so, it is apparent that the meaning of the statute is, that when land is thrown open or dedicated to the public, the way will not become a

public highway, however long it may be used, provided the travel upon it is limited to travel to and from a toll-bridge or ferry; and that if it is used for general public travel, although not exclusively for such travel, it may become a public highway by twenty years user.

The plaintiff's evidence tended to prove that the highway in question had been used for general public travel for more than twenty years, during which time the town had kept it in repair, and was sufficient to warrant the conclusion that it was a public highway by user. *Stevens* v. *Nashua, supra; Campton's Petition*, 41 N. H. 197, 198; *Willey* v. *Portsmouth*, 35 N. H. 303.

3. There was some evidence tending to prove that at the time of the accident the plaintiff's horse had become frightened, was beyond control, and was actually running away, and the defendants requested the court to charge the jury, in substance, that they were not bound to anticipate that horses of travelers upon the highway would become frightened and uncontrollable; that if the accident to the plaintiff occurred while her horse was beyond her control, in consequence of the defendants having narrowed up the highway with obstructions, that would not make them responsible; that they were only bound to anticipate and provide against accidents to travelers while their horses were within their control; and that unless the alleged obstructions in the highway were the sole cause of the accident, no other cause contributing thereto, the plaintiff could not recover.

Whether the defendants, in view of the above evidence, were entitled to have the first part of the request given to the jury depends upon the question whether there was any evidence from which it could have been found that the defendants should have anticipated that horses of travelers passing along the highway in the vicinity of the accident might become frightened and uncontrollable, and that their conduct in narrowing up the highway might render it dangerous. If there was such evidence, then the fact that the plaintiff's horse was beyond control without her fault would be a mere condition which the defendants should have provided against, and the question was for the jury. *Ela* v. *Cable Co.*, 71 N. H. 1, 3, 4; *Brown* v. *Railroad*, 73 N. H. 568, 573, and cases there cited.

It appeared in evidence that the highway in the vicinity of the accident was located beside the tracks of the Boston & Maine Railroad, upon which locomotives were liable to be, and that the plaintiff's horse took fright at locomotives upon those tracks. From this evidence, if from none other, it could have been found that the defendants should have anticipated that horses of travelers passing along there might become frightened and uncontrollable,

and that the defendants were negligent in not providing against such a contingency. This part of the request was properly denied, and the same is true of the portion that remains to be considered. It was not necessary, in order to render the defendants liable, that the jury should find that the plaintiff's injury was due solely to the defendants' negligence, if her conduct in no way contributed thereto. *Hanson* v. *Railway*, 73 N. H. 395; *Nashua etc. Co.* v. *Railroad*, 62 N. H. 159; *Winship* v. *Enfield*, 42 N. H. 197, 215; *Clark* v. *Barrington*, 41 N. H. 44, 50; *Norris* v. *Litchfield*, 35 N. H. 271.

Exceptions overruled.

PARSONS, C. J., did not sit: the others concurred.

Merrimack,
June 29, 1907.

HUB CONSTRUCTION CO. *v.* NEW ENGLAND BREEDERS' CLUB *& a.*

Mandamus is the appropriate remedy by which to enforce the right of stockholders and creditors to an inspection of the records, accounts, and papers of a corporation.

The clerk of a corporation who wrongfully refuses to permit an inspection of its records, accounts, and papers is not thereby made liable to the penalty prescribed by section 14, chapter 148, Public Statutes.

Where a creditor having an overdue and unpaid demand against an insolvent corporation seeks to enforce his right to an inspection of its records and accounts, his petition is sufficiently definite if it alleges his desire to inspect all papers containing specified information to which he is entitled, and sets forth the relation of such information to his debt or its collection.

The statutory right of a creditor of a corporation to inspect its records and accounts is not dependent upon the purpose of the inspection, nor upon the admissibility of the documents as evidence in a proceeding for the collection of the debt.

PETITION, for *mandamus*. Transferred from the April term, 1907, of the superior court by *Chamberlin*, J. The petition alleges that the plaintiffs are creditors of the Breeders' Club, having an overdue and unpaid demand against that corporation; that the defendant Hollis is clerk of the corporation and has in his possession certain records, accounts, and papers of the corporation, which have relation to the plaintiffs' demand, namely, the clerk's records,

the names of associate grantees and their respective dates of election, and the names of stockholders and when each became or ceased to be such; and that he refuses to allow inspection thereof by the plaintiffs' attorneys. The prayer of the petition is that Hollis be ordered to allow the plaintiffs' attorneys, or one of them, to inspect said records, accounts, and papers.

The Breeders' Club was defaulted. Hollis appeared and filed a motion to dismiss, which was denied without exception. The plaintiffs then filed an amendment to their petition, stating that they desired, through their attorneys, to inspect all records, accounts, and papers belonging to the Breeders' Club, for the purpose of obtaining, among other things, the following information: (1) The names of all grantees and associate grantees, the residence of each, when elected, how long each was connected with the corporation, and what votes or acts each participated in with reference to incurring any debts or obligations against the corporation. (2) The name and residence of each director, when elected, and how long he remained in office. (3) A list of the stockholders and their respective residences, and when certificates of stock were issued to each. (4) The amount of debts, liabilities, and contracts of the Breeders' Club, and when each debt, liability, or contract was incurred. (5) A list of all the officers of the Breeders' Club, and when each one was elected, and how long he remained in office. (6) In what way the capital stock was paid in, and whether any part of the same has been withdrawn or refunded to any stockholder. (7) The total amount of debts, contracts, and liabilities incurred by any officers, down to and including July 30, 1905. (8) The value of the property of the club on July 30, 1905, and the value of the property at the present time. (9) The date of each directors' meeting and the names of directors who acted in the same. (10) If the capital stock was paid into the club, when it was paid and in what form. (11) A list of the officers or agents of the Breeders' Club, with the date of their election, the scope of their duties, and the terms during which they respectively held office or acted as such officers or agents, from the date of the incorporation of the club down to the present time.

The defendant Hollis then answered, alleging that "he has no records, accounts, or papers of said New England Breeders' Club touching the information specified, in his possession, the discovery or inspection of which may not expose him to pains and penalties, or subject him to some forfeiture or something in the nature of forfeiture, or tend to convict him thereof, or lead to a violation of professional confidence." A hearing was had upon this answer, and the defendant Hollis was ordered to answer further, plead, or

demur to every material allegation of the petition. To this order he excepted, and demurred to the amended petition, stating the following grounds: (1) That the discovery or relief sought may subject said defendant to pains and penalties, or to some forfeiture, or something in the nature of forfeiture. (2) That said bill does not allege any suit pending, or to be brought, in which the discovery sought would be material. (3) That said bill does not describe with sufficient accuracy the records, accounts, and papers, or the parts of the same, which it desires to inspect. (4) That said bill does not show by clear averment the materiality of the records, accounts, and papers sought to be disclosed. (5) That said bill is not incidental to any relief which said court has the right to grant. (6) That said plaintiff has no right to compel the submission of any records, accounts, and papers in said defendant's possession, to general inspection, or examination, with a view to find evidence to be used in other suits or prosecutions. (7) That said plaintiff does not show that it is fairly entitled to the evidence sought in order to enable it properly to prepare and try its case. (8) That said plaintiff has a full, adequate, and complete remedy at law by special statute. (9) That said bill does not state a case coming within the principles of equity jurisprudence.

The demurrer was overruled, and the defendant Hollis was ordered to submit for inspection of the petitioners' attorney all the records, accounts, or papers relating to the overdue and unpaid demand of the petitioners which are in his hands and possession as clerk of said corporation, or which belonged to the records and files of the corporation. To this order he excepted.

Taggart, Dickinson, Wyman & Starr, for the plaintiffs.

Harry J. Brown, for Henry F. Hollis.

PARSONS, C. J. *Mandamus* is the appropriate remedy by which to enforce the right of corporate stockholders and members to an inspection of the books and records of the corporation, and of creditors of the corporation in cases where such right is given by statute. 10 Cyc. 961, *s.* 20b; High Ex. Rem., *ss.* 308, 312; 2 Spell. Ex. Rel., *s.* 1610; *Queen* v. *Railway*, 3 E. & B. 784. The proceeding is therefore to be considered as an application for such writ, and not as a bill of discovery. This is especially clear in this state, since the original of the statute under consideration was adopted in 1830 (Laws 1830, *c.* 13, *s.* 1), when, whatever may be the fact as to the existence of equitable principles as a part of the common law of the state, there was no court with general chancery

powers, and the accepted construction of the law was that the court had no chancery power except what was specifically conferred by statute. *Reynolds* v. *Fibre Co.*, 71 N. H. 332, 333; *Wells* v. *Pierce*, 27 N. H. 503, 512; *Dover* v. *Portsmouth Bridge*, 17 N. H. 200, 212. It is not probable, as the law was then understood, that in 1830 the legislature, in granting a right of inspection of the votes and proceedings of corporations to creditors whose demands were unpaid, contemplated a proceeding in equity for discovery, general authority for which was not specifically conferred upon the court until twelve years later. *Reynolds* v. *Fibre Co.*, *supra*; Laws 1828, Nov. Sess., *c.* 95, *s.* 9 (Act of January 2, 1829); Laws 1832, *c.* 89, *s.* 9; R. S., *c.* 171, *s.* 6. As the proceeding is not a bill for discovery, or a petition in the nature of such a bill, it is immaterial whether the allegations of the petition are sufficient to sustain such a proceeding. The authorities cited by the defendant to sustain his contentions in this respect, and those construing statutes authorizing proceedings of this nature, are not in point.

This conclusion, however, does not meet all the objections raised by the defendant. Other grounds remain to be considered. Among them, the one first stated is that the relief sought may subject the defendant to pains and penalties, or some forfeiture, or something in the nature of a forfeiture. It is a sufficient answer to this contention that it is not supported by the facts in the case. By section 14, chapter 148, Public Statutes, the clerk or other officer or agent of a corporation is made liable to a penalty for the neglect or refusal to furnish, after demand, and payment or tender of his fees, a certified copy of any record, account, or paper which the party demanding is entitled to inspect. This is a penal statute and must be strictly construed. The penalty attaches to the neglect or refusal for the specified time to give the certified copy, and not to the refusal to permit inspection—the only matter now alleged against the clerk. As the defendant is not on the facts alleged liable to any penalty, compelling him to perform his statutory duty—the relief asked—will not subject him to one. Whether, if he had made himself liable to the penalty, that fact would excuse him from obeying the law permitting inspection, is not considered. As there is no penalty prescribed against any officer of a corporation who refuses to permit an inspection of the records accounts, and papers of a corporation, the statute itself fails to provide a remedy, and the defendant's argument under his eighth ground—that the plaintiffs should first exhaust the remedy provided by the statute—is without support.

The remaining reasons urged in support of the demurrer—that the papers which the plaintiffs desire to inspect are not described

with sufficient accuracy, that their materiality is not shown by clear averment, and that the plaintiffs are not entitled to a general inspection of the corporation papers—are in substance an objection that the facts upon which the plaintiffs rest their right to the writ are not definitely or sufficiently alleged.

"When a statute is relied upon as a declaration of a duty to do a thing, it should clearly appear by its terms or necessary implication that the performance of the act devolved upon the defendant, for the benefit of the petitioner; . . . and all the facts upon which rests the relator's claim to have the duty performed must be alleged in issuable form." 2 Spell. Ex. Rel., *s.* 1370. The statute upon which the plaintiffs rest their right is as follows: "All records, accounts, and papers of a corporation shall be open to the inspection of every member and stockholder of the corporation; and such portions thereof as have any relation to an overdue and unpaid demand of a creditor of the corporation, or to the collection of any such demand, shall be open to the inspection of the creditor and of his attorney." P. S., *c.* 148, *s.* 12. As the statute requires certain papers to be open to inspection, it follows by necessary implication that the duty devolves upon the person in charge of such papers to permit the exercise of the right of inspection by those to whom it is given. The defendant is alleged to be clerk of the corporation, and as such officer is the official custodian of certain of the records and papers of the corporation. P. S., *c.* 148, *ss.* 10, 11. The petition alleges certain records and papers to be in his possession and the existence of the plaintiffs' overdue and unpaid demand to which it is alleged the said records and papers have relation. The only allegation that appears to be open to the objection of insufficiency is the one alleging that the records and papers named have relation to the plaintiffs' demand.

Whether the papers have any relation to the plaintiffs' demand or its collection would seem to be an inference to be drawn from the facts in the case. Whether a particular inference can be drawn is a question of law; and there seems to be force in the defendant's contention that the facts from which such inference is claimed to be drawn should be alleged, thereby affording the opportunity for a joinder of issue on the questions of fact and law involved. The plaintiffs, by amendment to their petition, set forth various items of information which they desire to obtain. It also appears from the defendant's pleading that the corporation is insolvent. From this fact and the nature of the information asked for by the plaintiffs, it may be inferred that the relation between the records and papers the plaintiffs desire to inspect and their unpaid demand and its collection is the assistance the information

that may be disclosed thereby may render in the collection of their demand, by the enforcement of the individual liability of the officers and stockholders of the corporation. P. S., *cc.* 150, 151; *Carter, Rice & Co.* v. *Hano Co.*, 73 N. H. 588. It is not to be inferred as matter of law that the plaintiffs have knowledge of the particular records, accounts, and papers in the defendant's possession; and an allegation that they desire to inspect all papers containing specified information to which the statute entitles them, as having some relation upon the ground suggested, or some other which may be alleged, to their demand or its collection, would seem to be as definite a description as could be obtained in advance. Upon the interpretation of the amendment above suggested, the record discloses all the facts which in this respect the defendant claims should be shown by the allegations of the petition. The objection therefore upon the whole record is merely formal, and can be easily obviated by inserting in the petition by amendment the fact of the insolvency of the corporation and the desire of the plaintiffs to inspect, in addition to the papers named in the petition, all records, accounts, and papers containing the information specified in the amendment. As the amendment will obviate the objection, it is not necessary to further consider its necessity. *Fellows* v. *Judge*, 72 N. H. 466, 467; *Peaslee* v. *Dudley*, 63 N. H. 220. The objection to indefiniteness in the order can be cured in the same way, by limiting the inspection to the records, accounts, and papers containing the information specified in the amended petition.

The great weight of the American authorities as to the stockholders' right of inspection is to the effect that when the right is statutory it is not necessary for the petition to aver or show the purposes or objects of the inspection. *Cincinnati etc. Co.* v. *Hoffmeister*, 62 Ohio St. 189, 198,—78 Am. St. Rep. 707; *Stone* v. *Kellogg*, 165 Ill. 192, 206,—56 Am. St. Rep. 240; *Ellsworth* v. *Dorwart*, 95 Ia. 108,—58 Am. St. Rep. 427; *Johnson* v. *Langdon*, 135 Cal. 624, 626,—87 Am. St. Rep. 156. The cases proceed upon the principle that where a party has a legal right to do a thing, the motive that may move him to act is not a proper subject even for judicial investigation. *Friel* v. *Plumer*, 69 N. H. 488, 489; *Horan* v. *Byrnes*, 72 N. H. 93, 98; 10 Cyc. 956, *s.* 4. In the present case, no reason appears why the plaintiffs should be required to allege more than the statute defines as the basis of their right. Whether such an application was for a proper purpose would ordinarily be determined in the trial of the question whether the subjects of the inspection desired bore any relation to the creditor's unpaid demand or its collection.

Without deciding whether the motives or purposes of a creditor

in seeking to enforce the right given by statute might not be such as to defeat his application for *mandamus*, the present case is disposed of by the conclusion that the allegation of all the facts made essential by the statute is upon demurrer a sufficient statement of the ground upon which the right is demanded. The admissibility of the records, papers, and accounts as evidence in some proceeding brought by the creditor against the corporation, or some other, is not made a test of his right to inspect them. It cannot be said as matter of law that such papers have not some relation to the creditor's demand or to its collection, though the documents themselves may not be admissible as evidence in a proceeding to enforce the creditor's right.

Case discharged.

All concurred.

Merrimack,
June 29, 1907.

HILL v. HILL *& a.*

A husband and wife cannot make a valid contract renouncing their marital rights.

If the provisions of a contract between husband and wife respecting property rights are dependent upon and inseparably connected with covenants renouncing marital duties and obligations, the entire agreement is void.

Where a written contract between husband and wife clearly discloses that a renunciation of marital obligations was one of the purposes sought to be accomplished thereby, extraneous evidence is not admissible to contradict such intent.

BILL IN EQUITY, to set aside a deed as fraudulent against the plaintiff's homestead and dower rights, and for other relief. Trial by the court. Transferred from the October term, 1906, of the superior court by *Wallace*, C. J.

In 1888 or 1889, Samuel D. Hill, one of the defendants, owned and lived upon a farm in Loudon worth $5,000. His children were a son and a daughter, aged respectively eighteen and fifteen years. At this time the plaintiff was employed as Hill's housekeeper for about three years, after which she went to Connecticut. In November, 1894, he persuaded her to return to Loudon and marry him. She had no property, and the farm constituted his entire estate. She knew he owned the farm, would not have married him if he had not owned it, and married to gain a home and

her rights in the farm as his wife. The marriage took place November 22, 1894. On the morning of that day, and before the marriage was solemnized, Hill had a deed drawn up by which he conveyed the farm without consideration to his son, who was then twenty-one years old, reserving "one undivided half of the same to be held, owned, and enjoyed by the said Samuel D. Hill during the term of his natural life." The son was present at the wedding. Both he and his father concealed from the plaintiff the fact that the conveyance had been made, and permitted her to marry in the belief that Samuel D. Hill was still the owner of the farm.

In July, 1897, Mrs. Hill first learned of the conveyance, which was made for the purpose of preventing her from acquiring rights of dower and homestead in the farm, and was fraudulent and void as against those rights. Her knowledge of the transaction caused unpleasantness between herself and her husband; and on July 20, 1897, the following agreement under seal was drawn up with a view of settling their difficulties: "Whereas Samuel D. Hill . . . and Alice J. Hill, his wife, are desirous of living separate and apart, owing to certain difficulties which have arisen between them, therefore it is agreed between them, as follows: Said Samuel D. Hill, in consideration of the premises, hereby covenants, promises, and agrees with the said Alice J. Hill that she may at all times hereafter live separate and apart from him, that he will allow and permit her to be in such place or places and to carry on for her sole benefit such business as she may from time to time desire, that he will not trouble or molest her on account of her living separate from him, or sue, molest, or trouble any other person for receiving, entertaining, or harboring her, that he will not claim or demand any of her monies, earnings, or other property that she may possess, that he will pay to her for her own support and maintenance and to use as she may see fit the sum of two hundred dollars, giving her his promissory note therefor, payable on demand with interest annually, signed by himself and by his son, J. Swett Hill, both as principals. Said Alice J. Hill agrees, in consideration of the premises, that she will accept said note above described in place of all other interest or claim in or to his estate, and in case his death shall occur before hers, she agrees not to make any claim for dower or other interest in his estate, but to receive the said sum of . . . two hundred dollars in full settlement and discharge of all interest of every kind which she may have in his estate by virtue of the marital relations."

The foregoing agreement was not executed until a year later, when the plaintiff signed it and received $200. In the meantime she lived with her husband as before, and remained with him upon

the farm for something over a year after she signed the agreement. At this time her husband and his son told her she must leave, and she returned to Connecticut, where she has since resided. The husband has occasionally visited her and lived with her one summer. She has spent the money received under the agreement and is without means of support.

The question of the validity of the agreement of July 20, 1897, is reserved. If it is held to be valid, the bill is to be dismissed; if it is invalid, there is to be a decree in the plaintiff's favor.

Henry F. Hollis and *Harry J. Brown*, for the plaintiff.

Martin & Howe, for the defendants.

BINGHAM, J. It is found that the deed of November 22, 1894, was fraudulent and void as respects the plaintiff. In this situation the case stands as though that conveyance had never been made, and the single question for our consideration is whether the agreement of July 20, 1897, is or is not void. The defendants say that it is valid and a complete defence to the plaintiff's position.

When the plaintiff and Samuel D. Hill married, they entered into a relation from which they could not relieve themselves by contract, and which while they live cannot be dissolved except with the assent of the state. So long as that relation continues, the law imposes upon them certain duties and obligations, and confers upon each certain rights in the other's property. If they can make a valid agreement between themselves touching their respective rights in each other's property,—a question not considered,—they cannot make a valid contract renouncing their marital rights; and if covenants of each kind should occur in the same contract, their validity would depend upon whether they were independent and their considerations distinct. If they were not, the whole agreement would be void. *Foote* v. *Nickerson*, 70 N. H. 496, 518.

The contract that was made between these parties in July, 1897, includes covenants that contemplate a renunciation of marital as well as a release of property rights; and the validity of the latter covenants, in the aspect of the case here considered, depends upon whether they are independent of the former and based upon distinct considerations. The preamble of the contract discloses that the moving cause for entering into it was the desire of the parties to live separate and apart from each other. With this object in view, they undertook to put an end to their marital duties and obligations and to release such property rights as had

arisen out of that relation. Samuel covenanted that the plaintiff might at all times thereafter live separate and apart from him and in such places as she might desire, that she might engage in such business as she saw fit and for her sole benefit, that he would not molest her on account of living apart from him, and that he would pay to her for her support and maintenance the sum of $200; and the plaintiff, in view of their desire to live apart and in consideration of Samuel's covenants that she might do so, agreed to accept the sum of $200 in discharge of his obligations to her, and in case he died before she did, not to make any claim for dower or other interest in his estate, but to receive that sum in full settlement and discharge of all interests of every kind which she might have by virtue of their marital relations. As Samuel's covenant that the plaintiff might live separate and apart from him forms a part, at least, of the consideration for her covenants, and as it cannot be known whether she would have entered into the contract but for his covenant that she might live apart from him, his covenant that she might do so is not independent of, and cannot be separated from, her covenants, and treated as valid, leaving the latter to stand. *Foote* v. *Nickerson*, *supra*; *Williams* v. *Park*, 72 N. H. 305, 311.

That the renunciation of marital obligations and duties was one of the purposes sought to be accomplished by the contract, is not obscure or doubtful. It was therefore not open to the parties to contradict this express intent by extraneous evidence; and if the evidence from which it was found—that the parties continued to live together for a time after the contract was made—was introduced for this purpose, it was incompetent and immaterial. *Bancroft* v. *Company*, 72 N. H. 402, 404; *Horne* v. *Hutchins*, 72 N. H. 211, 214. If it was introduced for the purpose of showing that the provisions of the contract relating to living apart had been waived, that fact is not found.

In accordance with the order made in the superior court, there should be a decree for the plaintiff.

Case discharged.

WALKER, J., did not sit: the others concurred.

Hillsborough,
June 29, 1907.

74 292
74 348

BANK COMMISSIONERS v. NEW HAMPSHIRE BANKING CO.

Where a savings bank is authorized by its charter to receive general deposits and special deposits for a guaranty fund,—the former being entitled to interest and repayment according to contract, and the latter drawing no interest, but required to be kept as a guaranty for the repayment of general deposits,—the general depositors, in the event of liquidation, are entitled to receive interest upon their deferred dividends, as against the depositors for the guaranty fund.

DECREE, as to the distribution of funds in the hands of a receiver, made at the January term, 1907, of the superior court by *Peaslee*, J., after hearing the facts.

The defendant bank began business in 1880, and received special deposits, constituting a guaranty fund under the charter (Laws 1879, *c.* 131), to the amount of $125,000. Under vote of the trustees, general depositors were entitled to three and one half per cent per annum as interest upon their deposits in 1897, and that rate had been paid for several years prior thereto. April 29, 1897, the trustees, with the concurrence of the bank commissioners, voted that the corporation go into liquidation and that the three and one half per cent interest promised depositors for the year ending April 30, 1897, be credited to depositors' accounts and paid out on or after May 1, 1897. April 29, 1897, the clerk of the corporation sent notice to the general depositors that the three and one half per cent interest promised for the year ending April 30, 1897, would be paid May 1, 1897, and that the bank would then proceed to liquidate. This interest was paid as called for. In the process of liquidation, 100 per cent has been paid the general depositors in various dividends. The interest on the deferred dividends at three and one half per cent amounts to more than the sum in the hands of the receiver. The general depositors and the depositors for the guaranty fund each claimed this sum. Subject to exception by the depositors for the guaranty fund, a decree was entered in favor of the general depositors.

George B. French, for Farley, receiver.

Harry P. Greeley, for the guaranty fund depositors.

Walter C. Harriman, *William H. Barry*, and *Burnham, Brown, Jones & Warren*, for the general depositors.

PARSONS, C. J. The defendant bank under its charter was authorized to receive deposits of money on such terms and conditions as might be prescribed by it or its trustees, or be agreed to by the parties making the same, and to receive special deposits to constitute a permanent guaranty fund. Laws 1879, *c.* 131, *ss.* 2, 3. The charter contemplates two classes of depositors: "general depositors" and "special depositors for the guaranty fund." In the ordinary savings bank the general depositors in some respects are stockholders, and their claims in case of insolvency are postponed to the claims of creditors. *Francestown Savings Bank Case*, 63 N. H. 138, 142; *Hall* v. *Paris*, 59 N. H. 71; *Cogswell* v. *Bank*, 59 N. H. 43; *Simpson* v. *Bank*, 56 N. H. 466. But by force of the special provisions of the defendants' charter, as between the "general depositors" and the "special depositors for the guaranty fund," the general depositors stand as creditors and the special depositors as stockholders. The general depositors have no part in the management of the bank or share in its profits. They are entitled merely to interest upon their deposit and to its repayment according to the terms upon which it was entrusted to the corporation. The special depositors may vote in the choice of officers, being entitled to one vote for each $100 deposited, are not entitled to interest, but are entitled to share in the net profits of the bank; their deposit is taxable as stock in banks, and the fund created by these deposits the bank is obliged to keep as a guaranty for the repayment of the general deposits. Laws 1879, *c.* 131.

By force of the relation created by the charter, the special depositors, as stockholders, could not share in the distribution of the corporate assets until the claims of all creditors, including the general depositors, were paid. *Hall* v. *Paris*, 59 N. H. 71, 72; P. S., *c.* 162, *s.* 20. To the same effect is the express provision of the charter, that in case of the insolvency of the bank "the general deposits shall have precedence of payment from the assets of the bank before payment from said assets on account of said guaranty fund." Laws 1879, *c.* 131, *s.* 3. The bank has been in process of liquidation, and in compliance with general law and the special provisions of the charter the proceeds of the assets have been paid to the general depositors. The only question raised by the claim of the special depositors to the remaining assets is whether the claims of the general depositors have been fully paid. They have been paid the principal of their deposits and the interest agreed upon up to May 1, 1897,—the date when the bank voluntarily went into liquidation. The question is whether their claims have been paid in full, although no interest has been allowed them since May 1, 1897.

The charter provided that the general deposits should be enti-

tled to such rate of interest as might be prescribed or agreed upon. Under the regulations prescribed, the general depositors had also the right to withdraw their deposits upon certain terms as to notice. So long as the general depositors voluntarily permitted their money to remain on deposit, such action constituted an assent to the rate of interest proposed to be paid by the bank. If they were notified that the bank refused in the future to pay any interest, and did not withdraw their deposit when they could do so, they would be estopped to claim interest. *Parsons* v. *Treadwell*, 50 N. H. 356; 364, 365. The agreement of the bank, as contained in the rules and regulations established by the trustees, was to declare a dividend May 1 each year, of three and one half per cent per annum, on the deposits then in the bank, reckoning only whole months. This agreement was kept up to May 1, 1897, when the depositors were notified that the bank would go into liquidation. No dividends of interest have since been declared. If the notice of intended liquidation was a notice that no further dividends of interest would be declared, it was also a notice that depositors would not be permitted to withdraw their funds, but must accept them through the process of liquidation. It was therefore notice of the intended breach of the contract to pay interest and to repay the principal. As the depositors could not withdraw their deposits, they are not now estopped to claim their legal damages for the breach of the bank's contract to pay both principal and interest. Interest is the damages the law allows for the failure to pay money when due. *Peirce* v. *Rowe*, 1 N. H. 179; *Swamscott Machine Co.* v. *Partridge*, 25 N. H. 369, 380; *Parsons* v. *Treadwell*, 50 N. H. 356, 365. As the general depositors were entitled to their deposit at the time when the bank went into liquidation, they are entitled to the damages the law allows for its detention. Until that amount is received by them, they have not been repaid. The special "deposits for the guaranty fund" are not entitled to share in the assets until such repayment is made.

As the fund is not sufficient to pay three and one half per cent, —the contract rate when the bank ceased to operate as a bank,— it is not necessary to consider whether after the breach the general depositors could claim interest at a higher rate.

Exception overruled.

All concurred.

Hillsborough,
June 29, 1907.

LORD, *Adm'r*, *v.* MANCHESTER STREET RAILWAY.

In an action against a street railway company to recover for injuries occasioned by the burning out of a fuse on an old car, a statement of counsel to the effect that the defendants knew that the electrical equipment would deteriorate with age is a conclusion fairly inferable from the evidence as to the age of the car, and not exceptionable.

It is within the limits of legitimate advocacy for counsel to positively state as a matter of fact an inference which may properly be drawn from the evidence.

Where the evidence in an action for negligently causing death discloses that the decedent had cared for her household and taken boarders, testimony as to the number and ages of her children is competent as tending to show her capacity to earn money.

A party who neglects to ask for instructions limiting the application of evidence cannot afterward take advantage of the court's failure to give such instructions, by an exception to the charge.

Evidence as to the customary speed of electric cars at a given point is competent to show the speed of a particular car at the same place upon a subsequent occasion.

Certain evidence deemed sufficient to warrant a finding that a street railway company was guilty of negligence in failing to provide a safe car, and that a passenger injured thereby was without fault.

CASE, for negligently causing the death of Matilda Ouillette, the plaintiff's intestate. Trial by jury and verdict for the plaintiff. Transferred from the January term, 1907, of the superior court by *Pike*, J.

The plaintiff's evidence tended to prove the following facts: On September 28, 1905, Mrs. Ouillette was a passenger on one of the defendants' open cars, and was seated nearly over and a few feet from the fuse-box. During her journey the fuse burned out with a loud report, and a sheet of flame, which streamed several feet above the floor of the car, seemed about to envelop her. All the passengers were frightened. Mrs. Ouillette jumped to the opposite side of the car to avoid the flame, and either stepped or fell from the car to the paved street, and was killed. The car was an old one and was running at a speed of about fifteen miles an hour. Mrs. Ouillette had kept house for her husband and taken boarders. She left no estate.

It appeared that fuse-boxes are attached to the outside sills of such of the defendants' cars as are equipped with the appliance,

and that passengers are often badly frightened when a fuse so located burns out. The fuse-box can as well be placed under the vestibule, and in that event a burning fuse is not likely to frighten passengers. The defendants knew that a fuse might burn out at any time, and that when such a thing occurred there would be a sharp report, varying according to the strength of the electric current from that made by a common firecracker to that made by a cannon cracker, and that the noise would be accompanied by a flame rising from a few inches to several feet above the floor of the car.

The defendants moved for a nonsuit and for the direction of a verdict in their favor, on the grounds that the evidence did not disclose negligence on their part contributing to cause the injury complained of, and that Mrs. Ouillette's act in stepping from the car was not reasonably to be anticipated and constituted contributory negligence. The motions were denied, and the defendants excepted.

A witness called by the plaintiff, being asked what she and another female passenger did at the time of the accident, replied that they arose to jump from the car, and that the conductor "stopped us—kind of changed our senses." To this evidence the defendants excepted.

A witness called by the plaintiff was asked what the custom of motormen was as to running cars at the place of the accident, and replied that when a car was waiting it was their practice to put on full power. The defendants excepted to this evidence, and also to testimony that Mrs. Ouillette was survived by four small children.

Several witnesses who had been employed by the defendants testified that passengers were frequently frightened by the burning out of a fuse; but no witnesses were produced who had been so frightened, except those who were upon the car with Mrs. Ouillette. In closing argument, the defendants' counsel said that if it were true that passengers were frequently frightened in that way, the jury would not have to rely on the testimony of discharged servants. "You could go out and find plenty of people who had either been frightened themselves, or had seen other people frightened." In answer to this, the plaintiff's counsel said: "Use your good judgment again, good common-sense. If we had the resources of the Manchester Street Railway, we would make the effort." To this the defendants excepted. In discussing the question of the defendants' fault, the plaintiff's counsel said that they knew, among other things, that "it was an old car," and were aware that electrical equipment "deteriorates with age." To this statement the defendants excepted.

Taggart, Dickinson, Wyman & Starr and *Tuttle & Burroughs*, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. 1. As it is common knowledge that all mechanical devices wear out, it cannot be said as matter of law that a fuse is not more likely to burn out in an old electrical appliance than in a new one. Hence there is no presumption that the defendants were prejudiced by the statement of the plaintiff's counsel, to the effect that they were in fault for using an old car, knowing that its electrical equipment would deteriorate with age. In the absence of evidence that electrical equipment is excepted from the general rule as to the effect of long continued use upon mechanical appliances, the statement of counsel was merely the conclusion fairly inferable from the evidence as to the age of the car.

2. The plaintiff produced no witnesses who had been frightened by the burning out of a fuse prior to the accident; and from that fact the defendants' counsel argued that the testimony that passengers were frequently frightened in that way was false. In other words, the jury were asked to infer, from the plaintiff's failure to adduce such proof, that nobody had ever been frightened in that way before the accident in question, and that the defendants were not chargeable with negligence because they did not anticipate the fright of the plaintiff's intestate.

Since it is common knowledge that a party litigant usually produces all available evidence in support of his contentions, the plaintiff's failure to explain why he did not call some of the persons who, according to his evidence, had been so frightened and could have been summoned to testify, might induce the jury to find that no such persons existed. It was therefore proper for counsel to explain the omission, in so far as he might do so by a reference to the facts in evidence. *Hersey* v. *Hutchins*, 70 N. H. 130. In explanation, the plaintiff's counsel said he would have produced the witnesses if his client had possessed sufficient means. That is the substance of his statement that he would have made the effort if he had the resources of the defendant corporation. If the jury could properly find that the witnesses were not produced because the decedent left no estate, the statement of counsel is not objectionable. As the plaintiff would naturally have produced available witnesses if he had had the means, and as it appeared that the decedent left no estate, it is clear that the plaintiff's failure to adduce the proof in question might reasonably be found to result from a lack of funds.

The defendants cannot complain because counsel asserted that he would have made an effort to produce available witnesses if he had had sufficient means, instead of requesting the jury to find that fact from the evidence. When in the course of argument counsel has occasion to direct the attention of the jury to an inference which may properly be drawn from the evidence, the conclusion may be positively stated as a matter of fact, or the evidence bearing thereon may be marshalled and the jury be requested to draw the desired inference therefrom. If the former course be pursued, the verdict cannot be set aside on the ground that it was induced by unsworn testimony. *Story* v. *Railroad*, 70 N. H. 364, 387. In such case, the question whether counsel has exceeded the limits of legitimate advocacy is not to be determined by the form of his statement. The test is whether the inference which counsel asserts as a fact, or asks the jury to find, may properly be drawn from the evidence.

3. The question asked the witness as to the reason why she and another female passenger did not jump from the car was in strict compliance with the rule, and the same is true of the answer so far as it concerned the action of the witness. So far as the answer related to the other passenger, it amounted to no more than a statement that she appeared frightened and about to jump, but was prevented by the conductor. This was merely a description of what the witness saw and heard.

4. It was incumbent upon the plaintiff to show Mrs. Ouillette's capacity to earn money. One method of proof was to show what work she habitually did. It was therefore competent to show the number and ages of her children, since it appeared that she had cared for them besides doing other work. If the defendants were of opinion that the jury should be instructed as to the bearing of the evidence, they should have requested the court to limit it to the issue of damages. In the absence of such a request, they cannot now be heard to assert that the jury may have made an improper use of the evidence. It is the policy of the law to end litigation. If a party neglects to ask for instructions limiting the application of evidence, he cannot afterward take advantage of the court's failure to give such instructions by an exception to the charge, even if it would have been error to refuse to limit the evidence in response to a request to do so.

5. Evidence as to the customary speed of the defendants' cars at the place of the accident was competent as tending to show the speed of the car upon which the plaintiff's intestate was riding at the time of her injury. If the exception to the evidence was intended to be taken to the answer of the witness, it must be overruled. If the defendants deemed the answer prejudicial in so far

as it was inapplicable to any facts in evidence, they should have requested the court to instruct the jury not to consider it. Having omitted to take this step, they cannot now insist that the court's failure to exclude the objectionable matter constitutes reversible error. *Meloon* v. *Read*, 73 N. H. 153.

6. If the decedent was frightened by the noise and electrical display which accompanied the burning out of the fuse, it cannot be held that her negligence contributed to cause her death if a person of average prudence, frightened as she was, would, or might, have pursued the same course to avoid impending danger. Upon all the evidence, it cannot be said as a matter of law that the electrical display was so slight that a person of average prudence frightened thereby would not have tried to remove himself as far as possible from the fuse-box, and that in such an attempt he might not have been thrown from a car running at a speed of fifteen miles an hour.

The defendants knew the location of the fuse-box. They were aware that the fuse was designed to burn out whenever the wires were overloaded, that no one could foresee such a happening or predict the violence of the explosion and the extent of the electrical display accompanying it, and that passengers were sometimes so frightened by the noise and flames that those in charge of the cars had difficulty in averting accidents. It was incumbent upon the defendants to so equip and operate their cars as to render it improbable that passengers who were themselves in the exercise of care would suffer injury; and this obligation was imposed for the benefit of those whom the defendants either knew, or ought to have known, were liable to be injured by a non-performance of the duty. It is clear that it might reasonably be found from the evidence that a man of ordinary prudence, possessed of the defendants' knowledge of the situation and its dangers, would not use for the conveyance of women and children a car with its fuse-box attached to the sill,—in other words, that the defendants negligently failed to provide a safe car. It can also be found that their fault in this respect was the legal cause of the injury for which the plaintiff seeks to recover, if there is evidence tending to prove that they ought reasonably to have anticipated such an accident as the natural and probable result of the continued use of the defective car; and it is obvious that there was such evidence, unless it is to be held as a matter of law that street railway proprietors who equip their cars with an appliance which they know may explode at any moment, producing at the same time a loud detonation and sheets of flame, are not bound to anticipate that a female passenger seated in close proximity to the

device may be so startled by such an explosion as to jump from the car because of fright.

Exceptions overruled.

All concurred.

Grafton,
June 29, 1907.

ATTWILL, *Adm'r*, *v.* DOLE, *Ex'r*.

Where trustees appointed by will have assumed the execution of the trust, the administrator of the beneficiary cannot maintain an action against the executor to compel an accounting.

The failure of testamentary trustees to furnish an official bond does not necessarily operate as a declination of the trust, unless they have neglected or refused to give bond when required.

BILL IN EQUITY, by the plaintiff as the administrator of the estate of Emily Sweatt, praying that the defendant, as executor of the will of Maria Buck, account for certain funds which came to his hands in trust for the benefit of the plaintiff's intestate. Trial by the court. Transferred from the November term, 1906, of the superior court by *Chamberlin*, J.

Maria Buck died April 29, 1902. By her will she gave to Fred A. Sweatt and Mary E. Fairbanks a certain sum of money, "in trust for the support and maintenance of said Fred's mother, Emily Sweatt, the principal as well as the interest to be used, if necessary, for her comfortable support; but if, at the time of her decease, there is an unexpended balance of this legacy in the hands or possession of said trustees, the same is then to be paid or to go to said Fred's daughter, Marian E. Sweatt, and her heirs." Emily Sweatt died December 3, 1902. Her estate was in fact insolvent. The debts proven against it to the amount of $526.76 were contracted for her necessary support and maintenance after the death of Maria Buck.

Upon the request of the trustees named in the will, the defendant in June and November sent them small sums of money; and in July a daughter of Mrs. Sweatt wrote one of the trustees for some money with which to pay outstanding bills. This request was forwarded to the defendant. The trust fund amounted to about $1,800, and the defendant has accounted for the same to the parties named in the will to receive it after the death of Emily. The trustees furnished no official bond. Upon these

facts the court ruled that the bill be dismissed, and the plaintiff excepted.

Guy C. Richards (of Massachusetts), for the plaintiff.

Charles A. Dole, pro se.

WALKER, J. There was evidence that the trustees appointed by the testatrix, Maria Buck, in her will, assumed the execution of the trust. It appears that they received from the defendant several sums of money before the death of Emily Sweatt, presumably for her benefit under the trust. There is no intimation that they in fact declined the trusteeship created in the will. And as the ruling of the court dismissing the bill is consonant with a finding upon this evidence that they assumed the duties of trustees and were acting as such, it cannot be inferred as a matter of law or of fact that the defendant occupied that fiduciary relation to the *cestui que trust*. Under these circumstances, it is apparent that Emily Sweatt during her lifetime could not have called upon the defendant to execute the trust, or compelled him to account to her as her trustee. If he did not pay over to the trustees the fund bequeathed in trust, they—not she—could compel him to account upon a proper proceeding. As her administrator has no greater rights in this respect than she had, the plaintiff's bill was properly dismissed.

The fact that the testamentary trustees did not furnish an official bond to the judge of probate is not important. Their omission to do so immediately upon the decease of the testatrix did not impose upon the executor the duties of administering the trust. Nor did it operate as a declination of the trust by the parties named in the will as trustees, so as to give plausibility to the argument that the executor thereupon became a trustee in their stead; for to have that effect, it should appear that they neglected or refused "to give bond when required." P. S., *c.* 198, *s.* 4. There is no finding that they were required or requested to furnish a bond. In fact, there was no occason for a bond until the fund, or a part of it, was turned over to them.

Whether the defendant is accountable to the trustees, and if so, for how much, and whether the trustees have fully performed the duties imposed upon them by the terms of the will, are manifestly questions which it is not advisable to consider at this time.

Exception overruled.

All concurred.

Grafton,
June 29, 1907.

STATE v. KIDDER.

The unlawful keeping for sale of fermented cider in a license town by a non-licensee is punishable under chapter 112, Public Statutes, and the amendments thereto.

INDICTMENT, for unlawfully keeping for sale fermented cider. Trial by jury and verdict of guilty. Transferred from the November term, 1906, of the superior court by *Chamberlin*, J.

Marshall D. Cobleigh, solicitor, for the state.

Scott Sloane, for the defendant.

BINGHAM, J. The respondent was indicted for unlawfully keeping for sale fermented cider in a license town, without being a licensed dealer. Upon being found guilty, he was sentenced to six months in jail and to pay a fine of $200 and costs of prosecution, under section 33, chapter 95, Laws 1903. An exception was taken to the sentence, upon the ground that the only penalty that could be imposed was prescribed by chapter 112 of the Public Statutes and the amendments thereto.

Chapter 95, Laws 1903, does not prohibit the sale or keeping for sale of fermented cider by non-licensees (*State* v. *Langdon*, *ante*, 50, 52); but under the provisions of chapter 112 of the Public Statutes and the amendments thereto (Laws 1903, *c.* 122, *s.* 2), the sale or keeping for sale of cider "in less quantities than one barrel, except when sold and delivered by the manufacturer at the press or in an unfermented state," is prohibited, and the penalty there prescribed for violations of the law applies to the sale or keeping for sale of cider by non-licensees in license as well as in no-license towns. *State* v. *Langdon*, *supra*; *State* v. *Kennard*, *ante*, 76. The penalty provided in section 33 is not applicable, but is limited to sales by licensees in license towns, contrary to the provisions of chapter 95. *State* v. *Corron*, 73 N. H. 434, 447, and cases above cited.

The question presented in *State* v. *Wenzel*, 72 N. H. 396, related to the competency of certain evidence, and the discussion proceeded upon the theory advanced by the state's counsel, that the penalty provided by section 33 was applicable; but that question was not there considered.

Exception sustained.

All concurred.

Coös,
June 29, 1907.

MADIGAN, *Adm'r*, *v.* BERLIN STREET RAILWAY.

A verdict cannot be ordered for the defendant in an action for negligence, on the ground of inherent incredibility of the testimony in behalf of the plaintiff and a preponderance in the evidence adduced by the defendant, unless it is certain that reasonable men, upon a consideration of all the proof, must unanimously decide the issue adversely to the plaintiff.

CASE, for negligently causing the death of the plaintiff's intestate. Trial by jury and verdict for the plaintiff. Transferred from the December term, 1906, of the superior court by *Stone*, J., on the defendants' exception to the denial of a motion for an order directing a verdict in their favor.

Henry F. Hollis and *Thomas H. Madigan, Jr.*, for the plaintiff.

Rich & Marble, *Goss & Tardivel*, and *Foster & Foster* (of Maine), for the defendants.

CHASE, J. The plaintiff's intestate, a boy about seven years old, was run over and fatally injured by a car on the defendants' railway in Main street in Berlin, opposite the French Catholic convent. The convent is on the westerly side of the street, and the defendants' railway track is on the extreme easterly side, the easterly rail being within about six feet of the fence dividing the street from the adjoining land. On the easterly side of the fence and near to it there is a branch railroad, which is operated by steam power. The intestate, with several of his companions of about the same age, having just been dismissed from a school in the convent in accordance with its daily routine, went across the street and got upon the fence to watch a locomotive and train of cars that were passing over the steam railroad. As the defendants' car passed, or was about to pass, the children on the fence, the intestate alighted from the fence and stepped either in front of, or against, the car and received the injury complained of. The evidence tended to prove that pupils from the convent schools were usually around and near the defendants' track opposite the convent at the hour of the day when the intestate was injured.

The negligence alleged by the plaintiff consisted of the fast driving of the car, the acts of the motorman in looking away from the track as the car approached the children, and the omission to ring the bell or give other warning of the car's approach. The

plaintiff laid before the jury evidence tending to prove all these propositions. The defendants do not question the relevancy or competency of the plaintiff's testimony, but they say that portions of it are inherently incredible, and that it, as a whole, was greatly outweighed by their testimony, and consequently that they were entitled to have a verdict ordered in their favor. The record does not disclose any such absurdity in the plaintiff's testimony, or any such preponderance in the weight of the defendants' testimony, as would justify the conclusion that impartial, reasonable men would unanimously find, from a consideration of it, that the boy's injury was not due to the defendants' negligence in some one or more of the particulars alleged. If the motorman was looking away from the track and did not notice the boys upon the fence,—if he was driving the car without any regard to the probable presence of children dangerously near the track at that place and hour of the day, or to the actual presence of the children upon the fence at that time,—it might reasonably be found that he did not exercise the care that ordinary prudence required under the circumstances. Even if he saw the boys upon the fence, ordinary prudence would seem to require, in view of their tender years, that some precautions should be taken to avoid injuring them in case they suddenly stepped down from the fence, especially if their attention was fixed upon the locomotive and train passing over the steam railroad. It cannot be said with confidence that reasonable men would unanimously justify the motorman in assuming that children of that age would remain on the fence while his car passed them, especially if they were not aware of its approach.

It is argued that the ringing of the bell would have frightened the children and caused them to jump into a place of danger. This suggestion discloses a consciousness that they were in a dangerous position because of the approaching car, and that care was required in driving the car past them. Whether the requirements of ordinary care would be satisfied by ringing the bell, or by omitting to ring it, is a question upon which men might differ. The absence of evidence of a rule or custom requiring the bell to be rung under such circumstances does not conclusively prove that it ought not to be rung. It might reasonably be inferred from the fact that the car was equipped with a bell, that it was to be used when circumstances reasonably called for its use to notify persons liable to be injured by the moving car, of the car's approach. Moreover, the use or non-use of the bell was not the only means of exercising care to avoid injuring the boys. It may have been necessary to stop the car and warn them orally to look out for it while it passed them. Like questions of fact were involved in the question whether the intestate exercised ordinary

care. The conflicting testimony raised questions of fact which it was the province of the jury to decide.

Exception overruled.

All concurred.

Coös,
June 29, 1907.

74 305
74 425

MOORE v. BERLIN MILLS CO.

An owner of flowage rights who creates a reservoir by means of a dam is not liable for damages caused to other land by the percolation of water, unless such use of his property is unreasonable; and the reasonableness of the use is a question of fact, to be determined in view of all the circumstances of the particular case.

CASE, for injuries to the plaintiff's land caused by the percolation of water from Dead river, across which the defendant maintains a dam. Plea, the general issue. Trial by jury and verdict for the plaintiff. Transferred from the December term, 1906, of the superior court by *Stone*, J.

The plaintiff's sole claim was for injuries occasioned by the percolation of water from the defendant's pond through land of the Grand Trunk Railway into her sand-pit. Her land is bounded easterly by land of the railroad, is not contiguous to the defendant's pond or to Dead river, and is from 97 to 183 feet distant therefrom. The defendant claimed that one question was whether it was making a reasonable use of the stream and its adjoining lands. The court did not submit that question to the jury, but instructed them that if the defendant "sees fit to build a dam across that highway and stop the water in its natural flow, it would be liable then for all damages that occurred to anybody by reason of damming up and stopping the water in its natural flow." To this instruction the defendant excepted.

Jesse F. Libby and *Edmund Sullivan*, for the plaintiff.

Drew, Jordan, Shurtleff & Morris and *Rich & Marble*, for the defendant.

WALKER, J. In this action the plaintiff seeks to recover damages occasioned by water which, it is claimed, the defendant, by means of its dam across the river, causes to percolate through the ground and into the soil of the plaintiff. Between the river and the plaintiff's land the railroad owns a strip of land from 97 to 183 feet wide, through which the water percolates before it reaches the plaintiff's land. Hence it follows that the plaintiff cannot complain that the defendant's dam obstructs the natural flow of the river or interferes with her riparian rights. So far as she is concerned, the defendant must be deemed to be the rightful owner of flowage rights in the river; and those rights are property rights, in the enjoyment of which it is entitled to the same protection accorded to the owners of real estate generally. The retarded flow of the water in the river produces an artificial reservoir which the defendant has the right to maintain and enjoy as its property; and the case does not materially differ from what it would be, if the defendant had constructed a reservoir on its own land for some useful purpose, and water from it had by percolation finally reached the plaintiff's land and damaged her sand-pit.

Upon this state of evidentiary facts, the court in substance instructed the jury, subject to the defendant's exception, that the defendant is liable for all damages caused by the percolating water, without regard to the question of the reasonableness of the defendant's use of the dam and the river. This was in effect telling the jury, that though the defendant could not in the exercise of ordinary prudence foresee the injury to the plaintiff resulting from the percolation of water from its reservoir, though it was guilty of no negligence with reference to the plaintiff's rights, and though it used ordinary care in the management of its property to avoid causing injury to others, still it was bound at its peril to keep the water held in its reservoir from reaching the plaintiff's land, located 100 feet from the river, through undiscovered subterranean passages. The doctrine of *Fletcher* v. *Rylands*, L. R. 1 Exch. 265, 272,—3 H. L. Cas. 330, was thus applied without qualification; and the jury, upon finding that the water did percolate into the plaintiff's land in consequence of the swollen condition of the river, and that it caused damage to the plaintiff's land, were required as a matter of law to return a verdict for the plaintiff. But the doctrine of that case has been repudiated in this state. In *Garland* v. *Towne*, 55 N. H. 55, 57, *Ladd*, J., apprehended: "It would be a surprise, not only to that large class of our people engaged in various manufacturing operations, who use water-power to propel their machinery, and for that purpose maintain reservoirs, but to the legal profession, to hold that, in case of the breaking away of such reservoirs, there is no question of care

or negligence to be tried, but that he who has thus accumulated water in a 'non-natural' state on his own premises is liable, at all events as matter of law, in case it escapes, for the damage caused by it." See, also, *Brown* v. *Collins*, 53 N. H. 442; *Carter* v. *Thurston*, 58 N. H. 104, 107; *Davis* v. *Whitney*, 68 N. H. 66; *Gerrish* v. *Whitfield*, 72 N. H. 222, 224.

The radical inapplicability of that doctrine to the modern state of industrial enterprise, even if it was suited to and originated in an ancient civilization, is pointed out in *Brown* v. *Collins*, *supra*, and is deemed to be a sufficient reason for its rejection as a present rule for regulating the rights and duties connected with the ownership and use of property. And the court say (*p.* 450): "When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act, or by an act of which he knew or ought to have known the damage would be a necessary, probable, or natural consequence, or by an act which he knew or ought to have known to be unlawful, we understand the general rule to be that he is not liable." The distinction between interfering with the property of one's neighbor under a claim of right, and causing him some damage or inconvenience by the reasonable enjoyment of one's property, though plain, has not been recognized by cases which have followed the theory of *Fletcher* v. *Rylands*. In the present state of society, the rights of property owners are not absolute, but interdependent, and a legal enjoyment thereof is not inconsistent with a resulting injury to others. *Bassett* v. *Company*, 43 N. H. 569, 577; *Hayes* v. *Waldron*, 44 N. H. 580, 584. As a consequence of this essential principle, the doctrine of reasonableness in the enjoyment of property has been established in this state as the test in many cases by which to determine questions of liability for damages arising from such enjoyment.

"As to the use of land in the control of surface water, the enjoyment of water percolating beneath the surface, and the use generally that may be rightfully made of real estate by the owner or occupant, the test has been considered to be not merely whether the act was an exercise of dominion on the land regardless of the injury to other land, but the reasonableness of the use under all the circumstances, including the necessity and advantage to one and the unavoidable injury to the other." *Horan* v. *Byrnes*, 72

N. H. 93, 97. "Every interference by one landowner with the natural drainage, actually injurious to the land of another, would be unreasonable if not made by the former in the reasonable use of his own property." *Bassett* v. *Company*, 43 N. H. 569, 577. "The question presented in such cases is not so much one of law as of fact. It would doubtless be convenient if it could always be answered by citing a stereotyped definition of legal right. But as the situation of all adjoining owners of land is not the same, and as the circumstances attending the use of land in view of the flow of surface water are infinitely various, the failure to attain substantial justice by the enforcement in all cases of a rule of law which does not recognize these important differences is not surprising. The result is that the question of the reasonableness of the use in a given case must be determined as a question of fact under all the attendant circumstances." *Franklin* v. *Durgee*, 71 N. H. 186, 191.

"One of Eaton's proprietary rights was the correlative of R's duty of abstaining from such a use of air and water, and from such an interference with their quality and circulation, as would be unreasonable and injurious to the enjoyment of Eaton's farm. The same principle governs the ownership and use of land, and all material things. Whether we say that R had a right to make a reasonable use of his land, and thereby cause a damage to Eaton, or that he had not a right, by an unreasonable use of his land, to injure Eaton, or that Eaton had a right not to be injured by R's unreasonable use of his own land, we mean the same thing. The principle may be expressed in an affirmative or a negative form, in a statement of rights or a statement of duties. Calling it a rule of consequential damages, or treating it under that head, tends to envelop a very plain matter in unnecessary obscurity." *Thompson* v. *Company*, 54 N. H. 545, 554, 555.

In *Ladd* v. *Brick Co.*, 68 N. H. 185, 186, the principle is tersely stated thus: "The owner may put his land or other property to any use not unlawful which, in view of his own interest and that of all persons affected by it, is a reasonable use. For the consequence to others of such a use, he is not responsible. The question of reasonableness is a question of fact." In *Dolbeer* v. *Company*, 72 N. H. 562, 565, it is said: "The rights of the owners of lands adjoining the plaintiff's land to have water percolate from the pond through the ground to their lands, like the correlative rights of the plaintiff, are limited by the bounds of reasonableness. The plaintiff has a right to obstruct or change such percolation to an extent that is reasonable in view of its effect upon the interests of all parties affected by it." Many other cases might be referred to, in which the foregoing principles have been applied. See

Swett v. *Cutts*, 50 N. H. 439, 446; *Thompson* v. *Company*, 58 N. H. 108; *Rindge* v. *Sargent*, 64 N. H. 294; *Hamlin* v. *Blankenberg*, 73 N. H. 258.

The charge of the court in this case, therefore, cannot be sustained. The defendant's acts in maintaining a dam across the river were not in the nature of trespasses as against the plaintiff. Its enjoyment of flowage rights by creating a reservoir for the storage of water to be used in the development of power at its mill, or for other useful purposes, did not depend upon the consent or pleasure of the plaintiff; and the plaintiff cannot complain unless her damage results from its unreasonable exercise of those rights. What acts would be competent and sufficient evidence, or would constitute as a matter of law conclusive evidence, of an unreasonable exercise of its flowage rights, it would be useless to attempt to specify. The case discloses evidence tending to show that the defendant was using its mill property in a reasonable manner with reference to the plaintiff's land. Whether it violated its duty to the plaintiff in this respect by suffering water from the river to reach her land by percolation, and whether, after learning of the damage it occasioned to her land, it could and should, under the circumstances, have prevented the percolation, are questions determinable, not by the court under set rules relating to legal titles, but by the jury in the exercise of a discriminating judgment in view of all the competent evidence.

Other questions presented by the record have not been considered, since upon another trial they may not arise.

Exception sustained: verdict set aside.

All concurred.

Coös,
June 29, 1907.

ROBINSON v. STAHL.

A statement as to the circumstances of an assault, made by the victim after the lapse of so brief an interval as to form an incident of the main transaction, is admissible in evidence in favor of the declarant, as part of the *res gestæ*.

Evidence that a witness declared his intention to testify for the party paying him the most money is relevant upon the issue of his credibility.

An exception to the admission of evidence relevant to any issue in the case ordinarily raises no question of law.

TRESPASS to the person. Trial by jury and verdict for the plaintiff. Transferred from the December term, 1906, of the superior court by *Chamberlin*, J.

During a quarrel the defendant ejected the plaintiff from a house so roughly that she fell and injured her arm. Subject to the defendant's exception, testimony was admitted that before the plaintiff regained her feet she said the defendant pushed her down. Subject to exception, the plaintiff was permitted to show that a witness for the defendant had said he should testify for the side which paid him the most money.

Jesse F. Libby, for the plaintiff.

Sullivan & Daley, for the defendant.

YOUNG, J. Statements made in the course of a transaction, or so soon thereafter as to form a legitimate part of it, are admissible in favor of the party making them in so far as they tend to explain it or the relation of the parties to it. *Murray* v. *Railroad*, 72 N. H. 32, 37. Consequently, it cannot be said as a matter of law that the court erred in admitting the plaintiff's statement as to the cause of her injury; for there was evidence from which it could be found that it was an incident of the assault. The defendant's contention that there was no such evidence is not sustained by the facts; for although the case does not show just how much time elapsed between the assault and the making of the statement, it does show that it was only so much as was required by the witness to walk forty or fifty feet, or eight or ten seconds.

The evidence as to what the defendant's witness had said about testifying was relevant to the issue of his credibility. Consequently its admission was not error (*Page* v. *Hazelton*, *ante*, 252),

even if it would not have been error to have excluded it (*State* v. *Gates*, 17 N. H. 373, 387): for an exception to the admission of evidence relevant to any issue in the case (*Darling* v. *Westmoreland*, 52 N. H. 401) usually raises no question of law. *Lambert* v. *Hamlin*, 73 N. H. 138. Since it is not error for the court to admit evidence relevant to any issue in the case, the fact that testimony is of such a nature that it will probably prejudice the party objecting to its admission furnishes no legal ground for disturbing a verdict procured by it. *State* v. *Lapage*, 57 N. H. 245, 255. So even if this testimony is of that character, as the defendant contends, it cannot be said as a matter of law that the court erred in admitting it.

Exceptions overruled.

All concurred.

Rockingham, Oct. 1, 1907.

TREADWELL *& a.* *v.* WILLIAMS.

Where a will directs trustees to divide the income of the estate among the testator's children, and gives the entire property to the last surviving child absolutely and in fee simple, the trust terminates and the estate vests in possession upon the death of all the children but one, without an election by the survivor; and this result is not affected by a provision in a codicil, that a third part of her husband's share of the income may be claimed during life by the wife of a son who eventually becomes sole survivor.

BILL IN EQUITY, for the termination of a trust. Transferred from the January term, 1907, of the superior court by *Wallace*, C. J.

Page & Bartlett, for the plaintiffs.

Streeter & Hollis and *Richard W. Hale* (of Massachusetts), for the defendant.

CHASE, J. This is a bill in equity, by which the plaintiffs seek a decree for the termination of a trust created by Daniel H. Treadwell by will. Treadwell was an inhabitant of Portsmouth at the time of his decease in 1864, and his will was duly proved and allowed in Rockingham county. By the fifth clause in the will,

after making certain provisions not material to be considered in the present inquiry, he gave the residue of his estate to his four sons "and to their survivors or survivor," as executors and trustees, to manage and care for, and, after paying taxes and other specified expenses, to pay from the balance of the income certain annuities to his wife and daughter during their lives, and—in the words of the will—"to divide the whole of what then remains of the said net income equally among my aforesaid sons, Robert O., William H., George L., and John P., or among those of them who may be alive at my decease, the share of each son to cease at the death of said son, and to be divided among the surviving sons during their lives." The sixth clause is as follows: "It is my will that my estate be not divided (except only the income of it), and that my last surviving child, whether son or daughter, inherit the whole estate of every kind after the death of my wife, absolutely and in fee simple." A codicil contains the following provision: "In consideration of the kindness and attention paid me by my daughter-in-law Marianna Weston Treadwell, wife of my beloved son Robert O. Treadwell, as well as in consideration of absence of dower in said Robert's share in my estate, I order and direct that, during the time she shall continue the wife or widow of said Robert, the said Marianna shall (if she desires it) receive out of that share of my annual income (after its division) which shall fall to the lot of said Robert, a portion not exceeding one third part of said Robert's share, which portion my executors shall pay over to her (should she wish it) at the same time that the remainder of the said share is apportioned to my said son Robert, and the other shares to the other recipients provided for. But said Marianna shall never compel my executors and trustees by legal process or otherwise to account to her for any sums of money or any doings of theirs." The death of the testator's wife preceded his death. All the children survived him. The daughter died first. William died in 1896, John in January, 1906, and George in February of the same year. Robert is still living, as is also his wife Marianna, and they are the plaintiffs. The defendant was appointed one of the trustees by the probate court in 1905. The residue of the estate consists of real estate situated in Portsmouth and in Boston, Massachusetts, and of personal property. Robert and his wife have severally elected that the trust terminate.

The question transferred is whether the trust is terminated by force of the terms of the will and codicil, either with or without the plaintiffs' election. The answer to this question depends upon the intention expressed by the testator in the will and codicil; and there is scarcely any ground for doubt as to what that inten-

tion was. As the testator's wife died before his death and Robert is his last surviving child, Robert inherited "the whole estate of every kind, . . . absolutely and in fee simple," upon becoming the sole survivor, unless there is something in the will or codicil which modified the ordinary meaning of the unambiguous terms of the sixth clause of the will. There is certainly nothing in the will which has a tendency to make such modification. According to its terms, there was no trust provision remaining to be executed after the deaths of his wife, daughter, and three of the sons; and the trust terminated by force of its limitation when George, the last son but one, died.

But it is said by the defendant that the codicil tends to show that the testator modified the sixth clause and other portions of the will, to the extent of postponing until Marianna's death the time when the estate would vest in possession in Robert absolutely and the trust would terminate. Referring to the terms of the codicil, it is noted that the provision for Marianna is only the right to claim, if she so desires, a portion not exceeding one third part of "that share of my annual income (after its division) which shall fall to the lot of said Robert," such portion being payable "at the same time that the remainder of the said share is apportioned to my said son Robert, and the other shares to the other recipients provided for." The share here referred to, obviously, is "that share" which "after division" would be allotted to Robert under the fifth clause of the will. The evidence is almost conclusive that the codicil was intended simply as an amendment of this clause of the will. It modified that clause by giving to Marianna during life, provided she continue to be the wife or widow of Robert, the right to claim while he lived a limited portion of the share of the annual income allotted to him under the clause, and after his death a similar portion of the share he was receiving at the time of his death. In the latter event, the son or sons who survived Robert would receive a correspondingly less portion of the income. The codicil clearly refers to a state of facts which requires the income to be divided into shares and to be apportioned among Robert and one or more other sons—not to a state of facts which requires it to be paid in its entirety to Robert. Its language cannot be applied to the latter state of facts without ignoring portions of it and giving other portions a meaning that they do not ordinarily have.

One of the motives which induced the testator to make the provision in behalf of Marianna was the "absence of dower in said Robert's share in my estate." There would be such "absence of dower" in her behalf in case Robert's share was only that provided for by the fifth clause of the will. In consideration of such

absence, the testator might reasonably be expected to substitute some provision for Marianna's benefit, especially in view of his appreciation of her kindness and attention to him. But if he became the sole surviving son and inherited the whole estate under the sixth clause, Marianna would be entitled to "dower" (whatever may have been meant by the term) in the estate received by Robert from the testator. In that event one of the considerations for making the special provision contained in the codicil would not exist. There is nothing in the will or codicil which tends to show that the testator intended to substitute the optional and precarious right mentioned in the codicil for Marianna's "dower" right, in case Robert inherited the entire estate. There is an equal dearth of evidence tending to show that he intended such right should be additional to her dower right if she should be entitled to dower. It would be absurd to suppose that a provision made in consideration of the absence of a dower right was intended to be additional to that right.

It is suggested by the defendant, that "for some reason not disclosed, the testator evidently thought that Robert could not surely be relied upon to provide for his wife out of his income." The only ground for this suggestion is the fact that the provision of the codicil in Marianna's behalf was made. The will contains abundant evidence that the testator had implicit confidence in the ability and integrity of his sons. In the very clause of the will under consideration (fifth), he devised the residue of his estate to them "and to their survivors or survivor, to have and to hold the same to them" upon the trusts before mentioned. He provided that their personal bond alone should be required for the faithful discharge of their duties; and he empowered them to sell and convey the real estate situated outside this state and the stocks belonging to the estate, and to reinvest the proceeds according to their best judgment and discretion. Under these provisions, Robert, as the survivor of the sons, would be sole trustee in case there was occasion for a continuance of the trust, and it would be his duty to administer that portion of it in favor of Marianna if it continued. If the testator distrusted his son with respect to the performance of his marital duties to his wife, he would not be likely to make it possible for the son to become trustee to administer a provision made to alleviate such failure of duty. The absence of a provision in the will for the appointment of a substitute or co-trustee in such case is weighty evidence that no distrust of the kind suggested existed. It may be remarked, in passing, that the appointment of the defendant as trustee has no bearing upon the question under consideration. It is altogether more reasonable to believe that the codicil was made to give Marianna

a substitute or consideration for the "dower right" which she would not have if Robert's only interest in the estate was that derived under the fifth clause of the will, than to believe that the testator questioned Robert's faithfulness to his marital obligations.

Another reason suggested by the defendant for the continuance of the trust is the alleged fact that it would be necessary if the testator's widow or daughter was alive. Without considering whether the trust would continue in such case, it is sufficient to say that, if it would, it does not follow that the testator intended it should continue for Marianna's benefit also. That would depend upon whether there was any trust provision in her behalf remaining to be executed.

The conclusion is, that according to the testator's intention, as expressed in the will and codicil, the provision made for Marianna in the codicil was to be operative only so long as Robert was receiving a share of the annual income under the fifth clause of the will, and in case of his death while receiving a share, so long as she remained his widow. As Robert has become the sole surviving son and the testator's widow and daughter are dead, the fifth clause of the will has ceased to operate and the sixth clause has become effective to its full extent. There are no trust provisions in the will or codicil remaining to be executed, and the trust terminated upon Robert's becoming the sole surviving son, without regard to the election of himself and wife. This conclusion renders it unnecessary to consider any of the other questions raised in the case or discussed in the briefs of counsel. There should be a

Decree for the plaintiffs.

WALKER and BINGHAM, JJ., concurred: PARSONS, C. J., and YOUNG, J., were of the opinion that the testator intended the trust should continue so long as Marianna lived.

Rockingham,
Oct. 1, 1907.

TILLEY v. ROCKINGHAM COUNTY LIGHT & POWER CO.

The fact that a gas main has been repeatedly cleaned out without accident is evidence that it and its appurtenances are properly constructed, so far as suitableness for the act of cleaning is concerned.

The responsibility of a master for injuries caused by the negligence of a fellow-servant is not determined by a difference in rank between the injured servant and the one in fault, nor by the fact that the negligent servant was foreman or in control of others, but upon the nature of the act complained of: whether it was an act of service, or an attempted performance of a non-delegable duty of the master.

Where a gas company has provided suitable valves by means of which a flow of gas to a main may be prevented, the act of closing them preparatory to cleaning a pipe is a mere detail of the service, and not a non-delegable duty owed by the corporation to the persons employed in the work.

A servant cannot recover of the master for personal injuries on the ground of the latter's failure to provide a safe place for the work, if the danger complained of was temporary and resulted solely from the negligent failure of a fellow-servant to perform a detail of the service.

CASE, for negligence. Trial by jury. Transferred from the January term, 1907, of the superior court by *Pike*, J., upon the plaintiff's exception to an order of nonsuit.

The plaintiff, an employee of the defendants, was burned and injured by an explosion which occurred while he was assisting in cleaning out a hydraulic main in their gas works. The negligence alleged consisted of the following particulars: (1) Neglect of the defendants' foreman to have the gas shut from the main before the plaintiff removed the covers; (2) his neglect to have the pipes aired so as to be free from gas; and (3) negligent construction of the main, in consequence of which gas leaked through the valves into the pipe which the plaintiff was directed to clean.

The following is a summary of the material portions of the testimony produced by the plaintiff: He, two fellow-servants, and the foreman of the defendants' gas department were engaged in cleaning out a hydraulic main. By direction of the foreman, the plaintiff removed the caps from two pipes and then asked if everything was all right, to which the foreman replied, in substance, "Yes, go ahead." The plaintiff then cleaned out one pipe, using an instrument which he described and which, he said, "we always use for it." As he began to clean the second pipe, an explosion occurred which caused the alleged injury. The witnesses did not know whether there was gas in the pipes, nor what caused the

explosion. Fire issued from the pipe at the time of the explosion. When the caps were first taken off, smoke issued from the pipes "so fiercely" as to drive the employees away temporarily. There were valves in the pipes by which the gas could be prevented from flowing back from the gas-holder into them. If the valves were closed and tight, no gas could flow back. This main had been cleaned out an average of four times each year for eleven years without accident. Nothing was said about closing the valves on this occasion, and it did not appear whether they were closed or not. Nothing was said about airing the pipes. The plaintiff had nothing to do with shutting off the gas; and when asked if anybody shut it off, he replied, "I supposed the foreman." The foreman was present while the work was in progress.

John G. Tobey, Jr., *Ernest L. Guptill*, and *Page & Bartlett*, for the plaintiff.

Samuel W. Emery (of Massachusetts), for the defendants.

CHASE, J. The plaintiff at the time of his injury was engaged with two other servants in cleaning out a hydraulic main, under the immediate supervision of the foreman having charge of the defendants' gas department. It would seem from the evidence that the hydraulic main consists in part, at least, of pipes in which valves are placed, which when closed prevent the gas from flowing from the gas-holder back into the pipes, and that usually four or more of these valves are closed while the main is being cleaned. One ground of liability alleged by the plaintiff is a faulty or imperfect construction of the main, in consequence of which gas leaked through the valves into the main and caused the explosion. There is no evidence whatever supporting this allegation. On the other hand, the evidence that the main had been cleaned out without accident an average of four times each year for eleven years tends to prove that it and its appurtenances were properly constructed, so far as suitableness for the act of cleaning was concerned.

The other allegations of the plaintiff relate to negligence of the foreman in omitting to close the valves before removing the caps from the pipes and in omitting to properly air the pipes. Assuming that there was evidence tending to support these allegations and also to prove that the explosion was due to such negligence,—a somewhat violent assumption,—the exception raises the question whether the defendants are responsible for the negligence. As was said in a recent decision: "The responsibility of the master is not determined by a difference in rank between the servant

injured and the one in fault, or by the fact that the servant guilty of negligence is foreman or in control of others, but upon the nature of the act complained of: whether it is an act of service, or an attempted performance of a non-delegable duty of the master." *Hilton* v. *Railroad*, 73 N. H. 116, 119. See, also, *McLaine* v. *Company*, 71 N. H. 294; *Galvin* v. *Pierce*, 72 N. H. 79; *Wallace* v. *Railroad*, 72 N. H. 504.

The question of law consequently resolves itself into this: whether the alleged negligence of the foreman was negligence in the performance of a non-delegable duty owed by the defendants to the plaintiff. So far as appears, the shutting of the gas from the main before removing the covers was a detail of the work that could be readily done. Valves were provided for the purpose, and all that was necessary was to close them properly. It is not suggested, either in the plaintiff's allegations or testimony, that any special skill was required to enable one to do this. The act of closing them would seem to be an act of service purely. As to the airing of the pipes, there is nothing in the testimony tending to prove that it was necessary or customary, nor is it a matter of common knowledge that they should be aired before attempting to clean them out. Moreover, the act of airing them, if necessary or prudent, would also seem to be an act of service.

But the plaintiff says in argument that the failure to close the valves and the consequent flow of gas into the pipes rendered the place to which he was assigned an unsafe place for his work. The place was a portion of a structure designed for the manufacture of gas. So far as appears, it was reasonably safe for that purpose. As previously stated, valves were provided for shutting the gas from the pipes whenever there was occasion for doing so. It does not appear that any special construction was required for airing the pipes. According to the plaintiff's allegations, whatever want of safety there was in the place at the time of his injury was temporary, and was due to failure to make proper use of these valves, or to properly air the pipes, or both. The defendants having provided proper appliances for securing safety to their employees, were not chargeable with the non-delegable duty of properly operating them. They were at liberty to entrust the operation of the appliances to any of their employees, provided only they exercised ordinary care in selecting the employee; and it is not contended that they failed in this respect in this instance. At best, so far as appears by the testimony, the acts required to secure safety of the place were mere acts of service which the defendants might properly delegate to their employees. The plaintiff's position is not strengthened to any degree by attributing his injury to want of safety in the place, for such course leads to the same

result, namely, that the negligence was that of a co-employee of the plaintiff, for which the defendants are not responsible.

Neither the plaintiff's allegations nor his proofs make a case for charging the defendants for failure to inform the plaintiff of the dangers incident to his employment, or to prescribe and promulgate reasonable rules for the protection of their employees while engaged in cleaning out the mains, or to perform any other of a master's non-delegable duties. As his case was presented to the jury, the nonsuit was properly ordered.

Exception overruled.

All concurred.

Merrimack,
Oct. 1, 1907.

BARRY *& a.* *v.* LITTLE *& a.*

A finding that a licensee has violated the statute regulating the traffic in intoxicating liquor and is no longer entitled to exercise the privilege conferred by his license, made by the state board of license commissioners after due notice and hearing, is a judicial act, and the judgment rendered is valid until set aside upon appropriate proceedings.

The fact that the license commissioners, prior to a hearing on a complaint against a licensee and in his absence, heard and considered evidence tending to prove a violation of law, does not render their proceedings void, unless it appears that at the time of the hearing the licensee was justifiably ignorant of such conduct, or that he seasonably objected to the tribunal as disqualified by prejudice.

BILL IN EQUITY, alleging that the defendants, constituting the state board of license commissioners, on May 1, 1904, issued to the plaintiffs a license of the second class to traffic in liquors in Newport; that on February 2, 1905, the defendants, by virtue of section 14, chapter 95, Laws 1903, and on a complaint that the plaintiffs in December, 1904, had violated the provisions of said chapter, decided that the plaintiffs were guilty as alleged, cancelled their license, and declared the condition of their bond forfeited; and that the defendants, before the hearing on the complaint and in the absence of the plaintiffs, heard and considered *ex parte* evidence of a violation of the provisions of the statute by the plaintiffs and conferred with one Flood about the plaintiffs' guilt. The bill prayed that the decision of the commissioners be decreed to be void. At the April term, 1906, of the

superior court, the defendants' demurrer to the bill was sustained by *Peaslee*, J., subject to the plaintiffs' exception.

Joseph Madden and *Dudley & Lowe*, for the plaintiffs.

Edwin G. Eastman, attorney-general, for the defendants.

WALKER, J. The demurrer raised the question whether upon the facts alleged in the bill the plaintiffs are entitled to equitable relief. They seek to have the order of the board of license commissioners cancelling their license declared to be null and void. Whether they have misconceived their remedy it is unnecessary to determine, since they have not stated a cause of action showing that they have suffered actionable wrong. If the action of the commissioners in cancelling their license was legal, it cannot be nullified in this, or in any other, form of procedure.

That the commissioners were exercising judicial functions in deciding that the plaintiffs had violated the provisions of the license law and that they were no longer entitled to exercise the privilege conferred upon them by their license, cannot be doubted. *Sargent* v. *Little*, 72 N. H. 555; *Parrent* v. *Little*, 72 N. H. 566; *State* v. *Corron*, 73 N. H. 434. In the case last cited, which involved a similar question relating to the powers of the license commissioners, it is said (*p.* 457) that the defendant "had notice, was heard, and litigated before a competent tribunal the matter in issue, and the same results must follow the judicial action in which he took part as ordinarily attend an adjudication of which the parties have notice and in the course of which they are heard. In short, the cancellation of Corron's license was a judicial act, and the commissioners had jurisdiction of the parties to and the subject-matter of the suit." As there is no allegation in the bill that the plaintiffs were not properly notified of the hearing before the commissioners, and as they make no claim of that character, it is presumed that they participated in the trial before that board. Hence the board had jurisdiction of the parties as well as of the subject-matter involved in the complaint, and its judgment upon the issue tried is valid until set aside upon appropriate proceedings.

The principal ground of complaint on the part of the plaintiffs is, that the commissioners were disqualified to act in a judicial capacity in the trial of the complaint against them, because they had, before the time of the hearing and in the absence of the plaintiffs, heard and considered evidence which was prejudicial to the plaintiffs. But however reprehensible such conduct on the part of the board may be in the performance of judicial duties (and upon this point no opinion is expressed), it did not necessa-

rily have the effect of rendering their proceedings absolutely void, so far as the plaintiffs are concerned. There is no allegation in the bill that they were ignorant, at the time of the hearing, of the facts which they now claim disqualified the members of the board from sitting in the case, or that they were not chargeable with knowledge thereof, or that they then objected to the tribunal on the ground of its disqualification for the reason suggested. In the absence of a statement of facts in the bill authorizing an inference that they were justifiably ignorant of the alleged incompetency of the board, it cannot be presumed that they were in that position at the trial. The only resulting conclusion is, that by their silence upon that point they were willing to submit the controversy to that tribunal, having jurisdiction of the subject-matter, and to waive the question of the bias or prejudice of its members produced by their having previously heard the statements of an interested witness, in the absence of both of the plaintiffs.

In *State* v. *Daniels*, 44 N. H. 383, the respondents, after verdict, objected that one of the jurors was disqualified because he had heard the case discussed before the trial. Upon this point the court say (*p.* 385): "There is a capital objection to the motion for a new trial on this account. It is not shown that the respondents and their counsel were not aware of the objection before the verdict was returned." This holding proceeds upon the obvious ground that the party urging such an objection assumes the burden of showing, that he did not knowingly and willingly submit to a trial by a prejudiced tribunal. If he did, he cannot be heard to complain after a verdict against him. *Rollins* v. *Ames*, 2 N. H. 349; *Warren* v. *Glynn*, 37 N. H. 340; *Gilmanton* v. *Ham*, 38 N. H. 108; *Edmunds* v. *Griffin*, 41 N. H. 529; *Moses* v. *Julian*, 45 N. H. 52; *Burnham* v. *Goffstown*, 50 N. H. 560; *Wentworth* v. *Farmington*, 51 N. H. 128; *Harrington* v. *Railroad*, 62 N. H. 77; *Fowler* v. *Brooks*, 64 N. H. 423; *Bickford* v. *Franconia*, 73 N. H. 194, 196; *Hutchinson* v. *Railway*, 73 N. H. 271, 276; *Moon* v. *Flack*, *ante*, 140, 143. The demurrer was properly sustained.

Exception overruled.

All concurred.

Hillsborough, Oct. 1, 1907.

WILSON v. READ & a.

As matter of law, a dead body becomes after interment a part of the ground to which it was committed.

Courts of equity have jurisdiction to settle controversies as to the burial of the dead, the care of their remains after burial, and the preservation of the place of interment from wanton violation or unnecessary desecration.

Where no trace of a dead body was discovered when a grave was reopened, but the earth in which it was buried was removed to a new location, a decree that the remains be restored to their original place of interment would be futile and cannot properly be made.

The right of the owner of a burial lot to disturb a grave thereon and the authority of the next of kin to prevent a removal of the remains of a person there interred are not absolute, but are bounded by rules of propriety and reasonableness determinable by a court of equity upon due application.

The next of kin of a person deceased cannot prevent the owners of a cemetery lot from using the precise spot where the remains were interred for a subsequent burial, unless such use would constitute a wanton invasion or unnecessary desecration of the original place of sepulchre.

BILL IN EQUITY, for the restoration of the remains of Harriet A. Read to the place of their original interment. Trial before *Peaslee*, J., at the January term, 1907, of the superior court. The defendants excepted to the overruling of their demurrer and to a decree ordered for the plaintiff.

Harriet A. Read, daughter of John L. and Lucy Read, died in 1855, aged seven months, and was buried in a cemetery lot owned by her father. Lucy died in 1860, and was buried by her husband in the same lot, leaving a space for a grave between hers and Harriet's. Mary A., daughter of John L. and Lucy, died in 1863, and was buried in the grave next Lucy's on the other side. In 1863, John married Mary E. Read. He died in 1895, and by his will devised the cemetery lot to his wife, Mary E., who buried him in the vacant space between the graves of his first wife and Harriet. Mary E. died in 1904, having expressed a wish to be buried beside her husband. She was buried in a grave directly in the rear of her husband's, but by whom does not appear. The following year Grace W. Read, one of the defendants, procured a permit for the relocation of the remains of Harriet and Mary E., and the remains of the latter were placed in the grave beside her husband. No trace of the remains of Harriet was discovered, but

the earth where she had been buried was removed to the new location. The work was done in a decent and proper manner, and the provisions of the statute relating to such matters were complied with.

The plaintiff is a daughter of John and Lucy. The defendants are children of John and Mary E., and, as heirs of Mary E., to whom John willed the lot, are the owners of it. In the same year after the death of John, Mary E. gave the plaintiff consent in writing to the erection by her of stones for her mother and sister and also at the grave of her father. The plaintiff has erected headstones to her father, mother, and sisters.

Edgar I. Kendall and *George B. French*, for the plaintiff.

Martin & Howe, for the defendants.

PARSONS, C. J. In the absence of any information as to the terms of the decree for the plaintiff, to which exception was taken, it is presumed that the decree was drawn to effect the purpose of the bill—the restoration of the remains of Harriet A. Read to their place of original interment. The fact that no trace of the remains which the plaintiff asks to have restored was discovered in the grave where they were originally buried discloses the futility of such a decree. If none was found in the grave, it is clear none can be in the place where the earth of the grave was deposited. The law does not require that to be done which is impossible or useless. *Wells* v. *Burbank*, 17 N. H. 393, 411; *Copp* v. *Henniker*, 55 N. H. 179, 211; *Cahoon* v. *Coe*, 57 N. H. 556, 579. "It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous. *Lex nil frusta facit. Lex non cogit ad vana seu inutilia.*" *Kent*, C. J., in *Huntington* v. *Nicoll*, 3 Johns. 566, 598. The court has no power to order one to do what the law will not require him to do because of its impossibility or futility. A contract to convey real estate of which the vendor has no title will not be decreed, for such a decree would be simply nugatory. Bisp. Eq. 435; *Woodward* v. *Harris*, 2 Barb. 439; *Fitzpatrick* v. *Featherstone*, 3 Ala. 40.

Not only did the body of Harriet become, as matter of law, after burial a part of the ground to which it was committed (*Meagher* v. *Driscoll*, 99 Mass. 281, 284), but from lapse of time it has, as a physical fact, become indistinguishable from the soil in which it was placed. The body was returned to the parent earth for dissolution. *Gilbert* v. *Buzzard*, 3 Ph. Ecc. 335, 350.

That purpose has been accomplished. Whatever right the plaintiff may have to protect the burial place of her sister, no decree of the court can effect the reburial of remains no longer in existence. The plaintiff is not entitled to a decree to carry out the impossible purpose of her bill. The exception to the decree is therefore sustained.

The defendants also except to the order overruling the demurrer to the bill. In the absence of the allegations of the bill, the question directly presented by this exception is merely that of jurisdiction of the subject-matter. It is well settled, that in this country, in the absence of ecclesiastical tribunals exercising such jurisdiction in England, courts of equity have power to settle controversies as to the burial of the dead, the care of their remains after burial, and the preservation of the place of interment from wanton violation or unnecessary disturbance. *Page* v. *Symonds*, 63 N. H. 17, 19, 20, and authorities cited. The defendants do not contest the power of the court, and the only question that can be raised is whether upon the facts the plaintiff is entitled to any relief. The cases are numerous which involve controversies as to the place of burial of a deceased relative, or as to a change of location of the remains after burial, or the diversion to other purposes of land once dedicated for use as a burial place; but none of them raises the precise question found here. This is not a controversy as to the removal of the remains of Harriet to some other location, or of the use of the burial place for other than burial purposes. The sole question appears to be whether the plaintiff can prevent the use by her sisters and brother, the owners of the burial lot, of the precise spot for the burial of their mother which was once used for the repose of their sister's remains.

Page v. *Symonds*, 63 N. H. 17, was an application to enjoin the removal of the remains of the plaintiff's relatives, by public authority, from a burial ground discontinued because of public necessity. It was then said (*pp.* 19, 20): "Strictly speaking, there is no right of property in a dead body. . . . But while it is not property in the ordinary sense of the term, it is regarded as property so far as to entitle the relatives to legal protection from unnnecessary disturbance and wanton violation or invasion of its place of burial. The plaintiff, notwithstanding he is neither the owner of the soil of the cemetery nor of the remains of his deceased relatives interred there, may nevertheless be authorized to invoke protection against unnecessary desecration of their place of burial." If the action of the defendants in opening the grave of Harriet was criminal, or a wrong against the plaintiff, this proceeding is not brought to punish that action, or to recover damages for the injury to the plaintiff's right.

Is the plaintiff entitled to an order requiring the defendants to remove the remains of their mother from the place where, in accordance with her expressed wish, they now rest beside those of her husband? The question is not whether the court, in the exercise of a sound judgment, would have enjoined the opening of the grave of Harriet for the purpose of interring the remains of the defendants' mother, but is whether the court can now order the removal of the remains of Mary E. from the spot where they now rest. The plaintiff has no title to the burial lot. She is not next of kin to Mary E., and can have no voice in the selection of a resting place for her remains. Her sole interest arises from her relationship to Harriet. Under the decision in *Paye* v. *Symonds*, she would be entitled to an order requiring the removal of the remains of Mary E. from their present resting place, if it could be found that their continuance there was a "wanton violation or invasion" of the place of Harriet's burial—an "unnecessary desecration" of the spot. But the reported facts are insufficient to sustain such a finding.

John Read, the father of all the parties to the controversy, owned the lot, and in 1855 buried therein the remains of his daughter Harriet, who died at the age of seven months. Subsequently he buried in the same lot his wife and another daughter, the graves being so arranged as to leave a space between those of Harriet and his wife, while the other daughter, Mary A., was buried in the grave immediately on the other side of her mother's. In 1863, John married Mary E. He died in 1895, having devised the burial lot to his wife Mary E. She buried him in the lot beside his first wife, in the vacant space between that grave and the spot where Harriet's remains were buried. Mary E. died in 1904, having expressed a wish to be buried beside her husband. The defendants, her children who now own the lot, have now buried her in accordance with her wish. The question is, whether such burial is such a desecration of the spot used for the entire dissolution of Harriet's remains that the court is authorized to order the remains of Mary E. to be again dug up and buried elsewhere. When a body is once buried, courts are slow to order its removal and will not do so except under circumstances of extreme exigency. This follows from considerations of the public health and welfare, as well as from a respect to the dead and consideration for the feelings of those who survive. *Gardner* v. *Cemetery*, 20 R. I. 646, 649,—78 Am. St. Rep. 897; *Choppin* v. *Dauphin*, 48 La. An. 1217, 1220,—55 Am. St. Rep. 313; *Thompson* v. *Deeds*, 93 Ia. 228,—35 L. R. A. 56. Where there is controversy as to the location of the grave, great weight is given to the wishes of the deceased, if known. *Pierce* v. *Cemetery*, 10 R. I. 227,—14 Am. Rep.

667. It has even been said to be "the duty of courts to see to it that the expressed wish of one as to his final resting place shall, so far as it is possible, be carried out." *Thompson* v. *Deeds*, 93 Ia. 228,—35 L. R. A. 56.

The body of Mary E. now rests in the place where she desired it to lie, beside her husband. The fact that the soil in which she lies once performed for the body of her husband's infant child the same service it is now performing for hers, is not a sufficient reason why her remains should again be exhumed, and her reasonable and proper wishes be defeated. No necessity probably has yet arisen in this country for holding that the right of burial is merely for the purpose of dissolution, generally requiring about a generation, and that each generation must give way to succeeding ones in the use of soil dedicated for that purpose. *Gilbert* v. *Buzzard*, 3 Ph. Ecc. 335. This case does not require such holding; for while, under the circumstances of the case as disclosed before the grave was opened, a refusal to permit the opening of Harriet's grave for the burial of Mary E., or to ascertain whether it contained any remains of the former occupant, might not have been erroneous as matter of law, the fact being established that the burial made by the defendants involved no disturbance of Harriet's remains, and being one that was otherwise fit and proper to be made, and having been made, no sufficient reason appears for disturbing the existing situation. None can be suggested except the injury to the plaintiff's feelings. In view of the relationship of the parties, an objection of this character by the plaintiff is too clearly fanciful and unreasonable to serve as a foundation for such an order. The defendants, as the owners of the lot, had not the absolute right to disturb the grave already upon the lot. Neither has the plaintiff, as next of kin, an absolute right to prevent the removal of the remains of one buried there, or other use of the land. The rights of each are bounded by rules of propriety and reasonableness determinable by a court of equity upon due application. This is the holding, in effect, of all the authorities. *Page* v. *Symonds*, *supra*; *Pulsifer* v. *Douglass*, 94 Me. 556,—53 L. R. A. 238; *Weld* v. *Walker*, 130 Mass. 422; *Pierce* v. *Cemetery*, 10 R. I. 227,—14 Am. Rep. 667; *Hackett* v. *Hackett*, 18 R. I. 155; *Toppin* v. *Moriarty*, 59 N. J. Eq. 115; *Smith* v. *Shepherd*, 64 N. J. Eq. 401; *Wynkoop* v. *Wynkoop*, 42 Pa. St. 293,—82 Am. Dec. 506; *Fox* v. *Gordon*, 16 Phila. 185; *Thompson* v. *Deeds*, 93 Ia. 228,—35 L. R. A. 56; *Larson* v. *Chase*, 47 Minn. 307,—28 Am. St. Rep. 370.

As the plaintiff has not the absolute right to require the removal of the remains of Mary E., and as the evidence has no tendency to establish the necessity, reasonableness, or propriety of their re-

moval, no order to that effect can be made. The case does not show that such an order has been made; but as the exceptions raise the question whether any decree can be made for the plaintiff, the power to make such an order has been considered. Some facts appear in the case as to the erection of gravestones by the plaintiff upon the lot, but it does not appear that any orders are necessary or were asked for in reference to them. As upon the facts found the plaintiff is not entitled to any relief, the order will be,

Exception sustained: bill dismissed.

All concurred.

Rockingham, Nov. 5, 1907.

BOYLSTON NATIONAL BANK *v.* KILBURN *& a.*

SAME *v.* SAME.

BRISTOL COUNTY NATIONAL BANK *v.* SAME.

As against a *bona fide* holder for value without notice, a partnership is liable upon an unauthorized acceptance of a negotiable draft in the name of the firm by one member thereof.

ASSUMPSIT, against the acceptors of negotiable time drafts. Facts agreed. The plaintiffs are *bona fide* indorsers and holders of the drafts for value, having obtained them before maturity, in the regular course of business, without knowledge of any infirmity or of facts which would put them upon inquiry.

The defendants filed the following brief statement of defence: At the time the name W. H. Kilburn & Co. was signed to the drafts declared on, that concern was a copartnership composed of William H. Kilburn and Oscar E. Smith, who were engaged in the business of buying and selling merchandise, and the scope of the partnership was limited to that business. Neither partner had the right or authority to sign the name of W. H. Kilburn & Co., or to pledge the credit of the firm, for any other purpose than to carry on said mercantile business. The acceptance of the drafts, as signed by W. H. Kilburn & Co., was by Kilburn, was without the knowledge or consent of Smith, and was not within the scope of the partnership authority conferred upon Kilburn.

The defendant Smith has no defence, except as set forth in the brief statement. At the April term, 1907, of the superior court,

Wallace, C. J., ruled that the brief statement did not contain a defence and found a verdict for the plaintiffs, subject to the defendants' exception. If the ruling is erroneous, the case is to stand for trial; otherwise, there is to be judgment on the verdict.

Edward H. Adams and *Arthur O. Fuller*, for the plaintiffs.

Ernest L. Guptill and *Page & Bartlett*, for the defendants.

PARSONS, C. J. The facts agreed establish a right of action to which the brief statement discloses no defence. *National State Capital Bank* v. *Noyes*, 62 N. H. 35; *Wagner* v. *Freschl*, 56 N. H. 495; *State Capital Bank* v. *Thompson*, 42 N. H. 369; *Stimson* v. *Whitney*, 130 Mass. 591; *Union National Bank* v. *Neill*, 149 Fed. Rep. 711; 1 Am. & Eng. Enc. Law 348.

Judgment for the plaintiffs.

All concurred.

Rockingham,
Nov. 5, 1907.

STATE v. ENGLISH & a.

The validity of a liquor license issued to a person competent to receive it and the liability of the licensee and his sureties upon the accompanying bond are not affected by the fact that the license was procured for the benefit of one to whom it could not be legally issued.

DEBT, on a bond given by English as principal and the other defendants as his sureties. Trial by the court. Transferred from the April term, 1907, of the superior court by *Wallace*, C. J.

In 1905, English obtained a license for the sale of liquor to be exercised in Gilsum, and furnished the bond now in suit. Afterward during the term of the license, upon notice and a hearing, the state board of license commissioners found he had violated the terms of his license, which they thereupon revoked. The defendants filed a plea alleging that the license was illegally issued to English, that it was in fact procured for the benefit of one Race, who was not entitled to a license under the law, and that therefore no license was issued to English and the bond is invalid. They offered to prove the facts stated in the plea, but the court excluded the evidence, and the defendants excepted. A verdict having

been found for the state, it was agreed that if the plea stated no defence there should be judgment on the verdict.

Edwin G. Eastman, attorney-general, for the state.

Joseph Madden, for the defendants.

WALKER, J. The exception raises the question whether the facts alleged in the plea constitute a defence. The claim is, that though the license was in fact issued to English, a competent person to receive a license, the privilege granted was to be exercised by and for the benefit of Race, to whom a license could not be issued under the law, and that therefore no valid license was issued to either of them, and the bond never took effect. This amounts to saying, that English was the licensee for the purpose of benefiting Race, but that he was not the licensee for the purpose of indemnifying the state; that Race, in order to get the right to traffic in liquors, was obliged to employ English to take out a license in the latter's name and to furnish the required bond, but that Race was the real licensee and that English's bond was void for that reason. Such reasoning merits little or no consideration. As the license was not issued to Race, the fact that he was disabled under the statute from receiving a license would not invalidate one issued to English. The purpose or understanding of English, Race, or the commissioners, as to the person for whose benefit the license was to be exercised, would not confer any peculiar rights on English or relieve him of any of the responsibilities imposed by the statute upon licensees. Nor would it authorize the sale of liquor by Race, except as the employee of English. Sales by him in any other capacity, or in any other way than in the conduct of English's business as a licensee, would expose him to prosecution, not under the license law, but under the general prohibitory statute. *State* v. *Langdon*, *ante*, 50; *State* v. *Kennard*, *ante*, 76. Such acts on his part, if allowed by English, might be deemed to constitute a violation of his license; but the latter's purpose to permit them, entertained before he obtained his license, would not render the license void, or affect it until executed. The plea does not set forth a valid defence, and according to the terms of the case there must be,

Judgment for the plaintiff.

All concurred.

Rockingham,
Nov. 5, 1907.

CLARK v. TILTON & a.

If a person arrested upon criminal process freely and of his own volition requests the officer not to present him before the court to which the warrant is returnable, and is thereupon released from custody, he may be estopped to set up such omission of duty in support of an action of trespass for false imprisonment.

An action for false imprisonment may be maintained against an officer or creditor by a person arrested for obtaining goods under false pretences, if he transferred property to the creditor in settlement of the claim while in the custody of the officer, and his imprisonment was made use of to compel the transfer.

In an action of trespass for false imprisonment, such damages are to be assessed as will compensate the plaintiff for the injury he sustained because of the arrest.

TRESPASS, for assault and false imprisonment. Trial by jury and verdict for the plaintiff. Transferred from the April term, 1906, of the superior court by *Chamberlin*, J.

The plaintiff and one Frost were formerly partners in a general store in Windham. In March, 1904, the partnership was dissolved, the plaintiff assuming the firm's indebtedness. The defendant Tilton was a creditor to the amount of $858.69, and held notes of the firm for the indebtedness. March 15, 1904, the plaintiff mailed Tilton a check for $300 and a new note for the balance of the old debt. In an accompanying letter he wrote that he had bought out his former partner, that he hoped Tilton would take a new note in part payment as old ones became due, and that he was to be backed by George E. Seavey, whose financial standing could be looked up. By May 14, 1904, the plaintiff had fully paid the old debt. Thereafter he continued to trade with Tilton, making payments from time to time, until his failure in November, 1904. In February, 1905, he was petitioned into bankruptcy, being then indebted to Tilton, who proved his claim in bankruptcy. At a hearing before the referee in bankruptcy, the plaintiff testified that Seavey had not agreed to back him financially.

March 10, 1905, Tilton swore out a complaint against the plaintiff, charging him with obtaining goods under false pretences, upon which a warrant was issued returnable to the police court of Portsmouth. The charge in the complaint was that the plaintiff had procured credit of Tilton by falsely representing that Seavey,

a man of financial responsibility, was to back the plaintiff in the business in which he was about to engage. March 17, 1905, the defendant Cram, a deputy sheriff, arrested the plaintiff upon the warrant at Windham and took him to Portsmouth, arriving there after the adjournment of the regular session of the police court for that day. The plaintiff and Cram went to the office of Tilton's attorney, who was the justice by whom the warrant was issued, and an arrangement was made with the justice of the police court for a special hearing during the afternoon. While in Portsmouth, the plaintiff protested his innocence, claimed that the warrant was unjust, and was apparently anxious to obtain counsel. After making fruitless efforts in this direction, it was suggested that one Pulver, who had acted as counsel for Tilton in the bankruptcy proceeding, could act as counsel for the plaintiff. A conference was held, and Tilton's counsel explained to the plaintiff the meaning of the word "backer," as used in his letter. Being advised that the only way to escape jail was to secure Tilton for his debt, the plaintiff agreed to a conveyance of his homestead right and personal exemptions, and partly executed such a conveyance while at Portsmouth in the custody of Cram. At the plaintiff's request, Cram afterward accompanied him to Manchester, where his wife joined in the conveyance; and this being done, the officer released the plaintiff from arrest, at the request of himself and Tilton.

The defendants excepted to the following portion of the charge to the jury: "So far as the defendant Cram was concerned, it was his duty under the law to take the plaintiff under the warrant, and take him before the court, and make due return of the process; and he acted unlawfully in not presenting him before the court, and in permitting him to enter into this contract whereby he allowed this complaint to be suppressed, and he was liable for such damages resulting to the plaintiff in consequence of that suppression. The defendant Tilton, having lawfully sworn out the warrant and placed it in the hands of the deputy sheriff, had no right to enter into a contract whereby the warrant might be suppressed; and after participating in the contract and taking part in that wrongful act, he is liable for any wrong which Clark suffered as a result of this process which was used against Clark. The defendants are liable because the evidence, without any question, fails to show a justification of the suppression of the criminal process, and they are liable for such damages as result from the abuse. In other words, they are liable in exactly the same way as if the defendants had proceeded without a warrant." The jury were also instructed that they should find a verdict for the plain-

tiff, and that the only question for their consideration was one of damages.

G. K. & B. T. Bartlett, for the plaintiff.

Frink, Marvin & Batchelder, for the defendants.

BINGHAM, J. Every arrest is *prima facie* a trespass (*Jackson* v. *Knowlton*, 173 Mass. 94; 12 Am. & Eng. Enc. Law, 2d ed., 724); and according to the rule of the common law, an officer could not avail himself of civil or criminal process to justify an arrest, unless he returned the writ or produced the prisoner with the warrant before the court to which the process was returnable (*Barrett* v. *White*, 3 N. H. 210, 229; *Parker* v. *Pattee*, 4 N. H. 530; *Poor* v. *Taggart*, 37 N. H. 544; *Taylor* v. *Jones*, 42 N. H. 25; *Boston & Maine R. R.* v. *Small*, 85 Me. 462; *Wright* v. *Marvin*, 59 Vt. 437; *Gibson* v. *Holmes*, 78 Vt. 110; *Tubbs* v. *Tukey*, 3 Cush. 437; *Brock* v. *Stimson*, 108 Mass. 520; *Williams* v. *Ives*, 25 Conn. 568, 573), or unless it was made to appear that the prisoner had so conducted with reference to the officer's omission that he had estopped himself from interposing the omission to the officer's use of the process to justify the arrest. *Wright* v. *Marvin*, *supra*; *Ellis* v. *Cleveland*, 54 Vt. 437; *Williams* v. *Babbitt*, 14 Gray 141; *Phillips* v. *Fadden*, 125 Mass. 193; *Caffrey* v. *Drugan*, 144 Mass. 294, 296; *Joyce* v. *Parkhurst*, 150 Mass. 243, 246; *Douglas* v. *Barber*, 18 R. I. 459; *Mulberry* v. *Fuellhart*, 203 Pa. St. 573; *Twilley* v. *Perkins*, 77 Md. 252; *Richardson* v. *Dybedahl*, 14 So. Dak. 126; N. E. Sher. & Const. 283, 284; 19 Cyc. 338.

In *Parker* v. *Pattee*, *supra*, it was said that an action of trespass could not be maintained against an officer who had made an arrest upon civil process, for his failure to return the writ to court, if he delivered the writ to the plaintiff's attorney and a settlement was made by the parties before the return day. This view of the law must have proceeded upon the theory that, the suit having been settled by agreement of the parties, the process could be used to justify the arrest, on the ground that the settlement was conclusive or *prima facie* evidence of an agreement that the person arrested would not interpose the omission to the officer's use of the process as a justification. *Paine* v. *Farr*, 118 Mass. 74.

In the service of criminal process, while it is the duty of an officer, having made an arrest, to take the prisoner as soon as circumstances will reasonably permit before the court to which the warrant is returnable for hearing, still this duty is not so impera-

tive that its performance, at least as between the officer and the prisoner, may not be omitted; and if omitted at the prisoner's request, of such a nature that the prisoner may not be estopped to interpose the omission to the officer's use of the warrant to justify such acts under it as were regular and legal. That this is the law in many jurisdictions may be seen from an examination of the cases above cited; and no reason appears why this should not be so, if the prisoner's request not to be returned before the court is made of his own free will and is not procured unfairly or through coercion.

Again, it is the law of this jurisdiction, that if an arrest is made for a just cause, upon a warrant which is regular and legal upon its face and issued from a court of competent jurisdiction, and the imprisonment consequent thereon is made use of to extort money from the prisoner, or to compel him against his will to pay a debt, such conduct makes the imprisonment a duress, which will render every act done under it voidable and make those directing or participating in the improper use of the process liable as trespassers *ab initio*. *Richardson* v. *Duncan*, 3 N. H. 508; *Severance* v. *Kimball*, 8 N. H. 386; *Shaw* v. *Spooner*, 9 N. H. 197, 200; *Colby* v. *Jackson*, 12 N. H. 526, 533, 534; *State* v. *Weed*, 21 N. H. 262; *Breck* v. *Blanchard*, 22 N. H. 303, 310, 311; *Mullen* v. *Brown*, 138 Mass. 114; *Wood* v. *Graves*, 144 Mass. 365; *Bath* v. *Metcalf*, 145 Mass. 274; *Everett* v. *Henderson*, 146 Mass. 89; *White* v. *Company*, 181 Mass. 339. In *Shaw* v. *Spooner*, *supra*, *Parker*, C. J., expressed the view of the court in this language: "It must be distinctly understood that it is wholly illegal to use the criminal process of the state to extort money, or even compel the payment of debts. It was not provided for any such purpose. If a creditor is desirous of collecting a demand lawfully due to him, the laws have provided remedies deemed by the legislature suitable and competent for that purpose."

In the present case the court instructed the jury, in substance, that the only question for them to consider was one of damages; that the defendant Tilton had no right to enter into a contract with the plaintiff whereby he obtained a conveyance of the plaintiff's homestead right and personal exemptions in settlement of his account against him; and that the defendant Cram acted unlawfully in not presenting the plaintiff before the court and in permitting him to enter into the contract with Tilton. These instructions cannot be sustained, for, as we have seen, the jury should have been told that, to entitle the plaintiff to recover in this action against Cram, they must be satisfied either (1) that the plaintiff did not freely and of his own volition request the officer not to return him before the court, and is not estopped to take advantage

of the officer's omission to do so, or (2) that the officer made use of the plaintiff's imprisonment to compel him against his will to transfer his property to Tilton in payment of the debt; and as respects the defendant Tilton, they should have been told that they must be satisfied that he, either directly or through Cram, made use of the plaintiff's imprisonment to compel him against his will to transfer his property in payment of the debt. The charge of the court would also give one the impression that the jury were instructed to assess such damages as resulted to the plaintiff in consequence of the suppression of the criminal prosecution. If this is its meaning, it is clearly wrong. The damages to be assessed are such as will compensate the plaintiff for the injury he has sustained because of the arrest.

It is not deemed advisable at this time to consider the questions raised by the exceptions to evidence. At another trial the same evidence may not be offered, and if offered, the issue may not be the same. The exception to the charge is sustained, and the order is,

Verdict set aside.

All concurred.

Hillsborough, Nov. 5, 1907.

LAUZE v. NEW YORK LIFE INSURANCE CO

Where an insurance policy stipulates that premiums must be paid at the home office unless otherwise provided, and, in any case, in exchange for an official receipt, a payment to a soliciting agent without the delivery of such receipt is not binding upon the insurer, in the absence of evidence tending to show a waiver of the express condition of the contract.

Under section 5, chapter 171, Public Statutes, a soliciting agent who negotiates a contract of life insurance is not deemed to be the representative of the insurer for the purpose of receiving any payments under the policy subsequent to the initial premium required to bring the contract into being.

In the absence of fraud or imposition, one who accepts a policy of insurance is presumed to have knowledge of the terms and conditions therein contained; and his inability to read English will not excuse his ignorance of the provisions of the contract, especially when he had ample opportunity to examine the policy and took no steps to procure a translation thereof.

ASSUMPSIT, on a policy of insurance upon the life of the plaintiff's wife. Trial by jury and verdict for the plaintiff. Trans-

ferred from the January term, 1907, of the superior court by *Peaslee*, J.

The policy contained the following clauses: "This agreement is made in consideration of the sum of ten dollars and eighty-four cents, the receipt of which is hereby acknowledged, constituting payment for the period terminating on the twenty-eighth day of November, nineteen hundred and four, and in further consideration of the payment of a like sum on said date, and thereafter on the twenty-eighth day of February, May, August, and November in every year during the continuance of this policy, until premiums shall have been paid for twenty years in all from the date on which this policy takes effect. . . . (1) Only the president, a vice-president, a secretary, or the treasurer has power on behalf of the company to make or modify this or any contract of insurance or to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or hereafter made, unless made in writing by one of said officers. (2) Premiums must be paid at the home office, unless otherwise provided, and, in any case, in exchange for an official receipt signed by one of the above named officers and countersigned by the person to whom payment is made."

The agent who solicited the insurance had authority to collect the first premium and deliver the policy. When the application was written, five dollars was paid to him to be applied upon the first premium in case the policy was issued, and he gave the insured therefor an official receipt of the company taken from the application to which it was attached. Subsequently the policy was left at the plaintiff's house with his wife, for examination, and at a later date it was delivered. Subject to the defendants' exception, testimony was introduced that at the time the policy was delivered the plaintiff paid the soliciting agent the balance of the first and second premiums, less $1.68 which the agent agreed to loan from his commission of $4.32. No such receipt as the policy mentions was given; but testimony was introduced, subject to exception, that the agent left a yellow paper, telling the plaintiff it was his receipt. The plaintiff and his wife were both French and were unable to read, write, or speak English; and the plaintiff had not read, or caused to be read, the provisions of the policy, and did not in fact know what they were. The defendants' motion to direct a verdict in their favor, on the ground that there was no sufficient evidence of the payment of the second premium, was denied subject to exception.

Branch & Branch, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

CHASE, J. The exceptions raise the question whether payment of the second premium to the soliciting agent, without the production and delivery of the receipt described in the policy, constituted a valid payment thereof and continued the policy in force during the three months' period to which it related, in which period it is understood the insured life expired. The policy acknowledges the receipt of $10.84, "constituting payment [of the premium] for the period terminating on the twenty-eighth day of November, nineteen hundred and four," which is understood to be the three months' period following the date of the policy. No question is made about this payment. The case states that the agent who solicited the insurance contract had authority to receive the payment and deliver the policy. This payment, accompanied with the delivery of the policy, completed the contract and made it binding upon the parties. Thereupon the life of the person mentioned in it was insured for the period of three months, at least.

The policy provided, in substance, that premiums of like sums should be paid quarter-yearly during twenty years from the date when it took effect. The attempted payment of the second premium was, consequently, an effort to fulfil a stipulation of the contract three months or thereabouts before it was due; it was not the fulfilment of a stipulation that was to be performed simultaneously with, or previous to, the delivery of the contract. The policy further provided that "premiums must be paid at the home office, unless otherwise provided, and, in any case, in exchange for an official receipt" signed by the president, a vice-president, a secretary, or the treasurer of the company, and countersigned by the person to whom payment is made. By virtue of this provision, possession of such a receipt by a person would ordinarily be evidence that the person was an agent of the company to receive the payment mentioned in it. *Dunn* v. *Insurance Co.*, 69 N. H. 324; *Williams* v. *Insurance Co.*, 31 Ia. 541; *Insurance Co.* v. *Davis*, 95 U. S. 425. It does not appear that the contract contained any other provision relating to the payment of premiums. No receipt, such as the policy describes, was produced by the soliciting agent and given to the plaintiff when he paid the second premium. So far as appears, the agent did not represent to the plaintiff that the yellow paper which he gave the plaintiff was such a receipt. He simply told the plaintiff it was his receipt. The terms of the policy certainly did not justify the plaintiff in assuming that the agent had authority from the company to receive a premium that was not due for nearly or quite three months, to say nothing of a premium that was due at the time of payment.

But the plaintiff says that the contract is modified in respect to its evidentiary force and effect on this point, by the provisions of

the statutes which make a person who assumes to act for an insurance company in negotiating a contract of life insurance a life insurance agent, and by which "a life insurance agent who acts for a person other than himself in negotiating a contract of life insurance shall, for the purpose of receiving the premium therefor, be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract." P. S., *c.* 171, *ss.* 4, 5. The proposition is, that these statutory provisions constituted the soliciting agent the agent of the company to receive the second and subsequent premiums without producing official receipts therefor, notwithstanding the provisions of the contract. If a life insurance company, upon the application of a person, delivers to him a policy duly executed, insuring his life or the life of a person in which he has an insurable interest, it is not unreasonable to make the company responsible for any payments made by the person on account of the premium due at the inception of the contract, to the party who acted in negotiating the contract, whether he so acted by previous arrangement with the company or was a mere volunteer. The company can in every such instance protect itself from loss by requiring payment of the first premium before, or simultaneously with, the delivery of the policy. By delivering a policy, it impliedly ratifies the acts of the soliciting agent as to the payments required to entitle the insured to the delivery. By entrusting a policy acknowledging the payment of the first premium to a soliciting agent for delivery, the company holds him out to the insured as the proper party to receive the premium due at that time. The policy itself is an official receipt, properly signed, within the meaning of its terms. But as to premiums subsequently due upon the policy, the company could not protect itself in this way. According to the plaintiff's view, the only way the company could protect itself as to the future payments due upon the policy would be to withdraw the authority to receive premiums, which, he alleges, the statute confers upon the person who negotiated the contract, and to seasonably notify the insured of such withdrawal. If this view were correct, the defendant company, in effect, withdrew the statutory authority of the soliciting agent to receive future premiums and seasonably notified the plaintiff of the withdrawal, by the provision under consideration. This provision declared to him in unambiguous language that the soliciting agent had no authority to collect premiums, unless furnished by the company with receipts therefor signed by the officers designated in the contract. But the statute in its terms does not purport to confer upon the soliciting agent authority to collect premiums that become due from

time to time during the life of the policy. The agency created by it is limited to "receiving the premium therefor,"—not the premiums therefor,—that is to say, the initial premium required to bring the contract into being as a valid, binding, subsisting contract. No reason has been suggested, or is apparent, which would be likely to move the legislature to attempt to extend such agency beyond the first payment. Such agency is not required for the protection of policy-holders. Persons ordinarily look to their contracts to ascertain when, where, and to whom payments required by them are to be made. In the absence of evidence tending to prove that a party to a life insurance contract requires something beyond the ordinary in this respect, it cannot be found that the legislature intended to create the agency for which the plaintiff contends. If the statute is read into the policy, it fails to supply evidence that the soliciting agent was authorized by the defendants to receive payment of the second premium, on their account.

The plaintiff accepted the policy and has brought this action upon it. There are no facts tending to show that he was defrauded or imposed upon in making the contract, or that its terms differ from what it was represented to him they would be. On the other hand, it appears that the contract was left at his house for examination before its delivery. His incapacity to read English did not excuse him from the obligation to ascertain what its provisions were before accepting it. Presumably, he would have had no difficulty in procuring a translation of the contract to the language with which he was familiar, if he had sought it. If he did not know what the provisions of the contract were, his ignorance was due to his own fault. 22 Am. & Eng. Enc. Law (2d ed.) 510; 9 Cyc. 390, and authorities cited in notes. If the agent had misread the contract to him, or misrepresented its provisions, it might be that the company would be held to the provisions thus represented. *Hartford Insurance Co.* v. *Haas*, 87 Ky. 531; *Cornelius* v. *Insurance Co.*, (Ia.) 31 N. W. Rep. 236; as to last case, see also 113 Ia. 183. But it does not appear that the agent did so. Under the circumstances, it must be held that the plaintiff "had notice of, understood and agreed to, and is bound by the terms, limitations, and conditions contained" in the contract. *Brown* v. *Insurance Co.*, 59 N. H. 298; *Davis* v. *Insurance Co.*, 67 N. H. 335; *Dwyer* v. *Insurance Co.*, 72 N. H. 572; *Johnson* v. *Casualty Co.*, 73 N. H. 259; *Northern Assurance Co.* v. *Association*, 183 U. S. 308.

The facts transferred have no tendency to show that the defendant company had, by a previous course of dealing with the plaintiff or others, waived the provisions of the policy in respect to the payment of premiums, or estopped themselves from setting up the

same. They relate solely to the single transaction resulting in the contract with the plaintiff. The apparent scope of the authority of the soliciting agent did not extend beyond the acts of soliciting and negotiating the contract, delivering it, and receiving the premium required to bring it into being. *Hayes* v. *Colby*, 65 N. H. 192; *Bohanan* v. *Railroad*, 70 N. H. 526. It did not extend to acts subsequently required in the execution of the contract. Sto. Ag., *s.* 98.

The purpose and effect of the testimony introduced by the plaintiff relating to the payment of the second premium were to vary the provisions of the written contract, and this in the absence of evidence from which it could be found that the defendants had in any way waived the provisions or estopped themselves from relying upon them. It is clear that the contract could not be varied in this way. The testimony introduced was incompetent; and the plaintiff having failed to prove that the soliciting agent had authority from the defendants to receive the second premium, the defendants' motion for an order directing a verdict in their favor should have been granted. Accordingly the order must be,

Exceptions sustained: verdict set aside: judgment for the defendants.

All concurred.

Hillsborough, }
Nov. 5, 1907. }

HARRIS *& a., Ex'rs, v.* INGALLS *& a.*

An express direction for the division of the residue of an estate into four equal parts and the distribution of each part among the heirs of certain relatives is sufficient to invest executors with authority to convert the realty into money for the purpose of such division, when the location and character of the property and the number of the beneficiaries render such a course necessary in order to effectuate the testator's intention to give a share in severalty to each of the distributees.

It is advisable, although not essential, that an executor who is authorized by will to dispose of the testator's realty should procure a license from the probate court.

Where a resident of this state provides by will for a division of property among the "legal heirs" of certain relatives, the persons entitled to share are those who answered the description according to the laws of this state, at the time of the testator's decease; and such division is to be made as is provided by the laws of this state for the distribution of the estate of a deceased person among his descendants.

If a will directs a division of property among the "legal heirs" of a relative who survived the testator, the persons entitled to share are those who would have been legal heirs in case such relative had been dead at the date of the testator's decease.

BILL IN EQUITY, by the executors of the will of Josiah G. Graves, late of Nashua, praying for direction as to the execution of the provisions of the will. The will is the same that was considered upon a former transfer. *Harris* v. *Ingalls*, *ante*, 35. The same facts are now transferred, together with some additional facts which, so far as material to the questions considered, appear in the opinion. Transferred from the May term, 1907, of the superior court by *Peaslee*, J.

Burns & Burns, for the plaintiffs.

Burnham, Brown, Jones & Warren, for the defendants.

CHASE, J. The second and third questions submitted are the same in substance as the third question submitted upon the former transfer: whether the plaintiffs have authority to distribute any part of the residue of the estate before the last annual payment to a legatee falls due. This question has been fully answered (*Harris* v. *Ingalls*, *ante*, 38); and no new fact is now submitted, and no reason has been suggested or has occurred to the court, which requires a change of the answer.

The first question submitted is, whether the plaintiffs have authority under the residuary clause of the will to sell and convey the testator's real estate or any part of it, and if so, in what manner and when. This is substantially the same as the second question submitted and considered upon the former transfer. The residuary clause reads as follows: "All the residue and remainder of my property, real, personal, and mixed, I order my executors to divide into four equal parts; and I give and bequeath one part thereof to the legal heirs of my mother's brother, Benjamin Ingalls, to be equally divided among them; and I give and bequeath one part thereof to the legal heirs of my mother's brother, Simeon Ingalls, to be equally divided among them; I give and bequeath one part thereof to the legal heirs of my mother's sister, Sophronia, to be equally divided among them; and I give and bequeath to the legal heirs of my mother's sister, Mariette, one part thereof, to be equally divided among them."

The only facts previously transferred bearing upon the question were the terms of the will and the fact that the estate consisted of both personal and real property, the former being more than

sufficient to pay the debts and legacies. The court held that it did not clearly appear from these facts that the testator intended to make it the duty of the executors to convert the real estate into money for division. *Harris* v. *Ingalls*, *ante*, 37. Upon the present transfer, the following additional facts are submitted for consideration: The real estate consists of a lot of land in Nashua, sixty by ninety feet in extent, with house upon it, all valued $3,000; a lot in Massachusetts, sixty by sixty feet, with summer cottage upon it, valued $5,000; an undivided fractional interest in a Colorado mine, value unknown; two tracts of land, not adjoining, situated in Butler county, Iowa, both containing 448 acres, and valued $13,440; one tract of forty acres in Winnebago county, Iowa, valued $125; and "surveys" of numerous disconnected tracts of land in Brewster and Crockett counties, Texas, together containing 7,680 acres and supposed to be worth $7,680.

Benjamin Ingalls survived the testator nearly a year and a half. Simeon Ingalls and the aunts, Sophronia and Mariette, died before the will was made. Benjamin left four children surviving him, and one child died between the death of the testator and Benjamin's death, leaving five children. Six children of Simeon survived the testator and two died earlier, one leaving three children and the other one child, all of whom survived the testator; Sophronia left two children, both of whom survived the testator; one has since died leaving five grandchildren. Another child of Sophronia died prior to the testator's death, leaving one child, who is still living. Mariette left four children, all of whom survived the testator, and one of whom has since died leaving three children. These children and grandchildren of the testator's uncles and aunts reside outside this state, widely scattered in different states. It is understood that they are the defendants.

In view of these additional facts, in connection with the terms of the will and the facts formerly transferred, does it clearly appear that the testator intended that the executors should convert his real estate into money preparatory to the division provided for in the residuary clause of the will? It is said in Perry on Trusts (*vol.* 2, *s.* 766): "No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee. . . . A devise and direction to divide and pay over the shares to legatees, where a division is impracticable, implies a power to sell. A mere direction to divide is not enough; there must be some further active duty to perform." This is a fair statement of the decisions on the subject. *Going* v. *Emery*, 16 Pick. 107; *May* v. *Brewster*,

187 Mass. 524; *Hobson* v. *Hale*, 95 N. Y. 588; *Cahill* v. *Russell*, 140 N. Y. 402; *Corse* v. *Chapman*, 153 N. Y. 466; *Salisbury* v. *Slade*, 160 N. Y. 278; *Murdock* v. *Kelley*, 62 N. Y. App. Div. 562; *Lindley* v. *O'Reilly*, 50 N. J. Law 636; *Chandler* v. *Thompson*, 62 N. J. Eq. 723; *Winston* v. *Jones*, 6 Ala. 550; *Hale* v. *Hale*, 125 Ill. 399; *Gammon* v. *Gammon*, 153 Ill. 41; *Stoff* v. *McGinn*, 178 Ill. 46; *Penfield* v. *Tower*, 1 No. Dak. 216; 7 Am. & Eng. Enc. Law (2d ed.) 466; 11 *Ib.* 1043; 18 Cyc. 320. The difficulty has arisen, not so much from doubt as to what the law was, as from doubts arising in the application of the law to the facts of a case. Cases differ so widely in their facts that little aid can be derived from them in attempting to apply the law to the facts of a particular case.

That the testator, in the case under consideration, intended to make it the duty of his executors to divide the residue of his property, real, personal, and mixed, into four equal parts for transmission to the legal heirs of his maternal uncles and aunts, is beyond question. His language is in the form of an order and is unequivocal in meaning. The express order to the executors to divide the property into four equal parts renders it impossible to find that the intention was simply to give the heirs of the uncles and aunts undivided fractional parts of undivided fourth parts of the entire property. It is also quite certain that the testator intended the four parts should be so nearly equal in value and desirability that it would be a matter of indifference to the beneficiaries to which of the parts their respective interests attached. It must be presumed that he knew of the scattered locations and of the difference in character of his real estate. He knew whether it would be practicable to divide it, in kind, into four parts having the equality which he intended. If such division is not possible, it reasonably may be inferred that his order to divide implied the doing of whatever was necessary to accomplish the division. The adaptability or non-adaptability of the property to such division therefore becomes a material fact to be considered in ascertaining his intention with respect to conferring upon the executors power to sell the property. *Perkins* v. *Mathes*, 49 N. H. 107; *Sanborn* v. *Sanborn*, 62 N. H. 631; *Cahill* v. *Russell*, 140 N. Y. 402. The real estate consists of many parcels of land scattered in parts of the United States widely separated from each other, those in this state and Massachusetts, at least, being incapable of division into four equal parts. It does not appear what the character of the Iowa lands is, nor what is meant by "surveys" of the Texas lands. It is reasonably certain, however, that these lands cannot be so equally divided into four parts that it will be a matter of indifference to a particular class of the legatees which part they take.

See *Bedford* v. *Bedford*, 110 Tenn. 204. Moreover, according to the testator's scheme, each of the four parts is ultimately to be divided into smaller parts. The individuals who are to receive the ultimate parts are widely scattered over the country. None of them resides where any of the lands are situated. It is apparent that necessity—not convenience, merely—requires the lands to be converted into money for the purposes of the divisions contemplated by the testator. It is noted, also, that he classes the real property of the residue of his estate with the personal and mixed property thereof, and uses the word "bequeath" to perform the office of transferring the whole—a word that is properly used in such connection only when the property is of a personal nature. While, as was said upon the former transfer, this circumstance of itself is not conclusive as to the testator's intention, it has some tendency to prove that he understood he was providing for the transfer of personal property, instead of real estate. *Merritt* v. *Merritt*, 32 N. Y. App. Div. 442. If he understood his order to the executors impliedly imposed upon them the duty of converting his real estate into money, as a step necessarily to be taken in dividing the property into four equal parts, the order with the implied power of sale operated in equity to convert the property from realty to personalty (*Perkins* v. *Coughlan*, 148 Mass. 30; *Salisbury* v. *Slade*, 160 N. Y. 278, 288, and authorities cited; *Penfield* v. *Tower*, 1 No. Dak. 216), and the use of the word "bequeath" was technically correct. If it appeared that the intention was to devise to the "legal heirs" undivided fractional parts of the real estate, no power of sale would be conferred upon the executors by implication, for such power cannot thus arise in opposition to an express devise. *Mapes* v. *Tyler*, 43 Barb. 421; *Gammon* v. *Gammon*, 153 Ill. 41. But, as has been seen, the intention clearly was to give the individuals referred to divided portions of the residue in severalty.

The association of the real property of the residue with the personal and mixed property thereof in a common mass, for division, also has some slight tendency to prove that the testator understood that the real property was to be treated by the executors like the personal property in making the division; or, in other words, that it was to be converted into money for the purpose. Upon all the facts now presented, it appears reasonably clear that the testator intended, by the provisions of the will, to impose upon the executors the duty of converting the residue of his property, real, personal, and mixed, into money as a necessary incident of its division into four equal parts, and the duty of distributing the parts among the legatees as set forth in the residuary clause of the will; and the plaintiffs are so advised.

As was said in the former opinion, if the legatees all prefer to take the real estate and hold it in common, and so elect, the executors will not violate their duty by allowing the legatees to so take the property. Indeed, if the legatees are all *sui juris*, it would seem that they have the right to elect to reconvert this property to real estate. *Sears* v. *Choate*, 146 Mass. 395; *Greenland* v. *Waddell*, 116 N. Y. 234; *Mellen* v. *Mellen*, 139 N. Y. 210; *Huber* v. *Donoghue*, 49 N. J. Eq. 125; *Lash* v. *Lash*, 209 Ill. 595; *Boland* v. *Tiernay*, 118 Ia. 59; *Bank of Ukiah* v. *Rice*, 143 Cal. 265; *Craig* v. *Leslie*, 3 Wheat. 563; 3 Pom. Eq. Jur., *s.* 1175; 1 Sto. Eq. Jur., *s.* 793.

The manner in which the sale is to be made, if made by the executors, depends upon the laws of the state where the real estate is situated. The plaintiffs, by virtue of their office, as executors of the will, have authority to sell the real estate situated in this state. While no license from the court for the purpose is necessary in the absence of a statute requiring it (*Going* v. *Emery*, 16 Pick. 107), it seems advisable, in view of the statutory provision on the subject in this state, that the plaintiffs should procure a license for making the sale of the land situated here. P. S., *c.* 194, *s.* 15. The sales should be made without unreasonable delay. It would serve no useful purpose for this court to attempt to advise the executors as to the manner of making sales in other states.

The fourth question submitted relates to the interpretation of the words "legal heirs,"—whether they were used with reference to the date of the testator's death or the date of the last payment to a legatee, and whether with reference to the laws of this state, the laws of the states where the real estate is situated, or the laws of the places of residence of the uncles and aunts referred to. A will speaks as of the date of the testator's death, unless a different intention is expressed. *Campbell* v. *Clark*, 64 N. H. 328, 330; *Frost* v. *Wingate*, 73 N. H. 535, 537. No different intention is expressed directly or inferentially in this will; and the "legal heirs" intended are those persons who answered that description at the time of the testator's death. There were no persons who, strictly speaking, were "legal heirs" of Benjamin Ingalls at that time, for he was then living. In view of the fact that the testator evidently intended to dispose of all his estate by the will (*Kennard* v. *Kennard*, 63 N. H. 303, 311), it is apparent that he used the words "legal heirs," so far as they relate to Benjamin, in a sense different from their strict technical sense. It is not a very uncommon thing for a person to speak of the children or other near relatives of a living person as his heirs; and in this instance the words manifestly refer to the persons who would be the legal heirs of

Benjamin at the time of the testator's death, in case Benjamin was then dead. *Sanborn* v. *Sanborn*, 62 N. H. 631; *Shapleigh* v. *Shapleigh*, 69 N. H. 577, 579; *Morton* v. *Barrett*, 22 Me. 257; *Lockwood* v. *Jesup*, 9 Conn. 272; *Healy* v. *Healy*, 70 Conn. 467; *Carne* v. *Roch*, 7 Bing. 226.

The majority of the court are of the opinion that the testator intended, by the words "legal heirs," those persons who answer that description according to the laws of this state, and by the provisions for equally dividing each of the four parts among the "legal heirs" of the persons named, such division as is provided by the laws of this state for the distribution of the estate of a deceased person among his descendants.

Case discharged.

All concurred.

Hillsborough,
Nov. 5, 1907.

MANN, *Ex'r*, *v.* CARTER, *State Treas.*

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When the legislature adopts the statutory language of another state, it is ordinarily presumed to have had in mind the existing decisions of such state defining the extent and purpose of the statute, and to have used the identical phraseology in the sense thus indicated.

Money deposited in a foreign savings bank and belonging to the estate of a person domiciled here at the time of his decease is constructively property within the jurisdiction of this state, is subject to the inheritance tax imposed by chapter 40, Laws 1905, and is not exempted from the operation of that statute by the fact that it is also liable to a similar tax in the state where the bank is located.

PROBATE APPEAL. Transferred from the January term, 1907, of the superior court by *Stone*, J.

George B. French, for the plaintiff.

Edwin G. Eastman, attorney-general, and *Joseph S. Matthews*, for the defendant.

WALKER, J. The plaintiff is the executor, under an appointment from the probate court of Hillsborough county, of the estate of Susan H. Mann, who died June 5, 1905, and who was at that time a resident of Nashua, in this state. A considerable part of

her estate consisted of deposits in savings banks located in Massachusetts. The plaintiff was also appointed ancillary executor of her estate in that state. April 6, 1906, he applied to the probate court of Hillsborough county to determine the question whether the deposits are subject to the collateral inheritance tax provided by the laws of this state. The judge of probate decreed that they were not subject to that tax, and the defendant appealed. The superior court sustained the appeal, and the plaintiff excepted. The laws of Massachusetts, if material, are made a part of the case.

In the recent case of *Thompson* v. *Kidder*, *ante*, 89, it was decided that the statute imposing a tax upon collateral legacies and successions (Laws 1905, *c.* 40) is not in conflict with the constitution as amended in 1903. The main point of that decision was that the constitution was amended for the purpose of authorizing the legislature to impose an inheritance tax upon the estates of deceased persons, under certain conditions, and that that purpose must be given an effect, though it introduces into the fundamental law ideas of disproportion in the raising of the public revenue antagonistic to those previously entertained on the subject of general taxation. No jurisdictional question was raised in that case. The deceased was domiciled in this state, and his entire estate, so far as appeared, was located and had its *situs* here. In the present case, while the deceased had her domicile here at the time of her death, a part of her estate consisted of deposits in savings institutions in another state; and it is insisted that the money so deposited is not subject to our inheritance-tax law.

The legislature of 1905 passed an act entitled "An act imposing a tax on collateral legacies and successions," the first section of which is as follows: "All property within the jurisdiction of the state, real or personal, and any interest therein, whether belonging to inhabitants of the state or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son or the husband of a daughter, of a decedent, or to or for the use of charitable, educational, or religious societies or institutions in this state the property of which is by law exempt from taxation, or to a city or town in this state for public purposes, shall be subject to a tax of five per cent of its value, for the use of the state; and administrators, executors, and trustees, and any such grantees under a conveyance made during the grantor's life, shall be liable

for such taxes, with interest, until the same have been paid." Laws 1905, *c.* 40, *s.* 1. The primary question presented is, whether the legislature intended by the language used to subject money deposited in a foreign savings bank to the duty, impost, or tax, when, upon the death of the depositor domiciled in this state, it passes to parties not within the exceptions enumerated. Whatever ambiguity there may be in the language of the legislature in relation to this question disappears upon a consideration of the material circumstances under which the statute was passed. The section quoted is almost a literal copy of section 1, chapter 15, of the Revised Laws of Massachusetts (Mass. Laws 1891, *c.* 425, *s.* 1), while the other sections of the act are substantially the same as the corresponding sections of the Massachusetts act. This coincidence is persuasive evidence of a practical re-enactment here of the foreign statute, and an adoption of the construction which the highest court of that state had given to it. *Parsons* v. *Parsons*, 67 N. H. 419, 420; *Commonwealth* v. *Hartnett*, 3 Gray 450; End. Stat., *s.* 371. The legislature is ordinarily presumed to have had in mind, when adopting the statutory language of another state, existing decisions of that state defining the extent and purpose of the statute, and to have used the identical language in the sense thus indicated.

Frothingham v. *Shaw*, 175 Mass. 59, was decided in 1899, six years before the enactment of our statute, and it was there held, upon a construction of the statute, that deposits in a foreign savings bank, belonging to the estate of a decedent resident in Massachusetts, were "property within the jurisdiction of the commonwealth," within the meaning of Laws 1891, chapter 425, section 1, and that the succession took place by virtue of the laws of the commonwealth. See, also, *Callahan* v. *Woodbridge*, 171 Mass. 595; *Greves* v. *Shaw*, 173 Mass. 205. That this construction was adopted by the legislature when the act of 1905 was passed is, therefore, reasonably certain, unless there are countervailing considerations peculiar to the jurisprudence of this state which preclude the inference that the legislature entertained that intention, or unless such an intention is so manifestly opposed to the recognized principles of judicial construction, as announced in our decisions, as to support the conclusion that the foreign decision was not discovered; or if discovered, that it was not recognized as a correct exposition of the legislative purpose.

To hold that the decedent's deposits in another state, or her right to them, constituted property in this state, within the meaning of the act, is not only not in conflict with any decision of this court, but is supported by the weight of authority elsewhere. She was not a mere creditor of the institutions in which her money

was deposited. If the legal title to the money she deposited passed to the bank receiving it (*Berry* v. *Windham*, 59 N. H. 288, 290; *Robinson* v. *Dover*, 59 N. H. 521), she stood "in the same relation to the assets of the bank as stockholders to banks of discount." *Cogswell* v. *Bank*, 59 N. H. 43, 44. "The depositors are stockholders and not creditors." *Francestown Savings Bank Case*, 63 N. H. 138, 142; *Hall* v. *Paris*, 59 N. H. 71; *Bank Commissioners* v. *Banking Co.*, *ante*, 292. And in *Lewis* v. *Lynn Institution for Savings*, 148 Mass. 235, 244, it is said that "to the depositors themselves, the undertaking of the corporation is that it will receive and combine the deposits, and manage and use them to the best practicable advantage, according to the judgment of the trustees, and give to the depositors in just proportion among themselves the benefit of the result of such management. There is no absolute promise to repay to any depositor the full amount of his deposit, at all events. Such a promise to one depositor would imply that in case of loss he should be repaid out of the deposits of others. But the promise or undertaking of the corporation is the same to all. There is no promise to pay one at the expense of others. The promise is, in effect, to pay each depositor in full, with his dividends, provided the assets are sufficient; and if they are not sufficient, then to pay each one his proportionate share." It is thus apparent that the testatrix had a direct interest in the property, as well as in the management, of the banks in which she deposited her money, and that her position was in many respects analogous to that of a stockholder in a business corporation. She was in fact one of the owners of the property in the possession of the incorporated partnerships. If she had formed a partnership with two other persons for the purpose of buying and selling real estate, and each of the partners had put in an equal amount of money, the property of the partnership purchased with money so invested would belong to the partners in equal shares, subject to the equitable rights of third parties. But her proprietary right to the property would not disappear if the partners became incorporated and carried on the business under a corporate name. The technical change in the form of ownership and management would not diminish her substantial rights as a beneficial owner of the property.

Accordingly it is held that a stockholder's right is personal property, which has its *situs* for purposes of general taxation where the owner has his domicile. Helliwell Stock & Stockh., s. 11. And this principle is recognized and enforced in statutes relating to the taxation of stock in foreign corporations. "Personal property liable to taxation is, . . . III. Stock in corporations located out of the state, owned by persons living in the

state, except where either the stock or the property represented by it is taxed in the towns or states where the corporations are located." P. S., *c.* 55, *s.* 7; *Smith* v. *Exeter*, 37 N. H. 556; *Kimball* v. *Milford*, 54 N. H. 406. Since corporate stock in a foreign corporation owned by a resident here is thus deemed to be within the jurisdiction of this state, the deposits in a foreign savings bank by one domiciled here constitute property within the state, upon which the legislature may impose a tax. In other words, such a deposit is property which follows the person of the owner, and for many purposes it has his *situs*. *Mobilia sequuntur personam.*

Before the death of the testatrix her interest in the Massachusetts savings banks, created by her deposit of money therein, was property in this state, because she lived here; and no reason is perceived why, if the legislature had enacted a statute taxing the right of a resident to savings bank deposits in another state, the legislation would not have been valid, so far as the question of jurisdiction is concerned. It might have been held unconstitutional on other grounds (*Berry* v. *Windham*, *supra*; *Robinson* v. *Dover*, *supra*), but not on the ground of a want of jurisdiction, where the owner of the savings bank right resided here. When the property is physically in another state, where the owner must go to acquire complete control of his money, it does not follow that the state where the owner has his domicile has no jurisdiction with reference to it. This point is illustrated by cases holding that the personal property of a deceased person, though in another state, descends according to the law of his domicile.

"When an individual dies possessed of estate in different governments, it seems to be settled, as a general rule, that his personal property, or movable estate, is to be distributed among his heirs or legatees according to the law of the place in which he had his domicile at the time of his decease." *Goodall* v. *Marshall*, 11 N. H. 88, 89. "There is sufficient evidence that the actual domicile of the deceased was in New Orleans at the time of his death. . . . And the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death." *Leach* v. *Pillsbury*, 15 N. H. 137, 138; *Emery* v. *Clough*, 63 N. H. 552, 535.

In *Frothingham* v. *Shaw*, *supra*, it is said (*p.* 62): "If there are movables in a foreign country, the law of the domicile is given an extraterritorial effect by the courts of that country, and in a just and proper sense the succession is said to take place by force of and to be governed by the law of the domicile. Accordingly, it has been held that legacy and succession duties as such were payable at the place of domicile in respect to movable property wherever situated, because in such cases the succession or legacy

took effect by virtue of the law of domicile. *Wallace* v. *Attorney-General*, L. R. 1. Ch. 1; Dicey Confl. Laws 785; Hanson's Death Duties 423, 526."

But it is argued that in the last analysis of this principle it will be found that these statements are too broad, and that in the case of an ancillary administration the personal property passes by virtue of the law of the forum, though in the manner indicated by the laws of the deceased's domicile. It is true that the forum furnishes the judicial machinery by which the title to the property is established and made effective; but it does not create the title by virtue of which the claimant is judicially recognized as the owner. That is derived from the deceased, the disposition of whose personal property is authoritatively determined by the law of his domicile, because the property in contemplation of law is deemed to be within that jurisdiction for the purpose of inheritance. Hence its law must determine the question of title, and be binding upon all other common-law courts. If, for instance, it is finally decided by the courts of the domicile that a specific legacy belongs to A and not to B, the fact that the particular property bequeathed happens to be in another state, and that resort to its courts is necessary to obtain possession of it, would not authorize the courts of that state to put a different construction on the will and to decide accordingly that the property belonged to B. Although the law of the foreign jurisdiction might be entirely different from that of the domicile, upon the point presented, the latter, which the testator is presumed to have had in mind and to have substantially incorporated into his will, can alone effectuate his intention; and the property passes under it, as much as though the testator in the state of his domicile had given or sold it to another who had transported it to the foreign state. If the donee or vendee was then obliged to defend his claim to the property and succeeded, no one would contend that his title judicially established in the foreign state passed to him by virtue of its laws. It was vindicated in its courts and under its laws, but it passed by virtue of the laws of the domicile. It follows as a logical sequence, that when personal property of a deceased person happens to be in another state at the time of his death, the title of the successor, whether by inheritance or by will, passes under the law of the domicile, though ancillary proceedings may be required to get physical control of the property.

In *Cross* v. *Trust Co.*, 131 N. Y. 330, it is held that an action cannot be maintained to declare invalid a testamentary disposition of personal property in that state, made in and by a resident of another state, lawful and valid at the place of the testator's domicile, but which would be invalid if the will had been one governed

by the laws of New York, although the beneficiaries may be domiciled there. In the opinion it is said (*p.* 341): "Should our legislature deem it for the public good to repeal the statute relating to wills and to provide that all property should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property, actually within the territory of the state, but owned by a person domiciled in another state, would still be valid providing it was valid by the law which governed the owner. When it is urged that we are bound by foreign law as to all the formal requisites of a will as a testamentary instrument, the capacity of the testator to make it, and its legal construction, meaning, and effect, and not bound by such law with respect to the particular bequests by which the testatrix has distributed her property among her heirs and next of kin, it is not perceived that such a distinction has any sound reason or principle to rest upon. A cause of action or right to property created by the statute laws of another state, and arising there, is recognized here and may be enforced, though our own statute on the same subject may be different in details." *Dammert* v. *Osborn*, 141 N. Y. 564, 567.

From the foregoing discussion the conclusion follows: (1) That the legislature of 1905 presumably adopted in the statute in question the construction put upon identical language in the Massachusetts statute; (2) that the deceased's right created by her deposit in foreign savings banks is a property right—in fact, is property; (3) that such property was at least constructively within this jurisdiction at the time of her death; and (4) that it then passed under her will by force of our statute of wills. If these conclusions are sound, the deposits in question fall within the operation of the statute creating a so-called inheritance tax upon legacies.

But it is further contended that such a construction of the statute results, or may result, in double taxation; that is, in the imposition of one inheritance tax in this state and of another in the state where the property is in fact situated. This objection of course would have no practical significance if the property was situated in a state having no statute of that character. Suppose these deposits were in savings banks in Rhode Island, where, it is said, there is no inheritance-tax law: in such a case it would be necessary to hold, in order to be consistent with the argument, that the imposition of the tax or duty here would be legal and right, but that when they are in banks in a state having such a statute the tax here would be illegal and wrong. Inasmuch as the statute makes no such distinction, as it does in the case of the taxation of stock in a foreign corporation owned by a resident (P. S., *c.* 55, *s.* 7), such an intention on the part of the

legislature cannot be found. If the imposition of such a tax in each of two states upon bank deposits passing by will or inheritance is in some sense "double taxation," it is not obnoxious to any constitutional principle involved in, or governing, the inheritance-tax law. As the property is deemed to be here so as to be controlled by our laws in its devolution, those who acquire title to it, through the operation of our laws relating to the estates of deceased persons, must take the benefits charged with the burdens imposed by those laws. "The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds." *Blackstone* v. *Miller*, 188 U. S. 189, 206, 207. The fact that the property may be subject to a similar burden in another state does not deprive this state of its power to impose the tax here upon the property which passes by inheritance or by will under our laws. The material inquiry relates to the legality of the tax in this jurisdiction.

"The fact that the plaintiffs' ice, stored in this state, has been taxed to them in Massachusetts, and that they have paid the tax there, is immaterial. The question is: Is it rightfully and legally taxable here? If it is, then its taxation in another state does not render its taxation here wrongful and illegal." *Winkley* v. *Newton*, 67 N. H. 80, 82. The legislature did not intend to impair the effectiveness of the inheritance-tax law by making its operation dependent upon the action or non-action of other states with reference to personal property of resident decedents, which might have a physical *situs* therein; and there is no constitutional provision limiting the power of the legislature to make a collateral inheritance tax applicable to all property passing under our laws. *Thompson* v. *Kidder*, *supra*. It is inexact and misleading to say that this result sanctions double taxation, which the policy of this state does not tolerate. Whether the burden imposed by the inheritance law is properly called a tax, it is unnecessary to inquire; for if it is, the legislature has not attempted to impose more than a single tax on the property of a decedent passing collaterally under our laws. If some other state makes a claim to the property under its tax laws and for the support of its institutions, the exercise of such power, whether rightful or wrongful, does not make the exercise of similar power by this state, for the support of its institutions, illegal on the ground of double taxation. The two burdens are created by two different and independent states, for wholly different local purposes, and are as distinct and as irrelevant, the one to the other, on the question of

double taxation, as were the two taxes assessed upon the plaintiffs' ice in *Winkley* v. *Newton*, *supra*.

This result is also in accord with the general trend of the authorities upon the subject. As said in *Hartman's Case*, 70 N. J. Eq. 664, 667: "The great weight of authority favors the principle adopted by the New York court of appeals, holding that the tax imposed is on the right of succession under a will, or by devolution in case of intestacy; and that as to personal property, its *situs*, for the purpose of a legacy or succession tax, is the domicile of the decedent, and the right to its imposition is not affected by the statute of a foreign state, which subjects to similar taxation such portion of the personal estate of any non-resident testator or intestate as he may take and leave there for safe keeping, or until it should suit his convenience to carry it away." In addition to cases already cited, see: *Hopkins' Appeal*, 77 Conn. 644; *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657; *Matter of Swift's Estate*, 137 N. Y. 77; *Matter of Houdayer*, 150 N. Y. 37; *State* v. *Dalrymple*, 70 Md. 294; *Eidman* v. *Martinez*, 184 U. S. 578, 581; Dos Passos Inher. Tax, *s.* 29; Dicey Conf. Laws 682, *et seq.* But see *In re Joyslin's Estate*, 76 Vt. 88.

Exception overruled: appeal sustained.

All concurred.

Hillsborough, Nov. 5, 1907.

ATTORNEY-GENERAL (*ex rel.* BRODERICK *& a.*) *v.* BARRY *& a.*

The local executive committee of a political party are not public officers, and cannot bring an information in the nature of *quo warranto*, in the name of the attorney-general, to determine a controversy as to membership.

A dispute as to the membership of a local executive committee of a political party must be decided by some tribunal within the party; and when it has been so determined, the court will make such decree as is necessary to enforce the rights of the regularly constituted members.

The state committee and the state convention of a political party are its regularly constituted tribunals to determine the membership of the local executive committee in any town.

INFORMATION, in the nature of *quo warranto*, to determine what persons constitute the local executive committee of the democratic party in Ward 5, Manchester. The relators were recognized as

such committee by the democratic state convention and are now recognized by the state committee of that party. Facts agreed. Transferred without a ruling at the request of the parties by *Peaslee*, J., from the January term, 1907, of the superior court.

James A. Broderick, for the relators.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. Although a political campaign affects the public and is in that sense public business, the fact that it is the business of the members of the local executive committee of a political party to conduct such campaigns does not make them public officers. *Attorney-General* v. *Drohan*, 169 Mass. 534; *Greenough* v. *Lucey*, (R. I.) 66 Atl. Rep. 300. Neither does the fact that chapter 93, Laws 1905, imposes certain duties on the members of such committees make them public officers. The law regulates the method of conducting many other kinds of business, but it has never been suggested that the persons who conduct a business so regulated are public officers. This disposes of the case in its present form. *Meehan* v. *Bachelder*, 73 N. H. 113. But the relators suggest that if they have misconceived their remedy they shall move for leave to amend by discontinuing as to the attorney-general: and as it is assumed that such a motion, if made, will be allowed as a matter of course, the question the relators seek to raise in this proceeding has been considered.

The caucus act (Laws 1905, *c.* 93) neither provides who shall constitute the local executive committee of a political party, nor how they shall be elected or appointed, and therefore it has no bearing on the question under consideration. As there are no other statutory provisions on the subject, when there is a dispute as to who are the regularly elected members of such a committee in a particular town or ward the question must be decided by some tribunal within the party; for who are the proper persons to conduct a campaign is not a question for the court, but for the party, to settle. *Moody* v. *Trimble*, 22 Ky. L. R. 692. When the question has been determined by the proper tribunal within the party, the court will make such a decree as is necessary to enforce the rights of the regularly constituted committee. *Attorney-General* v. *Drohan*, *supra*.

There can be no doubt but what "the state committee and the state convention of a party are its regularly constituted" tribunals to determine whether the relators or the defendants are the local executive committee (*In re Fairchild*, 151 N. Y. 359; *Cain* v. *Page*, 19 Ky. L. R. 977; *Phillips* v. *Gallagher*, 73 Minn. 528;

State v. *Liudahl*, 11 No. Dak. 320); and it is agreed that both of these tribunals have considered that question and decided it in favor of the relators. Consequently, when their motion to amend is allowed there will be a decree in their favor.

Case discharged.

All concurred.

Hillsborough, Nov. 5, 1907.

WARREN & *a.* *v.* HAYES & *a.*

SAME *v.* DIXON.

A mortgage given to secure an indorser of the mortgagor's note is not discharged as matter of law by payment of the obligation, but subsists for the benefit of an assignee thereof who advances funds for the defrayal of the original loan.

The equitable right of an innocent mortgagee for value is, to the extent of the loan, superior to the right of the mortgagor's grantor whose conveyance was induced by fraud; and the lien of such mortgagee is not invalidated by a subsequent conveyance to him of the mortgagor's equity of redemption, in satisfaction of the mortgage debt.

A principal is chargeable with his agent's knowledge of a particular transaction only so far as the latter's acts with respect to it were within the scope of his authority.

A principal who has knowledge of his agent's unauthorized act and accepts a benefit therefrom is estopped to repudiate the agency.

BILLS IN EQUITY, the first to avoid a fraudulent conveyance, and the second to remove a cloud from the plaintiffs' title. There was a decree for the plaintiffs in the first action against all the defendants except Mrs. Dixon, and the second action was dismissed, and the plaintiffs excepted. Transferred from the January term, 1907, of the superior court by *Peaslee*, J.

The plaintiffs were induced to convey the property in question to Hayes' grantor by the fraud of the defendants in the first action. Hayes mortgaged it to one Jennings. The mortgage purported to be made to secure the payment of Hayes' note for $3,500, payable to Jennings on demand, but was in fact made to secure Jennings for indorsing a note for Hayes. That note was paid at maturity, but the mortgage was not discharged, and it was subsequently

agreed that Jennings should indorse another note for Hayes and hold the mortgage as security for so doing.

In May, 1902, Hayes borrowed $3,000 of Mrs. Dixon, the defendant in the second action, to pay the second note indorsed by Jennings, and the latter assigned the mortgage to her to secure the payment of her loan to Hayes. The loan not being paid when due, she employed J. B. Dixon, one of the defendants in the first action, to collect it, and he had Hayes convey the property to her in satisfaction of her claim against him. She supposed J. B. Dixon was acting for her when he procured the conveyance from Hayes, but she afterward learned that he acted in the matter for Hayes. Both Mrs. Dixon and Jennings are innocent parties, and at the time the settlement was made she did not know any of the facts which it is now claimed invalidate her title to the property.

G. K. & B. T. Bartlett, for the plaintiffs.

Taggart, Tuttle, Burroughs & Wyman, for Mrs. Dixon.

YOUNG, J. The payment of the notes indorsed by Jennings did not discharge the mortgage as a matter of law (*Quimby* v. *Williams*, 67 N. H. 489, 492, 493); so when he assigned the mortgage to Mrs. Dixon, the legal title to the property vested in her to secure the payment of her loan to Hayes. Since she was an innocent purchaser for value to the extent of that loan, her equitable right to the property was, to that extent, superior to the plaintiffs'. *Lewis* v. *Dudley*, 70 N. H. 594. Since this is so, the conveyance from Hayes did not invalidate her lien on the property, unless she is held to know that Hayes' title to it was procured by fraud, or unless she is in some way estopped to deny that J. B. Dixon was acting for her when he procured that conveyance.

If she is to be held to have known of the defect in Hayes' title, it must be because of the rule which imputes the knowledge of an agent to his principal; for it is found that she neither knew nor ought to have known of it. That rule does not charge the principal with his agent's knowledge of facts affecting the subject-matter of the business in which the latter is employed, unless the agent in fact acts for the principal in what he does in the matter in respect to which it is sought to charge the principal with his knowledge. *Henry* v. *Allen*, 151 N. Y. 1, 10. In other words, the principal is not charged with his agent's knowledge regarding a particular transaction unless the latter's acts in respect to it were within the scope of his employment. To illustrate: If a person employs an agent to buy property, and the latter, instead of buying, sells to the principal property procured from a stranger by

fraud, the agent's knowledge of that fraud will not be imputed to the principal (*Allen* v. *Railroad*, 150 Mass. 200, 206); but if the agent buys property for the principal, the latter will be charged with the agent's knowledge of any defects in the grantor's title. *Hovey* v. *Blanchard*, 13 N. H. 145, 149. The test, therefore, to determine whether an agent's knowledge is to be imputed to his principal is to inquire whether or not the agent was acting for the principal when he did that in respect to which it is sought to charge the principal with his knowledge. *Clark* v. *Marshall*, 62 N. H. 498, 500; *Brookhouse* v. *Company*, 73 N. H. 368, 374; *Gunster* v. *Company*, 181 Pa. St. 327,—59 Am. St. Rep. 650, 658, note; *Akers* v. *Rowan*, 36 S. C. 87,—10 L. R. A. 705, 706, note.

It has been found that J. B. Dixon was not acting for Mrs. Dixon when he procured the conveyance from Hayes, so she is not charged with his knowledge of the defect in Hayes' title. Consequently, she can hold the property as she would if that conveyance had not been made, unless she is estopped to deny that J. B. Dixon was her agent when he procured it. Although the plaintiffs cannot maintain this action by merely showing that J. B. Dixon was in Mrs. Dixon's employ when the conveyance was made, she cannot set up that conveyance to defeat the plaintiffs' right to redeem the property from her. The reason is, not that she is charged with J. B. Dixon's knowledge, but because a person cannot claim the benefit of so much of his agent's unauthorized act as is beneficial to him and repudiate the remainder. If he accepts any benefit from it after he knows and appreciates what his agent has done, he will be estopped to deny that the agent was acting for him. In other words, such conduct constitutes a ratification of the agent's act. In this case it is not found that Mrs. Dixon claims to stand any better because of the conveyance than she would if it had not been made, so it cannot be said as a matter of law that she is estopped to deny that J. B. Dixon was her agent.

Exception overruled.

All concurred.

Sullivan,
Nov. 5, 1907.

FRYE, *Ex'r*, v. HUBBELL & *a.*

An action otherwise maintainable is not barred by section 6, chapter 191, Public Statutes, because it is not brought until more than two years after the original grant of administration.

The presumption that a mortgage debt has been paid or had no valid existence, which arises from twenty years' unexplained and undisturbed possession by the mortgagor, is repelled by any act recognizing the validity of the mortgage.

Whether the occupation of mortgaged premises by the mortgagor under the mortgagee is a sufficient possession to complete foreclosure, is a question of fact dependent upon the purposes and intentions of the parties.

The payment and acceptance of a sum less than the amount due in full satisfaction and discharge of a debt is a defence to an action for the collection of the balance.

WRIT OF ENTRY, to foreclose a mortgage. Plea, the general issue and a brief statement, as follows: That the action did not accrue within twenty years of the date of the writ; that the defendants had not disseized the plaintiff within twenty years; that the plaintiff was never seized of the premises; payment; accord and satisfaction; that the action was not brought within two years of the original grant of administration; that the plaintiff's mortgage was subject to a prior mortgage to the Newport Savings Bank, which had been foreclosed, and the title had come to the defendant Abbie A. Hubbell. Trial by jury. Under instruction from the court, a verdict was returned for the plaintiff. Transferred from the November term, 1905, of the superior court by *Chamberlin*, J.

The evidence tended to prove the following facts: December 16, 1879, the defendants, Abbie A. and William W. Hubbell, executed a mortgage of the demanded premises to John M. Wakefield, the plaintiff's testator, to secure their promissory note for $600, signed by Abbie A. as principal and William W. as surety. The premises were then incumbered by a mortgage to the Newport Savings Bank, to which the Wakefield mortgage was made subject. Otis S. Johnson purchased the bank mortgage for value, and on May 13, 1886, his administrator was put into possession of the premises by virtue of a writ of possession issued upon a judgment against these defendants in a suit brought by Johnson on the bank mortgage. The delivery of possession appeared from the sheriff's return upon the writ of possession. Wakefield was

not a party to the suit. November 18, 1890, Johnson's administrator, in consideration of the payment of $1,692.57, conveyed the premises by quitclaim deed to Ida E. Brigham, who quitclaimed them on October 6, 1903, to her sister, Abbie A. Hubbell. Abbie A. was never actually put out of possession of the premises, but continued to collect the rents and treat the property as her own, paying interest on the bank debt owned by the Johnson estate up to the time of the conveyance to her from her sister. She never had a lease of the premises, nor paid rent. Wakefield died February 3, 1900. The plaintiff was appointed executor February 12, 1900, and brought this suit on January 16, 1905.

The Wakefield note was further secured by a mortgage of real estate in Enfield, which was discharged on November 23, 1893, upon payment to Wakefield of $293.03, that sum being realized from a sale of the premises. The note bore the following indorsement: "$292.03. Nov. 28, 1893. Received of Abbie A. Hubbell $293.03 from sale of Endfield property as part of the within note." There was evidence that William W. Hubbell made two payments on the note, one of $20 and one of $25, that Abbie A. paid $300 about November 28, 1893, and that Wakefield agreed, at the time of the latter payment, to accept said payments, together with that indorsed on the note, in full satisfaction and payment of the debt.

At the close of all the evidence, a motion for a nonsuit as to William W. Hubbell was granted. A motion for a nonsuit and verdict in favor of Abbie A. Hubbell was denied, subject to exception. The latter motion was upon the grounds (1) that the action was not brought within two years after the original grant of administration to the plaintiff, (2) because the action was not brought within twenty years after the right of action accrued, and (3) because of the foreclosure of the bank mortgage. There were no exceptions to the charge to the jury. After being out eighteen hours, the jury were unable to agree as to how much had been paid on the note, or as to the alleged agreement that the sums paid were accepted in full payment of the note and satisfaction of the debt. Thereupon the plaintiff consented to admit the several payments claimed by the defendants. The court withdrew the instructions previously given, instructed the jury that an agreement on the part of Wakefield to accept the payments in full satisfaction and discharge of the note would be no defence to a suit for the balance, and directed them to return a verdict for the plaintiff for the amount due on the note after applying the payments claimed by the defendants. To this

instruction and direction of verdict the defendant Abbie A. excepted.

Frank O. Chellis, for the plaintiff.

George R. Brown and *Hosea W. Parker*, for the defendant.

PARSONS, C. J. The only questions of law transferred are those raised by the exceptions to the denial of the motion for a nonsuit and verdict in favor of Mary A. Hubbell, to the verdict directed for the plaintiff against her, and to the final instructions given the jury as to the effect of evidence that certain sums were paid and accepted in full satisfaction of the debt.

There was no error in the denial of the motion for a nonsuit and verdict. Section 6, chapter 191, Public Statutes, suspends in favor of the executor the running of the statute of limitations as to all rights of action existing in favor of the deceased at his death, if suit is brought within two years. It does not bar an action otherwise maintainable brought after two years from the date of administration. *Morse* v. *Whitcher*, 64 N. H. 591. As to the two other grounds upon which the motion for a nonsuit was placed,—that the action was not brought within twenty years after the right of action accrued, and the alleged foreclosure of the prior bank mortgage,—the most favorable view of the case for the defendant is that the evidence presented questions of fact upon which a jury might find for her. Although twenty years' unexplained and undisturbed possession by the mortgagor bars the right of the mortgagee to the land, upon the presumption that the mortgage debt has been paid or had no valid existence, this presumption is repelled by any act recognizing the validity of the mortgage. *Tripe* v. *Marcy*, 39 N. H. 439, 449, 450; *Green* v. *Cross*, 45 N. H. 574, 584; *Clark* v. *Clough*, 65 N. H. 43, 78; *Martin* v. *Bowker*, 19 Vt. 526, 527. Whatever the legal conclusion might be if the only evidence of payment was the indorsement of the sum received from the proceeds of other property mortgaged to secure the same debt, the case does not rest on this evidence. There was other evidence as to this payment, and the defendant claimed to have made other payments. Whether they were made, and whether either was so made as to constitute a recognition of the validity and existence of the mortgage, were questions upon which the evidence was not conclusive in favor of the mortgagor. As to the remaining ground, the evidence conclusively established the entry of the prior mortgagee and that possession was taken by him for the purpose of foreclosure. *Wendell* v. *Mugridge*, 19 N. H. 109; *Lewis* v. *Blair*, 1 N. H. 68.

Whether the foreclosure was completed by a year's possession, by the occupation of Abbie A. Hubbell under the mortgagee, was a question of fact dependent upon the purpose and intentions of the parties. *Ross* v. *Leavitt*, 70 N. H. 602, 604; *Thompson* v. *Paris*, 63 N. H. 421, 423; *Hall* v. *Hall*, 46 N. H. 240, 243; *Howard* v. *Hundy*, 35 N. H. 315, 325; *Deming* v. *Comings*, 11 N. H. 474, 479; *Downer* v. *Clement*, 11 N. H. 40; *Gibson* v. *Bailey*, 9 N. H. 168, 172; *Gilman* v. *Hidden*, 5 N. H. 30; *Kittredge* v. *Bellows*, 4 N. H. 424. Without reference to the soundness of the plaintiff's contention that foreclosing possession by the mortgagee could not be found from the evidence, the admitted fact that the occupation was by one of the mortgagors instead of by the mortgagee, and the controversy as to the character of such occupation, prevents the conclusion that as a matter of law the mortgagee retained possession for one year so that the foreclosure became complete.

No question is raised as to the right of Abbie A. Hubbell to possession under the bank mortgage if it was not foreclosed. The statement that the plaintiff's mortgage was subject to the bank mortgage qualifies the covenants of warranty on the part of the grantors and establishes that the grantee had notice that his security covered only an equity of redemption. *Lawrence* v. *Towle*, 59 N. H. 28, 30. The original title of the two mortgagors is not stated. No facts appear as to the transfer of the bank mortgage interest in the property from Ida E. Brigham to the defendant Abbie A. Hubbell, except that it was by quitclaim deed. The determination whether this transaction effected a payment or discharge of the bank mortgage, or an assignment of it to the defendant Abbie, and whether she could insist upon payment by the plaintiff before he would be entitled to possession by virtue of his mortgage of the equity of redemption, would involve legal questions not raised or transferred, dependent upon facts not reported. As to this point, it must be concluded that the rulings at the trial term were satisfactory to the parties, or that no question was made, if any could be, because, as was suggested in argument, the property is sufficiently valuable to satisfy both mortgage debts if legally chargeable therewith.

There were no exceptions to the instructions to the jury, as the case was first submitted to them. It therefore must be concluded that all questions of fact raised by the pleadings and evidence were correctly submitted. After being out a long time, it appeared that the jury were unable to agree as to the payments that had been made, or whether they had been accepted in full payment of the note and satisfaction of the debt. It is to be inferred that the jury had agreed on all questions presented by the evidence upon the issues involved in the trial, except the

extent to which the debt had been satisfied and discharged. Upon the fact and character of the disagreement of the jury becoming known, the plaintiff assented to the payments claimed by the defendant, and the jury were instructed, in computing the amount due on the note, to allow the payments which the defendant claimed. The instructions previously given were withdrawn, and the jury were instructed, in substance, that the alleged agreement to accept the payments in full satisfaction and payment of the note was immaterial upon the question of the amount due, and were directed to return a verdict for the plaintiff for the balance due after allowing the payments claimed. To this instruction and direction of the verdict the defendant excepted. In this action, the verdict for the plaintiff upon the general issue must have been that the defendant did disseize the plaintiff as alleged, and the assessment of damages was essential only to determine the amount for which conditional judgment should be rendered. The verdict directed and the instruction given, after the difficulty of the jury was disclosed, appear to relate only to the question whether anything was due. It is therefore inferred that the jury had found the technical verdict in favor of the plaintiff except as affected by the alleged agreement of satisfaction, or else that it had been previously ruled, without objection from the defendant, that the evidence as to the bar of the statute and the foreclosure presented nothing for the jury. It has therefore not seemed necessary to consider whether a payment of a certain sum in full satisfaction and discharge of a mortgage debt is an acknowledgement of an existing greater debt, sufficient to repel the presumption of full payment arising from twenty years' undisturbed possession by the mortgagor, without other payment or recognition of the existence of the debt. The material question raised by the case is the legal soundness of the ruling that the payment and acceptance of a sum less than the amount due in full satisfaction and discharge of the debt is no defence to the collection of the balance.

The rule given the jury has been followed by this court. *Page* v. *Brewster*, 54 N. H. 184, 189; *Mathewson* v. *Bank*, 45 N. H. 104, 106, 107; *Blanchard* v. *Noyes*, 3 N. H. 518. In the first case cited there is no consideration of the question, and the authorities relied on—*Fisher* v. *Willard*, 20 N. H. 421, and *Clark* v. *Dinsmore*, 5 N. H. 136—are not in point. In *Blanchard* v. *Noyes*, 3 N. H. 518, the suit was debt on a judgment for $9.91 debt and $4 costs. The defendant pleaded payment of $10 to the plaintiff in full satisfaction of the judgment. The plea was held bad, the court saying: "It is well settled, that a plea simply alleging the acceptance of a smaller sum of money in satisfaction of a larger sum is bad." But it was further held that the defend-

ant might have leave to amend and plead payment. It was said: "The agreement to accept the $10 in satisfaction may be left to the jury, as evidence that the rest has been paid," citing *Henderson* v. *Moore*, 5 Cranch 11. This conclusion was approved in *Lisbon* v. *Bath*, 21 N. H. 319, 332, by *Eastman*, J., where he says: "It is perfectly competent for a person to take a less sum than what is actually due, and discharge his claim if he thinks proper so to do. And upon a plea of payment, the acceptance of a less sum in satisfaction may be left to a jury as evidence that the rest has been paid." If the rule of these cases is sound, the verdict directed in this case was erroneous because there was evidence upon the plea of payment.

In *Mathewson* v. *Bank*, 45 N. H. 104, it was held that payment of a part of a debt after it is due is not a sufficient consideration for a promise to give time to the principal debtor, so as to discharge the surety, a conclusion which the court felt "reluctantly compelled by the weight of authority" to reach. In support of the conclusion it was said: "A parol agreement by a creditor to accept part payment of his debt in money in satisfaction of the whole debt will not be binding upon him for want of consideration, although he actually receive such part payment and give a receipt for the whole debt." Although impressed with the unreasonableness of the rule, the court then felt compelled by the weight of authority to adhere to it. In *Russ* v. *Hobbs*, 61 N. H. 93, a written agreement of extension in consideration of a note for the interest then due, signed by the maker of the note and a third party, was held invalid for want of consideration. The court say: "The case does not show the fact, and there is no legal presumption that the new note for the amount of interest due was given or received as anything but payment, or was more valuable as an investment than the same amount of cash, or that for any reason it was more effective as a consideration than payment of the same amount of money." The rule has also been recognized in other cases which have been considered to constitute exceptions because of evidence held to furnish a consideration, viz.: Payment by note of a third person for a less sum (*Colburn* v. *Gould*, 1 N. H. 279); payment by a third person, at the debtor's request, of a less sum in note or money (*Grant* v. *Porter*, 63 N. H. 229, 230); composition with creditors (*Bartlett* v. *Company*, 69 N. H. 316; *Grant* v. *Porter*, *supra*; *Browne* v. *Stackpole*, 9 N. H. 478); if the damages are unliquidated (*Hilliard* v. *Noyes*, 58 N. H. 312).

In *Fisher* v. *Willard*, 20 N. H. 421, 424, it is said that "nothing is better settled than that a promise, without some kind of consideration, to receive a less sum in payment of a greater is of no effect." The only authority cited in *Fisher* v. *Willard* is *Clark*

v. *Dinsmore*, 5 N. H. 136, which was a claim for unliquidated damages in which the accord would have been a bar if there had been satisfaction. In *Watson* v. *Elliott*, 57 N. H. 511, it is said: "A plea of accord and satisfaction must aver something done and accepted in satisfaction, and the averment must be proved. If the demand to be satisfied is a definite sum of money, and the sum to be paid in satisfaction also money, the satisfaction must equal the claim; but if the claim is for unliquidated damages, or the thing done or given is not money, the question of adequacy does not arise." In *Curtis* v. *Egan*, 53 N. H. 511, 514, 515, the effect of an entry "N. P." (neither party) being under discussion, it was said that "the abandonment and discharge of the defendant's claim for costs was a good consideration for the abandonment and discharge of the plaintiff's claim for debt and costs." The conclusions reached in these cases seem in accord with the law as elsewhere held, with perhaps the exception of the holding in *Russ* v. *Hobbs*, 61 N. H. 93, that the note of the debtor and another was no more effective as a consideration than the payment of the same amount of money,—a conclusion in principle in conflict with the statement in *Grant* v. *Porter*, 63 N. H. 229, 230, three years later, upon the authority of *Brooks* v. *White*, 2 Met. 283, that the note of a third person for less than the amount due, accepted in full satisfaction and discharge, extinguishes the debt, unless a distinction can properly be made between an agreement for delay and one to discharge a debt. *Gibson* v. *Renne*, 19 Wend. 389; *Boyd* v. *Hitchcock*, 20 Johns. 76.

In the remaining cases, the invalidity of a parol agreement discharging an ascertained debt upon payment of less than is due is reluctantly recognized in view of the weight of authority, but any circumstances which could be considered as furnishing a technical legal consideration have been seized upon to establish the validity of the discharge. It is to be noted that only in *Page* v. *Brewster*, 54 N. H. 184, has the rule been directly enforced, and that in that case the rule was applied without discussion of the question or the citation of authorities supporting it. In *Blanchard* v. *Noyes*, 3 N. H. 518,—the remaining case where the rule was directly involved by the plea,—although upon the authorities the plea of accord and satisfaction was held bad, the evidence was considered sufficient to support a plea of payment, and, with the evident idea that the injustice of the court might be corrected by the jury, the responsibility was transferred to them. In other jurisdictions the rule is almost universally regarded with disfavor, although followed, and the extension of the exceptions has been carried so far by the discovery of sufficient consideration in trivial and apparently immaterial circumstances that the rule itself might more

logically be abandoned, while in two states it has been directly attacked and overruled. *Clayton* v. *Clark*, 74 Miss. 499,—37 L. R. A. 771, 60 Am. St. Rep. 521; *Dreyfus* v. *Roberts*, 75 Ark. 354,—69 L. R. A. 823. In others it has been abrogated, in whole or in part, by legislative action. Wald's Poll. Cont. (3d ed.) 211, note; 1 Cyc. 322; 1 Am. & Eng. Enc. Law 414, 415. In this state of the law it has been thought to be the duty of the court to re-examine the foundations of the rule rather than to permit the case to be carried by the mere weight of authority here and elsewhere.

Discussion of the question generally starts with Lord *Coke*, A. D. 1602. In *Pinnel's Case*, 5 Co. 117,—1 E. R. C. 368, the plaintiff brought an action of debt on a bond for payment of 8*l.* 10*s.*, November 11, 1600. The defendant pleaded that before that day, on October 1, at the request of the plaintiff he paid 5*l.* 2*s.* 2*d.*, which sum the plaintiff accepted in full satisfaction of the debt. "The plaintiff had judgment for the insufficient pleading; for he did not plead that he had paid the 5*l.* 2*s.* 2*d.*, in full satisfaction (as by law he ought), but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction." The only point decided in *Pinnel's Case* was a point of pleading, now obsolete; for it is certain that no court, English or American, would now dispose of *Pinnel's Case* as it was determined in 1602. If the point of pleading was considered of any moment, the defendant would have leave to amend, and judgment would go according to the right—not the form.

But in deciding the case, "it was resolved by the whole court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but that the gift of a horse, hawk, or robe, &c., in satisfaction, is good. For it shall be intended that a horse, hawk, or robe &c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So if I am bound in 20*l.* to pay you 10*l.* at Westminister, and you request me to pay you 5*l.* at the day at York, and you will accept it in full satisfaction of the whole 10*l.*, it is a good satisfaction for

the whole; for the expenses to pay it at York is sufficient satisfaction." While no case has been discovered resting on the point decided in *Pinnel's Case*, the matters "resolved" by the court have had great influence upon the law, as determined by decided cases which are generally and until recently, in the absence of statutory correction, universally in conformity with the *dictum* of the resolutions and the further point "adjudged"—that a release by deed without consideration was a good bar.

Two things were resolved: (1) That if the creditor accepted in discharge of the debt anything which might be by any possibility of benefit to him, this was a good satisfaction; and (2) that payment of a lesser sum on the day in satisfaction could not by any possibility be beneficial to the creditor. The latter resolution was in no way involved in the case, and the conclusion was simply *dictum*. Lord *Blackburn*, in *Foakes* v. *Beer*, 9 App. Cas. 605, 616, 617. In the *dicta* of Lord *Coke*, nothing is said of a want of consideration for the creditor's agreement to accept the less sum in satisfaction of the debt; but in 1804, Lord *Ellenborough*, in *Fitch* v. *Sutton*, 5 East 230, relying upon the authority of Lord *Coke* in *Pinnel's Case*, introduced the idea of a want of consideration. "There must be," he says, "some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." This statement of Lord *Ellenborough* has been followed by the courts, and is the foundation of the extended discussions which are to be found in the books. 12 Harv. Law Rev. 524. Much argument is found on the question whether in the particular case some consideration could be found for the agreement, or as Lord *Ellenborough* puts it, some "possibility of benefit" to the creditor. The cases are very numerous. 1 Cyc. 319–322; 1 Am. & Eng. Enc. Law 415, 428; notes in 100 Am. St. Rep. 428–447, 64 Am. Dec. 138, 20 L. R. A. 785, 1 E. R. C. 368–405, 1 Sm. L. C. 146; *Jaffray* v. *Davis*, 124 N. Y. 164, 167.

But the courts, while following the *dicta*, "have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty." *Jaffray* v. *Davis*, *supra*. *Alderson*, B., in *Sibree* v. *Tripp*, 15 M. & W. 23, 38, says, after stating the rule: "The courts might very well have held the contrary, and have left the matter to the agreement of the parties"; while Lord *Selborne*, in *Foakes* v. *Beer*, 9 App. Cas. 605, 613, says: "It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole) were held to be generally binding, though not under seal." In the same case

the history of the rule is given by Lord *Blackburn*, who, while yielding to the opinion of his associates as to the weight of authority, says (*pp.* 617, 622): "And, notwithstanding the very high authority of Lord *Coke*, I think it is not the fact that to accept prompt payment of part only of a liquidated demand can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges. . . . What principally weighs with me in thinking that Lord *Coke* made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so." "To say that you may receive something which is not money,—a chattel, for instance, of inferior value,—but that you cannot receive money, is to my mind a very singular state of the law." *Grove*, J., in *Goddard* v. *O'Brien*, 9 Q. B. Div. 37, 39. In *Johnston* v. *Brannan*, 5 Johns. 268, 271, the principle under discussion is termed the "rather unreasonable rule of the old law"; while in *Kellogg* v. *Richards*, 14 Wend. 116, 119, it is said to be "technical and not very well supported by reason." Under the rule, "the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made. This rule . . . obviously may be urged in violation of good faith." *Brooks* v. *White*, 2 Met. 283, 285. "The principle of law . . . has been long established and is well settled; still very little reason can be given for it." *Mitchell* v. *Wheaton*, 46 Conn. 315,—33 Am. Rep. 24. The rule is "somewhat harsh, contrary to the apparent intentions of parties in making a compromise settlement, and not in harmony with the dictates of natural justice." *Shaw*, C. J., in *Langdon* v. *Langdon*, 4 Gray 186, 189.

But despite this criticism the rule has survived, in form at least. It is of course impossible to have examined all the cases; but so far as such examination has been carried, the number of cases in which the rule has been applied, and judgment rendered for the plaintiff, despite the agreement to discharge, is small in comparison with those in which the courts have been able to discover some circumstance, however trifling, which could be construed a technical legal consideration. The rule is not a statute, or even a rule of property. Its validity depends upon its consonance with reason. While the almost universal acceptance of it may commend it to the court with almost irresistible force, still it is open for examination as to whether it was originally sound and whether the weight of the authority upholding it is not diminished

or totally overthrown by the exceptions with which the rule cannot logically stand. Before reaching these questions, it is to be considered whether, if originally sound, the reason does not fail after the changes of three hundred years—a proposition for the affirmative of which there is authority.

"There was a time in the history of the law when, like everything else of that day, it was a system of metaphysics and logic, and when the case was decided without the slightest regard to its justice, solely on the technical accuracy of the pleaders on the several sides; defect of form in the plea was defect of right in him who used it. . . . Payment of debt and interest on a bond, the next day after it fell due, was no defence in a court of law; nay, it was no defence to prove payment without an acquittance before the day; nay, if you pleaded and proved a payment which was accepted in full of the debt, yet you failed unless your plea stated that you paid it in full, as well as that it was accepted in full, or perhaps because you pleaded it as a payment when you ought to have pleaded it as an accord and satisfaction. . . . It is not a century since it was solemnly decided, that if a creditor, finding his debtor in failing circumstances and being afraid of losing his debt, proposed to give him a discharge in full if he paid half the money, and the debtor borrowed the money and paid the one half on the day the bond fell due, and got an acquittance in terms as explicit as the English language could afford, yet if sued he must pay the rest of the debt; for it was impossible, say the court, payment of part could be a satisfaction of the whole; but if part was paid before the day, it was good satisfaction of the whole. . . . It avails little, then, to go back to the last century, or further, to cite cases in which a matter was of validity or effect according as it was couched in this or that form. Universally the law is, or ought to be, that the meaning or intention of the parties is, if it can be distinctly known, to have effect, unless the intention contravenes some well established principle of law." *Milliken* v. *Brown*, 1 Rawle 391, 397, 398. "The rule that payment of a smaller sum is not a good accord and satisfaction for a larger one . . . . was a deduction of strict scholastic logic, in the days when money was regarded as having a fixed and unchangeable value. Hence, a part payment of money due could never logically be treated, even by agreement, as equivalent to a payment of the whole. In the business methods of the present, it has come to be recognized that money, like other commodities, has fluctuations of value, not only in the general market, but also and more especially to the individual. To a merchant with a note coming due, $5,000 before three o'clock today, which will save his commercial credit, may well be worth more than $20,000 tomorrow, after his note has

gone to protest. . . . The rule was always regarded as more logical than just, and as coming very close to a contradiction of the general rule that the law will not measure the amount or value of the consideration if parties have agreed upon it." *Ebert* v. *Jones*, 206 Pa. St. 395, 398. See Lord *Blackburn* in *Foakes* v. *Beer*, *supra*. "The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum is without any consideration to support it; that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, or delay, or the hazards of litigation in an effort to collect all, is not often —nay, generally—greatly to the benefit of the creditor." *Clayton* v. *Clark*, 74 Miss. 499, 509. An abandonment of the rule may well be placed on the broadened spirit of the law and upon the fact that the premise upon which it was founded, if true in the seventeenth, is not true in the twentieth century.

In the application of the conclusion of Lord *Ellenborough*, that some possibility of benefit to the creditor would furnish a consideration for the agreement to discharge the balance, the courts have practically in many cases overruled the rule itself, while adhering to it in form. They proceed upon the assumption that the observation of Lord *Coke*, that the acceptance of any chattel in discharge of the debt was a satisfaction because the court could not know the value of the chattel, implied that anything except money, though notoriously of less value than the debt, would furnish a consideration for the agreement. Some of the grounds upon which a parol agreement for discharge has been held valid are, as said in a recent case, "interesting and amusing." *Dreyfus* v. *Roberts*, *supra*. Reference to them would only tend to display in a stronger light the disfavor with which the rule has been regarded, which sufficiently appears from the quotations already given. Many cases are discussed in *Jaffray* v. *Davis*, 124 N. Y. 164. Others are to be found in the general works cited *supra*.

But the cases which hold that the furnishing of security by mortgage, pledge, or notes of a third person for a part of the debt is a sufficient consideration for a discharge of the residue are without foundation, unless the payment of money is such a considera-

tion. These cases are numerous. *Brooks* v. *White*, 2 Met. 283; *Guild* v. *Butler*, 127 Mass. 380; *Boyd* v. *Hitchcock*, 20 Johns. 76; *Kellogg* v. *Richards*, 14 Wend. 116, 119; *Keeler* v. *Salisbury*, 33 N. Y. 648; *Jaffray* v. *Davis*, 124 N. Y. 164; *Sibree* v. *Tripp*, 15 M. & W. 23; *Bidder* v. *Bridges*, 37 Ch. Div. 406. The only purpose of security of this sort is to produce money for payment on the debt, and the only benefit to the creditor is that such may be the result. If it is not beneficial to a creditor to receive one half his debt in cash, it is not beneficial to have such payment secured. A promise cannot be beneficial unless the thing promised is. In *Jaffray* v. *Davis*, *supra*, notes for one half the debt, secured by a chattel mortgage, were given in discharge of the claim. The discharge was held good, although it appears to be conceded that the payment of one half in money at the time the notes were given, upon the same agreement, would not constitute a valid discharge. Under the doctrine of this case, a one day note for one half the debt, secured by the pledge of an equal amount in gold coin, would constitute a valid discharge, while the direct payment of the same amount in gold coin could not. It is undoubtedly true that the creditor may be better off with security for one half the debt than with the whole claim unsecured. It may be true, as held in *Goddard* v. *O'Brien*, 9 Q. B. Div. 37, that a check, from its negotiable character, may be more beneficial to the creditor than a book account for a larger sum; but no security can be more valuable or more negotiable than cash in hand. Scholastic or any other variety of logic which establishes the sign to be more valuable than the thing signified, the shadow superior to the substance, the possession of an order for money more beneficial than the cash that can be obtained upon it, is the logic of unreason. When it is held that something whose only purpose and value lies in its capacity to secure the payment of money is a sufficient consideration for an oral discharge, the rule of *Pinnel's Case*, that the money itself is not such a discharge, is logically overturned. The two cannot stand together. To attempt to reconcile them by the suggestion of value in the paper on which the mortgage is written would be as reasonable as to say that the signature of a third party to a note "may be worth something as an autograph." *Curlewis* v. *Clark*, 3 Exch. 375, 380. It is generally beneficial to a creditor to transform his claim into money. Whether under the circumstances it is more beneficial for him to take part in money, or to retain the claim for the whole, is for him to decide; and no sufficient reason exists in logic or morals why he should be relieved from an agreement understandingly made.

Difficulty has been found in technicalities of the plea of accord and satisfaction. *Watson* v. *Elliott*, 57 N. H. 511, 513. But diffi-

culties of pleading are not now insuperable. If the parties have settled and agreed upon a discharge, or the application of something received—money, or anything else—in discharge, it is not material whether the transaction "came under the technical appellation of payment, accord and satisfaction, or release, or under no particular head usually found in the books. . . . And there seems to be no reason why such a discharge or application should not be shown under the general issue, as well as payment, or accord and satisfaction, if it would not come under either of those heads." *Curtis* v. *Egan*, 53 N. H. 511. The difficulty, aside from the technicalities of an ancient plea, arises from the familiar common-law principle that a promise without consideration cannot be enforced. The entire foundation of the application of this principle to the question under consideration is the assumption that Lord *Coke* thought, three hundred years ago, that the payment of part of a debt was no consideration for a promise. But Professor Ames has not only demonstrated (12 Harv. Law Rev. 521–523) that this assumption is not warranted by anything said in *Pinnel's Case* or the statement in the Commentary on Littleton (212 b) often cited to the same point, but cites the explicit language of *Coke* himself, in *Bagge* v. *Slade*, 3 Bulst. 162, to the contrary. The foundation of the remarks in *Pinnel's Case* he suggests to be the statement of *Brian*, C. J., that "payment of 10 pounds cannot be payment of 20 pounds." Y. B. 10 Hen. VII, *fol.* 4, *p.* 4. After stating the language of *Pinnel's Case* quoted above, the article continues: "There is no allusion in any of these remarks of the judges to the consideration for an assumpsit. The word 'consideration,' in its modern sense, was unknown to *Brian*, and the action of assumpsit was in his day in the embryonic stage. To his mind, whether 10 pounds could be a satisfaction of 20 pounds was a question of simple arithmetic which admitted of only one answer. Ten cannot be twenty, the part cannot be the whole. *Coke* was presumably familiar with *Brian's* statement. At all events, he reasoned in precisely the same axiomatic way: 'It appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater.' It is sufficiently obvious from the similarity of the language of *Coke* and *Brian*, that it never occurred to the former that the resolution in *Pinnel's Case* was based upon any doctrine of consideration. But, fortunately, *Coke's* opinion is not a mere matter of inference. We have his own explicit statement, discriminating in the sharpest way between the operation of part payment as a satisfaction and as a consideration. In *Bagge* v. *Slade* [3 Bulst. 162] he said: 'If a man be bound to another by a bill in 1,000 pounds and he pays unto him 500 pounds in discharge of this bill, the which he

accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of 1,000 pounds, this 500 pounds is no satisfaction of the 1,000 pounds, but yet this is good and sufficient to make a good promise and upon a good consideration, because he has paid money 500 pounds, and he hath no remedy for this again.' In 1639, the obligor recovered judgment upon a promise like that in the case put by *Coke*, the court saying: 'For though legally, after the obligation is forfeited, 30 pounds can be no satisfaction for 60 pounds, yet to have the money in his hands without suit is a good consideration to maintain this action upon the promise.' [*Rawlins* v. *Lockey*, 1 Vin. Abr. 308, *pl.* 24]." Other cases are cited to the same effect. 12 Harv. Law Rev. 523.

As has been seen, the absurdity of the results of the rule relied upon in this case has been commented upon in case after case; but persistence in error under the shadow of a great name still calls that right which is recognized to be wrong. Can the faulty structure stand, now that the foundation stone has been removed? The contention is that there is no consideration for the promised release or discharge, if less than the full amount of money is paid. In *Kidder* v. *Blake*, 45 N. H. 530, 532, Judge *Bartlett* quotes with approval this definition: "Consideration means something which is of some value in the eye of the law, moving from the plaintiff. It may be some benefit to the defendant [promisor], or some detriment to the plaintiff [promisee]." Stated with greater elaboration, "a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Currie* v. *Misa*, L. R. 10 Exch. 153, 162; *Rector etc.* v. *Teed*, 120 N. Y. 583, 586; Wald's Poll. Cont. 167. Professor Langdell says "detriment to the promisee is a universal test of the sufficiency of consideration," and regards benefit to the promisor as "irrelevant to the question whether a given thing can be made the consideration of a promise." Lang. Cont., *s.* 64. Professor Ames, in the article to which reference has been made, approves this simplified definition, but raises the question, what will be understood by detriment? He reaches the conclusion that the term should include every act or forbearance; while the opposite conclusion is that certain acts or forbearances as matter of law cannot constitute a detriment—that a person does not in legal contemplation incur any detriment by doing a thing which he was previously bound to do. Lang. Cont., *s.* 84. In the attempt to scientifically apply the rules of abstract logic to all the cases involving the question of consideration since the inception of the action of assumpsit, it is inevitable that numerous

cases will be found unexplainable upon any theory deducible from such rules.

Upon the theory that the detriment to the promisee which will furnish a consideration for a promise is any act or forbearance, *Foakes* v. *Beer* and the line of cases following its doctrine are exceptions contrary to principle; while whatever rule is adopted as to acts or forbearances that as matter of law cannot constitute a detriment, numerous cases are found which must be recognized as exceptions. It is not necessary to consider further these abstract discussions of the subject. It must be and is conceded that the common definition of "consideration" found in the reports is, as above stated, in substance "a detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise." If any act or forbearance by the promisee is a detriment which will sustain a promise, the sole question is of sustaining an exception in principle and following authority which "originated in misconception, is repugnant alike to judges and men of business, is not applied consistently to all the cases fairly within its scope, has been a source of highly artificial and technical distinctions, has been changed by statute in India and in ten of our states, and is likely to be generally superseded by similar legislation." 12 Harv. Law Rev. 531. Under the other definition of consideration, the doctrine can be upheld only upon the ground that as matter of law payment of a part of a debt before it is due cannot be beneficial to the creditor or a detriment to the debtor. Upon either view, we are met merely by an assumption of the judges which is unfounded in fact. Upon the question whether such payment is or may be beneficial to a creditor, sufficient has already been said. There is nothing new or modern in the proposition that it may be. In *Reynolds* v. *Pinhowe* (1595), Cro. Eliz. 429, the court said of a payment to the creditor, "it is a benefit to him to have it without suit or charge." "Payment without suit or trouble of that which is due is a good consideration." *Johnson* v. *Astell* (1667), 1 Lev. 198. These and other like expressions, cited in 12 Harv. Law Rev. 523, show that the opinions of the modern judges before quoted, that payment before it can be compelled may be beneficial to the creditor, are not new discoveries.

Nor if detriment to the promisee is to be taken as the sole definition of consideration, is the conclusion that the present parting with money is no detriment defensible, judged by the fact and the practice of business men. When the parties have made a contract and agreed on the consideration,—the immediate payment of a sum of money,—it is the refinement of logic to say that such payment is no detriment, or to say, as does *Alderson*, B., in *Sibree* v. *Tripp*, 15 M. & W. 23, 37, "it is not one bargain but two; name-

ly, payment of part, and an agreement without consideration to give up the residue." Such a statement is generally untrue. If A pays B $50 on a $100 debt, and then requests B to release him from the residue, there are two contracts if B agrees, and no consideration for the second; but such is not the transaction in fact, when A pays today $50 in consideration of B's agreement to discharge the whole debt. But, it is said, A is legally bound to pay B the $50; and as A only does what he is legally bound to do, there is no consideration. But the confusion arises from a failure to distinguish between legal and moral obligations. One may be morally bound to do precisely in terms as he agrees; but he is legally bound to do, as a practical proposition, whatever the theory may be, only what he can be compelled by law to do. The common law does not compel men to do as they agree. It gives damages for the failure to perform legal or contractual duties, but except in a few instances only can the specific performance of the contract be enforced. If A owes B a promissory note, no form of action is known by which B can compel A to pay it when due. If A does not pay as promised, in an action of assumpsit B can recover damages because of the breach of A's promise. Since the abolition of imprisonment for debt, the law does not take any steps to compel A to pay the damages. A's property, if he has any subject to execution, the law will seize and apply on B's damages. So that the most that A, who owes B a note, can be legally compelled to do is to suffer his property to be applied to pay B's damages. As to permit this is all A can be compelled to do, it is all that he is legally bound to do. The law does not prohibit his breach of his contract, but leaves him free to break it if he chooses, giving the other party the remedy of damages. *Chellis* v. *Grimes*, 72 N. H. 104, 106; *Wiggin* v. *Manchester*, 72 N. H. 576, 581; *Cox* v. *Jones*, 73 N. H. 504, 505. The damages the law awards for the non-payment of money is interest, and for the expense of obtaining judgment and execution, costs. If costs always equal the expense of litigation, if interest is always full recompense for delayed payment, and if an execution is always equivalent to money in hand, then a present part payment of a debt in cash is in fact never beneficial to the creditor or detrimental to the debtor, and can never be a consideration for a discharge of the balance. Whatever the conclusions of scholastic logic, as men having some acquaintance with affairs judges are bound to know that none of these propositions are always, if ever, true; and as they are not always all true, it cannot be matter of law that in a particular case a part payment was not such a benefit to the creditor or detriment to the debtor as to furnish a consideration for the creditor's agreement of discharge.

Harriman v. *Harriman*, 12 Gray 341, decided in 1859, was a suit on a judgment for $140.03 recovered in 1839. The defendant was then poor and unable to pay, and the plaintiff told him if he would raise and pay $20 he would receive the same in full satisfaction of the judgment. The defendant borrowed and collected $20 and paid it to the plaintiff, who accepted it in full settlement and satisfaction of the judgment, and gave the defendant a receipt in full of all demands. If the defendant was poor and unable to pay, it is to be inferred nothing could be collected on the judgment. As a business proposition, the question for the plaintiff would seem to have been whether it was more beneficial for him to accept what the defendant could then raise and pay, in discharge of the judgment, or to wait for an increase in the defendant's financial resources. There seems no reason why the plaintiff should not have been permitted to decide this question, or why the receipt of money which the defendant could not then be compelled to pay, and which the plaintiff could not obtain without the defendant's consent, should not constitute a sufficient consideration for the agreement under which the defendant was induced to part with his money. But it was held to be well settled that the discharge was invalid for want of consideration. But it is now held elsewhere that acceptance of part payment from an insolvent or embarrassed debtor in full satisfaction of the claim is founded on a sufficient consideration (*Engbretson* v. *Seiberling*, 122 Ia. 522, —101 Am. St. Rep. 279, 64 L. R. A. 75; *Melroy* v. *Kemmerer*, (Pa.) 67 Atl. Rep. 699), and that the abandonment of the right to go into insolvency or to take advantage of the bankrupt law furnishes a sufficient consideration for such a contract. Notes in 100 Am. St. Rep. 441, 442. The reason is clear. In such cases the creditor receives money he would not otherwise receive, and the debtor pays money for the discharge which he could not be compelled to pay. It is difficult to see why money so paid and received is not a benefit, despite the observations of Lord *Selborne* to the contrary in *Foakes* v. *Beer*, 9 App. Cas. 605, 613, 614. It is to be noted that the extension of the exemption from execution in modern times, as well as the abolition of imprisonment for debt, creates a situation in which the debtor, by sacrificing a right which the law gives him, may pay more or less upon a debt when he can legally be compelled to pay nothing.

The law does not measure the adequacy of the consideration upon which the parties have agreed. Wald's Poll. Cont. 193; Lang. Cont., *s.* 55. If a payment which the debtor cannot be compelled to make because of lack of property furnishes a consideration, present payment which he cannot be compelled to make because of lack of judicial machinery to effect such result must be

equally efficacious. In the notes to *Cumber* v. *Wane* (1 Stra. 426), 1 Sm. L. C. (7th Am. ed.) 595, 610, it is doubted "whether the maxim that a smaller sum cannot be a satisfaction of a larger debt could apply to anything but a bond; . . . technically, it would be very difficult to make it apply to simple contracts. But as a principle of evidence, this rule, which requires for the substantiation of such agreements either a surrender of the instrument or a legal release, is a just, wise, and convenient rule, so great is the danger of fraud and mistake." This might have been a sound reason for a rule of evidence applying in all cases of discharge claimed by anything but full performance. But a payment of less before the day, or in another place at the day, or by a chattel, is not a discharge unless so agreed; and the necessity of the rule of evidence is as strong in the one case as in the other. No such rule has been applied, nor does it appear to have been attempted to support the maxim on this ground in the adjudged cases. The whole matter resolves itself into one of statement. If A holds B's note for $100, there is no reason in law or morals why he may not sell it to C for $50, or to B. An agreement by A to sell to B B's note for any sum less than there is due upon it is open to no objection arising from the intricacies of the plea of accord and satisfaction, or of any theory of consideration. Lang. Cont., *s.* 88.

The facts in the present case are not fully reported, but enough appears to justify the suspicion that the case may be within some of the exceptions. It is at least fairly inferable that the defendant was insolvent and had no other property except that covered by the plaintiff's mortgage, upon which another mortgage had precedence. Wakefield could recover nothing out of the property without paying the first mortgage. The defendant was under no obligation to sell or assent to a sale of the Enfield property; and if her consent to such sale was part of the agreement, there was a sufficient consideration under all the cases. Wakefield could have sold his second mortgage to the defendant for such sum as he saw fit; and the fact that the sum would not have equaled the amount due on the mortgage would not have invalidated the contract. Wakefield lived some six years after these transactions. There is no suggestion that he had any purpose except to be bound by the contract. His executor brings the suit; and the contention is, that because the parties regarded the transaction as payment or discharge instead of a sale, or because Wakefield neglected to deliver the note to the defendant as it has been suggested in argument he agreed to do (*Draper* v. *Hitt*, 43 Vt. 439), the law requires the plain purpose of the parties to be defeated, not because of any immorality in the transaction or lack of power in

the parties to make the agreement, but because the words they used to describe what they did imply that it was impossible for them to do what they in fact did.

No better guide for the determination of the rights of the parties in a contract can be discovered than their purpose and intention in making it. That having been ascertained, a sufficient reason for defeating such purpose is not found in the misinterpretation and misunderstanding of the language of a great jurist of the seventeenth century, however long continued. The rule that the payment of a less sum can never sustain an agreement to discharge a greater, because without consideration, however well supported by the authorities, is contrary to the fact at the present time, whatever the fact was when the rule originated, is based upon misconception, is not founded in reason, and cannot be followed without abandoning the greater principle that reason is the life of the law. In the words of the court in *Clayton* v. *Clark*, 74 Miss. 499, 510: "A rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterward, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it."

While there was authority for the instruction finally given the jury, the discussion establishes that the instruction given and the direction of a verdict were erroneous. The verdict is set aside and a new trial granted.

Exceptions sustained.

CHASE, J., dissented: the others concurred.

Coös,
Nov. 5, 1907.

HAMEL v. BURGESS SULPHITE FIBRE CO.

In an action of negligence against an employer, certain evidence deemed to conclusively establish that the injuries complained of resulted from the plaintiff's failure to definitely ascertain the condition of machinery and appliances, knowing such information to be essential to his safety.

CASE, for personal injuries sustained by the plaintiff while in the defendants' employ. Trial by jury and verdict for the plaintiff. Transferred from the December term, 1906, of the superior court by *Stone*, J., upon the defendants' exceptions to the denial of their motions for a nonsuit and the direction of a verdict in their favor.

In that section of the defendants' mill where the plaintiff worked there were six distinct lines of screens, constituting a part of a paper machine. The screens were boxes four or five feet wide and from two to four feet deep, which stood on legs and were placed in lines from fifty to sixty feet long. There were spaces a foot or more in width between the lines. The screens were operated by shafting which extended beneath the center of each line and was located three feet below the boxes. At the lower end of each shaft was a pulley, called the driven pulley. When a shaft was dead this pulley did not revolve, and the screens were motionless. Different belts connected each driven pulley to a driving pulley attached to an overhead power shaft. There was a large window over the screens, and both sets of pulleys could be readily seen. It was somewhat dark on the day of the accident, and the windows were more or less dirty.

The plaintiff was one of the "screen men," whose duty it was, when a screen stopped, to go between the screens, attach a Stilson wrench to the dead shaft, and press upward or downward according as the shaft was to revolve to the right or left, while other men at the lower end of the line replaced the belt upon the driven pulley. The plaintiff was injured while at work between two lines of screens, the circumstances of the accident being sufficiently stated in the opinion.

William H. Paine, for the plaintiff.

Merrill & Merrill (of Maine), for the defendants.

BINGHAM, J. At the time he received his injury the plaintiff

had worked in the defendants' mill for three years, and upon and about that part of a paper machine known as the screens for eighteen months. He was a young man of average intelligence and possessed of all his faculties. It was his duty to assist in starting up the shafts which run beneath the screens, when for any reason they stopped. This work required him to go between the screens and attach a wrench to the dead shaft, and lift or press down upon the wrench, according as the top of the shaft was to revolve from or toward him. He had done this work as occasion demanded throughout the latter period of his employment, and was fully acquainted with the method to be pursued in its performance. On the day of the accident he was notified by his boss that a screen was down on his section, and to take a wrench and assist in starting up the shaft. It does not appear that he inquired or was told which of the six lines of shafting that operated the screens upon which he worked was dead. He saw his boss with other men working at the lower end of the screens between No. 2 and No. 3 lines of shafting, and for this or some other reason entered the space between them. No. 2 shaft was dead, but No. 3 was in motion. They were about five feet apart, and the space in which he had to walk in going to do this work was between them. He says that he entered this space by climbing over the screens, instead of entering at the lower end where the men were at work, as he thought his boss was mad at him; and that as he went between the screens, a belt that drove one of the shafts was beneath his feet and he saw the men pulling it up. By inquiry, he could then have learned which shaft was dead, or have ascertained that fact by looking at the driven pulleys upon the ends of the shafts. The belt that supplied the power from the shafting above to the driven pulley upon No. 3 shaft must have been in plain sight and in operation, for No. 3 shaft was then revolving; and had the plaintiff looked at this belt, he would in this way have learned that No. 3 shaft was in motion. He also says that he looked at the screens before going beneath them, to determine which shaft was in motion, but could not tell; that it is difficult to tell whether screens are in motion when they are filled with material as these were; that after going beneath the screens he looked and saw the shafts; that on account of the want of sufficient light he could not determine by looking at them whether either was at rest, nor by listening, on account of the noise. He knew, however, that it was dangerous to attach a wrench to a moving shaft, and that if he did so he was liable to be injured. He knew, when beneath the screens, that it was not sufficiently light or sufficiently quiet for him to determine, either by looking at the shafts or by listening, whether No. 2 or No. 3

was at rest, and that he did not know which was. He then knew that by inquiring of the men, or by going a few feet and looking at the driven pulleys, he could definitely ascertain which shaft was at rest. But notwithstanding he knew he was ignorant of what was essential to his safety, he placed his wrench upon No. 3 shaft, and was injured. The fact that he and the other men were in a hurry to start up the screens is of no consequence, in view of his failure to inform himself of what he knew was indispensable to his safety. The evidence shows that he was careless when his duty required him to be careful, and the jury were not warranted in drawing the inference that they did from it.

Exceptions sustained.

All concurred.

Rockingham, Dec. 3, 1907.

LADD, *Ex'r*, *v.* LADD *& a.*, *Ex'rs.*

Where a will directs executors to slate the roofs of the testator's buildings and repair the foundations, in case he dies without making "contemplated repairs upon the roofs," they are authorized to make such repairs upon the foundation of each building as the increased weight of the superstructure necessitates, when it is apparent that such was the testator's design.

Evidence as to the oral declarations of a testator is not admissible to explain the meaning of language employed in the will.

A bequest to nieces of one hundred dollars for each year that each should live with the testator, followed by a provision that C "shall in any event receive the full sum of one thousand dollars," does not give C that sum in excess of what another niece would receive, but merely fixes the amount payable to her in the event of her not living with the testator ten full years.

BILL IN EQUITY, for a construction of the will of Lydia W. Ladd, of which the parties are all executors, and for instructions as to its execution. Transferred from the April term, 1907, of the superior court by *Pike*, J.

The testatrix made her will on April 25, 1889, executed a codicil thereto on May 14, 1898, and died on March 1, 1904. She owned a farm, the buildings thereon consisting of a main house, ell, barn, shed connecting the ell and barn, cornhouse, and woodshed. Between the date of the codicil and the time of her death she caused the roof of the main house, one half of the roof of the ell, and the whole of the roof of the barn to be slated, and also put

props under the barn to sustain the added weight of the slate. At the trial the defendants introduced evidence to establish the above facts, and, subject to the plaintiff's objection, evidence of Lydia's declarations of intention as to what repairs she contemplated making upon the buildings. The court did not pass upon the question of admissibility, but transferred the case with a transcript of the testimony.

The material portions of the will and codicil are stated in the opinion, with the exception of the following clause: "Whereas in my last will and testament I gave to my niece, Clara M. Ladd, the sum of one hundred dollars for each year she may have lived with me, at and prior to my death, now I do hereby revoke said bequest to said Clara, and instead thereof do hereby give her the sum of five thousand ($5,000) dollars in addition to the sum of five hundred ($500) named in my will. And I do revoke the provision in my will giving to any other of my nephews and nieces, living with me at my death or having lived with me prior thereto, for the period there named the sum there named, but this revocation shall not affect any other bequests, either in my will or this codicil, to said Clara or any other of nephews and nieces, excepting so far as the same may be modified in this codicil."

The instruction of the court is desired as to the following questions: (1) Is it the duty of the executors, under the provisions of the codicil, to have the roofs of the farm buildings slated and to repair the foundations of the buildings? (2) If it is the duty of the executors to slate the roofs and repair the foundations, what is the meaning of the term "repairs," as used by the testatrix in the codicil? (3) Is Clara M. Ladd entitled under the provisions of the will and the codicil to the sum of $1,000 in addition to the sum of $5,500 which she has been paid?

Martin & Howe, for the plaintiff.

Frink, Marvin & Batchelder, for the defendants.

BINGHAM, J. The codicil to the testatrix's will contained the following provision: "If I should die before making contemplated repairs upon the roofs of my buildings, then I direct my executors to have the roofs of the buildings of my farm slated, and to make such repairs on the foundations of the same as they, in consultation with the occupants of my house, may deem proper." It seems that by this provision the testatrix made the direction to her executors as to slating the roofs and repairing the foundations of her buildings dependent upon her death without having completed the contemplated repairs upon the roofs; and although she does not expressly

state what she means by the words "contemplated repairs upon the roofs," it is made reasonably certain from other terms employed in the same paragraph that slating is what she had in mind, and, as incident to this, such reasonable repairs in the way of strengthening the timbers of the building as might be necessary to sustain the added weight and render slating practicable. If the testatrix had not contemplated the use of slate in repairing the roofs, it is improbable that she would have directed her executors to use slate to complete the repairs, in case she died without having completed them. It is not too much to say that what she directed her executors to use to complete the work she purposed using herself, so that the buildings, when the repairs were made, would be alike in character and appearance. It is equally certain from the terms of the codicil that what the testatrix contemplated with reference to the extent of the slating was coextensive with what she directed her executors to do—to slate the roofs of all the buildings. These conclusions are confirmed by the evidence disclosing the conduct of the testatrix from the time she made the codicil to the time of her death, and independently of and without considering her express declarations of intention. It is the general rule that declarations of intention are not admissible to explain what a testatrix meant by the terms employed in her will, and this case does not fall within any exception to that rule. But the rule does not preclude a consideration of the attending circumstances as aids in applying the will, for the purpose of ascertaining what was meant by the terms employed. *Bishop* v. *Holt*, [1900] 2 Ch. 620, 624.

In considering the question of the extent to which the executors may go in making repairs upon the foundations of the buildings, under the authority directing them to "make such repairs on the foundations of the same as they, in consultation with the occupants of my house, may deem proper," the evidence submitted, so far as it may properly be considered, does not lend any material aid. It is reasonably clear, however, that under the authority conferred by this clause they are not authorized to enlarge the capacity of the buildings by raising them a story higher, or by excavating beneath them for a cellar. *State* v. *White*, 16 R. I. 591; *Stevens* v. *Milnor*, 24 N. J. Eq. 358; *Douglass* v. *Commonwealth*, 2 Rawle 262, 264; *Ardesco Oil Co.* v. *Richardson*, 63 Pa. St. 162; *Pittsburg & Birmingham Ry.* v. *Pittsburg*, 80 Pa. St. 72. If there are circumstances attending the situation of the buildings that would render it probable that the testatrix could have intended by this clause that any of the buildings should to some extent be raised, the evidence submitted does not disclose them. But in view of the fact that she instructed her executors to slate the roofs, the direction to repair the foundations is to be considered with reference to

such repairs; and when this is done, it is manifest she intended that the foundation of each building should be put in such condition as to afford proper support to the superstructure resting upon it, increased in weight by the slate.

The defendant Clara M. Ladd is a daughter of the testatrix's brother, Samuel Ladd. She claims that she should have paid to her, in addition to the sum of $5,500 which she has received, the sum of $1,000, under the following provision of the will: "I give and bequeath unto the children of my brothers, Daniel and Samuel Ladd, the sum of five hundred dollars [to] each child . . . living at my death, and if either of the children of said Daniel and Samuel shall have lived with me, at any time, a longer period than one year, then such child if living at my decease shall take and receive the sum of one hundred dollars for each year he or she has so lived with me, in addition to said sum of five hundred dollars. And it is my will that my niece, Clara M. Ladd, shall in any event take and receive the full sum of one thousand dollars." At the time of making the will Clara had lived with her aunt eight years, and the plaintiff says that the construction to be given the clause is that Clara was to have $100 a year, in addition to $500, on the same terms as the other nephews and nieces, if she lived with her aunt ten years or more, but in view of the length of time (eight years) which she had then lived with her, it was the aunt's wish that Clara should have $1,000 if the aunt died without Clara having lived with her ten full years; that as Clara had, at the time of her aunt's death, lived with her for a greater period than ten years, she would take under the clause providing for $100 a year, if it were not for the provision in the codicil revoking it; and that the event never happened upon which she was to take the $1,000.

When the codicil was made in May, 1898, revoking the provision of $100 a year in favor of Clara and the other nephews and nieces, Clara had lived with her aunt seventeen years. If the aunt had then died without making the codicil, and Clara is right in her construction of this provision of the will, she would be entitled to receive under it the sums of $500, $1,700, and $1,000. But this does not seem to be the probable meaning of the provision. That portion of it beginning with the words "and it is my will," etc., cannot be read by itself as an independent clause. If it was such, and the testatrix had intended that Clara should receive $1,000 in addition to the gifts of $500 and $100 a year, it cannot be conceived why she made use of the words "shall in any event" and "full sum," when by omitting them the remaining words of the sentence would have clearly expressed her meaning. But these words are not meaningless. They were inserted for a purpose, and must be read with reference to the preceding sentence

and the fact that Clara had then lived with her aunt eight years. When this is done, it is apparent that the gift of $1,000 was provisional—not absolute, and was to become absolute only in the event of the testatrix's death without Clara having lived with her ten full years.

Case discharged.

All concurred.

Rockingham, Dec. 3, 1907.

SPINNEY *& a.* *v.* MELOON.

A party who objects to the withdrawal of incompetent evidence which was admitted subject to his exception cannot be heard to complain of its prejudicial effect after a verdict against him.

Where the parties to a chattel mortgage covering future acquisitions verbally agree that a portion of the property may be exchanged and the proceeds of the trade substituted therefor, the lien sought to be secured is not enforceable as against a purchaser of the substituted property who has neither actual nor constructive notice of the mortgage.

REPLEVIN, for a pair of black horses, and BILL IN EQUITY, to enforce a lien on the same horses created by a mortgage given to the plaintiffs in August, 1905, by the T. E. Wilson Company, a corporation doing business at Kittery, Maine. Trial by the court and verdict for the defendant, to which the plaintiffs excepted. Transferred from the April term, 1907, of the superior court by *Wallace*, C. J.

The mortgage in question covered all the horses owned by the corporation at the time it was made and "any and all other property which said T. E. Wilson Co. (incorporated) shall hereafter purchase," and was duly executed and recorded. Shortly after the mortgage was made, the parties agreed that Jacob Drinkwater, the Wilson Company's agent, should trade a pair of horses included in the mortgage for the black horses, and that the latter should be subject to the lien.

In February, 1906, the Wilson Company sold the black horses to the defendant. Subject to exception, the defendant testified that before he bought the horses he heard that W. H. Kilburn had some kind of a claim on them, that he informed Kilburn that Drinkwater wanted to sell him the horses and asked if he could buy them and pay Drinkwater therefor, and that Kilburn said that

would be all right. Kilburn was a member of the firm of Kilburn & Co., plaintiffs in this action. He has died since these proceedings were begun, but his administrator is not a party to them. After the case was argued, but before it was finally submitted, the defendant moved to strike out the evidence admitted subject to exception, but the plaintiffs objected and the motion was denied.

Page & Bartlett and *Ernest L. Guptill*, for the plaintiffs.

Frink, Marvin & Batchelder, for the defendant.

YOUNG, J. The defendant had a legal right to withdraw the evidence admitted subject to exception, at any time before the case was submitted. *Mason* v. *Knox*, 66 N. H. 545. The fact that the court could set the verdict aside if it were found that it was produced by that evidence, even if the testimony had been excluded, is immaterial; for the court refused to strike out the evidence because of the plaintiffs' objection to this course, and not because the trial justice found that he could not free his mind from the impressions produced thereby. It is obvious that if the evidence had been withdrawn the plaintiffs could not insist on their exception to its admission, and they are in no better position now. If they have been prejudiced, it is because the evidence was considered—not because it was admitted; and since it would not have been considered if they had not insisted that it should be, their exception must be overruled. They cannot be heard to complain because the court did what they insisted should be done.

The mortgage in question is so far governed by the provisions of the common law that the plaintiffs have no claim on the black horses which can be enforced in an action at law, however it may be as to the horses which Drinkwater traded for them. If the plaintiffs are to prevail, it must be because of the rule by which such mortgages are enforced in equity (*Pierce* v. *Emery*, 32 N. H. 484); and to avail themselves of that rule, they must show that the defendant knew of their mortgage at the time he bought the black horses. It is found that the defendant did not know of the plaintiffs' mortgage and is not chargeable with knowledge of it; and consequently they have no lien which is enforceable in equity against him.

Exceptions overruled.

All concurred.

Merrimack,
Dec. 3, 1907.

CURTICE, *Adm'r*, v. DIXON.

Where A's expressions of disapproval have been introduced in evidence for the purpose of showing his belief that B, whom he knew intimately for many years, possessed a violent and unreasonable temper, evidence of specific acts of quarrelsomeness on the part of B, occurring in the absence of A and subsequently to his declarations, is admissible as corroborative proof.

Whether evidence is too remote to be of assistance to the jury is a question determinable by the trial court and not ordinarily reviewable upon exception.

The admission of incompetent evidence in disparagement of credibility does not furnish cause for setting aside a verdict, if it was not prejudicial upon that issue and was competent for another purpose for which it was offered.

An objection that a hypothetical question propounded to an expert witness assumed facts not justified by the evidence is waived unless taken at the trial.

A verdict is not set aside for erroneous instruction when it is apparent, upon a reasonable construction of the whole charge, that the jury were not misled thereby.

Where a person of advanced years enters into a contract whereby he disposes of a large portion of his estate in view of approaching death, the question of his mental soundness at the time of the transaction is determinable by the rules which would be applied if the disposition had been by will and his testamentary capacity was the subject of inquiry.

BILL IN EQUITY, to set aside a contract made by Isaac D. Merrill with the defendant, his niece, and to compel the restitution of property transferred thereunder by him to her, upon the ground of his insanity and of her undue influence over him. A jury found, in answer to special questions submitted, that at the date of the contract Merrill was not of sound mind, and that the contract and the conveyance of property to the defendant were procured by fraud and undue influence on her part. There was a decree for the plaintiff. Transferred from the October term, 1906, of the superior court by *Peaslee*, J.

Merrill was over eighty-eight years old when the contract was made, and there was much evidence tending to show that he was afflicted with senile dementia. The plaintiffs in interest and the defendant are his nieces and nephews, and together constituted the residuary legatees named in his will, sharing equally. His will was made some time before the contract in question. He had known all these parties intimately for many years. The defendant

claimed to have been his favorite. This fact the plaintiff denied, and he adduced evidence to the contrary which further tended to show that the defendant is possessed of a violent temper and is inclined to meddle with the affairs of others, which characteristics Merrill disapproved of. The only direct evidence tending to prove that Merrill was informed of the fact that the defendant had a violent temper and was inclined to meddle with the affairs of others was contained in the testimony of one Danforth, a witness for the plaintiff, who testified that on one occasion Merrill said to him: "I don't like Nettie Dixon. She is always in trouble with somebody. I don't like her." The only evidence which tended to show that the defendant has a violent temper and is inclined to meddle with the affairs of others was elicited on cross-examination of her husband as to specific acts, occurring some time after the date of the contract and not in Merrill's presence. This evidence was admitted, subject to exception.

The plaintiff was allowed, subject to exception, to introduce a letter written by the defendant to one Ward, her tenant, in which she peremptorily ordered him to replace a certain gate which he had removed from leased premises and found fault with him in other respects, threatening to increase the rent if he did not comply with her demands. Other exceptions taken by the defendant to the evidence and the charge of the court are considered in the opinion.

William H. Sawyer and *Streeter & Hollis*, for the plaintiff.

Martin & Howe and *Sargent, Remick & Niles*, for the defendant.

1. The defendant's character was in no way in issue or material to any issue in the case. It was, of course, competent to prove that Merrill did not approve of her, as bearing upon the question whether his disposition of his property was so unnatural and unreasonable as to indicate that it was the product of a diseased mind, or the result of fraud or undue influence. His attitude of mind toward her was of course material, and his expressions of approval or disapproval were competent as indicative of that attitude. That he thought her quarrelsome, and disapproved of her for that reason, could properly be proved by his statements to that effect. But the question whether she was or was not in fact of a violent and meddlesome temper has no possible bearing upon the case. The question is, what was his opinion of her, not what was her real character, or what ought his opinion to have been. If he disapproved of her because he thought her quarrelsome, or extravagant, or lazy, or untruthful, she could not meet the force of testi-

mony to that effect by proving that his judgment of her was erroneous; nor can the plaintiff add to the force of his expressions of an unfavorable opinion of her by proof that the opinion was in fact well founded. It is entirely immaterial whether his judgment as to her character was just or unjust. His opinion is material; its grounds are utterly immaterial.

But the evidence in question would not have been competent, even if the defendant's character had been capable of proof, as bearing upon the esteem in which she was held by Merrill. The inquiries to which exception was taken related to specific acts supposed to indicate a violent and quarrelsome character. But character cannot be proved by evidence of specific instances of misconduct; the only legitimate proof of character, collaterally in issue, is reputation. The application of this principle to a witness' bad character for veracity is familiar to all. Its application to proof of character in other respects, though perhaps less familiar, is equally well settled. In fact, it is a principle regarding which it can safely be asserted that there is today no difference of opinion in jurisdictions in which the English common law prevails. 3 Enc. Ev. 35, 36, 40; Underhill Ev. 26; 2 Wig. Ev., *ss.* 1106, 1131; McKelvey Ev. (2d ed.), *ss.* 122, 123; 16 Cyc. 1275, 1279; *Moulton* v. *State*, 88 Ala. 116; *King* v. *State*, 65 Miss. 576; *Campbell* v. *State*, 38 Ark. 498; *State* v. *Sterrett*, 71 Ia. 386. The New Hampshire decisions are clear and to the point, and are in perfect accord with the authorities elsewhere. *Hoitt* v. *Moulton*, 21 N. H. 586; *State* v. *Forshner*, 43 N. H. 89; *State* v. *Knapp*, 45 N. H. 148; *State* v. *Lapage*, 57 N. H. 245. See, also, *Commonwealth* v. *O'Brien*, 119 Mass. 342.

2. The cross-examination of the defendant's husband was also objectionable because it related to her conduct at a time when her character could not, on any possible theory, be material. This case was tried at the April term, 1906,—nearly three years after Merrill's death. The inquiries related to the time of the trial. The defendant's conduct or character after Merrill's death certainly could not have been brought to his attention, or affected the esteem in which she was held by him. Exhibitions of the defendant's quarrelsome disposition, if competent evidence of her character at the time of the trial, were utterly incompetent upon the question of her character three years earlier. There is no presumption that a person's character has always been what it is today. A woman unchaste today may have been a model of propriety a few months ago; and a woman who three years ago was gentle, peaceable, a kind mother, and a good neighbor, may, from illness, family troubles, or slander, have become nervous, excitable, suspicious, and quarrelsome. Character, once demonstrated, is presumed to con-

tinue until a change is shown; but there is no presumption that present traits of character have always existed. *State* v. *Forshner*, 43 N. H. 89, 90, and authorities cited.

3. The cross-examination of the defendant regarding the Ward letter was incompetent. It was introduced for the expressly declared purpose of showing the defendant's character, and its use for that purpose was specifically excepted to; but the statement was not withdrawn, nor did the court explain that the evidence could not be considered for that purpose. The plaintiff's counsel then stated another ground of supposed competency—that of credibility.

The evidence was incompetent upon character, for the reasons already stated. If competent for the purpose of disparaging credibility, that fact does not cure the error of its uncorrected admission for an incompetent purpose. "A verdict is not set aside for the admission of evidence competent for some purpose, and not shown to have been offered or used for a purpose for which it was incompetent." Head-note to *Rogers* v. *Kenrick*, 63 N. H. 335. See, also, *Smith* v. *Morrill*, 71 N. H. 409; *Haskell* v. *Railway*, 73 N. H. 587. This evidence is shown to have been offered *and* used for a purpose for which it was incompetent,—so offered because expressly so stated, and so used because the jury were not informed that its use for that purpose was incompetent.

The letter was not competent in disparagement of the defendant's credibility as a witness. The extent to which evidence tending to disparage credibility may be introduced on cross-examination is within the discretion of the trial court; but that discretion must have something within its scope upon which to operate. It certainly is not within the discretion of the court to determine how far evidence injurious to the witness, but not tending to disparage his credibility, shall be admitted. Such evidence is always inadmissible, and its use cannot be justified upon any rational theory of judicial discretion. 2 Wig. Ev., s. 1115; *Buel* v. *State*, 104 Wis. 132.

The precise question has never been decided in this state; but the limitations of the rule are impliedly recognized in several decisions. "The question put to the plaintiff's husband was asked for the purpose of disparaging his credibility. How far justice required the cross-examination should be allowed to go in that direction, was a question of fact to be determined at the trial term." *Merrill* v. *Perkins*, 59 N. H. 343. That is to say, the evidence must have some tendency toward disparaging the credibility of the witness. How far "in that direction" the cross-examination shall go is discretionary with the trial court; but in that direction it must go. See, also, *Gibbs* v. *Parsons*, 64 N. H. 66. Whether we

call the question one of discretion or of fact, the result is the same. The question is: How much and how remote evidence, tending to show that the witness is not a reliable source of testimony, shall be received? But the evidence must tend to show that the witness is not reliable. There is no discretionary power to admit disgracing, humiliating, or otherwise prejudicing testimony which has no tendency "in that direction."

There is no possible connection between the letter and the credibility of the witness. The admission of such testimony was obviously beyond the scope of the judicial discretion. The question of fact, whether the evidence in question was material to the credibility of the witness, was erroneously decided, and the error was unquestionably prejudicial.

4. The court told the jury that if the transaction in question was in their judgment "unjust or unreasonable," that was evidence upon the issues of sanity and undue influence; and that if the transaction was in the judgment of the jury unjust or unreasonable to "such an extent as to convince you [them] of the existence of undue influence, or an unsound mind," they were at liberty to decide both questions submitted upon that evidence alone. That erroneous statement was peculiarly adapted to reach and indelibly impress itself upon the minds of the jurors, and to lead them to say: "The defendant, Mrs. Dixon, got too much for the consideration she gave, and the court has told us that we may set the whole transaction aside, and answer both these questions in favor of the plaintiff, if we are convinced that the transaction was unjust or unreasonable."

Perhaps if the charge had been so limited as to make injustice and unreasonableness evidence only in case there was evidence of a confidential relation between the parties, or evidence of fraud, undue influence, or insanity, it might have been sustained; but as it permitted insanity or undue influence to be found from the fact alone that the transaction was unjust or unreasonable, it seems in conflict with *Bedel* v. *Loomis*, 11 N. H. 9, 19, and the cases hereinafter cited, which hold that the fact that the disposition of property is unjust or unreasonable, even to the degree of "outraging common feeling," is "insufficient evidence of itself" to authorize a court or jury to find insanity or undue influence, and that that fact is a circumstance to be considered only in case there is "other evidence on the question of unsoundness or delusion of mind" or undue influence, and then as an "auxiliary influence"— "not a controlling one." *Denison's Appeal*, 29 Conn. 399, 405, 406; *Bitner* v. *Bitner*, 65 Pa. St. 362; *Lamb* v. *Lamb*, 105 Ind. 456, 462; *Kimball* v. *Cuddy*, 117 Ill. 213; *Kevil* v. *Kevil*, 2 Bush 614.

5. The transaction in question was a contract made by Merrill —not his will. The transaction being a contract, there was no occasion for capacity on Merrill's part to know "who his relatives were, and what reasonable claims, if any, they had upon his bounty." The importance of this error, and the fact that it was error, becomes more apparent when we consider the next paragraph of the charge. That paragraph abandons capacity as the test and substitutes conduct in its stead. It says if Merrill "correctly thought out substantially what his property was, recalled to mind his nephews and nieces, and then decided, either from the selfish motive of provided comfort for his remaining days, or from a feeling of generosity for his niece, or perhaps from a mixture of motives, made up his mind to do what he did, then he was of sound mind." Undoubtedly he was of sound mind if he did those things, but he may have been of sound mind if he did none of them. If he had the capacity to do them he was of sound mind, whether he did them or not. This instruction in effect directed the jury to find that Merrill was of unsound mind unless they were satisfied that at the time of the transaction in question he did as a matter of fact recall to mind his nephews and nieces, what claims, if any, they had upon his bounty, and decide as to those claims. As his will, in which he dealt with his nephews and nieces and determined the question of their claims upon his bounty, had already been made, and as this was the disposition of but about a half of his estate and was a contract, it was immaterial whether his mind adverted to his nephews or nieces at all or not; and it seems to have been certainly improper to have given the jury an instruction which would permit them to say: "If Merrill, when he made this contract with Mrs. Dixon, did not 'recall to mind his nephews and nieces'—these plaintiffs—and decide as to their claims upon him, the court has told us we cannot find him to have been of sound mind."

6. The question of the validity of the contract in question was one of mixed law and fact; and the plaintiff's expert alienist, by his answer, assumed to decide not only the fact of insanity, but the law governing a contract made by an insane person. That the expert guessed right as to the law, and answered the mixed question of law and fact correctly, does not render the submission of that issue to him the less erroneous.

The objection to the question and answer is two-fold: (1) The expert was permitted to exercise the function of the jury and decide (without instruction as to the law) a mixed question of law and fact. (2) The expert did not give the jury (or, for that matter, the court) any statement of the facts which he assumed as the basis for his opinion. Both these objections are fully sustained

by the cases we cite. *Fairchild* v. *Bascomb*, 35 Vt. 398; *Hamrick* v. *State*, 134 Ind. 324; *Illinois Central R. R.* v. *People*, 143 Ill. 434; *Kempsey* v. *McGinniss*, 21 Mich. 123; *Bennett* v. *State*, 57 Wis. 69; *Farrell* v. *Brennan*, 32 Mo. 328.

WALKER, J. The plaintiff claimed at the trial that Merrill was mentally incompetent to do business at the time of the transaction in question and that he was unduly influenced by the defendant. The plaintiff also contended that the sum of $20,000 which Merrill gave to the defendant under the supposed contract was so exorbitant, in view of the size of his estate and the claims of his other relatives, that it afforded evidence that he was of unsound mind or was subject to the control of the defendant. That it might constitute evidence of that character, when considered in connection with other evidence bearing upon the questions of his mental capacity and her influence over him, cannot be denied as a matter of law. While it might be of little weight, it furnished a logical basis for the deduction suggested.

In reply to this contention on the part of the plaintiff, the defendant insisted that she was a particular favorite of her uncle, and that this fact led him to favor her, to the prejudice of his other relatives. On the other hand, the plaintiff contended that she was not his favorite, that he disliked her because of her quarrelsome disposition, and that this fact tended to prove that he did not enter into the arrangement with her while in the reasonable possession of his faculties, uninfluenced by her. The issue, though a subsidiary one, was clearly presented: Did Merrill dislike the defendant because he believed she had a violent or unreasonable temper? If he did, it is not improbable that he entertained toward her feelings of disapproval or hostility. The defendant's position that she was her uncle's favorite made this a direct—not a merely collateral—issue. To prove the affirmative of it, the plaintiff showed that Merrill had said that he did not like the defendant because "she is always in trouble with somebody." This evidence, received without objection, had a direct tendency to prove the plaintiff's contention and was material, particularly as it appeared that Merrill had known the defendant intimately for many years and had been in a position to observe her traits of character. In addition to this evidence, and to strengthen and corroborate the testimony that Merrill disliked the defendant for the reason above given, the plaintiff was permitted, subject to exception, to show specific acts of ill-temper and quarrelsomeness on the part of the defendant, when Merrill was not present. If the instances of her quarrels had occurred in the presence of Merrill, they would afford some evidence that he might reasonably

entertain the idea that she was quarrelsome, and hence that he did entertain it. One's actual observation of a transaction is certainly evidence that he believed it took place. Nothing could be more elementary. And as traits of character are indicated and shown by actions, A's belief that B possesses a disposition to quarrel with his associates would be a reasonable belief if he had seen B manifest such a trait by acts or language. But if there was no evidence that A had observed such acts or heard such language on the part of B, and had been in no position where he could acquire a knowledge of B's peculiarities, specific instances of B's violent temper would not tend to show that A entertained the belief. Whether his belief might be proved by the common reputation in which B was held by those who knew him need not be considered; for the point is, not what B's character was as indicated by his reputation, but what did A think or believe it was. One ground on which it could be found that he reasonably might have a belief as to B's character would be the fact of his actual observation of B's acts showing his character; but that is not the only evidence authorizing such an inference.

If the issue had been merely whether the defendant had or possessed a violent temper, specific acts of unreasonable violence on her part would logically tend to prove the affirmative. The fact of her characteristic in this respect would not depend exclusively on her general reputation. A person's reputation and character are not the same. Reputation, as evidence, may tend to prove character; but a man may in fact have a good character while suffering from a bad reputation. *Bottoms* v. *Kent*, 3 Jones L. 160. In this case no attempt was made to prove her character by general reputation. Her general reputation for kindness and patience was not in issue; and much difficulty in determining the question of the admissibility of the evidence of specific acts of ill-temper is avoided by clearly understanding that the evidence was admitted as corroborative proof that her uncle regarded her as a quarrelsome person. If she repeatedly exhibited an unreasonable temper toward people with whom she came in contact, even in the absence of her uncle, the inference would not be unreasonable or illogical that he entertained the belief that she was quarrelsome, based upon his observation of her during his intimate acquaintance with her for many years. If it was shown by specific instances, not occurring in his presence, that as a matter of fact—not as a matter of reputation—she was "always in trouble with somebody," it would be difficult to understand why that fact would not have a logical bearing on the probability of his entertaining a similar idea in regard to her. If it is claimed that A thinks B is a great mathematician, for instance, the fact that he has performed remark-

able feats in that line, though unknown to A, has some tendency to prove that A does think so, after proof of A's long and intimate association with B in scientific pursuits requiring skill of that character.

If the fact that a person has done a particular thing on a single occasion has a tendency to prove he is in the habit of doing it under similar circumstances (*Lyman* v. *Railroad*, 66 N. H. 200; *Smith* v. *Railroad*, 70 N. H. 53; *Tucker* v. *Railroad*, 73 N. H. 132), the fact that he has done it on many occasions must also have such a tendency. *Plummer* v. *Ossipee*, 59 N. H. 55, 59. In fact, the reason evidence of that character is sometimes excluded is not because it is irrelevant to the matter in issue (*Darling* v. *Westmoreland*, 52 N. H. 401, 405, 409), or because there is no logical connection between it and the fact to be proved, but because the evidence has too great a tendency to prove it. In other words, because the evidence has a tendency to excite undue prejudice. 1 Wig. Ev., ss. 55–57. It may be relevant, but inadmissible on other grounds.

Whether a man was negligent in a given situation is provable in this state by evidence of specific acts tending to show his negligent habit. "In this state specific instances of a party's negligence of the same general character of those complained of, and which are not too remote in point of time, may be put in evidence to show his negligence at the particular time, upon the theory that a person is more likely to do a thing in the way he is in the habit of doing it, when he acts thoughtlessly and without an actual intention of injuring any one." *Proctor* v. *Freezer Co.*, 70 N. H. 3, 4. Upon the same theory, it has been held that it may be shown by specific instances that a party rode "her bicycle on the sidewalk near the place of the accident," to prove "that at that time she was occupying that part of the highway." *Kenney* v. *Hampton*, 73 N. H. 45, 46. On the question whether a tree was situated so near the traveled path of a highway as to render the highway at that point defective and dangerous to people traveling thereon, evidence is admissible to show that at various times teams and carriages ran against the tree. *Griffin* v. *Auburn*, 58 N. H. 121. The character of the tree as a dangerous obstruction was proved by specific instances of danger occasioned by it. This case merely followed the decision in *Darling* v. *Westmoreland*, 52 N. H. 401, where it was held that it might be shown that a pile of lumber was likely to frighten horses, by evidence that horses passing it were frightened by it. The absence of the parties to the suit when a particular horse was frightened was unimportant. The character of the lumber pile was not affected by that circumstance. See, also, *Cook* v. *New Durham*, 64 N. H. 419.

In *Whittier* v. *Franklin*, 46 N. H. 23, the vicious character of the plaintiff's horse was shown by evidence of specific acts of viciousness, some of which were not known by the plaintiff. In *Judd* v. *Claremont*, 66 N. H. 418, it was held that evidence that a horse driven by a highway traveler had previously stumbled is competent in an action for damages from a defective highway, without proof that the fact was brought to his knowledge, when it also appears that he had opportunities for becoming informed as to the suitableness of the horse. These, and many other authorities that might be cited, illustrate the general principle that the existence of a particular trait or characteristic in inanimate objects or animals may be proved by instances of its manifestation. If the question is whether a person has the habit of becoming intoxicated, proof that he was frequently in that condition would seem to be specially apt and material, and would tend to prove that his near relatives and associates might have the opinion that he possessed that habit. *Cummings* v. *Nichols*, 13 N. H. 420, 428. The principle is well stated in *Whittier* v. *Franklin*, *supra* (*p.* 26): "The instructions to the jury as to the proof of the habits of the horse, we think were correct. It was admissible to show that the horse was vicious and unsuitable to use for such purposes, and that might be done by proof of acts not brought to the knowledge of the plaintiff, because it is not the knowledge of the particular acts that was to be brought to his notice, but of the character which those acts denote. It would, therefore, be sufficient, after showing his vicious character, to prove notice by plaintiff's admissions, and by similar acts in his presence."

Upon the issue whether Merrill believed that his niece had an irritable disposition, the fact that she had exhibited the outward manifestations of such a disposition to others would seem to be especially relevant and admissible in proof, when coupled with evidence of his declaration that he had such a belief, presumably based upon his observation of her. 1 Wig. Ev., *s.* 208. Suppose the defendant were an insane person, and her conduct toward her associates and neighbors had been such as to put them in fear of personal violence: it is not easy to explain, on logical grounds, why specific instances of that character would not be admissible evidence to show that her uncle, who had known her intimately during the period of her insanity, feared her, or that testimony that he had said he feared her was probably true. The moral quality of her conduct, as good or bad, does not affect the question of its relevancy to the fact to be proved. Evidence that she is insanely or unreasonably violent in her actions, when shown by a sufficient number of specific instances, logically proves the fact. It is not made plainer, or more obscure, by a consideration

of her moral accountability or of the fact that it is not proved by opinion evidence of general reputation. The question is, not whether she has a good or bad reputation in the community where she lives, but whether she actually has a particular trait which manifests itself in acts of violence. If she does have that trait, there is a natural presumption of fact that her uncle, who had long known her, entertained the idea that she was a woman of a violent temper. It shows that such an idea on his part was at least reasonable, and tends to substantiate the testimony that he said she was always in trouble. If the issue had been whether he thought she was benevolent or affectionate, the moral quality of her acts indicating such a character would not furnish a test of their admissibility, nor would his actual knowledge of their occurrence be essential.

Whatever rules are applied in the admission of character evidence for the purpose of impeachment (*Sargent* v. *Wilson*, 59 N. H. 396), or for the purpose of showing reputation merely (*State* v. *Forshner*, 43 N. H. 89), they are not necessarily applicable to exclude specific instances of one's exhibition of violent action, introduced for the purpose of showing that another probably entertained the idea that the former had a violent temper during their long and intimate acquaintance. Nor when used for this purpose can the evidence be excluded on the ground that its admission would authorize the inference that the defendant committed the wrong or crime charged in the suit, from the fact of her having previously done a similar wrong. *State* v. *Lapage*, 57 N. H. 245. The evidence showed merely that on several occasions she had exhibited a violent temper; and it logically follows that her uncle was likely to think she was quarrelsome. That was the natural bearing of the evidence. Whether, if he had that idea, it was in fact correct, and whether upon full investigation it would be found that she did have a violent temper, do not seem to be questions of importance in this case. To show that he might reasonably think she had that character, instances of its exhibition were competent; for the jury might reasonably infer that Merrill had often seen similar instances of excitement on her part, and that to a man of his temperament they would indicate a violent temper, which, as the testimony showed, he disliked. If she was excitable and unreasonable or quarrelsome in her relations with the members of her own family and with her neighbors,—if that was her temperament or disposition when her uncle was not present,—it would be natural to expect her conduct in his presence, or within the range of his observation, would not be materially different. The general characteristics of people do not suffer sudden and radical changes.

Whether the evidence of the defendant's exhibition of temper was too remote to be of use to the jury presents a question of fact determinable by the trial court. The admission of the evidence was based upon a finding by the court that, if competent and relevant, it might assist the jury, though relating to matters somewhat removed in point of time from the principal fact in issue. Ordinarily, the exercise of discretion is not reviewed on exception. *Cook* v. *New Durham*, 64 N. H. 419; *Beckman* v. *Souther*, 68 N. H. 381. Nor is the evidence objectionable as a matter of law because it relates to the events occurring after the principal event or transaction. The defendant's disposition to quarrel after the contract in suit was made, or after her uncle told the witness he disliked her, was as competent as her previous disposition would have been. *Chamberlain* v. *Enfield*, 43 N. H. 356, 360. "A man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date, because character is a more or less permanent quality, and we may make inferences from it either forward or backward." 2 Wig. Ev., s. 1618.

The defendant's claim that the Ward letter was improperly received in evidence, and constituted error on account of which the verdict should be set aside, cannot be sustained. It does not appear how the contents of the letter tended to disparage the credibility of the defendant. She merely insisted that her tenant should refrain from doing certain things which she understood he had no right to do; and in this view the letter was not prejudicial so far as her credibility was concerned. Its admission for that purpose, therefore, was harmless error. But so far as the letter showed that she was unreasonably insistent upon her rights as she conceived them to be, and that she was illustrating her alleged character for quarrelsomeness by seeking trouble with her tenant, it was competent for the reasons above considered. That it might have that tendency under the circumstances cannot be doubted. If the admission of the letter to impeach the defendant's veracity as a witness was harmless error, and if it had a legitimate bearing upon the question of her quarrelsomeness, for which purpose it was also admitted, manifestly no reversible error was committed by permitting the letter to be read in evidence.

The exception to the hypothetical question addressed to the expert cannot be sustained. The record shows that the ground of the objection was that the question required the witness to pass upon the issue which it was the province of the jury to determine. After assuming that a man exhibits certain peculiarities, the question required the witness to give his opinion "as to the capabilities of that individual to transact business that requires the use of

judgment." The reply was, "I should say that that person would not have the capacity to transact business in a way that you have mentioned." The inquiry related to the mental capacity of such a person to do acts requiring judgment and discretion. It did not call for expert opinion as to his ability to make a contract which would be binding in law—a position which seems to be taken by the defendant. It called for the witness' opinion as to the fact of the ability of the supposed person to exercise a reasonable or ordinary judgment in the business affairs of life. The further question, whether, if he lacked that ability, he could or could not make a valid contract, was not submitted to the witness, and he did not answer it. To say that the expert told the jury, in effect, that Merrill did not have the legal capacity to make a binding contract, is to misinterpret the testimony reported in the case and to substitute fancy for fact.

It is further urged that the question assumed facts relating to mental unsoundness which were not justified by the evidence, and that the question should have been excluded for that reason. If this contention is sound, the fact that it was not taken at the trial, where the alleged defect might have been obviated, precludes the defendant from now insisting upon it. The first objection to the question was the one considered in the preceding paragraph. The second was general in its character and did not call the attention of the court to the alleged defect that is now suggested for the first time. Under such circumstances justice requires that the defendant should not be allowed to insist upon the objection. *Carter* v. *Beals*, 44 N. H. 408; *Reagan* v. *Railway*, 72 N. H. 298; *Gendron* v. *St. Pierre*, 73 N. H. 419.

The defendant took several exceptions to the charge and to the refusal of the court to incorporate certain requests in the instructions. One point thus presented is, in the language used in the defendant's brief, that the jury were in effect instructed that "if they thought the transaction unjust and unreasonable, they could from that fact alone find unsoundness of mind, or undue influence, or both." This is an inference based upon a single sentence in the charge, which is as follows: "If the donation is unjust or unreasonable, that fact is evidence for you to consider upon the issues of sanity and undue influence, but it is not of itself a cause for revising what has been done, unless it is of such an extent as to convince you of the existence of undue influence or an unsound mind." It is admitted that in various forms of language, employed both before and after the sentence above quoted, the court instructed the jury correctly on this point. They were told that one in disposing of his property has a right to "disregard all natural ties and every idea of moral obligation, and still be within

his legal rights"; that "the right to dispose of one's property is not dependent upon the condition that the gift shall be reasonable"; that "this transaction here in question is such a one as he [Merrill] could lawfully enter into if he saw fit. And so you will at once dismiss from your minds any idea that this transfer may be set aside merely because it gives one niece a large part of his estate, and address yourselves solely to the task of ascertaining whether this gift or contract was his in fact and in law." Upon a reasonable construction of the charge, it seems plain that the court did not intend to say, and that the jury could not understand they were told, that if they thought the contract unreasonable they might from that fact alone find insanity or undue influence. That the injustice and unreasonableness of the transaction is competent evidence on those issues is conceded in argument; but it is the special unreasonableness found to exist under all the circumstances of the case relating to Merrill in his disposition of his property, and not what the jurors might think would be unreasonable for men in general to do under like circumstances, that was intended in the sentence quoted from the charge. In view of his purposes, peculiarities, prejudices, and other special considerations influencing his conduct as a sane and free moral agent, one question for the jury would be whether the transaction in question was reasonable; that is, whether it was naturally to be expected, or whether it was so in conflict with his known disposition and purposes as to be unnatural and unexplainable, or unjust and unreasonable, from his point of view when sane and subject to no undue influence. If the single remark of which complaint is made is susceptible of the construction given it by the defendant, and if that statement of the law is incorrect, it does not follow that the jury disregarded the other parts of the charge bearing on the same subject and rendered their verdict because of the erroneous remark. It does not plainly appear that they were misled thereby, or that they were likely to adopt the erroneous construction suggested. "Taken as a whole," it is not apparent "that the charge was very liable to lead the jury to this erroneous conclusion." *Cohn* v. *Saidel*, 71 N. H. 558, 571; *Lord* v. *Lord*, 58 N. H. 7, 11; *Cooper* v. *Railway*, 49 N. H. 209.

The court further instructed the jury, that "to be of sound mind within the meaning of the law and for the purposes of this transaction, he [Merrill] must have had a sufficient mental power to understand the nature and extent of his property, who his relatives were, and what reasonable claims, if any, they had upon his bounty"; that "if his mind was . . . practically gone, if . . . he was incapable of consecutive thought, or if he could not think at all except as some one matter was sharply thrust

upon his attention, . . . then he had not the mental capacity which is required"; and that "to sum it all up in a few words: Did he know what he was about? That is the essence of the test of sanity: Did he know what he was about?" It is objected that if this instruction is correct in determining a testator's capacity in disposing of his property, it is not applicable when the question of capacity relates to a contract, as in this case. But one theory of the plaintiff's case was, that though the transaction took the form of a contract, which was executed, it was in effect a disposition of a large part of Merrill's estate in view of his great age and approaching death. In this view, the instructions were correct.

It is believed that the foregoing substantially covers all the numerous exceptions argued by the defendant; and as no error is found, the order must be,

Exceptions overruled: judgment on the verdict.

All concurred.

Merrimack,
Dec. 3, 1907.

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BENNETT v. CONCORD WOODWORKING CO.

A master who suffers his premises to remain in a condition which he knows to be dangerous is liable for injuries resulting therefrom to a servant who has not been notified of the danger and is justifiably ignorant of its existence.

CASE, for negligence. Trial by jury and verdict for the plaintiff. Transferred from the October term, 1906, of the superior court by *Wallace*, C. J., on the defendants' exceptions to the denial of motions for a nonsuit and the direction of a verdict in their favor.

While the plaintiff was working at a bench saw in the defendants' factory, a piece of wood called a core dropped through a hole in the floor of the room above the one in which he worked, fell upon a moving pulley, and was projected by the pulley against his eye, causing the injury complained of.

Martin & Howe, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. It is the master's duty to use ordinary care to notify his servants of all the dangers peculiar to his premises, of which

he has knowledge and they are ignorant; and they assume the risk of those which they know are incident to the condition of the premises. 1 Labatt M. & S., *ss.* 54–66. The test, therefore, to determine whether the master is responsible for an injury caused by the condition of his premises is to inquire (1) whether the servants appreciated the risk incident to that condition; (2) if they did not, whether he appreciated it; (3) if he did appreciate the condition, whether it was abnormal,—that is, such a condition as a man of average prudence would not suffer to exist; and (4) if the condition was abnormal, whether he used ordinary care to notify his servants of the dangers incident thereto. Wood M. & S., *ss.* 414, 415. Ignorance without fault on the part of the servants and knowledge—or its equivalent, culpable ignorance—on the part of the master (*Nashua etc. Co.* v. *Railroad*, 62 N. H. 159, 163) must both be shown before it can be found that the master is in fault for the condition of his instrumentalities.

The condition of the defendants' premises of which the plaintiff complains is that there was nothing to prevent cores from rolling into the hole in the floor, that the machine which made them was so close to the hole that cores were liable to roll into it, and that the hole was so located with reference to the machinery in the room below that cores rolling into it were liable to fall on a pulley and be projected toward the saw at which the plaintiff worked. The defendants admit that it can be found from the evidence that this was an abnormal condition and that they failed to notify the plaintiff of the dangers incident thereto, but they contend that the evidence does not warrant a finding either that they did, or that the plaintiff did not, appreciate the risk. Since the plaintiff must establish both of these propositions in order to charge the defendants with responsibility for his injury, he cannot recover unless it can be found from all the evidence (1) that he was not and (2) that they were at fault in not appreciating that risk.

1. The evidence shows that when the plaintiff was at work at the saw he could see the hole in the floor, but was unable to observe whether it was so located that cores would be likely to roll into it, or whether there was anything to prevent such an occurrence. He testified that he did not know where the cores were made, or that the hole was unguarded, or that any cores had ever rolled into or fallen through the hole. Although he also testified that during the three months he worked for the defendants he had occasionally been in the room where the cores were made, and had frequently seem them on the floor of the room in which he worked, it can be found that he did not know of the physical

conditions which caused his injury, much less appreciate the risk incident to those conditions; for it cannot be said as matter of law that he knew the hole was unguarded from the mere fact that he had been in the room where it was, nor that he knew where the cores were made from the fact that he had visited the room where such work was done and had seen them about the floor of the room in which he was employed. The question is not whether that evidence would justify a finding that the plaintiff knew the hole was unguarded and that cores were liable to roll into it, but whether that is the only conclusion that can be drawn from all the evidence, including his own testimony.

2. The defendants admit that they knew of the physical conditions which produced the plaintiff's injury and that cores occasionally rolled into the hole in the floor, so this issue is narrowed down to the question whether it can reasonably be found that they ought to have anticipated that a core would be projected against the plaintiff by the pulley. The evidence relevant to that issue shows that one Fauchier had been struck a violent blow by a core while at work just back of the spot where the plaintiff stood at the time of his injury. The violence of the blow tends to prove that the core was projected against Fauchier in some way. The cores are round pieces of wood, about an inch thick and from an inch and a half to two inches in diameter; and it is obvious that if a piece of wood of that size were merely dropped on a man's head from the floor above it would not deal him a violent blow, even if the distance were fourteen feet, as in this case.

It could reasonably be found that the core which struck Fauchier was projected against him in some way; and since there was no evidence to show that it could have been projected in any other way, it can be found that it was thrown by the moving pulley, as obviously might have been the case. The jury might find, therefore, that if the defendants did not know that the core which injured Fauchier was projected from a moving pulley, they were at fault; and if that fact were found, the conclusion would be warranted that the defendants should have anticipated a similar injury to the plaintiff unless they took some precautions to prevent cores from rolling into the hole in the floor.

Exceptions overruled.

All concurred.

Hillsborough,
Dec. 3, 1907.

CHABOT *v.* DAVIS.

One who pleads self-defence to an action of trespass for assault is only required to show that his acts apparently were reasonably necessary to repel the plaintiff's attack.

TRESPASS, for assault. Defence, justification on the ground of self-defence against an attack by the plaintiff. Trial by jury and verdict for the defendant. Transferred from the May term, 1907, of the superior court by *Peaslee*, J. The plaintiff excepted to a refusal to charge the jury as follows: To sustain a plea of self-defence, the defendant must show either that he retreated to avoid the encounter, or that retreat was impossible or was attended with great danger.

Osgood & Osgood, for the plaintiff.

George A. Wagner, for the defendant.

CHASE, J. Whether, if the defendant had killed the plaintiff and this action was an indictment for the homicide, the charge requested would be proper (4 Bl. Com. 184, 185; 2 Bish. Cr. Law, *s.* 548, *et seq.*) need not be considered; but that the plaintiff was not entitled to the charge in the present action is elementary law. It was one of the defendant's "natural, essential, and inherent" rights to do whatever apparently was reasonably necessary to be done, to repel the plaintiff's attack. *Dole* v. *Erskine*, 35 N. H. 503; *Towle* v. *Blake*, 48 N. H. 92; *Aldrich* v. *Wright*, 53 N. H. 398. Whether his acts were within the requirements of reasonable necessity, under the circumstances, was a question of fact, which presumably was properly submitted to the jury for decision.

Exception overruled.

All concurred.

Hillsborough, Dec. 3, 1907.

BEAN & a., *Apt's*, v. BEAN & a.

BOND, *Ap't*, v. SAME.

A legatee who contests the executor's claim of ownership of part of the testator's property may be awarded reasonable compensation for counsel fees and expenses, to be paid out of the funds of the estate; and his right to such remuneration is not dependent upon his success in the litigation.

PROBATE APPEALS. The cases are those reported in 71 N. H. 538 and in 72 N. H. 444, in which the appellees moved for an allowance of counsel fees and expenses. Transferred from the May term, 1907, of the superior court by *Peaslee*, J.

The appellants are executrices of the estate of John D. Bean, and the property in question was willed to them for life. The remainder was willed to the appellees. Only a part of the latter joined in the employment of counsel. It was ordered that so much of the fees and expenses as should be determined to have been reasonably incurred for the benefit of the fund should be paid by the estate, and the appellants excepted.

Burnham, Brown, Jones & Warren, for the plaintiffs.

Mitchell & Foster, for the defendants.

WALKER, J. As executrices, it was the duty of the appellants to protect and conserve the estate committed to their care. But as they were personally interested in the property in question, claiming adversely to the estate to be the absolute owners of it, the interests of the estate in it were in fact protected by the intervention of one or more of the legatees, the appellees. That such intervention was reasonably necessary and prudent, the result of one of the suits seems to establish. *Bean* v. *Bean*, 71 N. H. 538. The result of that suit added to the estate or trust fund certain property which the executrices claimed to own individually. A finding by the superior court that the appellees are equitably entitled to reasonable compensation on this account out of the trust fund presents no error of law. *Burke* v. *Railroad*, 62 N. H. 531.

The fact that the appellees did not succeed in the second suit (*Bond* v. *Bean*, 72 N. H. 444) does not conclusively show that they may not also be entitled to remuneration from the estate for

the expenses incurred therein. It is merely a circumstance bearing upon the reasonableness of the services and the good faith in rendering them for the estate. In legal effect, they represented the estate as much as though they had been the executors of it. *Bean* v. *Bean*, 71 N. H. 538, 540.

Exception overruled.

All concurred.

Hillsborough, Dec. 3, 1907.

FARNHAM v. ANDERSON.

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The objection that evidence adduced by the adverse party is insufficient to warrant a verdict in his favor cannot be first interposed after a submission of the case upon its merits, unless the facts presented by the record disclose that the deficiency is incapable of being supplied.

ASSUMPSIT. Trial by jury, resulting in a disagreement. Transferred from the May term, 1907, of the superior court by *Peaslee*, J. The facts are stated in the opinion.

Walter E. Kittredge and *Taggart, Tuttle, Burroughs & Wyman*, for the plaintiff.

Hamblett & Spring, for the defendant.

BINGHAM, J. This case was submitted to the jury upon its merits, without a motion for a nonsuit, a verdict, or judgment having been interposed by the defendant. The jury disagreed and were discharged. The defendant then moved for judgment, on the ground that the evidence in the case would not warrant a verdict for the plaintiff on the issue raised by the pleadings. The motion was denied, and the defendant excepted. We are therefore called upon to consider whether the question of the sufficiency of evidence to support a material issue in a case can be raised by a motion made at this stage of the proceedings.

This is not the first time the question has been before the court. An examination of the cases discloses that it has been held that the moving party waives his right to call in question the sufficiency of the evidence to sustain such an issue, when his motion is not seasonably made; and that it is not seasonably made after the case has been submitted to the court or the jury. If the motion is interposed after that time, the presumption is, unless the

facts in evidence disclose the contrary, that the deficiency in the evidence is capable of being supplied; but as the plaintiff then has no opportunity to supply it, the motion comes too late.

In *Brown* v. *Insurance Co.*, 59 N. H. 298, 307, a motion of this character was held to be seasonable if made not later than the close of all the evidence. In *Baldwin* v. *Wentworth*, 67 N. H. 408, which was an action of trover for a yoke of oxen and other cattle, a motion made by the defendant, after the charge of the court had been delivered and the jury were about to retire, that the jury be instructed "that on the evidence the plaintiff could not recover for the oxen," was held to come too late; that "the defendant could not lie by until after the evidence, arguments, and charge to the jury were closed, and then first avail himself of an objection that was open to him, and which in fairness he ought to have taken as soon as the evidence of the plaintiff was closed, or, at latest, when the evidence was closed on both sides."

In *Lane* v. *Hill*, 68 N. H. 275, which was an appeal from the probate of a will, the jury disagreed upon the first issue submitted to them, but upon the second and third issues returned a verdict for the plaintiff. The plaintiff then moved for judgment, on the ground that the evidence introduced by the defendant to show a revocation of the will was insufficient in law for that purpose; and although there was no evidence upon which a finding of a revocation could be sustained, the court held—the question being reserved without a ruling—that the plaintiff "having suffered the case to go to the jury upon this issue without objection, her motion comes too late after the failure to find a verdict." In *Elwell* v. *Roper*, 72 N. H. 585, 586, *Gendron* v. *St. Pierre*, 73 N. H. 419, 424, and *Kidd* v. *Traction Co.*, *ante*, 160, 175, the position is also taken that a motion addressed to the legal sufficiency of evidence to support a material issue comes too late if made after the case has been submitted to the jury.

The motion in this case having been made after the issue raised by the pleadings had been submitted to the jury, and as the facts presented by the record do not disclose that the deficiency in the evidence is incapable of being supplied, the same result follows. It is unnecessary to consider the circumstances under which a motion for judgment *non obstante veredicto*, or a motion in arrest of judgment upon an adverse verdict, may properly be made, or the questions that may be raised by them. It may, however, be said that it has not been understood that the question of the legal sufficiency of evidence to sustain a material issue could be so raised. *Lovell* v. *Sabin*, 15 N. H. 29, 37; 23 Cyc. 826 e.

Exception overruled.

All concurred.

Hillsborough,
Dec. 3, 1907.

DUSSEAULT *& a. v.* ASSOCIATION CANADO-AMERICAINE.

Evidence that the members of a society were admitted to a fraternal order, upon the express agreement that those above a certain age should be insured for a less sum than the death benefit provided by the constitution, warrants a finding of estoppel against a beneficiary who claims the larger sum upon the death of a member in the excepted class.

ASSUMPSIT, to recover $1,000 alleged to be due upon a benefit certificate issued by the defendants to Alfred Dusseault. Transferred from the May term, 1907, of the superior court by *Peaslee*, J., upon an agreed statement of facts.

The defendant corporation is a mutual benefit and fraternal order. Under the constitution in force in 1899, its membership was limited to French-Canadian Catholics between eighteen and fifty years of age at the date of initiation. One of its objects was to establish a benefit fund, from which might be paid to the duly authorized appointee a sum not exceeding $1,000 upon the death of a member. The fund was to be created by each member paying one dollar on his admission to the association, and renewing the same upon the death of each of his fellows. The payment at each death was fixed at one dollar until the number of persons insured exceeded 1,000, when the payment by each member was to be proportional to the surplus. There were four classes of members. After the membership reached 1,000, there was no provision under the constitution of 1899 for the payment of a smaller death benefit than $1,000. At the date of the death of Alfred Dusseault the membership was over 9,000.

The executive powers of the association were vested in a High Court, composed of ten members, which had the right to admit to the association "societies already existing," and to fix the "price of admission" in such cases. On November 16, 1899, Dusseault was a member of a local society in Franklin, composed of seventy-eight members. Prior to that date one Francour, an organizer duly appointed by the High Court, had proposed that the Franklin society join the defendant association as a subordinate court. At a meeting of the Franklin society, held September 20, 1899, the organizer stated that all members of the society over fifty-five years old would be required to pay the regular death assessments and would be entitled to a death benefit of only $500. The society voted to join the association, was admitted as a subordinate lodge on November 16, 1899, and its members became members of

the association, their names being entered upon the books of the High Court at Manchester.

Although Dusseault's name was entered in "Class A, $1,000," the certificate issued to him on December 29, 1899, called for the payment of $500 to the beneficiary, Adele Dusseault, in the event of his death. Dusseault regularly paid the death assessments and contributions for sick benefits required of members of Class A. The defendants have refused to pay $1,000 to the beneficiary, although duly notified of Dusseault's death, but tendered her $500 and have always been ready to pay that sum. Judgment was ordered for the plaintiffs for $500, and they excepted.

Branch & Branch, for the plaintiffs.

Aime E. Boisvert, for the defendants.

BINGHAM, J. The plaintiffs' contention is that the High Court had authority to admit members of an existing society to membership in the defendant association as a body and without regard to whether any or all of them were over fifty years of age, but that it was without authority to admit them separately; that when the Franklin society became a subordinate court of the association, all of its members, irrespective of their ages, upon the payment of one dollar became entitled under the constitution of 1899 to a certificate of insurance for $1,000; and that after they had become members, the High Court had no authority to limit the amount for which those over fifty-five years of age could be insured, by issuing to them a certificate for $500; in other words, that their membership fixed their rights under the constitution, which could not be limited or abridged by any subsequent action of the High Court.

But the trouble with this contention is that it omits from its consideration certain essential facts which seem to be determinative of the plaintiffs' right. The decree of the court to which the plaintiffs excepted, and in which it was ordered that they should recover the sum of $500, includes a finding that the society of which Dusseault was a member became a subordinate court, and its members members of the defendant association, upon the express agreement and understanding that Dusseault and such others as were over fifty-five years of age could not be insured for more than $500, and that the society having become a subordinate court and Dusseault having been admitted to membership upon this understanding, the plaintiffs, who claim through him, are estopped to claim any further sum. This finding is not inconsistent with the facts specially found, and would sustain the

decree; and such being the case, the only question raised by the plaintiffs' exception is whether there was any evidence upon which the finding could be based. That there was such evidence is not difficult to perceive.

It appears that at a meeting of the Franklin society, held September 20, 1899, the High Court through its duly appointed officer submitted a proposition in behalf of the association, upon which the society could become a subordinate court and its members members of the association, one of the terms of which was "that all members of the society over fifty-five years old would be required to pay the regular death assessments and would be entitled to a death benefit of only $500"; that the society voted to accept the proposition and was admitted to the association; and that shortly afterward a certificate of insurance was issued to Dusseault, calling for the payment of $500 upon his death to the plaintiff, his wife. It is also clear upon the evidence that the High Court could have declined to admit the society to membership in the association had it not agreed to the proposition submitted to it, and that the association changed its position by admitting it to membership. The case presents no error of law.

Exception overruled.

All concurred.

Grafton,
Dec. 3, 1907.

HERBERT v. STEELE *& a.*

In an action to determine the location of a boundary line, evidence of the grantor's acts and declarations prior to the conveyance is not admissible, if its effect is to change the terms of the deed and not to remove a latent ambiguity therein.

TRESPASS *quare clausum.* Trial by the court and verdict for the plaintiff. Transferred from the May term, 1907, of the superior court by *Pike*, J.

The controversy relates to the location of the dividing line between the plaintiff's land on the north and the defendants' land on the south. One Hutchins formerly owned both tracts, and in 1893 conveyed to the plaintiff the northerly tract by a deed describing it in part as follows: Beginning at a certain point in a certain highway—the same being in the line of Herbert's farm—"and following the middle of said highway south about fifty rods to a

point about two rods from a white pine tree, about two feet through, stand east of the said point in the highway and running about east from said tree over or near a large boulder stone; and thence to a pine tree, marked, on the bank of the pond; thence north on said pond to said John Herbert's land; thence west on said land to the bounds begun at. The pine tree is the south one on the bank of the pond, and is marked with a cut on the west side and on the north side." The defendant Steele acquired title to the southerly tract from Hutchins' estate in 1905.

The parties agree as to the location of the starting point of the southerly line of the tract conveyed to Herbert. A line running from this point south forty-two degrees east passes within three or four feet of the southerly end of a boulder which is five or six times larger than any stone on or near the disputed tract, to a pine tree on the bank of the pond, marked with a cut on the west and north sides, and being the southerly pine of those in the vicinity. The cuts on this pine were probably made about 1893. The plaintiff claims to this line. The defendants claim to a line running from the starting point south sixty-seven degrees east. This line passes over "a large boulder stone" one fifth or one sixth as large as the one above mentioned, to a pine on the bank of the pond, being the southerly one of two standing in the immediate vicinity, but not the southerly one of those in the locality. There is a mark upon the west side of this tree and another upon the east side, made perhaps not more than four or five years ago by cutting the bark half way through. There is no mark on the north side. There are several marked birches and small trees on this line. Two small birches near the pine are marked on the sides toward it, they being near an old lumber road running north and south, built eighteen or twenty years ago and having blazed trees upon its side. The distance between the pines at the easterly ends of the two lines is eight rods; and the controversy is as to the title of the triangular tract between the two lines. It was found that the first line above mentioned is the one described in the plaintiff's deed, and that no other line answers the description sufficiently to render the description ambiguous.

The defendants excepted to the exclusion of proffered testimony, that just before the deed was made Hutchins and the scrivener went upon the land with a view of determining where the southerly line should be, that Hutchins marked the trees on the last mentioned line and declared that the land to be sold to the plaintiff was to be bounded by this line, and that they returned to Hutchins' house, where the deed was written.

Burleigh & Adams, for the plaintiff.

James B. Wallace, for the defendants.

CHASE, J. The proffered testimony was properly excluded, it appearing from the findings of the superior court, which were fully sustained by the evidence, that the effect of the testimony must be to change the terms of the deed—not merely to remove any latent ambiguity there may be in them. The defendants must procure a reformation of the deed before they can avail themselves, in an action like this, of the facts which they offered to prove.

Exception overruled.

All concurred.

Coös,
Dec. 3, 1907.

BENNETT *v.* HEBBARD & *Tr.*

Under section 5, chapter 245, Public Statutes, a non-resident landowner who sells the products of his farm through a resident agent may be summoned as trustee.

FOREIGN ATTACHMENT. Trial by the court. Transferred from the December term, 1906, of the superior court by *Stone*, J., on the defendant's exception to an order charging the trustee.

Walter C. Burbank, the trustee, is a resident of New York and the owner of a farm in Shelburne which he occupies a portion of each year. The pasture land upon the farm is let for grazing purposes, the standing grass is sold each season, and wood and timber is cut and drawn from the premises year by year. One Wilson, a resident of this state, managed the farm as agent for Burbank, and the writ was served upon him. The trustee disclosed that the principal defendant had recovered a verdict against him in the superior court for Coös county, for $166.56 and costs taxed at $24.17, in a suit arising out of contracts made and performed within this state on account of the farm, and that the same was unsatisfied.

Jesse F. Libby, for the plaintiff.

Harry G. Noyes, for the defendant.

YOUNG, J. Section 5, chapter 245, Public Statutes, provides that "a person doing business in this state . . . may be summoned upon trustee process." It is clear that the purpose of this section is to enable creditors to reach the property of their debtors in the possession of non-residents; and if the language the legislature used is capable of more than one construction, it is probable the one which will promote that purpose was intended. If, therefore, "doing business in this state" is fairly capable of a construction which will include the care of real property, it was probably the legislative intent to include within the operation of the section non-resident landowners having resident agents in charge of their property.

"Business" is a word in common use to describe every occupation in which men engage (*Goddard* v. *Chaffee*, 2 Allen 395; *People* v. *Commissioners*, 23 N. Y. 242; 5 Am. & Eng. Enc. Law 72; 6 Cyc. 260), and it is not only fairly capable of a construction which will include the care of real estate, but is in common use to describe the occupation of those engaged in the management of such property. Such persons are commonly said to be engaged in the real estate business. Since the phrase "a person doing business in this state" is fairly capable of a construction which will include a non-resident landowner, and since giving it that construction will promote the purpose the legislature had in view in enacting the section above cited, it is more probable than otherwise that it was the legislative intent that the property of debtors in the possession of such persons might be attached on trustee process under the provisions of the section.

Exception overruled.

All concurred.

Rockingham, Dec. 26, 1907.

NEW HAMPTON INSTITUTION v. NORTHWOOD SCHOOL DISTRICT & a.

Pupils who have received instruction under a contract between their parents and an institution of learning are not liable for tuition fees, if they neither requested such instruction nor promised to pay therefor.

An institution of learning which furnishes instruction under an agreement to look to a school district for compensation cannot maintain assumpsit against the pupil's parent for the tuition fees.

Under chapter 96, Laws 1901, a school district which does not maintain a high school is only liable for the tuition of children who have not received instruction in a high school or one of corresponding grade, and for such time as is required for the completion of one full course.

ASSUMPSIT. Five actions, in which the plaintiff, an approved school within the meaning of section 4, chapter 96, Laws 1901, seeks to recover in each suit the tuition of one child for the school year of 1903–04. The defendants in each case are the school district in which the pupil lived with his father, the father, and the child. All the children had taken a four years' course at an approved school before their parents sent them to New Hampton Institution, one having graduated in 1901, two in 1902, and two in 1903. The school district paid nothing for the pupil who graduated in 1901, but paid a year's tuition for those who graduated in 1902 and two years' tuition for those who graduated in 1903.

At the April term, 1907, of the superior court, the question of the liability of the defendants, or any of them, was transferred at the request of the parties, without a ruling, by *Pike*, J.

Felker & Gunnison, for the plaintiffs.

Burnham, Brown, Jones & Warren, for Northwood school district.

Eastman, Scammon & Gardner, for the other defendants.

YOUNG, J. As the facts are understood, the instruction for which the New Hampton Institution seeks to recover was furnished to the children under a contract between the Institution and the children's parents. If that is the fact, the Institution can recover from the parents, but not from the children; for it is not found that the children either requested the Institution to instruct them, or promised to pay for the instruction furnished. If, however, the instruction was not furnished by virtue of any contract, express or implied, between the Institution and the parents,—that is, if it was understood and agreed between them that the Institution should look to Northwood school district for compensation,—it cannot maintain these actions against the parents. *Concord Coal Co.* v. *Ferrin*, 71 N. H. 33.

But however that may be, neither the Institution nor the children's parents can maintain an action against the defendant district by virtue of any provisions of the common law; and neither the Institution nor the parents can recover from the district unless section 2, chapter 96, Laws 1901, gives a right of action to one or

both of them. That section is as follows: "If any town in which a high school or school of corresponding grade is not maintained neglects or refuses to pay for tuition as provided in the preceding section, such town shall be liable therefor to the parent or guardian of the child furnished with such tuition if the parent or guardian has paid the same, or to the town or city furnishing the same, in an action of contract." The section gives parents, and school districts which maintain approved schools, an action against school districts which neglect or refuse to pay tuition for which they are made liable by section 1 of the act, but it does not give one to academies and approved schools as such. *Sanborn Seminary* v. *Newton*, 73 N. H. 109. Consequently the New Hampton Institution cannot maintain an action against the defendant district; but since it can maintain an action against the parents, and they can recover of the district if they pay the Institution, the district's liability for the tuition has been considered.

The children had all graduated from an approved school before their parents sent them to the New Hampton Institution. The question of the district's liability therefore depends on whether the legislature intended, by the enactment of chapter 96, Laws 1901, to compel school districts in which approved schools are not maintained to pay the tuition of children residing therein as long as they choose to attend an approved school elsewhere, or whether the liability imposed is limited to the payment of the tuition of children who have not graduated from such a school, for such time as is necessary to enable them to take one full course. In considering this question it is immaterial when the children graduated, or who paid their tuition. The material question is whether they are such children as the legislature intended to benefit. The question therefore is: Did the legislature intend to impose an unlimited liability on such districts for the tuition of children residing therein, or did it intend to limit liability to the payment of the tuition of children who have not graduated from an approved school? It is clear that the duty was imposed on such districts because of their failure to furnish such instruction as it was thought should be available to every child in the state; in other words, one purpose of the act is to standardize the instruction which districts must provide for the benefit of the children residing therein. Since that is the purpose of the act, it is improbable that the legislature intended to compel districts failing to maintain approved schools to provide more instruction than is demanded of districts in which such schools are maintained. In the absence of evidence as to the fact, it cannot be assumed that the legislature intended to make such districts liable for the tuition of all the children living in them, for

all the time they choose to attend an approved school, unless districts which maintain schools approved for only one course are liable for the tuition of children who have taken that course, while they take another course at another approved school. It is not likely that the legislature would compel a district too poor to maintain an approved school to do more for the education of its children than is required of a district which is able to maintain such a school. It is certain that a district which maintains a school with only one course of instruction cannot be compelled to pay the tuition of children who, having taken that course, attend an approved school elsewhere. P. S., *c.* 89, *ss.* 9–13; Laws 1899, *c.* 77; Laws 1901, *c.* 96; Laws 1903, *c.* 118; Laws 1905, *c.* 19; *Ib.*, *c.* 90.

If, therefore, the legislature did not intend to impose upon districts which fail to maintain approved schools a greater duty in respect to furnishing instruction than that imposed on districts which do maintain them, the question in this case is not whether a district which maintains a school with more than one approved course can be compelled to permit children residing therein to take more than one course at that school, but is whether a district which maintains a school approved for only one course can be compelled to pay the tuition of children who, having taken that course, attend an approved school elsewhere.

Whatever duty is imposed on districts which fail to maintain approved schools is created by chapter 96, Laws 1901, as amended by chapter 118, Laws 1903. If such districts can be compelled to furnish instruction which districts maintaining approved schools are not required to provide, it is by virtue of these enactments. Section 1 of the act provides that "any town not maintaining a high school or school of corresponding grade shall pay for the tuition of any child who with parents or guardian resides in said town, and who attends a high school or academy in the same or another town or city in this state, and the parent or guardian of such child shall notify the school board of the district in which he resides of the high school or academy which he has determined to attend." Section 4 provides that "by the term 'high school' or 'academy,' as used in this act, is understood a school having at least one four years' course, properly equipped and teaching such subjects as are required for admission to college, technical school, and normal school, such high school or academy to be approved by the state superintendent of public instruction as complying with the requirements of this section, and said superintendent is authorized to approve a school maintaining any part of such course for the part so maintained." If the language of section 1, considered by itself, is capable of a con-

struction which imposes an unlimited liability upon districts failing to maintain approved schools in respect to the payment of the tuition of children who attend such schools elsewhere, it is clear, when the section is read in connection with section 4, that such was not the sense in which the legislature used it. Section 4 defines the duty imposed by section 1; and if the language of section 4 is given its ordinary meaning, the duty imposed by section 1 is limited to paying the tuition of children while they are obtaining a high-school education. Districts which maintain schools approved for a part of a high-school course—say for two years—are only liable for tuition of children for the remaining two years of the course. The fact that districts which maintain schools so approved are only liable for tuition while the children complete the course is conclusive that the legislature intended to limit the duty imposed by the act to the payment of the tuition necessary to enable the children to graduate from an approved school. Since this is so, the act is not intended to benefit children who have graduated from such a school; and consequently it must be held that the Northwood school district is not liable for the tuition of these children, either to the New Hampton Institution, or to the children's parents.

Case discharged.

All concurred.

Strafford,
Dec. 26, 1907.

GEBHARD, *Ex'x*, *v.* LENOX LIBRARY *& a.*

The jurisdiction of the court to advise an executor as to his duties will not be exercised during the pendency of proceedings in the probate court for a re-examination of the will.

BILL IN EQUITY, for the construction of the will of Mary S. Durell. Transferred from the February term, 1907, of the superior court by *Wallace*, C. J.

Daniel Hall, for the plaintiff.

Arthur O. Fuller, specially, for Edward Gebhard.

WALKER, J. It appears that the will was duly proved in common form in March, 1907, that in April, 1907, the defendant,

Edward Gebhard, an heir of the testatrix, filed a petition in the probate court asking for a re-examination of the probate of the will, and that this petition is still pending. The court is, therefore, asked to construe the provisions of a document purporting to dispose of the property of the deceased, while proceedings are pending which may show that its execution was invalid, and that the plaintiff has no title to the estate as executrix and no trust duties to perform. It does not appear that the advice sought will be of use to the plaintiff in the discharge of official duties. In such a case the court will decline to comply with the request for instructions. As held in *Carr* v. *St. Paul's Parish*, 71 N. H. 231, the jurisdiction of the court to advise in the administration of a trust is not ordinarily exercised unless the advice is necessary for the protection of the trustees.

Case discharged.

All concurred.

Hillsborough, Dec. 26, 1907.

MANSFIELD, *Adm'r*, *v.* HOLTON.

An administrator who assumes management of the decedent's realty, under an agreement with the heir to apply the net income thereof in liquidation of the debts of the estate, is chargeable with the ascertained amount of such income upon a settlement of his adminstration account; but in the event of a controversy as to the amount received from the property under the agreement, the probate court does not have jurisdiction to determine the question of net income, unless the estate has been decreed to be administered in the insolvent course.

The probate court does not have jurisdiction to inquire into an administrator's management of the decedent's realty until the estate has been decreed to be administered in the insolvent course; and jurisdiction, having once attached by virtue of such decree, is not liable to be defeated by proof that the estate is in fact solvent, but continues in full force until the administration is closed or the decree is set aside.

PROBATE APPEAL, from a decree allowing the plaintiff's first account as administrator *de bonis non* of the estate of Henry Holton, both in this state and in Massachusetts. Transferred from the January term, 1907, of the superior court by *Peaslee*, J.

The personal property of the estate was insufficient to pay the

debts, and the plaintiff agreed with the defendant, who is sole heir, to take charge of all the deceased's real estate and apply the net income thereof to the payment of debts. No account was settled in Massachusetts, it being agreed that the whole matter should be adjusted in this proceeding. In so far as the real estate is concerned, the court ruled that the management of that located in Massachusetts could, and of that located in New Hampshire could not, be made a part of the administration by agreement. The plaintiff excepted to this ruling as to real estate in New Hampshire, and the defendant as to that in Massachusetts.

George B. French, for the plaintiff.

Sam K. Paige (of Massachusetts), for the defendant.

YOUNG, J. Real estate vests in the heirs, charged with the payment of debts and administration expenses. Their interest in the property is not unlike that of a mortgagor (*Gibson* v. *Farley*, 16 Mass. 280); for they may provide the money needed to pay their ancestor's debts and the expenses of administration, and when that is done the court will refuse to license a sale of the land, even if the debts have not been paid. *Fay* v. *Taylor*, 2 Gray 154. It is therefore the duty of an administrator to accept money of the heirs for that purpose; and if he does accept it, he will be charged with it the same as if he had received it from a sale of the land. *Griswold* v. *Chandler*, 5 N. H. 492; *Brown* v. *Fessenden*, 81 Me. 522; *Campbell* v. *McCormick*, 1 Ohio C. C. 504, 508. The plaintiff managed the real estate under an agreement to apply the net income to the payment of debts; so if there was any such income while he had charge of the property, he has received money which it was his duty to apply as a part of the deceased's estate. Consequently, in this case he may be compelled as administrator to account for the net income of the real estate, although he could not be so compelled if he had managed the property for his own benefit, or for the benefit of the heirs. *Perkins* v. *Perkins*, 58 N. H. 405; *Lucy* v. *Lucy*, 55 N. H. 9.

Since the plaintiff can only be compelled to account for what he agreed to apply to the payment of debts, it will be necessary to ascertain just what the agreement contemplated should be applied for that purpose. It provided that the plaintiff should "collect all rents and profits from houses and real estate to which I am entitled as heir of the estate of Henry Holton and which are included in the Holton estate," and should "pay debts on the estate with the proceeds thus collected, also costs of repairing and keeping said real estate in rentable condition." If this language

is given its ordinary meaning, he is to account for the net income of the property as a whole—not for the net income of Massachusetts or New Hampshire property as such. Consequently, if there was some net income from the property in Massachusetts, but none from the whole property, he has not received any money from the defendant to pay the debts of the deceased, and there is nothing for which he can be compelled to account, either to the defendant or to the deceased's creditors.

The other question raised by the plaintiff's exception is whether, when the parties do not agree as to the amount of money the administrator has received from the heirs to pay the debts of the deceased, the probate court has jurisdiction of that issue; or, stated another way, whether the probate court of this state has jurisdiction of disputes growing out of, but not connected with, the settlement of an estate. It neither has such statutory (P. S., *c.* 182, *s.* 2) nor such common-law jurisdiction (*Hayes* v. *Hayes*, 48 N. H. 219, 229), nor do the cases on which the plaintiff relies sustain his contention that it has. Those outside of Massachusetts simply hold that if the administrator occupies the real estate, under an agreement to use the income to pay the debts of the deceased, he should be charged with the income as administrator. *Brown* v. *Fessenden*, 81 Me. 522; *Campbell* v. *McCormick*, 1 Ohio C. C. 504, 508; *Stiver* v. *Stiver*, 8 Ohio St. 217. To the same effect is *Griswold* v. *Chandler*, 5 N. H. 492. Although the Massachusetts cases hold that if there is a dispute as to the amount of income the administrator has received the probate court has jurisdiction to determine the controversy, they were all decided under a statute which confers such jurisdiction on the court in express terms. *Gibson* v. *Farley*, 16 Mass. 280; *Stearns* v. *Stearns*, 1 Pick. 157; *Wilson* v. *Shearer*, 9 Met. 504; *Newcomb* v. *Stebbins*, 9 Met. 540; *Palmer* v. *Palmer*, 13 Gray 326; *Almy* v. *Crapo*, 100 Mass. 218; *Towle* v. *Swasey*, 106 Mass. 100; *Brooks* v. *Jackson*, 125 Mass. 307; *Choate* v. *Jacobs*, 136 Mass. 297; *Brigham* v. *Elwell*, 145 Mass. 520.

It can serve no useful purpose to consider the effect of the defendant's exception; for whether he is right or wrong, the plaintiff cannot be charged in this proceeding with the income of the Massachusetts property. Assuming that the court could ascertain the net income from that property, it could not charge the plaintiff with it as assets in his hands for distribution; for the statute which confers jurisdiction provides, in substance, that when there is an agreement between the heirs and the administrator, the income shall be applied in accordance with it. *Brigham* v. *Elwell*, 145 Mass. 520; *Stearns* v. *Stearns*, 1 Pick. 157; *Gibson* v. *Farley*, 16 Mass. 280. Therefore if this decree is considered as a final

adjudication of the controversy in so far as the Massachusetts property is concerned, all that it establishes is that the administrator has so much money in his hands to offset any loss he may have sustained on the New Hampshire property. Since the plaintiff is only chargeable with the net income of the property as a whole, he cannot be charged with anything until it has been ascertained whether there was any such net income; but when that has been done, if there is any such income he must account for it.

Case discharged.

All concurred.

After the filing of the foregoing opinion the plaintiff moved for a rehearing, and the parties were further heard by brief.

George B. French, for the motion.

Sam K. Paige (of Massachusetts), opposed.

BINGHAM, J. The plaintiff takes the position, in his motion for rehearing, that the case finds that the estate was actually insolvent; and that as the administrator has received the rents and profits of the real estate under an agreement with the heir that he should apply the net income thereof in payment of the debts of the estate, jurisdiction is conferred, by section 13, chapter 189, Public Statutes, upon the probate court to determine the question of net income, in the settlement of the administrator's account. A sufficient answer to this contention is that the case does not find that the estate was actually insolvent. The finding upon this subject was simply that the personal property belonging to the estate was insufficient to pay the debts, that a part of the Massachusetts real estate had been sold, and that all the claims of creditors had been paid. This is equivalent to a finding that the estate was solvent; and when it is recalled that the New Hampshire real estate and a part of that in Massachusetts now remains undisposed of, and that the heir is the only party contesting the plaintiff's claim, it may well be inferred that the estate was actually solvent.

As the estate was solvent and was not decreed to be administered in the insolvent course, the question presented is whether in such case, the administrator having received the rents and profits of the real estate under an agreement with the heir to apply the net income in payment of the debts of the estate, the probate court has jurisdiction to determine the question of net income. The provision of law under which jurisdiction is claimed is section 13,

chapter 189, Public Statutes. But this section does not invest the probate court with authority to determine the net income received by an administrator from the rents and profits of real estate when the estate is solvent and there is no decree that it be administered in the insolvent course. In such case the rents and profits belong to the heir; and if the administrator receives them, he does so, not officially, but in his private capacity, with or without the authority of the heir. *Gregg* v. *Currier*, 36 N. H. 200, 208; *Lucy* v. *Lucy*, 55 N. H. 9; *Perkins* v. *Perkins*, 58 N. H. 405; *Ayers* v. *Laighton*, 73 N. H. 487, 489; Hoyt Prob. Pr. 167, 225, 226. An agreement of the parties that the net income of the real estate shall be applied by the administrator in payment of the debts of the estate will not invest the probate court with authority to determine the question, if such was the intention; for jurisdiction of the subject-matter of a controversy cannot be conferred upon a court in that way, and the right to object to the want of it cannot be lost by acquiescence or neglect. *Wright* v. *Cobleigh*, 21 N. H. 339, 341; *State* v. *Richmond*, 26 N. H. 232, 239, 240; *Tebbetts* v. *Tilton*, 31 N. H. 273, 289; *Carlisle* v. *Weston*, 21 Pick. 535, 537; *Chemung Bank* v. *Judson*, 8 N. Y. 254; *In re Walker's Will*, 136 N. Y. 20; *Collins* v. *Keller*, 58 N. J. Law 429; 11 Cyc. 673, 674, 783, 917.

The substance of the decisions in *Lane* v. *Thompson*, 43 N. H. 326, and *Ayers* v. *Laighton*, 73 N. H. 487, as to the construction of the section of the statute here under consideration, is that the phrase "in case the estate is insolvent" does not mean actual insolvency, but merely "the method adopted when the estate is being settled in the insolvent course"; that whether the estate is solvent or actually insolvent, the powers and duties of the administrator in relation to the real estate and its income do not arise until the estate is decreed to be so administered; and that meanwhile the estate is in the heirs. In the former decision it is expressly stated that "the statute does not take away from the heirs the right of possession until [there is] a decree that the estate be administered as insolvent," and that "the powers and duties of administrators in relation to the real estate" do not arise "until an estate is so administered." And the language of the court in *Goodwin* v. *Milton*, 25 N. H. 474, and in *Plummer* v. *Plummer*, 30 N. H. 566, wherein the impression is conveyed that in case of actual insolvency the heir never has a right to the possession of real estate, is questioned, and is said not to have been "intended as a statement of a general legal proposition, but as mere commentary upon the ultimate effect of actual insolvency."

As the powers and duties of an administrator with reference to the possession and income of real estate under the statute do not

arise until the particular estate is decreed to be administered in the insolvent course, so, too, the jurisdiction of the probate court to administer upon the estate in that manner does not attach so as to authorize an inquiry into the management of the real estate until such a decree is made; and jurisdiction having once attached, it is not tentative merely, and liable to be defeated upon its being shown that the estate is in fact solvent, but continues with full force until the administration is closed or the decree that it be administered as insolvent is set aside. The decree, so long as it stands and the administration is not closed, is conclusive upon the parties in interest as to the powers and duties of the administrator with reference to the real estate and of the jurisdiction of the court over the same, and is not merely *prima facie* evidence of their existence. *King* v. *Chase*, 15 N. H. 9; *MacDonald* v. *Railway*, 71 N. H. 448; *State* v. *Corron*, 73 N. H. 434.

Motion for rehearing denied.

All concurred.

Hillsborough,
Dec. 26, 1907.

MANAGLE, *Adm'x*, *v.* PARKER, *Ap't.*

A reason of appeal from the allowance of a will is sufficient if it alleges in substance that the instrument offered for probate is not the will of the testator, but a copy of a will destroyed by him, *animo revocandi*.

An amendment of a sufficient reason of appeal from a probate decree is not exceptionable merely because it sets forth additional facts and conclusions of law upon which the appellant depends.

PROBATE APPEAL, from the allowance of the will of Hannah Stevens. Trial by the court. Transferred from the September term, 1907, of the superior court by *Peaslee*, J.

The appellant assigned the following reason for her appeal: "That the said alleged will was in fact a copy of a will made by said Hannah Stevens and by her believed to be cancelled when she destroyed the copy in her possession, which she supposed and believed to be in fact her last will and testament. That said will —the one in her possession—was by her destroyed, and she intended and purposed to cancel any and all other wills by that act." The plaintiff's motion that the appeal be dismissed because no legal ground was assigned therefor was denied, and she excepted.

The appellant was granted leave to amend her reason of appeal by adding the following: "That said alleged will which is offered for probate was never intended by the testatrix to operate as her will, for that at the time of writing out and executing said alleged will certain words were crossed out and erased, whereupon on, to wit, the same day, a later will identical in substance was duly executed before the same witnesses, which said later will was intended as the only will of said testatrix, who thereafter voluntarily destroyed said later will with the intent to revoke the same; that said alleged will was as a matter of law revoked by the making of a subsequent valid will by said testatrix; that said alleged will was revoked as a matter of fact by the destruction by tearing by said testatrix of said later will, the said later will being as to its contents in substance the same as said alleged will which is now offered for probate." The plaintiff excepted to the allowance of the amendment. So far as its allowance was a matter of discretion, it was found in favor of the appellant, and was not transferred.

John O'Neill and *Burnham, Brown, Jones & Warren*, for the plaintiff.

David W. Perkins and *Taggart, Tuttle, Burroughs & Wyman*, for the defendant.

BINGHAM, J. The reason assigned as the ground of appeal is, in substance, that the will offered for probate is not the will of Hannah Stevens, but a copy of a will which she at one time made and afterward destroyed, thereby intending to revoke any and all wills by her made. Had the allegation been simply that the will offered for probate was not the will of Hannah Stevens, a sufficient reason would have been assigned. *Lane* v. *Hill*, 68 N. H. 398. In the amendment the reason given is the same as that originally assigned. It is true that additional facts and conclusions of law are stated, showing wherein the will offered for probate is not the will of Hannah Stevens, but that is permissible. *Lane* v. *Hill*, *supra*.

Exceptions overruled.

All concurred.

MEMORANDUM.

On the twenty-eighth day of December, 1907, Mr. Justice CHASE, having attained the age of seventy years, retired under the limitation of the constitution.

On the sixth day of November, 1907, Mr. ROBERT JAMES PEASLEE was appointed an associate justice of the court to fill the vacancy occasioned by the retirement of Mr. Justice CHASE, and took his seat upon the bench at the January session, 1908.

Rockingham, }
Feb. 4, 1908. }

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CHAPMAN v. NEWMARKET MANUFACTURING CO.

An unconditional deed of a right of flowage entitles the grantee to a reasonable exercise of the privilege, as against the servient estate.

CASE, for flowage. Trial by jury and verdict for the plaintiff. Transferred from the April term, 1907, of the superior court by *Wallace*, C. J.

The defendant's title is by deeds from the plaintiff's ancestor, which convey a right to flow by the use of a certain dam. The plaintiff claimed that this gave only a right to reasonably exercise the granted privilege. The court submitted to the jury the question whether the defendant "unreasonably used the water of the stream by improperly managing the dam," and the defendant excepted.

Page & Bartlett and *Ernest L. Guptill*, for the plaintiff.

Kivel & Hughes, for the defendant.

PEASLEE, J. The defendant's contention is, that because its deeds of flowage rights are absolute in form, the right conveyed is without limitation, so far as the servient estate is concerned. This is not the law here. *Abbott* v. *Butler*, 59 N. H. 317; *Franklin* v. *Durgee*, 71 N. H. 186; *Horne* v. *Hutchins*, 71 N. H. 117, 124, and cases cited; *Horan* v. *Brynes*, 72 N. H. 93, 97; *Berry* v. *Hutchins*, 73 N. H. 310, 316.

An unlimited conveyance of an easement is, in law, a grant of unlimited reasonable use. *Bean* v. *Coleman*, 44 N. H. 539, 543, 544. No express restriction was necessary to save to the grantor the use of

his land beyond reasonably necessary use by the grantee, "because nothing beyond such use was included in the grant, either expressly or by implication." *Horne* v. *Hutchins*, *supra*, 125. "There is no presumed grant of a right to exercise the easement in an unnecessary and unreasonable manner. . . . The right of the easement owner and the right of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both." *Olcott* v. *Thompson*, 59 N. H. 154, 156. "The right is not to be exercised arbitrarily whenever the one entitled to exercise it thinks proper or sees fit, but only when there is a reasonable necessity for its exercise." *Berry* v. *Hutchins*, *supra*.

The question is not whether the defendant might flow strictly according to the letter of its deeds if such flowage would be of use to it in a reasonable way, but whether it may so flow when it has no use for the water, and when the flowage would be a detriment to the servient estate and in fact unreasonable. The question is not an open one in this state.

The issue presented was one of fact and was properly disposed of as such, although the rigid rule of construction contended for by the defendant might have been more easily applied. *Franklin* v. *Durgee*, 71 N. H. 186, 191; *Moore* v. *Company*, *ante*, 305.

Exception overruled.

All concurred.

Strafford,
Feb. 4, 1908.

COLES *v.* BOSTON & MAINE RAILROAD.

An objection that proof adduced by the opposite party is insufficient to sustain a verdict in his favor is waived unless taken before the evidence is closed.

A transfer of evidence to the supreme court, without any ruling or agreement as to its sufficiency, or any finding as to facts proved thereby, presents no question of law.

CASE, for negligence whereby goods entrusted to a common carrier were lost in transit from Philadelphia to Conway Junction, Maine. Transferred from the September term, 1907, of the superior court by *Stone*, J.

A few days prior to November 13, 1904, the plaintiff, who was unacquainted with the methods employed in the shipment of freight, went to the office of the Pennsylvania Railroad, told those in charge that she wished to ship her goods to Maine, described

the property, and inquired if she must hire a car. She was asked if she wished her goods to go as reasonably as possible, replied in the affirmative, and was told that she need not hire a car if she would see that the goods were well packed and would herself come to the office when they were shipped. The person to whom she talked said that if the goods were his he "would let them go right along."

The plaintiff went to the office when the goods were shipped, saw them weighed, and paid $10.80—the sum demanded for their transportation. A few minutes later she was called to the window and given a way-bill, but nothing further was said to her. She examined the way-bill to see if her name was in it and that it receipted for her money, and then placed it in her pocket. She did not know that it limited her damages to $5 a hundred-weight until she made her claim for loss against the defendant. The goods were shipped over the Pennsylvania Railroad on November 13, 1904, and a part of them were received at Conway Junction three weeks later. The plaintiff's testimony was made a part of the case.

Counsel for the parties agreed as follows: (1) If on the foregoing facts the plaintiff can only recover $5 per hundred-weight as damages, she is to have judgment for $120 and costs; (2) if she is not limited to $5 per hundred-weight, she is to have judgment for $300 without costs.

William S. Pierce, for the plaintiff.

Kivel & Hughes, for the defendant.

PEASLEE, J. The agreement at the close of the case may fairly be construed to mean that the defendant admits its liability as a common carrier for the full value of the property, unless facts are disclosed which limit such liability. The defendant makes this admission in its brief and joins issue with the plaintiff on the question whether she is bound by the bill of lading. Both parties assume that the reported facts, taken in connection with the testimony of the plaintiff, present a question of law as to the written document being her contract.

Whether she assented to a contract was a question of fact. *Gray* v. *Jackson*, 51 N. H. 9, 12. Whether there was any evidence from which it could be found that she did not assent was a question of law. *Ib.* If the issue of fact was tried, this question of law was waived unless raised in the superior court. The sufficiency of the evidence offered to sustain a verdict upon the issue tried must be brought in question before the evidence is closed. *Elwell* v. *Roper*, 72 N. H. 585, 587.

The transferred case does not show what proceedings were had, or whether there was any trial. The difficulty of attempting to dispose of the case is thus increased. As the case stands, it contains some material facts and some evidence as to some other material facts, coupled with an agreement that if the ultimate conclusion of law is one way there is to be a certain judgment, and if it is another way there is to be a different judgment. The basic question of fact, whether the plaintiff assented to the bill of lading, was not answered, nor was the sufficiency of the evidence ruled upon. If a defendant wishes to raise the question as on a motion for a nonsuit, he must, in the absence of an agreement for a transfer without ruling, make the proper motion at the trial. *Farnham* v. *Anderson*, *ante*, 405. So far as appears, this has not been done, and the case stands as one where the evidence is transferred to this court without any ruling or agreement as to its sufficiency, or any finding of what it proved. Such a case presents no question of law. *Morse* v. *Morse*, 71 N. H. 622.

The agreement of counsel would present the case for consideration upon the facts recited, were it not that the evidence is included in the statement of facts. It may be doubtful what is meant by this admixture, but it must at least mean that the case is not to be disposed of without a consideration of the evidence in this court. The evidence must have been added for some purpose, and the only ones conceivable are those already mentioned, *i. e.*, either that its sufficiency to support a finding be settled, or that a finding be made from it. The one question is not properly raised, and the other cannot be brought here for decision.

Taking the case strictly according to its letter, a final judgment against the defendant might be rendered as the matter now stands, for it has staked its rights upon the answer to the query whether upon the "state of facts" the plaintiff's damages are limited. But as the course of the argument plainly indicates that both parties understood important questions of law were presented, and as it also appears that these questions, or some of them, may be of the substance of this controversy, justice seems to require that the case be returned to the superior court for a determination of the issue of fact as to whether, either by assent in fact or by estoppel, the bill of lading became the plaintiff's contract. If it is found to be her contract, the facts as to where the loss occurred, and whether by the defendant's negligence, may be of importance.

Case discharged.

All concurred.

Belknap,
Feb. 4, 1908.

ANDERSEN v. YOUNG.

Where want of consideration is relied upon as a defence to an action upon a promissory note, it is incumbent upon the defendant to establish a total failure of consideration, in the absence of a special plea or brief statement alleging facts which show a partial failure.

The fact that a deed of land is ineffectual to pass title thereto by reason of a defect in its execution does not establish a total failure of consideration for a note given for the purchase price, if the deed constitutes a memorandum of the contract of purchase sufficient to entitle the grantee to a decree for specific performance.

Where a contract for the sale of land is executed on the part of the purchaser by the payment of the price, it is not necessary that the memorandum of the transaction required by the statute of frauds should state the precise sum paid, if payment is acknowledged therein.

ASSUMPSIT, on a promissory note. Plea, the general issue. Trial by the court. Transferred from the March term, 1907, of the superior court by *Chamberlin*, J.

Ira A. Chase and *Stephen S. Jewett*, for the plaintiff.

Walter S. Peaslee and *Charles B. Hibbard*, for the defendant.

BINGHAM, J. This action was brought to recover the sum due on a promissory note given by the defendant in part payment for two lots of land situated in the state of Nebraska. The plea was the general issue. The defence under it was a total failure of consideration. No special plea or brief statement alleging facts showing a partial failure of consideration was filed. *Jones* v. *Houghton*, 61 N. H. 51; P. S., *c.* 202, *s.* 7. It was therefore incumbent upon the defendant to establish a total failure of consideration. *Fletcher* v. *Chase*, 16 N. H. 38, 40. The case states that "there was no failure of consideration unless such failure is the legal result of the facts herein found." It appeared that prior to May 1, 1894, one Campbell was the owner of the land, which was unimproved, vacant house-lots, and that on that day the plaintiff paid him $500 and received therefor his warranty deed of the lots, with the name of the grantee left in blank, and verbal authority to insert the name of the grantee when he procured a purchaser. The plaintiff was the only witness to the deed, and, as a commissioner for the state of Nebraska authorized to take the acknowledgment of deeds, took the acknowledgment. Shortly after receiv-

ing the deed, the plaintiff effected a sale of the land to the defendant, and inserted his name as grantee in the deed and delivered it to him. Before delivering it he explained to the defendant how the name of the grantee came to be left in blank and that he was authorized to fill it up; in fact, he informed the defendant of everything he knew relating to the execution of the deed, and there was no fraud and no attempt to deceive him. According to the law of Nebraska, which the trial court found as a fact, a person interested in a deed or the property conveyed by it is an incompetent witness, and a deed so witnessed conveys no title. It was also found that at the time the plaintiff wrote in the name of the grantee he was the equitable owner of the land. Whether this finding is one of fact, or a conclusion of law from facts found, we need not inquire. It will be assumed that the plaintiff was interested in the land and was an incompetent witness to the deed. The question then is, whether it follows as a legal consequence from the above facts that there was a total failure of consideration for the note in suit.

It should, perhaps, be said before proceeding further that the finding of the trial court as to the law of Nebraska, in the broad sense in which it is stated, is probably incorrect. In *Pearson* v. *Davis*, 41 Neb. 608, 611, 612, it is said that "a deed to real estate, executed, acknowledged, and delivered by the grantor, is valid as between the parties to it, although the same is not witnessed." If a deed is valid as between the parties to it when not witnessed, it would seem that it would not be rendered invalid, as between them, by being witnessed by a person who was incompetent. The decision in *Child* v. *Baker*, 24 Neb. 188, 201, upon which, as we infer from the defendant's second brief, the finding of the trial court was based, did not involve a consideration of rights existing between grantor and grantee in a deed, but of rights between a grantee and a subsequent purchaser from the same grantor; and, when read in the light of the decision in *Pearson* v. *Davis*, probably only stands for the proposition that the record of a prior deed which is attested by an incompetent witness is not constructive notice as against a subsequent grantee from the same grantor. If, however, the subject-matter of the conveyance had been a homestead right, the finding of the court would undoubtedly have been correct; for under the law of Nebraska a deed of a homestead is void and passes no title, even as between the parties to it, unless it is attested by a competent witness and acknowledged before a disinterested magistrate. *Horbach* v. *Tyrrell*, 48 Neb. 514; *Holmes* v. *Hull*, 50 Neb. 656; *Prout* v. *Burke*, 51 Neb. 24; *Linton* v. *Cooper*, 53 Neb. 400, 408.

But if we assume that the law as found is, as between the par-

ties, applicable to a deed of unimproved land, it does not necessarily follow, because the deed is ineffectual to pass either the legal or equitable title, that the defendant obtained nothing of value, and that there is a total failure of consideration for the note. In *Doe* v. *Doe*, 37 N. H. 268, which was a bill in equity asking, among other things, for a decree confirming and assuring title to a farm in Tamworth, it appeared that the defendant, Benjamin Doe, owned the farm and in 1834 executed a deed of it to the plaintiff, attested by only one witness; that upon receiving the deed in the spring of 1834, the plaintiff went into possession of the farm and continued in the possession and occupation of it until October, 1838, when he conveyed it to a purchaser who entered and made valuable improvements upon it; and that it was this title which the plaintiff sought to have confirmed. The act of June 29, 1829, relating to the execution of deeds, was then in force and required that a deed should be signed and sealed by the grantor, attested by two or more witnesses, and acknowledged; and it was held that under this act a deed attested by one witness only was inoperative even as against the grantor. The reasoning of the court was as follows: "By the express terms of the act, the attestation by two witnesses is made essential to render the deed 'effectual to hold the land.' Without such attestation it is equally ineffectual, *ex proprio vigore*, to give an equitable title as to pass the legal. Considered as a conveyance 'to hold the land,' whether by way of the legal or of an equitable estate, it is utterly void." It then goes on to say, that while the mere fact that the defendant intended and attempted to make a valid conveyance is no ground, of itself, for a decree that the defendant should now execute a valid conveyance, equity would grant him the relief asked for should he show he was a purchaser for value; that "the deed itself, expressing a consideration paid, might perhaps be evidence of a purchase for value," but as the answer denied "an agreement to convey and all consideration for a conveyance, . . . this denial . . . is to stand unless overthrown by plenary proof." The court then assumes that the plaintiff may upon a further hearing be able to show that he agreed with the defendant for the purchase of the farm for a valuable consideration which he has executed wholly or in part, and holds that upon such a showing he would be entitled to a decree confirming the legal title to the farm in him or his grantee.

It will be noted that this decision proceeds upon the theory, that if the plaintiff paid a valuable consideration for the farm in pursuance of a contract of purchase, and he or his grantees entered into possession and made valuable improvements, the contract would not be within the provisions of the statute of frauds and

would be enforceable in equity. It may therefore be considered an authority for the proposition, that notwithstanding a deed of land may, as between the parties to it, be invalid to convey title, legal or equitable, because, under a statute regulating conveyances by deed, two witnesses are essential to its taking effect as a deed, nevertheless, as the instrument expresses a consideration paid, it may be evidence of a purchase for value; and that if a contract of purchase and a payment of a valuable consideration are proved, and valuable improvements are shown to have been made, equity will decree a conveyance of the legal title, no rights of innocent purchasers for value having intervened. Has the defendant shown such a state of facts as will preclude him from invoking this equitable remedy? If he has not, he has failed to make out his defence.

It does not appear that any rights of innocent third parties have intervened; but it does appear that the plaintiff procured an irrevocable power of attorney from Campbell to sell the lots, that in pursuance of it he effected a contract of sale with the defendant, that the defendant has executed the contract on his part by the payment of a valuable consideration, and that Campbell has executed a warranty deed of the lots. It is to be presumed that the deed was in the ordinary form. This being so, it stated a consideration for the purchase, acknowledged its receipt, and described the subject-matter of the sale. Although the deed was executed in blank as to the grantee, the defendant's name as one of the contracting parties was inserted before the deed was delivered, and this was done with the defendant's knowledge and with the authority of Campbell. It seems, therefore, that the deed is a sufficient memorandum to identify the parties and the subject-matter of the contract, within the requirements of the statute of frauds. *Gardels* v. *Kloke*, 36 Neb. 493. It would even have been sufficient as a deed under the law of Nebraska to convey the legal title if it had been properly witnessed; for according to the law of that state, if an owner of land delivers to his agent a deed thereof executed in blank as to the grantee, with authority express or implied to insert the name of the purchaser and perfect the conveyance, and he does so in good faith, the title will be conveyed. *Garland* v. *Wells*, 15 Neb. 298.

The defendant further contends that the memorandum required by the statute of frauds must be sufficient not only to identify the parties and the land, but also the price, without a resort to parol evidence; and that while it may be presumed that the deed states a consideration and acknowledges its receipt, such a statement is not a statement of the agreed price and as such conclusive upon the parties. An objection similar to this was interposed in the

case of *Fugate* v. *Hosford*, 3 Littell 262, where the memorandum did not state the price, but contained a statement acknowledging that the vendor had "received value in full," and the court in answer to the objection said: "Where the contract is executory on both sides, it is doubtless necessary that the land sold and the price should be both evidenced by some memorandum in writing and signed by the party to be charged, as the statute requires; but where the contract is executed on the part of the purchaser, by the payment of the price, and that fact is evinced by written evidence, as in this case, it would seem, according to the reason of the thing, sufficient, without stating the precise price. There is in such a case nothing to be ascertained by parol proof, for the purpose of enforcing such a contract; and, of course, the danger of frauds and perjuries in setting up parol agreements, to guard against which was the object of the statute, is not in such a case to be apprehended. We cannot, therefore, think that the statute constitutes a good defence." To the same effect see: *Sayward* v. *Gardner*, 5 Wash. 247, 255; 2 Reed St. Fr., s. 593; 20 Cyc. 269, note 62.

As the deed is a sufficient memorandum of the contract of purchase to entitle the defendant in a court of equity to a decree for specific performance, he has failed to establish a total failure of consideration.

Having failed to make out this defence, the defendant further contends that, inasmuch as he has not obtained all that he contracted for, it would be inequitable to allow the plaintiff to recover the amount of the note and interest, and that he should be relieved from paying the note upon filing in court a reconveyance of such title as he has received. Whether it would be equitable to permit him to do this (*Towle* v. *Lawrence*, 59 N. H. 501; *Nelson* v. *Hall*, 60 N. H. 274; *Wiswall* v. *Harriman*, 62 N. H. 671), or whether, as the defect in his title is due to a faulty execution of the deed and not to a want of title in the grantor, it would be more equitable to permit the plaintiff to have judgment upon filing in court a deed of the land properly executed (*Hobbs* v. *Hobbs*, 58 N. H. 81), is not found. When this fact is found, and a deed is filed in compliance with it, the superior court will enter judgment accordingly.

Case discharged.

All concurred.

Hillsborough,
Feb. 4, 1908.

BOUCHER *v.* LAROCHELLE.

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Where there is some evidence tending to establish negligence on the part of the defendant and the likelihood of its causing the injury complained of, the question of its weight is for the jury.

The rule that the jury cannot be permitted to determine by conjecture between two equally probable causes of injury, for one only of which the defendant is responsible, has no application unless the existence of a sufficient cause aside from the negligence charged is conceded or conclusively proved.

Where an injury complained of is the natural and probable result of the negligence charged, a wrongdoer cannot set up as a defence the bare possibility of loss if his wrongful act had never been done.

CASE, for causing the death of the plaintiff's intestate by the negligent administration of chloroform. Trial by jury and verdict for the plaintiff. The defendant moved for a nonsuit upon the ground that there was no evidence of the cause of death. The motion was denied, and he excepted. Transferred from the January term, 1907, of the superior court by *Peaslee*, J.

Branch & Branch, for the plaintiff.

David W. Perkins and *Cyprien J. Belanger*, for the defendant.

PARSONS, C. J. The defendant was employed to set a broken bone in the arm of the plaintiff's child, an infant of the age of seventeen months. For the purpose of the operation he administered chloroform, and before the operation was completed the child died. The plaintiff offered evidence tending to show that death may result from the negligent administration of chloroform and of the defendant's lack of care in administering it likely to produce this result. While the evidence was not without contradiction and was not entirely clear and convincing, it cannot be said there was not some evidence tending to establish each of these propositions. There being some evidence, the question of its weight was for the jury. It was for them to determine what amount or weight of competent evidence was sufficient or insufficient to convince their minds and warrant them in determining the matter of fact in dispute. *Deschenes* v. *Railroad*, 69 N. H.

285, 289; *Felch* v. *Railroad*, 66 N. H. 318, 323; *Fuller* v. *Rounceville*, 29 N. H. 554, 563, 564. From these facts, in the absence of other sufficient cause for the child's death, the jury could infer that the death resulted from the defendant's lack of care. There would be a direct and visible connection between the negligence charged and the injury complained of.

But the defendant contends that, conceding there was some evidence of the character stated, the conclusion that the death resulted from the negligence proved would be a mere surmise or conjecture, because it appeared from the evidence that the mere administration of chloroform to persons in a certain rare and obscure pathologic condition is sufficient to cause death, and that the fracture of a bone may cause a fatal embolism. The claim is that the death of the child may have been due to its condition, or may have been the direct result of the fracture; and that therefore the plaintiff failed to prove that the defendant's negligence was the cause of death. Using the word "proof" in the sense of demonstration to an absolute certainty, the defendant's contention could probably be sustained. No such burden rested on the plaintiff. He was not bound to exclude all possible causes of death. He was required only to make it more probable than otherwise that the fact was as he claimed it. The rule of *Deschenes* v. *Railroad*, 69 N. H. 285, that the jury cannot be permitted to determine by guess or conjecture between two equally probable causes of the injury, for one only of which the defendant is responsible, has no application unless the existence of a sufficient cause or causes for the injury, aside from the negligence charged, is conceded or conclusively proved.

Whether the child's condition was such that the mere administration of chloroform was a sufficient cause of the fatal result, or whether an embolism resulting from the fracture was the cause of the injury, are questions of fact upon which the case discloses little, if any, evidence. If there was evidence tending to establish either cause, it must be assumed in the present posture of the case that the jury were properly instructed as to its legal effect in the decision of the controversy submitted to them, if they found either contention sustained. It is common knowledge that death does not ordinarily follow the proper administration of an anesthetic, or immediately result from a fractured humerus. The defendant's motion for nonsuit could not be sustained upon the ground suggested, except upon the assumption that one or the other of these claims was conclusively proved by evidence which, in fact, went little farther than to suggest the possibility of their existence. The case is not one of a choice between two or more probable causes conceded to exist, but involves merely the power of

the jury to determine as matter of fact the non-existence of the causes which the defendant claimed, if existent, would render the cause of death doubtful.

Where the evidence discloses no connection between the injury and the negligence charged, except a bare possibility that the former resulted from the latter, there is nothing for the jury where it is also possible the injury may be due to other causes. *Deschenes* v. *Railroad*, 69 N. H. 285; *Dame* v. *Car Works*, 71 N. H. 407; *Reynolds* v. *Fibre Co.*, 73 N. H. 126. But where the injury is a natural and probable result of the negligence charged, a wrongdoer "cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done." *Davis* v. *Garrett*, 6 Bing. 716, 724; *Baltimore etc. R. R.* v. *Reaney*, 42 Md. 117; *Beauchamp* v. *Company*, 50 Mich. 163,—45 Am. Rep. 30. It was for the jury to determine what inference should be drawn from the fact that neither party secured or asked for an autopsy.

Exception overruled.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
Feb. 4, 1908.

CUNNINGHAM *v.* C. R. PEASE HOUSE FURNISHING CO.

A tradesman who represents that stove polish sold by him may be safely used upon a hot stove is equally liable to the purchaser or to a member of his family, who is injured by an explosion of the compound.

One who purchases stove polish upon the representation that it may be safely used upon a hot stove, and is injured by an explosion of the compound, may maintain an action of deceit against the vendor if the representation was made with knowledge of its falsity, and an action of negligence if the statement, although honestly believed to be true, was made upon insufficient knowledge and without such an investigation as ordinary care demanded.

CASE, for personal injuries caused by an explosion of stove blacking. The declaration contained a count under sections 26 and 28, chapter 126, Public Statutes, and a count in negligence. A demurrer to the first count was sustained, and the question of the correctness of the ruling was reserved. There was a trial by jury upon the common-law count. At the close of the plaintiff's evidence a nonsuit was ordered upon the defendants' motion, and

the plaintiff excepted. Transferred from the September term, 1906, of the superior court by *Pike*, J.

The plaintiff's evidence tended to prove that the manufacturers of a stove blacking advertised it in Nashua, stating that it was for sale by the defendants. The plaintiff's mother saw the advertisement, called at the defendants' store, and asked a clerk if the blacking they were advertising was intended for stovepipes or for stoves. He replied that it was intended for stoves, and said that "the warmer the stove, the better it works." She replied, "Won't that be fine; I can black my stove without letting my fire go out." Relying upon the representation that the blacking could be safely used on a hot stove, the mother bought a can. Two days later the plaintiff, a member of her mother's family, used some of the blacking on a hot stove and an explosion resulted, causing the injuries complained of. The plaintiff and her mother were blamelessly ignorant of the fact that the blacking contained naphtha.

Doyle & Lucier, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. The defendants' position is like that of one who "puts destructive . . . materials in situations where they are likely to produce mischief." *Ricker* v. *Freeman*, 50 N. H. 420, 432. Such a person must respond in damages to those who are injured because of his acts, if he either knew or ought to have known that the materials were dangerous and that the persons injured might come in contact with them. *Hobbs* v. *Company*, *ante*, 116; *Scott* v. *Shepherd*, 3 Wils. 403; *S. C.*, 2 W. Bl. 892; Cool. Torts 78.

Although the defendants probably did not have the plaintiff in mind when they sold the blacking to her mother, they knew the mother bought it to use on her stove and that other members of the family were likely to use it; consequently the plaintiff can recover, if her mother could have recovered had she been injured instead of the plaintiff. The defendants will not be prejudiced by the assumption that the plaintiff cannot recover if her mother could not and by the omission to consider whether the situation might not be such that recovery might be had against both the mother and the defendants. *Ricker* v. *Freeman*, 50 N. H. 420, 432. The case therefore is considered as though it were an action by the mother. The declaration does not sound in either assumpsit or deceit. Whether she could maintain an action for a breach of warranty need not be considered; and whether she could recover for deceit will be considered only so far as is necessary to

distinguish between facts constituting an intentional injury and those constituting a negligent one.

The common law imposes upon the seller the duty to refrain from falsely representing material facts for the purpose of misleading the buyer. The seller may praise the good qualities of his wares as much as he pleases, and is not bound to disclose their defects to the buyer, even if he knows of them and is aware that the buyer believes he is purchasing sound goods. But if, for the purpose of inducing the prospective buyer to change his position, the seller sees fit to make any representation, either express or implied, in respect to facts which are material to the subject-matter of the sale, he must tell the truth. *Shackett* v. *Bickford*, *ante*, 57; *Spead* v. *Tomlinson*, 73 N. H. 46, 61; *Stearns* v. *Stearns*, 63 N. H. 99; *Rowell* v. *Chase*, 61 N. H. 135; *Springfield* v. *Drake*, 58 N. H. 19; *Pettigrew* v. *Chellis*, 41 N. H. 95; *Hanson* v. *Edgerly*, 29 N. H. 343; *Mahurin* v. *Harding*, 28 N. H. 128.

The defendants admit their liability for an intentionally false statement of fact, but contend that they are not liable for a false statement honestly believed to be true, though negligently made. Although there are authorities which sustain that position (*Derry* v. *Peek*, 14 App. Cas. 337; *Angus* v. *Clifford*, [1891] 2 Ch. 449, 470), it is not the view which obtains in this jurisdiction. In this state, a person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he sustains in an action of deceit when the maker of the statement knew it to be false, and in an action of negligence when he ought to have known it to be so. *Shackett* v. *Bickford*, *supra*; *Hewett* v. *Association*, 73 N. H. 556; *Pittsfield etc. Co.* v. *Shoe Co.*, 71 N. H. 522; *Edwards* v. *Lamb*, 69 N. H. 599; Judge Jeremiah Smith in 14 Harv. Law Rev. 184.

If, therefore, the defendants' false representation that it was safe to use the blacking on a hot stove was the cause of the plaintiff's injury, the facts that they thought the statement was true and had no intent to deceive do not necessarily bar her right to a recovery. Proof of those facts would merely require her to prove facts not essential to her case if the representation was deceitfully made. If the representation was deceitful, she could recover by showing that their fault contributed to cause her injury; but if it was merely negligent, she must show that it was the sole cause of her injury. 14 Harv. Law Rev. 188. The reason for this is, that the law makes it the duty of every one to use ordinary care to avoid being injured by another's negligence; but it imposes on no one the duty to use such care to avoid being injured by another's intentionally wrongful act. In actions for negligence, contributory negligence is a defence; in actions for intentional injuries, it is not.

There is a difference, also, between intentional and negligent wrongs, as to the facts necessary to establish the defendant's fault. If an injury is intentionally inflicted, proof that the defendant did the act establishes his fault; but where negligence is charged, proof of the act must be supplemented by proof that the average man would not have done it. So in this case, if the defendants, for the purpose of inducing the plaintiff to buy the blacking, told her it could be safely used on a hot stove, and they neither knew nor cared whether their statement was true or false, they would be liable. *Shackett* v. *Bickford*, *ante*, 57; *Spead* v. *Tomlinson*, 73 N. H., 46, 61. But if they had no thought of deceiving her, it would not be enough to show that they made the representation; she must then go further, and show that the ordinary man would not have made it. 14 Harv. Law Rev. 188. The test, therefore, to determine whether the defendants were in fault for making the representation is to inquire whether the ordinary man, having no more knowledge of the situation and its dangers than the defendants are shown to have had, would have told the plaintiff it was safe to use the blacking on a hot stove. . . .

It cannot be said as a matter of law that the ordinary man would have made such a representation, unless it is common knowledge that the average man who engages in trade is accustomed to tell his patrons, not what he believes to be the truth in respect to his goods, but what he thinks will induce them to buy. It can be found from the evidence that the defendants thought the plaintiff was looking for a blacking to be applied to a stove in which there was a fire, and that they represented the blacking sold to the plaintiff as safe to use in that way, for the purpose of inducing her to purchase it, when they either knew that the representation was false, or did not know it to be true. It is not common knowledge that the ordinary man is accustomed to make such representations to induce customers to buy his goods; and it cannot be said as a matter of law that an ordinary man selling a new blacking would affirm that he knew it would do all, and more than all, its makers claimed for it, when in fact he knew nothing of its qualities and had done nothing to inform himself as to the soundness of the makers' claims.

The plaintiff was entitled to go to the jury on the common-law count. The demurrer to the statutory count was properly sustained, for it is not alleged that the defendants sold the blacking as an illuminating oil (P. S., *c.* 126, *s.* 26), or that they sold naphtha under an assumed name. P. S., *c.* 126, *s.* 28.

Exception sustained.

PEASLEE, J., did not sit: the others concurred.

Coös,
Feb. 4, 1908.

LANCASTER *v.* COÖS COUNTY.

To gain a pauper settlement under clause 9, section 1, chapter 83, Public Statues, residence in the town for the prescribed period, taxation of the poll for the specified term, and payment of taxes legally assessed during the term are essential; and the acquisition of such settlement is prevented by a failure to comply with the statutory requirements in any particular.

In an action to determine the liability of a town for the support of certain paupers, evidence of any facts prior to ten years preceding the date of application for support is immaterial.

ASSUMPSIT, for aid furnished to certain paupers from April 2 to June 1, 1907. Transferred from the September term, 1907, of the superior court by *Pike*, J.

For ten years prior to April 1, 1904, Fred Louden resided in Lancaster and paid all poll taxes assessed against him. He moved to Berlin some time in the early part of 1904, and his taxes were abated in Lancaster for that year. In September, 1905, he returned to Lancaster. He died in 1906. Upon the foregoing agreed facts, it was ruled that the paupers, who are Louden's widow and minor children, had no settlement in Lancaster and were a charge upon the county. To this ruling the defendants excepted.

Bernard Jacobs, for the plaintiffs.

J. Howard Wight, solicitor, for the defendants.

PARSONS, C. J. "No town shall be liable for the support of any person unless he, or the person under whom he derives his settlement, shall have wholly gained a settlement therein during the ten years preceding the last date of application for support." Laws 1903, *c.* 106, *s.* 1; Laws 1897, *c.* 31, *s.* 1. The paupers derived their settlement, if any, from Fred Louden, the husband and father. P. S., *c.* 83, *s.* 1, *cl.* I, II. His settlement, if any, was gained under the ninth clause of section 1, chapter 83, Public Statutes. To gain a settlement in this mode, residence in the town for seven years, taxation of the poll for seven successive years, and payment of all taxes legally assessed during the term are required. Residence, taxation of the poll for the specified term, and payment are all essential. Failure to comply with the statute in either particular will prevent a settlement.

Warren v. *Wentworth*, 45 N. H. 564; *Bradford* v. *Newport*, 42 N. H. 338; *Berlin* v. *Gorham*, 34 N. H. 266; *Springfield* v. *Enfield*, 30 N. H. 71, 75, 76; *Tamworth* v. *Freedom*, 17 N. H. 279; *Henniker* v. *Weare*, 9 N. H. 573; *Burton* v. *Wakefield*, 4 N. H. 47; *Weare* v. *New Boston*, 3 N. H. 203.

As the settlement must have been wholly gained within ten years preceding the application for support, evidence of any facts prior to the same date ten years before—April 2, 1897—is immaterial. The case stands precisely as if the person whose settlement is claimed to have been acquired came into the town for the first time on April 2, 1897. *Andover* v. *County*, 37 N. H. 437, 440; *Andover* v. *County*, 46 N. H. 180.

Whether Louden gave up his residence in Lancaster so early in 1904 that he did not reside there seven years after April 1, 1897, is not clear from the statement that he "moved to Berlin some time in the early part of 1904." If he abandoned his residence in Lancaster prior to April 1, 1904, neither residence nor legal taxation of his poll for seven years in succession is shown. If he did not leave until after April 1, his failure to pay the tax of 1904 is sufficient to prevent his gaining a settlement within the prescribed time. His payment of the tax of 1897 is immaterial, since that tax was imposed on April 1, more than ten years before the application for aid. Taxation on that day is no more material than his residence in Lancaster on the same day, on which ground only could the tax have been assessed against him. P. S., *c.* 57, *s.* 1. In the absence of any suggestion of error by brief or argument in behalf of the county, no ground is perceived upon which to question the ruling of the superior court.

Exception overruled.

All concurred.

Coös,
Feb. 4, 1908.

74 440
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DISALETS v. INTERNATIONAL PAPER CO.

A master who is aware of his servant's ignorance is bound to instruct him as to the proper method of doing dangerous work and to warn him as to the special hazard attendant upon the course he is likely to adopt if uninstructed.

A master who provides improper appliances is liable to an ignorant servant who is injured while using them by the direction of a fellow-servant.

In an action to recover for injuries sustained by a boy eighteen years old while working about dangerous machinery, the plaintiff's age may properly be considered by the jury upon the question of appreciation of the risk.

Where the justices sitting in a case are equally divided in opinion upon a question of law arising on exception, the ruling of the superior court stands.

CASE, for personal injuries suffered by the plaintiff by having his hand and arm drawn in between the calender rolls of a paper machine, while in the employ of the defendant in its mill at Berlin. Trial by jury and verdict for the plaintiff. Transferred from the December term, 1906, of the superior court by *Stone*, J.

The plaintiff's evidence tended to prove the following facts: For more than a year the plaintiff had worked as fourth hand on the machine at which he was injured. It was one of his duties as fourth hand to oil the calender rolls of that machine while they were in motion, and he had performed that duty ten or twelve times a day during the entire term of his employment. It was customary to promote the fourth hand to the position of third hand. While employed as fourth hand the plaintiff had an opportunity to observe the third hand at work, and he had applied for promotion to that position and considered himself competent to do the work incumbent upon him, if promoted. It was not until the night of the accident, however, that he was given an opportunity to work as third hand, and he had been engaged in this capacity for about two hours when he received his injury.

The calender rolls consist of a "stack," ten or eleven feet high, comprising eleven metal cylinders, placed one above the other, the power being attached to the bottom roll, the others revolving by their own weight. The two lower rolls are composed of cast iron faced with steel and are much larger than the others, except the top roll, which at the time of the accident was chained high up above the stack and was not in use. The smallest rolls are ten inches in diameter and weigh 1,800 pounds each. The calender rolls when revolving are hot and are used for the purpose of putting the finish on the paper, which passes alternately in and out of the rolls, guided from one to the other by means of a piece of iron, bladelike in appearance, and known as a feed. There is a foot-board in front of the stack and about three or three and a half feet from the floor, so situated that a person standing upon it and facing the calenders has a clear and unobstructed view of the stack, every other roll being free from paper and in plain sight.

After the plaintiff had been working for about two hours on the night of the accident there occurred what is known as a break in the paper. This break caused the paper to wind around the rolls, and the plaintiff, knowing that it was his duty as third hand to

assist in removing from the rolls the paper which had thus accumulated, asked the machine-tender for a knife with which to perform this task; but the machine-tender, not having a knife in his possession, pointed to a file which he was accustomed to use for a similar purpose. This file was not an instrument furnished by the defendant company, but one which the machine-tender himself had used for his own convenience or protection, as other men furnished their own jack-knives and used them. The plaintiff, taking this file and mounting the foot-board, attempted to remove the paper, and while so engaged caught his hand in the revolving rolls and was drawn in "as far as between the hand and elbow."

When a break occurs, the proper way ordinarily to get the paper off the roll is to use an appliance called a feed, or when it cannot be done in that way to use a jack-knife, by which the paper can be cut and removed; but in using a knife a quick slash should be given on the bottom of the roll turning toward the workman, to avoid having his hand drawn in between the rolls. A file is a dangerous tool to employ for this purpose unless the workman understands how to use it, but one had been so used by the third hands in the defendant's mill. When the plaintiff was employed as third hand on the night of the accident, he received no instructions as to how the work should be done and no warning as to the dangers incident to it. While working as fourth hand, he had seen the men go to the rolls when there was a break, taking knives with them, but on those occasions his duties were such that he had no opportunity of observing just how they did the work. When the machine-tender, Caird, pointed out the file, the plaintiff did not know it was not a proper tool to use for removing the paper. He struck the paper about the middle of the roll, instead of at the bottom, when his hand was caught, thinking that was the most convenient place.

The defendant's motions for a nonsuit and for the direction of a verdict in its favor were denied, subject to exception. The defendant excepted to the refusal of the court to charge the jury that the fact that the plaintiff was eighteen and a half years old should not be considered upon the question of his appreciation of the risk, to the instruction that "mere knowledge of the danger will not preclude the plaintiff from recovering unless he appreciates the risk of the danger," and also to the court's refusal to instruct the jury that Caird, in telling the plaintiff to use the file in cleaning the roll, did not represent the defendant corporation.

There was evidence that the calender stack did not have a friction clutch, a device by means of which the motion of the rolls could be stopped in a few seconds, that other similar machines in the same mill were supplied with such clutches, and that at the

time of the plaintiff's injury the machine could not be stopped for several minutes, or until the power could be shut off at the engine. The defendant excepted to the admission of this evidence, and also to the following argument of the plaintiff's counsel: "If this machine had had a friction clutch, and with it the machine could have been stopped in six seconds, I claim this boy would not have lost more than a finger. The evidence shows you that the machine could have been stopped in six seconds. Think of that, as compared with ten minutes of agony the boy endured. . . . I claim here is evidence of defective machinery. It was not reasonably safe; and if it had been equipped with a friction clutch, this boy's arm might have been saved, even though his fingers were severed."

Sullivan & Daley and *Enoch Foster* (of Maine), for the plaintiff.

Drew, Jordan, Shurtleff & Morris and *Rich & Marble*, for the defendant.

WALKER, J. The defendant's motions for a nonsuit and for a verdict were properly denied. The plaintiff was properly allowed to introduce evidence tending to show that it required some degree of skill to safely remove the paper that accumulated on the rolls when there was a break, and that observation of how it was done by those who had had experience in the work, or instruction by competent persons, was reasonably necessary before a person of the plaintiff's age, understanding, and mental acuteness would discover the proper and safe way of doing the work. The evidence also authorized the inference that the plaintiff had had no opportunity for such observation, and that he had received no instruction how to proceed. The jury were warranted in finding, also, that he did not in fact know that there was a safer method than the one he adopted, and that the defendant ought to have known that the plaintiff did not know how to do the work in a safe manner and did not understand that he was adopting a specially dangerous method. Upon the assumption that these facts existed, it became the legal duty of the defendant to instruct the plaintiff, whom it directed to do the work of a third hand, how to do the work and to warn him of the danger of doing it in the way he was likely to do it if uninstructed. The fact that the plaintiff knew that if he allowed his hand to be drawn in between the rolls he would suffer injury is not important. The gist of the plaintiff's case is that he did not know and appreciate the peculiar and extra hazard of doing the work in the way he did it. He was directed to do work without instructions which

could be done in a reasonably safe way, but which was attended with increased hazard if done in some other way; to discover the safe way skill was required; hence the defendant ought to have instructed him. In this respect the case differs materially from *Hicks* v. *Paper Co.*, *ante*, 154, in which it was held that there was no evidence that special skill was required for one to know and appreciate the danger of doing what Hicks attempted to do. And it is there said (*p.* 157): "If there was special danger in the process not apparent to the observation of an unskilled workman, or if special skill was required to enable one to do the work in safety, the defendants' failure to warn or instruct the plaintiff might be found to be the cause of the injury."

There was no error in the refusal of the court to charge that Caird was acting as the plaintiff's fellow-servant when he told him to take the file to clean the paper from the roll. There was evidence that the use of a file for that purpose, though it was dangerous, was not an uncommon occurrence in the defendant's mill; and the jury might have found from the evidence that its use in that way was known to, and ratified by, the defendant; in effect, that it was furnished by the defendant as a proper tool for that use, so far as the plaintiff was concerned. Upon this view of the evidence, it would be immaterial what relation Caird sustained to the plaintiff when he directed him to use the file. He used the instrument which the defendant provided, or which the defendant permitted to be used in its mill, without knowing it was a dangerous tool to be used for that purpose. *Lapelle* v. *Paper Co.*, 71 N. H. 346, 349. Under the circumstances, the jury were warranted in finding that the file was a dangerous tool to use for cutting off the paper from the revolving rolls, that the plaintiff did not know or appreciate that fact, and that it was furnished by the defendant for such use. Upon that theory the defendant's liability for its breach of duty is plain.

The defendant's request for an instruction that the jury should not consider the plaintiff's age (eighteen and a half years) upon the question of his appreciation of the risk was properly refused. Whether one understands the perils of his work to such a degree that he is thus enabled, in the exercise of reasonable care for his safety, to protect himself, involves a consideration of his age, intelligence, experience, and special knowledge relating to the situation, as evidentiary facts. To hold as a positive proposition of law that the plaintiff's age had no bearing upon that question would be illogical and unreasonable. As evidence, it may have been of little weight; but it was the province of the jury to determine that question.

Upon the defendant's exceptions to the evidence of the want of a friction-clutch attachment on the machine, and to the remarks of the plaintiff's counsel in argument upon this evidence, in view of the charge to the jury, the members of the court sitting in the case are equally divided, and no decision thereon has been reached. The result under these circumstances is that the ruling of the superior court must stand (*State* v. *Sunapee Dam Co.*, 72 N. H. 114, 144), and the order must be,

Exceptions overruled: judgment on the verdict.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
Feb. 8, 1908.

SHEEHAN *v.* MAYOR AND ALDERMEN OF MANCHESTER. 74 445 | 74 457

In the determination of an election contest, each branch of the city councils, as well as the city convention, acts in a judicial capacity, and the conclusions reached are final as to matters of fact; the superintending power of the court being limited to the correction of errors of law apparent upon the record, or to requiring action by the body refusing to entertain a contest.

Where the allegations of a petition to a board of aldermen present a contest as to an election and make it the duty of the petitionees to determine the controversy, a refusal of the board to hear competent evidence is error, correctible by *mandamus* directing the board to proceed with a hearing.

Whether a claimant of the office of alderman, or the occupant of the seat, was duly elected thereto, is determinable by the decision, upon competent evidence, of the question as to which party received the larger number of legal votes, or for whom the larger number of legal votes were intended; and this is a question of fact for the statutory tribunal, whose decision is not correctible by the court.

A petition for a writ of *certiorari*, brought for the purpose of reviewing the action of a board of aldermen in an election contest, presents no question for the consideration of the court when it appears that the plaintiff has expressly waived any claim based upon a denial by the board of opportunity for a full trial before it.

PETITION, for a writ of *certiorari*. The plaintiff alleged that he and one Barry were candidates for alderman from Ward 5, Manchester, in November, 1906. Barry was, and the plaintiff was not, the regular nominee of their party. After the moderator had

counted the ballots he declared that Barry had received 553 votes, that the plaintiff had received 464 votes, and that Barry was elected alderman, and the clerk issued an election certificate in accordance with that declaration. In December, the plaintiff procured an inspection of the ballots, which showed that he had received 487 votes, and that notwithstanding Barry's name was not erased from 517 ballots marked with a cross in the circle over the column in which his name appeared, on thirty-six of these ballots there was a cross in the square opposite the plaintiff's name. The plaintiff contested Barry's right to a seat in the board of mayor and aldermen; but the board, having been advised that the law required the thirty-six ballots in dispute to be counted for Barry, refused to hear him. The defendants' demurrer was sustained, and the plaintiff excepted. Transferred from the May term, 1907, of the superior court by *Peaslee*, J.

James A. Broderick, for the plaintiff.

George A. Wagner and *Burnham, Brown, Jones & Warren*, for the defendants.

PARSONS, C. J. "Each branch [of the city councils] shall be the final judge of the election and qualification of its members, and if any election is contested shall have the same powers to ascertain the facts as the city convention have in regard to the election of mayor." P. S., *c.* 48, *s.* 11. "In case the election of mayor is contested, the city councils in convention shall have power to send for persons and papers, may inquire into the correctness of the returns, and shall hear and receive evidence as to any fraud or misconduct in relation to the election." P. S., *c.* 47, *s.* 3. In the determination of an election contest, each branch of the city councils, as well as the city convention, acts in a judicial capacity, and the conclusions reached are final as to matters of fact and cannot be otherwise inquired into. The superintending power of the court is limited to the correction of errors of law apparent upon the record, or to requiring the body to act if they refuse to entertain a contest. *Cate* v. *Martin*, 70 N. H. 135; *Cate* v. *Martin*, 69 N. H. 610; *Pittsfield* v. *Exeter*, 69 N. H. 336; *Attorney-General* v. *Sands*, 68 N. H. 54; *Gregg* v. *Goodrich*, 67 N. H. 543. "The form of the process required for the exercise of this power is not material. . . . 'On a sufficient petition, the question is whether there is an error correctible by the superintending power, and not whether . . . it is correctible on writ of error, writ of false judgment, *certiorari*, *mandamus*, *audita*

querela, or prohibition.' " *Manchester* v. *Furnald*, 71 N. H. 153, 157; *Boody* v. *Watson*, 64 N. H. 162, 172, 173.

In his petition to the board of aldermen the plaintiff alleged that at the election to that office for the term in dispute from Ward 5 in Manchester he received more votes than any other person; that by a false and fraudulent count and declaration one Barry was declared elected and a certificate of election issued to him. These allegations presented a contest as to the election and made it the duty of the board to hear the parties and determine the controversy. The board granted the plaintiff an opportunity to present his claims by counsel, and at the conclusion of the statement of his contentions, made by counsel, without going into the evidence gave the plaintiff "leave to withdraw." If upon any evidence competent upon the question, producible under the statement of the plaintiff's counsel, it could have been found that Sheehan and not Barry was entitled to the office, the plaintiff should have had an opportunity to lay the evidence before the board; and the refusal of the board to hear the evidence would be error, correctible (treating the petition as in the nature of an application for *mandamus*) by an order directing the aldermen to proceed with the hearing. The issue whether the plaintiff or Barry was elected is determined by the decision, upon competent evidence, of the question who received the larger number of legal votes, or for whom were the larger number of legal votes intended. *Attorney-General* v. *Colburn*, 62 N. H. 70. This is a question of fact for the decision of the statutory tribunal, whose decision is not correctible by the superintending power of the court.

The evidence suggested by the plaintiff's counsel consisted of the moderator's count and declaration and the facts appearing and to be inferred from the ballots. *Attorney-General* v. *Megin*, 63 N. H. 378; Cool. Con. Lim. (6th ed.) 788; 15 Cyc. 418; 2 Wig. Ev., *s.* 1351; 10 Am. & Eng. Enc. Law 827. Conceding the plaintiff's claim as to the thirty-six ballots in dispute, the evidence is conflicting—the declaration tending to show that Barry was elected, and the ballots that Sheehan was. The only remedy, therefore, to which the plaintiff can be entitled in any view of the law is a direction to the board of aldermen to proceed with the hearing. But in the superior court the plaintiff expressly waived any claim based upon a denial by the board of opportunity for a full trial before it. As the court in the exercise of its superintending power cannot try the fact, the ruling of the superior court upon this waiver, that it did not appear that there was error which the court can review, must be sustained. The case therefore is at an end unless the plaintiff obtains leave to withdraw his waiver.

The controversy relates to the evidential force of thirty-six bal-

lots marked by a cross in the circle over the party column in which Barry's name appears and also by a cross in the square at the right of Sheehan's name, which appears in another column. It is contended that the provision of the statute (Laws 1897, *c.* 78, *s.* 17) —"unless cancelled or erased, all names in the party columns under the circle marked by the voter shall be counted, to the exclusion of all others"—is unconstitutional as an unreasonable regulation of the right of suffrage, and as an attempted legislative decision of the weight of evidence—a purely judicial question. The only manner in which Sheehan could be harmed by the alleged unconstitutionality of this provision would be if the board, having found on competent evidence that these ballots were intended as votes for Sheehan, or were not intended to be votes for Barry, nevertheless counted them for Barry and found that it was necessary to so count them to elect him. Neither of these facts is alleged. It does not appear upon what ground the aldermen refused to hear the contest. The petition therefore does not show error of law in the action sought to be reviewed.

As these objections might be obviated by amendment, the constitutional question argued by the plaintiff has been considered; but it cannot be decided in this action because the justices sitting in the case are equally divided in opinion thereon. As the matter stands, an amendment will not avail anything. The order is,

Exception overruled.

PEASLEE, J., did not sit: the others concurred.

Merrimack,
March 3, 1908.

BICKFORD v. BICKFORD.

Under section 18, chapter 175, Public Statutes, the court has power to revise and modify an order as to custody and maintenance of a child, made in accordance with an agreement of the parties to a proceeding for nullity of marriage.

The mere fact that a woman entered into a void contract of marriage during the lifetime of her lawful husband does not conclusively prove that she is "the guilty party," within the meaning of section 13, chapter 175, Public Statutes.

Where a decree has been made annulling a marriage and providing for the custody and maintenance of a child, an attempt to question its validity

upon a subsequent application for an extension of the allowance is a collateral and not a direct attack upon the judgment of nullity.

The superior court may entertain a petition for the annulment of a marriage which is made absolutely void by statute.

PETITION, for the extension of an order made upon a decree of nullity of marriage. Transferred from the April term, 1907, of the superior court by *Chamberlin*, J.

The original petition was filed by the plaintiff, Nellie F. Bickford, in October, 1903, and alleged that at the time of her marriage to the defendant she had a former husband living, who, as she had been informed and then believed, had secured a divorce from her; but that at the date of the petition she was informed and believed that no such divorce had been secured. Upon this petition there was a decree annulling the marriage and an order, based upon an agreement of the parties, that the defendant pay to the plaintiff $30 a month for the support, care, and education of Arthur F. Bickford, the child of their marriage, until he should arrive at the age of fourteen years,—the defendant to have access to Arthur F. at reasonable times. The child reached the age of fourteen years in July, 1907.

In April, 1907, the plaintiff petitioned the court for an extension of the order. The defendant appeared, and a hearing was had at which the question litigated was the reasonableness of the sum named in the order. The following decree was entered: "Order extended for two years from the fourteenth birthday of Arthur F. Bickford." The defendant objected that the court was without jurisdiction over the subject-matter of the decree, and moved that the order be vacated for that reason. The court then filed an order which, after reciting the previous order and stating that a full hearing on the merits had been had, concluded as follows: "This order is now amended to read as follows: Ordered, that the defendant pay to the plaintiff the sum of thirty dollars on the last day of each month until Arthur F. Bickford is sixteen years old, said defendant to have access to said Arthur F. Bickford at all reasonable times. This order is not based upon any agreement of the parties; neither was the above quoted order."

The defendant excepted on the ground that the court has no jurisdiction of the subject-matter and no authority to impose upon the defendant any order for support under the circumstances stated in the original petition for annulment.

Albin & Sawyer, for the plaintiff.

Henry F. Hollis, for the defendant.

PARSONS, C. J. The court had power to revise the order originally made as to custody and maintenance of the child, and to make such new orders with reference thereto, or as to alimony or an allowance to the wife, as might be necessary. P. S., *c.* 175, *s.* 18; *Wallace* v. *Wallace*, *ante*, 256. So far as the order excepted to relates to the custody of the child of the annulled marriage, it was authorized by section 13, chapter 175, Public Statutes: "In all cases where there shall be a decree of divorce or nullity, the court shall make such further decree in relation to the maintenance, education, and custody of the children as shall be most conducive to their benefit." So far as it provides for an allowance to the wife, it is supported by the following section (*s.* 14): "Upon a decree of nullity or divorce, the court may restore to the wife all or any part of her estate, and may assign to her such part of the estate of her husband, or order him to pay such sum of money, as may be deemed just." The defendant contends that the order cannot be supported under the final clause of the preceding section, which, immediately following the portion above quoted, is: "And may order a reasonable provision for their support to be made by the guilty party, or out of his estate."

The superior court appears to have heeded the objection of counsel and to have substituted for the provision for the child's support, under which it is claimed the order could be made against the "guilty party" only, an allowance to the wife, as to which the statute contains no such provision. *Cross* v. *Cross*, 63 N. H. 444, 446. The present order makes no reference to the support of the child. The only objection that appears to it is that it is not warranted by the pleadings, as the relief given differs from that asked for in the present proceeding. No objection is made on this ground; but if made, it can be obviated by an amendment of the petition. But assuming that the order was intended to provide for the support of the minor child of the parties as matter of law (as it was doubtless expected it would as matter of fact), and reference to the support of the child was omitted from the order by accident and not by intention, the order is not beyond the power of the court upon the facts stated. It is urged that such an order could not be made against the defendant unless the defendant was the "guilty party." Whether this language was intended to apply to proceedings founded upon a decree of nullity may be open to doubt; but assuming that it does, whether the defendant was or was not the party through whose guilt the illegal marriage was contracted was a question of fact. Bish. Mar. & Div. (1st ed.) 267. If there was no evidence of the fact before the court, it was the duty of the defendant to call attention to that fact before the case was submitted, if he

relied upon it as a defence. Having submitted the case without objection to the insufficiency of the evidence, the objection comes too late after verdict. *Chapman* v. *Company*, *ante*, 424; *Farnham* v. *Anderson*, *ante*, 405.

But it is claimed that, as the plaintiff's prior undissolved marriage rendered the marriage between the parties void, she must be regarded as the guilty party. It is clear that she was the party ineligible to enter into the contract; but that the legislature intended to make ineligibility to marry, rather than moral fault, the ground upon which the support of the children of the marriage should be imposed upon one of the parties, is not probable. The defendant in this case may be responsible for the plaintiff's belief that her former husband had secured a divorce. He may have entered into the marriage knowing that there was no divorce and that the plaintiff believed there had been. See *Bonaparte* v. *Bonaparte*, [1892] P. D. 402. To call the plaintiff the guilty and the defendant the innocent party under such a state of facts would be such a perversion of language that it cannot be considered to have been within the legislative purpose. There is no evidence of such a state of facts in this case; but the defendant made no issue on the question of his guilt, if that was material, and did not object to the absence of evidence of the fact when he had his day in court, and cannot now object that the trial court has construed the absence of objection on this ground as an admission that he is the guilty party, so far as his guilt is necessary to sustain the order made.

The defendant further contends that the order as to custody and support, or custody and alimony or allowance, is invalid because, as he says, upon the allegations of the original petition the court was without authority to make the decree of nullity upon which the order is founded, and claims that such objection is a direct attack upon the judgment of nullity. "A direct attack upon a judicial proceeding is an attempt to avoid or correct it in some manner provided by law." Van Fleet Col. At., *s.* 2. Such attack upon a judgment improperly rendered may be made by a motion to bring forward the action and vacate the judgment. "If the defendant is entitled to relief, this is the appropriate form of remedy. It is comparatively speedy and inexpensive." *Clough* v. *Moore*, 63 N. H. 111, 113; *Moore* v. *Carpenter*, 63 N. H. 65; *Reed* v. *Prescott*, 70 N. H. 88. If a court has jurisdiction of the parties and the proceeding, its judgment, however erroneous, is valid until reversed or set aside and cannot be collaterally attacked. *Spaulding* v. *Groton*, 68 N. H. 77, 78; *Fowler* v. *Brooks*, 64 N. H. 423, 424; *Lawrence* v. *Smith*, 45 N. H. 533. The revisory power over orders as to alimony, allowance, and custody made upon a

decree of divorce or nullity, given by section 18, chapter 175, Public Statutes, does not open upon an application thereunder the decree of divorce or nullity upon which such orders may have been based. *Ela* v. *Ela*, 63 N. H. 116, 121; *Folsom* v. *Folsom*, 55 N. H. 78, 81. There has been no application by either party to revise the decree of nullity, and no ground has been suggested upon which a new trial could be granted. The defendant's objection to the competency of the decree of nullity as a foundation for the order to which he excepts is a collateral—not a direct—attack upon the judgment. Van Fleet Col. At., *ss.* 3, 17.

As there is no question of jurisdiction of the parties, the only ground upon which he can sustain the claim that the decree is void is the want of jurisdiction of the court by which it was made over the subject-matter of the suit. Such jurisdiction is conferred by article 75 [76] of the constitution: "All causes of marriage, divorce, and alimony . . . shall be heard and tried by the superior court, until the legislature shall by law make other provision." This jurisdiction has not been taken away by the legislature; on the contrary, it is provided by section 4, chapter 204, Public Statutes, that "the court, at the trial terms, shall take cognizance . . . of petitions for divorce, nullity of marriage, alimony, custody of children, and allowance to wife from husband's property for support of herself and children." By the act of 1901, establishing the present organization of the courts, the superior court are given "original jurisdiction of all actions, appeals, processes, and matters and things" which were then cognizable by the supreme court at the trial terms. Laws 1901, *c.* 78, *s.* 2. The proceeding was a petition for nullity of marriage—a marriage cause, in the language of the constitution; the superior court had, both by the constitution and the statute, power to hear and determine it. The decree made therein, if erroneous, is not void and cannot be attacked collaterally.

The defendant relies upon sections 1 and 2 of chapter 175 of the Public Statutes, which are as follows: "Section 1. All marriages prohibited by law on account of the consanguinity or affinity of the parties, or where either has a former wife or husband living, knowing such wife or husband to be alive, if solemnized in this state, shall be absolutely void without any decree of divorce or other legal process. Sect. 2. If any doubt exists whether any marriage is void, or as to the effect of any former decree of divorce or nullity between the parties, a libel may be filed as in other cases, and a decree of divorce may be made."

The sections first appear, substantially in their present form, in 1842. R. S., *c.* 148, *ss.* 1, 2. The first section makes void a marriage within the prohibited degrees of consanguinity or affinity,

which otherwise might be held to be only voidable. *Hayes* v. *Rollins*, 68 N. H. 191. As to a marriage between parties one of whom is then married, the statute is a statement of the common law by which such a marriage is a mere nullity—absolutely void. 1 Bl. Com. *436; 2 Kent 79; Bish. Mar. & Div., *ss.* 200, 201, 205. The second section substitutes the more accurately designated decree of nullity for the decree of divorce in such cases authorized by the act of 1791 (Laws, *ed.* 1830, *p.* 157; Laws, *ed.* 1797, *p.* 295), but does not in terms confer jurisdiction upon the court to determine such causes, or deprive the court of power otherwise existing. *True* v. *Ranney*, 21 N. H. 52, 55; *Keyes* v. *Keyes*, 22 N. H. 553, 555. There appears to be no express mention in the statutes of the jurisdiction of the court over causes for nullity of marriage, until 1867 (G. S., *c.* 189, *s.* 2); but the court in *True* v. *Ranney*, *supra*, considered "the power of the court to make such a decree and to regulate the mode of procedure" as beyond doubt—a conclusion reaffirmed in *Keyes* v. *Keyes*. In view of these decisions and the provisions of the statutes cited *supra* now in force, the jurisdiction of the court over causes of nullity of marriage, without reference to the sections cited by the defendant, is too clear to be open to discussion.

If a marriage is void, strictly no proceedings are necessary, since the invalidity of such a marriage may be relied upon in any court and in any proceeding between any parties, whether the question is directly or collaterally in question. *Emerson* v. *Shaw*, 56 N. H. 418, 420; *Mountholly* v. *Andover*, 11 Vt. 226; Bish. Mar. & Div., *s.* 46. But the fact that the marriage was known to be void did not take away the power of the ecclesiastical court in England to declare it invalid. *Andrews* v. *Ross*, L. R. 14 P. D. 15, 16, and cases cited. Although there may be no doubt in the minds of the parties, "yet, practically, it is often of the very highest importance, both to individuals and to the community, that there should be a judicial adjudication in reference to a void marriage. For then the question of the *status* of the parties and their children is put at rest, while the witnesses are alive; and the former are justified, in the eyes of the community, in entering into a second marriage." Bish. Mar. & Div., *s.* 262; Stew. Mar. & Div., *ss.* 50, 139, 140, 143; 2 Kent 76; *Pingree* v. *Goodrich*, 41 Vt. 47, 49; *Rawson* v. *Rawson*, 156 Mass. 578, 580; *Wightman* v. *Wightman*, 4 Johns. Ch. 343, 345; *Patterson* v. *Gaines*, 6 How. 550, 592.

Exception overruled.

YOUNG, J., did not sit: the others concurred.

Merrimack,
March 3, 1908.

GOODALE v. YORK.

In an action of negligence against an employer, certain evidence deemed sufficient to warrant a finding that the injuries complained of resulted from an abnormal risk of which the defendant had full knowledge, but which the plaintiff, who was in the exercise of due care, did not appreciate.

CASE, for negligence. Trial by jury and verdict for the plaintiff. Transferred from the April term, 1907, of the superior court by *Chamberlin*, J., on the defendant's exception to the denial of a motion for the direction of a verdict in his favor.

The evidence tended to prove the following facts: The plaintiff was sixteen years old at the time of his injury, and was not so quick of comprehension as the ordinary boy of that age. He was employed to run a matching machine in the defendant's box factory, began work on Saturday, and was injured on the following Monday. On Saturday he had no trouble with the machine. On Monday shavings collected about an open gear on the machine and interfered with its operation. The first time they collected the defendant brushed them away and told the plaintiff to keep them cleared, but he did not call the boy's attention to the gear, nor did he tell him how to remove the shavings or warn him of the danger of his arm being drawn into the gear in case his shirt sleeve came in contact with it while the shavings were being brushed away. A little later the shavings again collected, and the plaintiff brushed them away with his hand. An hour later they again interfered with the operation of the machine. The plaintiff attempted to remove them in the same way, when his shirt sleeve caught in the gear and drew his arm into it, thus causing the injuries complained of. The plaintiff's work at the machine absorbed his attention, and when he was engaged with it he could not see the gear. When he was brushing away the shavings the gear was plainly visible. He worked on the same machine for two weeks about a year prior to his injury, and at that time the gear was enclosed.

John M. Meserve and *Frank M. Beckford*, for the plaintiff.

William B. Fellows and *Shannon & Tilton*, for the defendant.

YOUNG, J. The defendant says the plaintiff cannot recover (1) because he assumed the risk of his injury and (2) because he was guilty of contributory negligence.

1. Servants assume the risk of the dangers incident to those conditions of their master's instrumentalities only in respect to which he owes them no duty. 1 Labatt M. & S., *ss.* 2, 3. It will be necessary, therefore, to determine whether the law imposed any duty in respect to the gear upon the defendant, in order to decide whether the plaintiff assumed the risk of his injury. The test to decide that question is to inquire whether (1) the plaintiff or (2) the defendant appreciated the risk of the plaintiff's arm being drawn into the gear if his shirt sleeve happened to come in contact with it, and (3) whether the ordinary man would use such a gear on such a machine if he employed such a boy to operate it. *Bennett* v. *Company*, *ante*, 400. If the defendant was, and the plaintiff was not, in fault for not appreciating that risk, and it was an abnormal one, it was the defendant's duty to use ordinary care to enable the plaintiff to avoid being injured by it. *Boyce* v. *Johnson*, 72 N. H. 41.

The defendant does not question but that it can be found the risk was an abnormal one and that he appreciated it, but he contends that it must be held the plaintiff also appreciated it; so the question for the court is not whether it can be found, but whether it must be held, that the plaintiff appreciated the risk of his arm being drawn into the gear. It will not be necessary to consider whether the plaintiff knew the gear was uncovered; for if that is conceded, it does not necessarily follow that he appreciated the risk of his injury. The test to decide that question is to inquire, not whether he knew the gear to be open, but whether he appreciated the risk of his arm being caught in it. *Disalets* v. *Company*, *ante*, 440.

It cannot be said as a matter of law that a boy no older than the plaintiff, with no more knowledge of the situation or capacity to appreciate its dangers than he is shown to have had, would realize the risk he ran of his arm being drawn into the gear if his shirt sleeve happened to come in contact with it, from the mere fact that he knew the gear to be uncovered, even if a man familiar with such gears would have realized it. *Demars* v. *Company*, 67 N. H. 404, 406. There is no other evidence which tends to prove that the plaintiff appreciated the risk of his injury. The fact that he worked on the machine for two weeks at another time has no such tendency, for at that time the danger of which he complains did not exist. It cannot be held, therefore, that the plaintiff assumed the risk of his injury.

2. Neither can it be held that the plaintiff was guilty of contributory negligence. The defendant's contention that it must be so held is based on the proposition that the plaintiff knew the gear to be uncovered. But if it were conceded that he knew that fact

and fully appreciated the risk incident to working near it, it could not be said from those facts alone that he was guilty of contributory negligence. Negligence is doing what the ordinary man is not accustomed to do—not what he is in the habit of doing; and that the great majority of men work for others, and that there are known dangers incident to every employment, are both matters of common knowledge. In other words, although it is true that servants who are injured by the condition of their masters' instrumentalities cannot recover when it appears they knew of and appreciated the risks which produced their injuries, the reason they cannot recover is not because the fact of their appreciation of the risks conclusively establishes their fault, but because of the doctrine of assumed risk. *Carr* v. *Electric Co.*, 70 N. H. 308.

Unless it can be said as a matter of law that the danger of being drawn into the gear was so apparent that no prudent man would have undertaken to brush the shavings away with his hands, the plaintiff cannot be held to be guilty of contributory negligence; and it is obvious that it cannot be said that the ordinary man would not have attempted such an act, if he had no more knowledge of the situation and no more capacity to comprehend its dangers than the plaintiff is shown to have had. *Boyce* v. *Johnson*, 72 N. H. 41.

Exception overruled.

All concurred.

Hillsborough,
March 3, 1908.

ROLLINS *v.* CONNOR *& a.*

In the determination of an election contest, the common council of a city acts in a judicial capacity; and a member of the body who is a party to the proceeding is disqualified from participating in a decision of the controversy..

The action of a judicial tribunal is voidable if a disqualified member participates therein, although the result may not have been dependent upon his vote.

PETITION for *certiorari*, to the common council of Nashua. At the September term, 1907, of the superior court, the defendants' demurrer was overruled by *Peaslee*, J., subject to exception.

The petition contains the following allegations: At the biennial election in 1906, the plaintiff and Peter Bruen were candidates

for the office of councilman from Ward 5, Nashua. More votes were cast for the plaintiff than for Bruen, but the moderator of the meeting declared the latter elected. On January 1, 1907, Bruen qualified as a member of the council, and on the same day the plaintiff petitioned the council to determine his right to the seat to which Bruen had been admitted. The petition was referred to a committee of three councilmen to investigate the election, count the ballots, and determine whether the plaintiff or Bruen was elected. The plaintiff and Bruen appeared before the committee with counsel. A majority of the committee refused to count all the ballots, reported to the council that of the votes cast Bruen was entitled to 101 and the plaintiff to 100, and recommended that the plaintiff be given leave to withdraw. A minority of the committee reported that of the votes cast the plaintiff received 103 and Bruen 100, stating in the report that the majority had refused to proceed with the count of the ballots and had voted to accept the declaration of the moderator as a correct statement of the vote, and recommended that the plaintiff be declared entitled to the seat. Both reports were presented to the council, and a motion to substitute the minority for the majority report was defeated, seven members voting in the affirmative and ten in the negative. By a vote of ten to seven, the majority report was accepted and adopted, and the plaintiff was thereby deprived of his seat. Bruen voted upon each motion with the majority. Each member of the council knew that the count of the ballots showed that the plaintiff had received 103 votes and Bruen 100.

Edward H. Wason and *George F. Jackson*, for the plaintiff.

William H. Barry and *Henri T. Ledoux*, for the defendants.

PARSONS, C. J. The action of the common council in weighing the evidence presented by the moderator's declaration and the subsequent count of the ballots was judicial in its nature; and from their determination of the question of fact according to their view of the comparative weight of competent conflicting evidence no appeal is provided, and the question of fact so determined is not revisable by the superintending power of the court. *Sheehan* v. *Mayor*, *ante*, 445. The finality of the decision, in the absence of a right of appeal, results from the judicial character of the proceeding. Though not in the ordinary sense a court, the members of the common council are required in controversies of this character to judicially determine which contestant is entitled to the office. "When so acting, they are not emancipated from the ordinary principles upon which justice is administered, . . .

and which are, as it has been said, founded upon its very essence." *Queen* v. *Council*, [1892] 1 Q. B. 190.

It is alleged that Bruen, whose seat the plaintiff claimed, although he appeared as a party with counsel before the committee, nevertheless participated in the action taken by the council, voting upon both motions by which the question was determined. He thus, while avowedly a party to the proceeding, attempted to act as a judge in its decision. "The rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case,—either in his own case, or in any case, where he brings forward the accusation or complaint on which the order is made." *Leeson* v. *Council*, 43 Ch. Div. 366, 379. It is equally plain that a man cannot sit in judgment to decide upon the validity of a claim against himself, or in a proceeding in which he is the defendant. "The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be judge and party, arbiter and advocate, in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice." *Oakley* v. *Aspinwall*, 3 N. Y. 547, 549, 550. Whatever right a member of a legislative body may have to vote upon questions in which he may be interested, when the question under consideration is purely legislative, he cannot do so when the body is acting judicially. *Rider* v. *Portsmouth*, 67 N. H. 298; *Dorchester* v. *Youngman*, 60 N. H. 385; *Commonwealth* v. *McCloskey*, 2 Rawle 369; *S. C.*, Br. Elec. Cas. 196.

The judgment of the common council of which the plaintiff complains was rendered by a tribunal one of whose members participating in the decision was disqualified. The personal disqualification to act in a particular case of a member of a tribunal having jurisdiction of the subject-matter renders the judgment voidable and liable to be set aside upon *certiorari*. *Bickford* v. *Franconia*, 73 N. H. 194, 196. In *Biggins* v. *Lambert*, 213 Ill. 625,—104 Am. St. Rep. 238, a decision by a court of three judges was objected to upon the ground that one of the judges was disqualified. The objection was overruled without discussion, the court saying: "The appellate court was composed of three judges, at least two of whom were not subject to the objection made." In *Oakley* v. *Aspinwall*, *supra*, it was claimed that the vote of the judge whose competency was disputed determined the decree whose validity was attacked, but the opinion of the court vacating the decree is put upon the ground that the judge in question "could neither lawfully hear nor take part in the decision." 3 N. Y. 555. In *Rider* v. *Portsmouth*, 67 N. H. 298, the question

was the validity of the action of five aldermen, of whom the plaintiff was one, in approving the claim in suit. It was said: "Without his vote there was not a majority in favor of paying it." But the validity of action in which an interested member takes part, when without his vote there was a legal majority in support of the action taken, was not presented or considered.

But despite the Illinois case above cited, it is clear upon reason and authority that judicial action by a tribunal one of whose members is disqualified to act is voidable if the disqualified member participates therein, without reference to the fact whether the result is produced by his vote. The preliminary question, whether the tribunal is properly constituted, is a question which must be answered in the affirmative before there can be a decision. As stated by *Denman*, C. J., in *Regina* v. *Justices of Hertfordshire*, 6 Q. B. 753, 756: "A decision is vitiated by any one interested person taking part in it. We cannot enter into an analysis of the different motives which may have produced the decision; it is enough to say that a single interested person has formed part of the court." In England this decision has not only been followed and applied in the case of strictly judicial tribunals, but its principle has been considered fatal to the action of other bodies when acting judicially. *Regina* v. *Justices of Suffolk*, 18 Q. B. 416; *Regina* v. *Justices of London*, 18 Q. B. 421, 424; *Queen* v. *Meyer*, 1 Q. B. Div. 173; *Leeson* v. *Council*, 43 Ch. Div. 366; *Queen* v. *Council*, [1892] 1 Q. B. 190; *Queen* v. *Huggins*, [1895] 1 Q. B. 563. The authorities in this country, with the exception above noted, appear to be to the same effect (*Oakley* v. *Aspinwall*, 3 N. Y. 547; *State* v. *Bradish*, 95 Wis. 205,—37 L. R. A. 289; *Case* v. *Hoffman*, 100 Wis. 314, 352); while the precise question appears to have been passed upon in this state in *Sanborn* v. *Fellows*, 22 N. H. 473, 479, in which it was held that proceedings before a board of three fence viewers, one of whom was disqualified from relationship to one of the parties, were void, and it is suggested by the court that the independent action of the two members of the board who were not disqualified, constituting a majority of the board, would be free from objection.

The lack of impartiality in the tribunal arises from the participation in the proceedings, as a co-ordinate member of the tribunal, of the person disqualified to act therein, and not merely from the fact that the decision is produced by the numerical effect of his vote. The influence a party in that position might have upon the decision of his associates cannot be estimated. It would be clear that he might have some advantage over his adversary, who is not a member of the court by which the controversy between them is decided. Whatever the rule may be as to the effect of the parti-

cipation of an interested member of a body such as the defendants are, upon action taken in accordance with, but not carried by, his vote in matters of an administrative nature (*Marshall* v. *Elwood*, 189 Pa. St. 348), such participation invalidates any judicial act. If *Hartshorn* v. *Schoff*, 58 N. H. 197, is inconsistent with this conclusion, it is overruled.

It does not appear that the plaintiff had opportunity to object to Bruen's acting in the matter as a member of the council, or that he has waived his right to object upon that ground. *Moon* v. *Flack*, *ante*, 140, 143. If upon hearing the facts are established as alleged and no waiver is shown, the decision of the common council denying the plaintiff's petition will be quashed. It will then be the duty of the council to adjudge the matter, excluding Bruen from any participation in their action; and treating the petition as an application for *mandamus*, they may be ordered to do so. In making such adjudication, all competent evidence offered, bearing upon the question for whom the larger number of legal votes were intended, including the moderator's declaration, the ballots in their present condition, and any facts tending to show which evidence, if conflict appears, is entitled to the greater weight, must be received and considered, and the seat awarded to the person whom it is found received the greater number of legal votes.

Exception overruled.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
March 3, 1908.

PRESCOTT v. ROBINSON.

A woman who is injured during pregnancy by a highway collision caused by another's negligence is entitled to damages for mental distress due to her fear or apprehension before the birth of the child that it would be deformed in consequence of the accident; but she cannot recover for her mental suffering after the birth of the infant and her prospective anxiety and disappointment, occasioned by its deformed and diseased condition, nor for the child's pain, suffering, and inability to labor.

CASE, for negligence. Transferred from the May term, 1907, of the superior court by *Peaslee*, J. The declaration alleged that the defendant so negligently managed an automobile and ran the same at such excessive speed, "that by reason thereof said auto-

bile was propelled with great force upon and against the carriage in which said plaintiff was riding, crushing and wrecking said carriage and hurling said plaintiff, who was then pregnant, from her seat in said carriage to the ground, whereby she was severely injured in and upon her head, body, abdomen, back, and limbs, [and was injured internally so that the child, to which she later gave birth and of which she was at the time of said injury pregnant, was born deformed, disfigured, and diseased, and has so continued from thence hitherto, all by reason of defendant's said negligence]; and said plaintiff was also bruised, lamed, and injured, externally and internally, and her nervous system shocked and injured, [and she suffered and endured great mental distress after said injuries during her pregnancy on account of her dread of the effect of said injuries upon herself and her unborn child; and since the birth of said child she has suffered and will continue to suffer in mind and body by reason of said injuries, both as above set forth and by reason of the deformity and diseased condition of said child.] Whereby a right of action in favor of said plaintiff against said defendant has accrued for all her past, present, and future injuries, pain, and suffering in mind and body, and inability to labor, [and all the injuries, pain, and suffering, and inability to labor of said child.]

The defendant demurred to the declaration and moved that the parts enclosed in brackets be stricken out. The demurrer and motion were denied, and the defendant excepted.

Burnham, Brown, Jones & Warren, for the plaintiff.

Branch & Branch, for the defendant.

WALKER, J. The demurrer and motion present the questions whether under the allegations of the declaration the plaintiff is entitled to recover damages for her mental distress due to her fear or apprehension before the birth of the child, that it would be deformed in consequence of the defendant's negligent act, and whether her mental suffering since the birth of the child and her prospective anxiety and disappointment on account of its deformity and diseased condition can be considered by the jury as elements of damage recoverable in this action. Assuming that she suffered mental distress, not only in regard to the effect of the accident upon her person, but in regard to its effect upon the unborn child, it cannot be doubted that it was proximately caused in both respects by the alleged negligence of the defendant. It was a natural result reasonably to be apprehended under the circumstances. The fact

that the defendant was ignorant of her condition does not lessen his liability for the natural consequences of his negligent act. *Chicago etc. Ry.* v. *Hunerberg*, 16 Ill. App. 387; *Brown* v. *Railway*, 54 Wis. 342; *Purcell* v. *Railway*, 48 Minn. 134.

But it is contended that, while she may be entitled to recover for distress of mind due simply to her fear of the results of the accident to her person, her apprehension that the child might be deformed thereby is too remote or fanciful to be deemed in law an element of damage, although proximately caused by the defendant's negligent act. If a *fœtus* is deemed to constitute a part of the mother's person, an injury to it is plainly an injury to her, as much as an injury to her hand or arm would be. And it would seem to follow that she has as much right not to be harmed in the one respect as in the other. A denial of that proposition would be equivalent to an assertion that the law protects persons in the use and enjoyment of some parts of their physical organisms, but not of all parts thereof. Such a conclusion rests upon no logical basis and is supported by no legal principle. If in consequence of a blow inflicted upon his person a man sustains an injury which may reasonably be expected to produce a deformity or to impair his health, his right to recover damages of the negligent defendant for his mental suffering occasioned by the prospect of such a result is a recognized and enforceable right. In *Walker* v. *Railroad*, 71 N. H. 271, 273, this principle was applied in the following language: "There was evidence that the plaintiff was suffering from partial mental disability. If as a result of mental disability induced by the defendant's fault the plaintiff suffered from apprehension of insanity, such suffering was an element of her damages." *Brush Electric Co.* v. *Simonsohn*, 107 Ga. 70; *Sherwood* v. *Railway*, 82 Mich. 374, 383; *Schmitz* v. *Railway*, 119 Mo. 256, 277. The fact that one of the results of the alleged injury in this case was the deformity of the *fœtus*, which became the child's misfortune upon its birth, does not prove that no right of the plaintiff was invaded in this regard for which damages are allowable; on the contrary, it shows that her natural right to the normal action of her physical organs in the growth and development of the *fœtus* was seriously infringed. *Alabama etc. R. R.* v. *Hill*, 93 Ala. 14. Her ability to be delivered of a normal and healthy child was jeopardized, and her grief and apprehension before the birth on account of what the probable or not unreasonable effect would be upon the child is not a remote consequence of the alleged negligence of the defendant. It was her right to produce a healthy child; and if by the defendant's negligence her enjoyment of that right was diminished or violated, her mental distress for the unnatural result to be expected

was an element of damage for which she should be compensated, as well as her disappointment at the birth of a deformed child.

In this view of the case it is unnecessary to consider or determine what, if any, rights a child *in ventre sa mere* has for injuries received by it, which render its existence after birth painful and burdensome. Whether it may or not, after birth, maintain an action on that account (*Dietrich* v. *Northampton*, 138 Mass. 14; *Gorman* v. *Budlong*, 23 R. I. 169; *Marsellis* v. *Thalhimer*, 2 Paige 35, 40; *Harper* v. *Archer*, 4 Sm. & M. 99; *Allaire* v. *Hospital*, 184 Ill. 359, 368; *Earl of Bedford's Case*, 7 Co. 7b; *Trower* v. *Butts*, 1 Sim. & St. 181; *Wallis* v. *Hodson*, 2 Atk. 115, 117; *Thellusson* v. *Woodford*, 4 Ves. Jr. 227, 322; *Doe* v. *Clarke*, 2 H. Bl. 399; *Scruby* v. *Payne*, 34 L. T. 845; *The George & Richard*, L. R. 3 Adm. 466; *Walker* v. *Railway*, 28 L. R. Ir. 69; 2 Witt. & Beck Med. Jur. 150, 152, 159–161), is immaterial in this case. The mother's right to the damages she suffers for the defendant's wrongful act in causing her to bring forth a misshapen and sickly child, instead of a well developed and healthy one, does not depend on the question whether at the time of the injury the *fœtus* is deemed in law a person, or whether after birth it may maintain an action to recover for the wrong done to it before its birth. She cannot recover in her own right for the child's injuries for which, if it were deemed a person in law, it would have a right of action; and if it is deemed not to be a person at the time of the injury, but *pars viscerum matris* (*Earl of Bedford's Case*, 7 Co. 7b), she suffers no damage for its deformity merely; that is, the fact alone that it is deformed is a misfortune to the child, for which she is not entitled to damages, unless it causes her special physical pain and suffering. Such damages pertain to the child alone. The mother is no more entitled to them than the father is. Upon the birth of the child, the physical consequences of the injury to it become effective. From the time of the injury to the time of the birth the mother suffers no physical damage merely because the child's limbs are distorted or because its health is impaired. It therefore follows that the child alone suffers damage on that account; and if that damage is held to be *damnum absque injuria*, the mother's right thereto would not be increased. If the child cannot recover therefor, it does not follow that she can. In fact, there is no legal connection between their rights of action for their respective damages. But while the injuries suffered by each are distinct and independent, the mother's anxiety before the birth of the child, in view of the reasonable probability that the defendant's act will cause her to produce an abnormal child, is peculiarly an element of damage to her.

This result is not in conflict with cases cited by the defendant

in which it has been held that no recovery could be had by the mother for the miscarriage and death of the child. See *Bovee* v. *Danville*, 53 Vt. 183; *Tumnicliffe* v. *Railway*, 102 Mich. 624; *S. C.*, 107 Mich. 261; *Western Union Tel. Co.* v. *Cooper*, 71 Tex. 507; *Hawkins* v. *Railway*, 3 Wash. 592. These cases do not decide that the mother's solicitude consequent upon the injury and before the birth is not an element of her damage, but that the death of the child and her loss of the comfort and enjoyment of the company of a living child are too remote consequences to be considered by a jury in assessing her damages. 1 Joyce Dam., *s.* 185. In *Bovee* v. *Danville*, *supra*, the decision is stated thus (*p.* 190): "The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no farther. Any injured feelings *following* the miscarriage, not part of the pain *naturally attending* it, are too remote to be considered an element of damage." But injured feelings and regret before the birth and while the mother is seeking to perform her function of child-bearing through the organs of her body may be proper elements of recoverable damage, for the same reason, substantially, as led to the holding by the same court in *Godeau* v. *Blood*, 52 Vt. 251, that solicitude occasioned by the bite of a dog, including apprehension of hydrophobia, though the dog was not shown to have been rabid, were proper matters for the jury's consideration. To the same effect are *Warner* v. *Chamberlain*, 7 Houst. 18, and *Trinity etc. Ry.* v. *O'Brien*, 18 Tex. Civ. App. 690.

The fact that the plaintiff will undoubtedly suffer great disappointment during her lifetime, occasioned by her continual observation of her child's deformity and its probable suffering, though in some sense caused by the defendant's negligence, is a misfortune for which the law can afford no compensation in an action for negligence. If the collision which caused the injury both to her and her child had occurred while she was carrying the child in her arms, it would be a novel proposition to urge that she might recover damages for her subsequent mental distress on account of the disfigurement and ill-health of the child. However severe the grief may be of the friends and relatives of the victim of a catastrophe, they can ordinarily maintain no common-law action for damages on that account. The deformity of a crippled child and its suffering may be an ever-present cause of disappointment to its parents, and their lives may be made miserable thereby; but they can obtain no redress on that ground against the person whose

negligence was the cause of the child's condition. *Hyatt* v. *Adams*, 16 Mich. 180, 197. The policy of the law requires that no action shall be maintainable for that cause. *Black* v. *Railroad*, 10 La. An. 33.

In *Cowden* v. *Wright*, 24 Wend. 427, it was held that in an action of trespass by a father for assaulting and beating his son *per quod servitium amisit*, a jury in assessing the damages are not authorized to take into account the wounded feelings of the parents. It was suggested in the opinion that it might be otherwise if the son were not also entitled to an action to recover for his mental suffering. In *Pennsylvania R. R.* v. *Kelly*, 31 Pa. St. 372, it was decided that when a father brings an action on the case for damages resulting from an injury to his child, he can only recover compensatory damages, to be measured by the loss of the child's services and the expense of nursing and curing him, that he cannot recover for his lacerated feelings or disappointed hopes, and that the personal sufferings of the child should not enter into the computation of the father's damages. *Sullivan* v. *Railway*, (Mass.) 83 N. E. Rep. 1091; *Butler* v. *Railway*, 143 N. Y. 417; *Galveston* v. *Barbour*, 62 Tex. 172; *Flemington* v. *Smithers*, 2 C. & P. 292; 1 Joyce Dam., *s.* 225. Such damages are too remote and speculative to be properly estimated by a jury upon the theory of strict compensation alone for the consequences of a negligent act. In cases where the elements of malice, wantonness, or willful indignity in causing the injury are present, it may be that a more liberal rule of damages prevails (*Fay* v. *Parker*, 53 N. H. 342; *Bixby* v. *Dunlap*, 56 N. H. 456; *Barnes* v. *Campbell*, 60 N. H. 27; *Kimball* v. *Holmes*, 60 N. H. 163), and that injured feelings indirectly caused by the defendant's willful act (*Friel* v. *Plumer*, 69 N. H. 498) may furnish a legitimate element of damage, while in the absence of evidence of intentional wrong they ought not to be included in recoverable damages.

If in the case at bar the fact was that the defendant maliciously inflicted the injury upon the plaintiff, one of the natural and intended results of the act would be to cause the plaintiff great mental distress, not merely on account of the injury to her and the unborn child, but on account of her parental anxiety for the future healthfulness of her child. It might not be incorrect to say that it would be conclusively presumed that the defendant's purpose was to inflict upon her the mental suffering she sustained, and hence that he ought to pay for it. But if the act causing the injury is merely a negligent act, the recovery of compensation for such remote, secondary, and speculative injuries could not be justified upon that ground, since a negligent defendant is answerable

only for the direct, proximate, and natural results of his act. If a negligent defendant inflicts a violent blow upon the person of the plaintiff, in consequence of which the latter falls upon another who is crippled thereby, the sorrow of the plaintiff for the suffering of the third party could not be considered a proximate result of the defendant's involuntary act, for which he should be charged in damages. As the child's suffering in this case is his misfortune, the plaintiff's regret on that account is not a legitimate element of her damage for the mere negligence of the defendant.

It is not necessary to discuss at length the claim advanced by the plaintiff and alleged in her declaration, that she is entitled to recover for the "pain and suffering and inability to labor of said child," for the obvious reason that the child's peculiar injuries afford it, if anybody, a right of action; and if it should be held upon consideration that it cannot maintain an action for the damages suffered by it after its birth, it is not apparent how a right of action therefor would become vested in the mother. Justice does not require that she should be paid for the sufferings of the child; and the doctrine of compensatory damages forbids it. *Fay* v. *Parker, supra; Kimball* v. *Holmes, supra.*

When the declaration is amended in accordance with the views above indicated, the demurrer will be overruled and the motion denied.

Case discharged.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
March 3, 1908.

SUPREME COMMANDERY UNITED ORDER OF THE GOLDEN CROSS *v.* DONAGHEY *& a.*

Where it has been decreed that a bill of interpleader was properly filed, and the plaintiff is ordered to pay the fund into court and be discharged, it is too late for a defendant who has neither demurred to the bill nor denied its allegations by plea or answer to raise the objection that other defendants were not properly made parties to the proceeding; and under such circumstances the case will be treated as a proper one for interpleader, whether it be technically so or not.

BILL OF INTERPLEADER, against the heirs, the administrator, and the designated beneficiary of Henry L. McKean. Transferred from the September term, 1907, of the superior court, by *Peaslee*, J.

John C. Bickford, for the plaintiff.

Henry N. Hurd, for Donaghey.

L. Ashton Thorp, for Barr, administrator.

Lee C. Abbott, for the McKean heirs.

BINGHAM, J. This action is a bill of interpleader brought by the plaintiff for the purpose of having the defendants litigate their respective claims to $1,000, the sum due on a benefit certificate issued by the plaintiff to one of its members. It is not found that the defendants have demurred to the bill, or filed pleas or answers in which they have denied any allegations essential to its maintenance, and it is assumed that they have not done so. The plaintiff has offered to pay the money into court, and the defendants have filed answers setting forth their respective claims to the fund. In the answers of the heirs and of the administrator, it is averred that the defendant Donaghey, to whom the certificate was made payable, is not a person entitled to receive the fund within the class of persons designated in the plaintiff's by-laws, which provide that a certificate may be made payable to the wife, family, or blood relatives of a member, or to a person or persons dependent upon him. Donaghey has demurred to their answers upon the ground that the administrator and the heirs are not proper parties to the bill; that the administrator is not a proper party because the fund is no part of the deceased member's estate, and that the heirs are not because they are not named as beneficiaries in the certificate. Her position is, that if she is not within the classes designated in the by-laws, the plaintiff, by paying the fund into court, has waived its right to raise the objection, and the administrator and the heirs cannot because they are not proper parties to the bill. It may therefore be considered that the plaintiff has paid the money into court, and that according to the ordinary course in such proceedings, a decree has been made permitting the bill to be filed and ordering the plaintiff to be discharged with its costs. The question is then presented whether Donaghey, by demurring to the answers of the heirs and of the administrator, and not having demurred to the bill or denied any allegation material to its maintenance, can thus call in question the right of the heirs and administrator to contest her claim to the fund.

It is one of the essentials to the right to file a bill of interpleader that there be two or more claimants to the disputed fund

capable of interpleading and settling the matter between themselves. If the bill discloses upon its face that only one of the claimants is in a position to enforce the demand against the plaintiff, it will be dismissed upon demurrer. If, on the other hand, its allegations are sufficient, a defendant may deny them in his answer and rely upon the plaintiff's failure of proof to sustain them; but if he neither demurs to the bill nor denies its allegations by plea or answer, and a decree is made that the bill is properly filed, and the plaintiff is ordered to pay the money into court and be discharged, it is then too late for him to raise the objection that the other defendants were not properly made parties to the bill. Under such circumstances it will be treated as a proper case for interpleader, whether it may be technically so or not. *Farley* v. *Blood*, 30 N. H. 354, 361; *Parker* v. *Barker*, 42 N. H. 78, 93; *Page Belting Co.* v. *Prince*, *ante*, 262; 23 Cyc. 21–33; Macl. Interp. 128–130, 158–160.

To sustain the demurrer in this case would necessitate a decree that the bill was not properly filed, contrary to the order of the trial court to which no exception was taken. The rights of the parties to the fund will be seasonably considered when the facts are found upon which their respective claims are based.

Demurrer overruled.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
March 3, 1908.

MANCHESTER v. HODGE & a.

Where a deed of land refers for a boundary to a street not actually existing at the time, but which is surveyed shortly afterward in substantial accordance with the terms of the conveyance, it will be presumed that the line shown by the survey was the one the parties had in mind, in the absence of evidence tending to prove a contrary intent.

A private individual cannot acquire rights against the public by adverse possession.

CASE, for obstructing a private way. Transferred from the May term, 1907, of the superior court by *Stone*, J., upon an agreed statement of facts.

The plaintiff city and the defendants derive title from the Amoskeag Manufacturing Company. In 1841 that corporation

deeded a tract of land to the city for a public cemetery, the material part of the conveyance being as follows: "Thence westerly . . . to Willow street; thence northerly on the easterly line of Willow street thirteen hundred feet, said line being parallel to and two hundred and seventy-five feet easterly of the east line of Elm street." In 1873 the corporation deeded land to the defendant Hodge, the material part of the conveyance being "easterly on Willow street, there measuring two hundred and twenty feet," and in 1892 deeded land to the Head & Dowst Company, who are also defendants, the material part of the last conveyance being as follows: "Thence northerly parallel with said Elm street by said westerly line of Willow street four hundred and ninety feet, to the southerly line of Summer street."

The way in dispute is that part of Willow street lying between the land of the city and that of the defendants. It has never been laid out as a highway, and the defendants have occupied and claimed to own it ever since they purchased their respective tracts. In 1843 the Amoskeag Company made a plan of this section of the city, which shows Willow street substantially as claimed by the plaintiffs.

Taggart, Tuttle, Burroughs & Wyman, George A. Wagner, and *David Cross*, for the plaintiffs.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. The deed to the city bounds the cemetery on the west by the easterly line of Willow street, and says that it is a line "parallel to and two hundred and seventy-five feet easterly of the east line of Elm street." If this language is given its ordinary meaning, Willow street had been surveyed at that time. The defendants contend, however, that since the case does not show when the Amoskeag Company surveyed this part of their land, it must be held that the parties intended to bound the cemetery on the west by a line two hundred and seventy-five feet easterly of the east line of Elm street. There is no evidence to sustain this contention. As has been seen, the language used by the parties tends to prove that Willow street was a known monument at the time the deed was made, and there is nothing in the case to rebut this presumption. But even if Willow street had not been laid out at the date of the deed, it was so soon thereafter that, in the absence of all evidence that such was not the intent of the parties, it must be held that it was the bound the parties had in mind when the conveyance was made. *Lerned* v. *Morrill*, 2 N. H.

197; *Berry* v. *Garland*, 26 N. H. 473, 482; *Wells* v. *Iron Co.*, 48 N. H. 491.

It follows that the legal title to one half of Willow street, with the right to use the whole of it for any purposes for which a way to the cemetery could be used, at one time was and still is vested in the city as trustee for the public, unless the defendant Hodge has by prescription acquired the fee to that part of it which lies between his lot and the cemetery. Whether or not he has so acquired title depends upon whether one can acquire rights against the public by adverse possession; and in this state it is held that public rights cannot be lost in that way. *State* v. *Company*, 49 N. H. 240; *Thompson* v. *Major*, 58 N. H. 242, 244; *Collins* v. *Howard*, 65 N. H. 190, 192; *Concord Mfg. Co.* v. *Robertson*, 66 N. H. 1, 19.

Case discharged.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
March 3, 1908.

74 470
74 482

VAISBORD v. NASHUA MANUFACTURING CO.

A master is responsible for a dangerous condition of his premises resulting from acts of his servants which he authorized or ratified.

A master who suffers his premises to remain in a condition which he knows to be dangerous is liable for injuries resulting therefrom to a servant who has not been notified of the danger and is justifiably ignorant of its existence.

That an injury to a servant resulted from the coöperating negligence of a fellow-servant and the master does not relieve the latter from liability.

CASE, for negligence. Trial by jury and verdict for the plaintiff. Transferred from the January term, 1907, of the superior court by *Stone*, J., on the defendants' exception to the denial of their motion for a nonsuit.

The plaintiff's evidence tended to prove the following facts: She was injured Monday forenoon, that being the first day of her employment by the defendants. On the previous Friday other employees of the defendants erected a staging over the machine on which the plaintiff was set at work. The staging was made of two-inch planks supported by wooden horses eight or ten feet high, the planks being laid on but not fastened to the horses, and the horses being set on but not fastened to the floor. One horse was placed in an alley between two lines of machinery, and

through this alley the materials used in the room were wheeled. The alley was so narrow that it was difficult to wheel a truck through it without hitting the horse; and in that event, the horse was likely to be moved about on the hard, smooth floor. The vibration caused by the machinery also moved the planks to such an extent that it was only a question of time when they would fall from the horses, if nothing were done to prevent it. The mill ran on Saturday, but the staging was not used until after the plaintiff was injured. She was unfamiliar with her work and surroundings. Two or three hours after she began work one of her fellow-servants wheeled a loaded truck through the alley. Just as he passed the horse a plank fell upon the plaintiff, causing the injury complained of.

Walter E. Kittredge and *Frederick J. Gaffney*, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

YOUNG, J. The plaintiff complains of the defendants' failure to fasten the planks to the horses and the horses to the floor in such a manner that neither the vibration of the mill, nor the acts of her fellow-servants, nor both of these causes combined, would cause a plank to fall on her; and the defendants say it cannot be found (1) that they were responsible for this condition of their premises, or (2) that they were in fault for it, or (3) that their fault was the legal cause of the injury.

1. The test to determine whether it can be found that the defendants were responsible for the condition of their premises is to inquire whether they intended the staging to be erected in the way it was, or ratified their servants' acts in constructing it as they did. They cannot escape responsibility for a condition resulting from acts of their servants which were either authorized or ratified. *Stevens* v. *Company*, 73 N. H. 159, 169. The men who erected the staging testified that they set it up in the way it was intended to be built and as they were accustomed to do the work; consequently it can be found that it was constructed as the defendants intended it should be. If the staging was not built as the defendants intended, it still can be found that they ratified the acts of their servants in doing the work as it was done; for the staging was in position so long a time before the plaintiff's injury as to warrant a finding that the defendants knew the plan upon which it was erected and had an opportunity to change the structure if they desired to do so.

2. As it can be found that the defendants were responsible for

the condition of their premises, the next step is to consider whether they were in fault for it. The test to decide that question is to inquire: (1) Whether the plaintiff either appreciated or should have appreciated the risk she ran of having a plank fall upon her; if she was not in fault for not appreciating that risk, (2) whether the defendants were at fault in that respect; if they were, (3) whether the ordinary man would erect such a staging in that place; and if such a man would not, (4) whether the defendants used ordinary care to notify the plaintiff of the dangers incident to the condition of their premises. *Bennett* v. *Company*, *ante*, 400.

The defendants concede that it may be found from the evidence that they did and the plaintiff did not appreciate the risk, and that they failed to notify her of the dangers. The question whether they can be found to have been in fault therefore resolves itself into this: Would the ordinary man have erected such a staging in that place? The evidence relevant to this question tends to prove that the defendants should have anticipated that a portion of the staging would fall upon the plaintiff if she was permitted to work under it,—in other words, that they ought to have known they were setting a trap for her; for it can be found that they knew their servants were accustomed to wheel loaded trucks through an alley so narrow that the trucks were liable to come in forcible contact with the horse supporting the planks, and that when this happened the horse was likely to move upon the smooth, hard floor to some extent. They also knew the vibration of the room to be so great that the planks might slide upon the horses so that a very slight movement of a horse would cause a plank to fall, and that in such a case it was liable to fall upon the plaintiff. Knowing all this, they set the plaintiff at work under the staging without telling her of the danger, and without doing anything to protect her, or to enable her to protect herself, from an injury they must have known she might sustain unless they took steps to prevent it. It cannot be said as a matter of law that an ordinary man with this knowledge would erect such a staging, or that, having erected it, he would not do something the defendants did not do to enable the plaintiff to avoid injury. Since this is so, it can be found that the defendants were in fault for maintaining such a staging, and doing nothing either to protect the plaintiff, or to enable her to protect herself, from probable injury. *Quimby* v. *Railroad*, 69 N. H. 334.

3. The defendants say that if it is decided they were in fault in respect to the condition of their premises, it cannot be held that their fault was the legal cause of the plaintiff's injury. They do not contend that their fault cannot be found to have been the

cause of the plaintiff's injury if the fall of the plank was the result of the vibration of the mill; but they do say that it must be held to be just as probable, from all that appears in the case, that the negligence of the man who wheeled the truck occasioned the fall of the plank, as that it was caused by vibration of the mill. *Deschenes* v. *Railroad*, 69 N. H. 285, 291.

If it be conceded that it must be found that the man who wheeled the truck was negligent,—a question as to which no opinion is expressed,—and that the plank would not have fallen when it did but for his negligence, it does not follow that it cannot be found that the defendants' negligence concurred with his to produce the plaintiff's injury, or that it was the legal cause of her injury (*Matthews* v. *Clough*, 70 N. H. 600); for the legal cause of an injury is the last act, or one of the last acts, in the series of events which produced it,—it is one of the last acts but for which the injury would not have occurred. It can be found that the defendants ought to have anticipated that, if they failed to fasten the planks to the horses and the horses to the floor, either the vibration of the mill, or the acts of their servants, or both of these together, might cause a plank to fall upon the plaintiff. Since this is so, it can be found they were in fault for not taking steps either to notify her of the danger or to prevent the plank from falling. Consequently, it can be found that their failure to anticipate that one of their servants might strike the horse with a truck and cause the fall of a plank, and to do what the ordinary man would do in such a situation to enable the plaintiff to perform her work in safety, was either the cause or the occasion of her injury; and whether it was the cause or the occasion depends on whether she would have been injured if they had used ordinary care. The test to determine whether the defendants' negligence was the cause or the occasion of the plaintiff's injury is to inquire whether the negligence of the servant who wheeled the truck would have produced that injury, even if they had used ordinary care to prevent it. If it would, then their negligence was the occasion merely; but if his negligence would not have caused the injury if the defendants had exercised ordinary care in its prevention, then their negligence concurred with that of the servant to produce the result of which the plaintiff complains. The servant who wheeled the truck testified that, if he struck the horse, the shock was so slight he did not notice it. It is obvious that it can be found from this testimony that the plank would not have fallen, notwithstanding the truck struck the horse in passing, if the defendants had used ordinary care either to fasten the plank to the horse or the horse to the floor.

If it be conceded, therefore, that the plank would not have

fallen when it did but for the negligence of the plaintiff's fellow-servant, it can still be found that the defendants' negligence in failing to anticipate that the horse might be hit by a truck, and in omitting to do what the ordinary man would have done to prevent an accident, concurred with his negligence in point of causation—not of time—to cause the injury; in other words, that the defendants' negligence in this respect was one of the last acts in point of causation in the series of events which resulted in the plaintiff's injury, or one of the last acts but for which the accident would not have occurred. *Ela* v. *Cable Co.*, 71 N. H. 1; *Sirois* v. *Henry*, 73 N. H. 148; *Hamel* v. *Company*, 73 N. H. 386.

Exception overruled.

All concurred.

Rockingham, April 7, 1908.

GOODRICH *& a.* *v.* WEBSTER *& a.*

An agreement between adverse claimants to real estate, entered into for the purpose of compromising their controversy as to title and empowering a third person to sell the land and distribute the proceeds, establishes a trust which is enforceable in equity and irrevocable except with the consent of all the beneficiaries.

WRIT OF ENTRY. Facts agreed. Transferred from the January term, 1907, of the superior court by *Pike*, J.

Eastman, Scammon & Gardner and *Willis D. Pulver*, for the plaintiffs.

G. K. & B. T. Bartlett, for the defendants.

WALKER, J. The plaintiffs are the heirs-at-law of Tristram C. Webster, who died in 1905, and the defendant Webster is his widow. The defendant Littlefield is the administrator, who with the widow is in possession of the premises. The heirs claimed title under a deed from their grandfather to Tristram, which, upon their construction, gave them the title upon the death of Tristram, unincumbered with any rights in favor of the widow. On the other hand, the widow claimed dower and homestead in the land. In order to avoid litigation upon this subject, the heirs and the

widow executed under their seals an instrument by which they agreed "to give Albert L. Littlefield power of attorney to sell at public auction the estate of Tristram C. Webster," and also agreed "to the following division of the proceeds after the debts are paid: one third to the widow, Jennie Webster, and the remainder to be equally divided" among the heirs. This agreement was understood by the parties to give Littlefield power to sell the land in question and to provide for the final distribution of the proceeds. It was a compromise of their several adverse claims to the land, and was entered into in consideration of the waiver of their hostile claims of title and to avoid litigation. The consideration was a valuable one, and the contract became binding in law, in the absence of any suggestion of fraud or mistake.

Some days later, the heirs notified Littlefield that they revoked the agreement, and insisted that the widow had no interest in the land. If they are still bound by the agreement, notwithstanding their attempted revocation, the question of title becomes immaterial, so far as these parties are concerned. The plain import of the agreement was that Littlefield should proceed to sell the land at auction and divide the proceeds as stipulated. Upon his obtaining a purchaser therefor, the parties impliedly agreed to execute a conveyance vesting in the purchaser their titles; and they could be compelled to do so. Before the division of the money, Littlefield would hold it as a trustee for the parties. In effect, the contract amounted to an agreement for the establishment of a trust in settlement of a controversy between the widow and the heirs; and upon its execution it became enforceable in equity. In *Leach* v. *Fobes*, 11 Gray 506, it was held that specific performance of an agreement of compromise, made upon a controversy concerning the validity of a will, will be decreed in equity, without inquiring into the adequacy of the consideration. The court remark that such an agreement "is of a nature which is entitled to the highest favor at the hands of a court of equity." 2 Sto. Eq. Jur., *s.* 793 *b*.

The fact that nothing has been done under the agreement which the plaintiffs now seek to rescind does not affect the trust which they established, upon a sufficient consideration. The defendants became entitled to the specific performance of the terms of the agreement: and the plaintiffs' refusal to be bound thereby did not deprive the defendants of that right or change the character of the property as a trust fund. A trust once perfectly established is irrevocable except with the consent of all the beneficiaries. *Minot* v. *Tilton*, 64 N. H. 371. "The rule that a valid agreement to create a trust *in futuro* is sufficient to create a trust *in præsenti*, so as to bind the property in the hands of the parties or those having notice of the agreement, depends on the maxim that 'equity regards that as

done which ought to be done.' It follows, therefore, that where a trust depends entirely on an *agreement* to do something, it depends for its validity on the question whether the agreement is one of which equity would decree specific performance." Und. Tr. 21.

Upon the plainest views of justice and equity, the plaintiffs should not be allowed to repudiate their agreement, and reopen the controversy as to the title of the property, which was adjusted to their satisfaction by the trust arrangement. Equity requires that that controversy be deemed to be settled, and that the stipulations of the parties be carried out. Perry (Trusts, *s.* 95) says: "The authorities establish this proposition: That where there is a valuable consideration the court will enforce the trust, though it is not perfectly created, and though the instruments do not pass the title to the property, if from the documents the court can clearly perceive the terms and conditions of the trust, and the parties to be benefited."

The fact that one of the heirs is a minor, whose guardian signed the agreement for her, may present no difficulty in the final adjustment of the parties' rights. P. S., *c.* 177, *s.* 8; *Woodman* v. *Rowe*, 59 N. H. 453; *Stevens* v. *Meserve*, 73 N. H. 293. The plaintiffs are not entitled to maintain the present action; and in accordance with the terms of the case the order must be,

Judgment for the defendants.

All concurred.

Rockingham,
April 7, 1908.

STATE v. ROBERTS *& a.*

STATE v. MULLIGAN *& a.*

Unless it is clear that a statute purporting to have been enacted for the protection of the public health and public morals has no relation to those objects, it cannot be set aside as unconstitutional and void.

The statute providing for the licensed sale of intoxicating beverages (Laws 1903, *c.* 95) is a restriction upon a traffic which was lawful at common law, was enacted for the purpose of safeguarding the public welfare, and is not void as being in conflict with the constitution.

A party cannot be heard to question the validity of a statute, or any part thereof, unless he shows that some right of his is impaired or prejudiced thereby.

DEBT, on two liquor license bonds. Trial at the October term, 1907, of the superior court before *Wallace*, C. J., who found verdicts for the state, to which the defendants excepted upon the ground that the liquor license law of the state is unconstitutional.

Edwin G. Eastman, attorney-general, for the state.

Albert D. Jones, *Elmer J. Smart*, and *William Wright*, for Mulligan and Roberts.

Frink, *Marvin & Batchelder*, for the Fidelity & Deposit Company of Maryland.

BINGHAM, J. These actions are debt upon bonds given to secure compliance with the conditions upon which liquor licenses were issued to the defendants under the provisions of chapter 95, Laws 1903. The justice before whom the actions were tried found verdicts for the plaintiff. The only defence set up was that chapter 95 was unconstitutional, and the defendants excepted to the verdicts upon this ground alone. In support of their exceptions, they take the position that the traffic in intoxicating liquors is productive of crime and pauperism; that it is therefore wrongful and cannot lawfully be licensed; that chapter 112 of the Public Statutes prohibits the sale of intoxicating liquor, and chapter 95, Laws 1903, licenses it; that the state cannot constitutionally prohibit and license the sale of liquor at the same time; also that it cannot license, but must prohibit, its sale, for the reason that article 82 of our constitution provides that "it shall be the duty of the legislators and magistrates, in all future periods of this government, . . . to countenance and inculcate the principles of humanity, . . . honesty, . . . sincerity, sobriety . . . among the people."

The business of selling liquor is not of itself wrongful and a nuisance *per se*. *State* v. *Marston*, 64 N. H. 603; *Commonwealth* v. *Blackington*, 24 Pick. 352, 358; *Commonwealth* v. *McDonough*, 13 Allen 581, 584; 1 Bish. New Cr. L., *ss.* 505, 1113; Bac. Abr., Inns; 1 Russ. Cr. 442, note *m*. It is the unrestricted and unregulated sale of it that the courts have regarded as tending to pauperism and crime. *State* v. *Gerhardt*, 145 Ind. 439; *Sopher* v. *State*, (Ind.) 81 N. E. Rep. 913; *Schwuchow* v. *Chicago*, 68 Ill. 444; Black Intox. Liq., *s.* 31. Its sale was lawful at common law; and if it were not for the restrictions that have been placed upon it by legislative enactments, every person in the state would be as free to engage in the business as he would be to engage in

the business of selling any other property. *Sopher* v. *State*, *supra*, 915, and cases there cited.

As this was the common-law right of every citizen, it is plain to be seen that statutes commonly spoken of as license laws are not, strictly speaking, grants of special privileges, but rather restrictions upon the exercise of a previously existing right. As was said in *Welch* v. *State*, 126 Ind. 71, 77: "All laws regulating and imposing burdens on the business are prohibitory in their character. There is no difference between an absolute prohibitory law, a law providing for local option, and [a] license law, except in the extent to which they prohibit the . . . sale of intoxicating drinks. An absolute prohibitory law deprives all within its reach from engaging in the business; a local option law prohibits all within a given locality from selling within that locality; while a license law prohibits all within the state, who have not obtained a license, from engaging in the business. . . . Each is a restriction upon the common-law right of the individual citizen. The first wholly deprives him of the right, while the other two prohibit him to a limited extent."

Under our system of government, the power to restrict the sale and use of such articles as tend to injure the public health and public morals is lodged with the legislature, and is known as the police power. Const., *art.* 5; *State* v. *Griffin*, 69 N. H. 1. All rights of the citizen are held subject to the lawful exercise of this power; and unless a court can clearly see that a law purporting to have been enacted to protect the public health and public morals has no relation to those objects, it cannot set it aside as unconstitutional and void. *State* v. *Noyes*, 30 N. H. 279; *State* v. *Griffin*, *supra*, 27, 28; *State* v. *Ramseyer*, 73 N. H. 31, 36, 40; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Crowley* v. *Christensen*, 137 U. S. 86.

Acting upon the well recognized understanding that the unrestricted sale of intoxicating liquor is detrimental to the public health and morals, the state, through its legislature, has from an early day safeguarded its welfare by the enactment of laws restricting its sale, sometimes absolutely prohibiting it, at others providing for its qualified prohibition and license. From 1781 to 1849, laws were in force here which authorized the selectmen of towns to issue licenses for the sale of spirituous and intoxicating liquors, without regard to the uses to be made of them, and prohibited their sale without a license. Laws, *ed.* 1815, *p.* 372; Laws, *ed.* 1830, *p.* 482; Laws 1838, *c.* 369; R. S., *c.* 117; Laws 1849, *c.* 846. In the latter year an act was passed prohibiting the sale of "spirituous liquor or wine, mixed or otherwise, in any quantity," and requiring the selectmen to license one or more persons to sell

the same for "medicinal, mechanical, and chemical purposes, and for no other use or purpose." C. S., *c.* 123, *ss.* 5, 6; *State* v. *Perkins*, 26 N. H. 9.

In 1855 an act was passed, many of the provisions of which are now included in chapter 112, Public Statutes. In this act provision was made for the appointment of town agents authorized to sell spirituous and malt liquors for medicinal, mechanical, scientific, and sacramental purposes, and for no other use or purpose whatever; and their sale by "any person not being the agent of a town for the purpose of selling spirit" was prohibited. P. S., *c.* 112, *s.* 15. This act was amended from time to time, but its prohibitory features remained substantially the same down to 1903, when their scope was materially lessened. Laws 1903, *c.* 95. Since then it (P. S., *c.* 112) has ceased to be a law entirely prohibiting the sale of liquor as a beverage. It now prohibits its sale for such use only when sold by persons not licensed under chapter 95, Laws 1903. In this respect, as held in *State* v. *Langdon*, *ante*, 50, 51, chapter 95 is an amendment of chapter 112; and section 15 of the latter chapter is construed as though it read: "If any person, not being an agent of a town for the purpose of selling spirit, and not being a licensee under chapter 95, Laws 1903, shall sell or keep for sale any spirituous liquor, in any quantity, he shall be fined," etc. The result is that chapter 112, since the enactment of chapter 95, has ceased to be an absolute prohibitory law, and that the two statutes, taken together, constitute a license law with local option provisions, authorizing the cities and towns of the state to decide by popular vote whether licenses of the second, third, fourth, seventh, eighth, and ninth classes shall be issued within their limits.

As the purpose of these laws was to safeguard the health and morals of the citizens of the state, and as they tend to accomplish that purpose, it is clear that the legislature was acting within its constitutional powers in enacting them. Its power to regulate, restrain, and prohibit whatever is injurious to the public health and morals is universally recognized, and nowhere more distinctly than in this state. *Pierce* v. *State*, 13 N. H. 536; *Lewis* v. *Welch*, 14 N. H. 294; *State* v. *Moore*, 14 N. H. 451; *Priest* v. *Pinkham*, 18 N. H. 520, 524; *Opinion of the Justices*, 25 N. H. 537; *State* v. *Clark*, 28 N. H. 176; *State* v. *Noyes*, 30 N. H. 279; *State* v. *Holmes*, 38 N. H. 225, 228; *State* v. *Freeman*, 38 N. H. 426; *State* v. *Cate*, 58 N. H. 240; *State* v. *Express Co.*, 60 N. H. 219, 260, 261; *State* v. *White*, 64 N. H. 48; *State* v. *Campbell*, 64 N. H. 402; *State* v. *Marshall*, 64 N. H. 549; *State* v. *Griffin*, 69 N. H. 1; *Mugler* v. *Kansas*, 123 U. S. 623. Whether the public good requires that the sale of liquor as a beverage should be

entirely or only partially prohibited is for the legislature to determine, in the exercise of its discretion. The court does not inquire into the expediency or wisdom of such legislation. *State* v. *Griffin*, *supra*; *State* v. *Ramseyer*, *supra*, 40.

The defendants further contend that the provisions of section 28, chapter 95, Laws 1903, as amended by section 17, chapter 49, Laws 1905, of chapter 121, Laws 1903, and of section 9, chapter 95, Laws 1903, as amended by section 6, chapter 49, Laws 1905, are unconstitutional, as being a delegation of legislative power and authorizing the commissioners to make regulations which hold equal place with the express provisions of the act, and as imposing the same penalties for their violation as are imposed for violation of its express provisions. These objections are not well taken. It does not appear that the licenses issued to the defendants, to secure a compliance with the conditions of which the bonds in suit were given, belonged to any of the classes of licenses specified in these provisions of the statute, or that these suits were based upon breaches of any condition imposed by the commissioners under the powers there conferred. A party will not be heard to question the validity of a law, or of any part of it, unless he shows that some right of his is impaired or prejudiced thereby. It is therefore unnecessary to consider the argument of counsel as to these matters.

Exceptions overruled.

All concurred.

Hillsborough,
April 7, 1908.

LEAZOTTE v. JACKSON MANUFACTURING CO.

A master who knows or ought to know that his premises are unsafe, and negligently fails to guard against the danger, is liable to a servant who is injured thereby, without reference to the manner in which the danger was created.

CASE, for personal injuries alleged to have been caused by the negligence of the defendants, by whom the plaintiff was employed. Trial by jury and verdict for the plaintiff. The defendants' motions for a nonsuit and the direction of a verdict in their favor, on the ground that there was no evidence to support a finding of their negligence, were denied subject to exception. Transferred from the September term, 1907, of the superior court by *Peaslee*, J.

The evidence tended to prove the following facts: In the defendants' weave room was a shaft supported by a hanger. The hanger was provided with an oil-cup, and also with a device for attaching a drip-cup by means of which the dropping of oil upon the floor might be prevented; but no drip-cup was attached to the hanger, and when too much oil was poured into the oil-cup any surplus dropped upon the floor. When the machinery was not in motion the oil settled in the cup, and any surplus ran out at the end of the shaft. During Saturday forenoon prior to the plaintiff's injury, the oil-cup was filled by an employee who used an oil-can attached to the end of a stick. The machinery was idle from Saturday noon until Monday morning. About eleven o'clock Monday forenoon the plaintiff slipped upon an accumulation of oil on the floor, fell, and received the injuries complained of. Previously a small amount of oil had been seen to fall a drop at a time from the shaft, until it covered a space upon the floor about half an inch in diameter.

Doyle & Lucier, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

PARSONS, C. J. Whether the absence of the drip-cup is of itself evidence of negligence in the defendants, and whether upon the evidence they are responsible for the method adopted by the oiler in performing his work, are immaterial questions. The immediate cause of the injury was the oil upon the floor. The jury might reasonably find, in the absence of any other explanation, that it fell from the bearing in the hanger immediately overhead, during the time when the machinery was not in motion; and from the evidence that surplus oil might drip when the machinery stopped, they might also find that men of ordinary care, after the machinery had been stopped some forty hours or more, would examine the condition of the floor, and that such examination would have disclosed the presence of oil before the time of the injury.

While the master who has provided a safe place is not liable upon the ground of that obligation merely because the work-place has become unsafe through the negligence of servants doing the work in the place (*McLaine* v. *Company*, 71 N. H. 294, 296), lack of care to guard against a danger which renders the work-place unsafe, of which the master knows or ought to have known in season to prevent the injury, is a breach of that obligation, without reference to the manner in which the danger was created.

Vaisbord v. *Company*, *ante*, 470; *Klineintie* v. *Company*, *ante*, 276; *Smith* v. *Railroad* 73 N. H. 325.

Exception overruled.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
April 7, 1908.

74 482
74 572

CARTER, *State Treas.*, *v.* WHITCOMB *& a.*, *Ex'rs.*

Section 1, chapter 68, Laws 1907, is amendatory, and not merely declaratory, of the original inheritance-tax statute.

The question whether collateral legacies are taxable is to be determined in accordance with the statute in force at the date of the testator's decease.

A legacy to a charitable, educational, or religious society or institution in this state, whose property, when used exclusively in carrying out the purposes of the association, is exempt from taxation, is not subject to the tax imposed by chapter 40, Laws 1905, although the legatee owns taxable estate and intends to invest the proceeds of the legacy in such property.

A legacy to a society organized for religious, educational, or philanthropic purposes, whose charity is administered for the benefit of the public within this state, is not subject to taxation under chapter 40, Laws 1905, notwithstanding such association confers particular benefits upon its own membership or a favored class, requires its beneficiaries to pay an established fee, and acknowledges formal allegiance to a national body incorporated in another jurisdiction.

A legacy to a missionary society existing in this jurisdiction, whose charity is of such a character and so administered as not to be of substantial benefit or advantage to the people of this state, is subject to the tax imposed by chapter 40, Laws 1905.

PROBATE APPEAL. Facts found by the court. Transferred without a ruling from the September term, 1907, of the superior court by *Peaslee*, J.

Susan E. Reed, a resident of Nashua, died September 21, 1905, and the defendants were appointed executors of her will. Among the legatees named are the Main-street Methodist Episcopal Church of Nashua, the Ladies' Social Circle, the Senior Sunday School, the Junior Sunday School, the Auxiliary of the Woman's Foreign Missionary Society, the Home Missionary Society, the Choir, the Epworth League, and the Junior League, all said societies being

connected with the Main-street Church; also, the Young Women's Christian Association of Nashua, the Auxiliary of the Young Men's Christian Association of Nashua, the Protestant Home for Aged Women in Nashua, the Day Nursery in Nashua, and the Women's Relief Corps of Nashua. April 20, 1907, the probate court decreed that these legacies were not subject to the inheritance tax provided in chapter 40, Laws 1905, and the plaintiff appealed.

Edwin G. Eastman, attorney-general, and *Joseph S. Matthews*, for the plaintiff.

George B. French, for the defendants.

WALKER, J. By the statute in force on the date of the death of the testatrix, "all property within the jurisdiction of the state, . . . which shall pass by will, or by the laws regulating intestate succession, . . . except . . . to or for the use of charitable, educational, or religious societies or institutions in this state the property of which is by law exempt from taxation, . . . shall be subject to a tax of five per cent of its value, for the use of the state." Laws 1905, *c.* 40, *s.* 1. Before the decree of the probate court in this proceeding, this statute had been amended by the legislature of 1907, by apparently making the exemption of legacies to such institutions from the tax or impost to apply only "when such society or institution is bound by the terms of the will, . . . or by the limitation of its powers, to devote such property solely to such uses and purposes that the property in its hands will be by law exempt from taxation." Laws 1907, *c.* 68, *s.* 1. Under the former law, no inheritance tax was chargeable upon a legacy to a charitable, educational, or religious society which enjoyed, under the law, immunity from taxation upon its property. The use to be made of the fund bequeathed to such a society was not deemed to be important; at least, it was not regarded by the legislature as so essential as to be declared to be the test of the exemption. Under the latter statute, it would seem the exemption attaches in such a case only when it appears that the money or property donated must be devoted to such uses by the society that it will be exempt from the general, yearly tax burden. That the legislature intended by this amendment to introduce into the law a material change is too plain for argument. Its purpose was to restrict the exemption within narrower bounds than those set by the former statute. The claim made by the plaintiff, that the amendment is merely declaratory of the meaning of the original statute, cannot be sustained upon any reasonable construc-

tion of legislative action; and if sustained, it might not be of controlling importance in a judicial finding of the legislative intention evidenced by the act of 1905. It is plain that the two acts are not identical in meaning.

Nor was it the intention of the legislature of 1907 to repeal the statute of 1905. While it reënacted the latter statute, with the material change above suggested, it did not in terms attempt to repeal it; and no reason is apparent why it should. It was seeking to perfect legislation upon a comparatively new subject; and it accomplished its purpose by enacting an amendment to the old statute in a single particular, "so that said section shall read as follows." To hold that this amounted to a repeal of the former statute would be to give no force to the evident intention of the legislature. *Matter of Estate of Prime*, 136 N. Y. 347.

Equally untenable is it to urge that the amendment of 1907 was intended to have a retroactive effect and to apply to estates then in course of settlement. The language used is prospective. It relates to property "which shall pass by will." The testatrix's will became effective to pass property upon her death. The necessary delays incident to the settlement of the estate and final decree of distribution did not postpone the passing of the estate within the meaning of the statute. The legatees derive their title from the testatrix. Their rights became fixed at her death. They then became the owners of the property bequeathed to them, though the possession and actual enjoyment thereof were delayed by operation of law; and at the same time the right of the public to the tax accrued. As the legatees' interests vested at the death of the testatrix or upon the probate of the will (*Brown* v. *Brown*, 44 N. H. 281; *Ordway* v. *Dow*, 55 N. H. 11; *Sanborn* v. *Clough*, 64 N. H. 315), there is little ground for holding, in the absence of express language to that effect, that the legislature intended the amendment of 1907 to have a retroactive effect and to defeat or limit rights so vested under testamentary provisions. The construction and effect of a will are ordinarily governed and determined by the law in force when it became effective. *Loveren* v. *Lamprey*, 22 N. H. 434; *Wakefield* v. *Phelps*, 37 N. H. 295, 306; *Perkins* v. *George*, 45 N. H. 453, 455; *Morgan* v. *Perry*, 51 N. H. 559, 567. The rights, therefore, of the parties to the suit under the will in question must be determined in accordance with the statute of 1905, which was in force when the testatrix died and when the interests of the parties under her will vested.

In this view of the case, the question arises whether the bequests to the defendant associations and societies are exempt from the tax imposed by the statute of 1905. In the language of the statute, if they are "charitable, educational, or religious societies

or institutions in this state," and if their property "is by law exempt from taxation," the bequests to them are not subject to the tax; otherwise they are. If the meaning of the statute is that the exemption only applies when the association, falling within the terms of the statute in other respects, holds all its property free from yearly taxation, practically the exemption, which was intended to foster and encourage such institutions, would be found to apply to a rather peculiar and limited class. *Matter of Will of Vassar*, 127 N. Y. 1, 10. Most charitable institutions whose property "is devoted exclusively to the uses and purposes of public charity," and which is "exempted from taxation" (Laws 1895, *c.* 66), may own property, not exclusively devoted to charity, which is subject to the general tax burden. The use that is made of the property determines the question of its taxability under the statute quoted. Some of it may be exempt from taxation while the rest of it is not. Such a society may own real estate which is not directly used in carrying on its charitable work,—as, for instance, it may rent real estate for business purposes (*Phillips Academy* v. *Exeter*, 58 N. H. 306; *New London* v. *Academy*, 69 N. H. 443, 446; *Young Men's Christian Ass'n* v. *Keene*, 70 N. H. 223) and be subject to taxation therefor. It may invest money in savings banks, which thereupon becomes taxable. But the fact that it may own taxable property, or that it in fact does own such property, does not prove that the legislature did not intend to include such an institution of a charitable character within the favored class. In consideration of public benefits conferred by such establishments, and in view of the fact that their property is substantially used directly in the promotion of public charity, is unproductive of profit or gain, and is not when so used taxable, it was the policy of the legislature to exempt them from the burden of the inheritance tax. If their general property is exempt from taxation under existing statutes, general or special, bequests to them are not taxable merely because it appears that they own incidentally property that is taxable. Nor does it appear that the legislature intended that a legacy to a charitable association should be subject to the succession tax if, when received, it might be invested in taxable property. The sole test suggested by the language of the statute in its application to the subject-matter is to ascertain whether the legatee is a charitable, educational, or religious society, whose property, when used exclusively in carrying out the purposes of the association, is exempt from taxation. It is the character of the institution, the purposes it was organized to accomplish, and its liability or non-liability to taxation for property devoted to those purposes, that determine whether it falls

within or without the exception provided in the inheritance-tax law.

This result accords with the view adopted by the court in *First Universalist Society* v. *Bradford*, 185 Mass. 310, in which a construction was given to a statute of that state which is identical with the statute in question. With reference to the clause under consideration, the court say (*p.* 313): "But we are of opinion that the exemption depends upon this question: Is the society or institution one whose property is generally exempt from taxation; and that the question is not: Is the property which passes to the society or institution one which will be exempt from yearly taxation under general laws." This decision was rendered in 1904; and as our inheritance-tax law of 1905 was evidently copied from the Massachusetts statute, it is not improbable that that construction of the exception was understood by the legislature and adopted as a part of the statute. *Mann* v. *Carter*, *ante*, 345. If the legatee would be exempt from taxation upon property directly devoted to its public charity, it is not subject to the inheritance tax, though it in fact may own taxable property at the death of the testatrix and may intend to invest the proceeds of the legacy in taxable property.

But it is urged that the various associations which the testatrix sought to benefit by her legacies are not "charitable, educational, or religious societies or institutions," within the meaning of the statute. In view of what has already been decided in this opinion, it is plain that if they are charitable in their nature and objects, so that their property devoted exclusively to those objects is not taxable under section 1, chapter 66, Laws 1895, the legacies in question are not subject to the inheritance tax. By that statute it is provided that "so much of the real estate and personal property of charitable associations, corporations, and societies as is devoted exclusively to the uses and purposes of public charity" is "hereby exempted from taxation." The question is: Are these associations formed and conducted for the purpose of promoting public charities? If they are, it will be unnecessary to inquire whether all or any of them might claim the benefit of the exemption on some other ground; for it is not doubted that the statute of 1895 was intended to exempt public charitable bodies, as defined in the law, whether incorporated or not, from taxation upon their property devoted to public charity.

"Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied."

2 Per. Tr., s. 687. In *Webster* v. *Sughrow*, 69 N. H. 380, it was held that a provision in a will, that the residue of the testator's estate shall be held by his executor and expended at his discretion for the saying of masses for certain persons, is a valid bequest to a charitable use; and the court quote with approval the following language from the opinion in *Jackson* v. *Phillips*, 14 Allen 539, 558: "A charity, in the legal sense, may be . . . defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

In *Gafney* v. *Kenison*, 64 N. H. 354, it was held that a provision in a will that the income of a certain fund shall be applied for the relief of the most destitute of the testator's relatives creates a valid charitable trust. For other cases illustrating the liberality of construction applied in upholding trusts as charitable, see: *Orford etc. Society* v. *Society*, 55 N. H. 463; *Goodale* v. *Mooney*, 60 N. H. 528; *Lovell* v. *Charlestown*, 66 N. H. 584; *Rolfe and Rumford Asylum* v. *Lefebre*, 69 N. H. 238; *Haynes* v. *Carr*, 70 N. H. 463; 2 Per. Tr., *ss.* 699–705. The legislative purpose to encourage charitable institutions is not to be thwarted by a strained, over-technical, and unnecessary construction, or by holding without evidence that a church society, as ordinarily organized and conducted, is not included in the legislative meaning of charitable institutions. In *Goodale* v. *Mooney*, *supra*, many of the questions which the plaintiff seeks to raise with reference to the charitable character of the defendant associations were disposed of in a single sentence. The court say (*p.* 535) that the testator "bequeathed to the Tilton and Northfield Congregational Society, $1,000; to the New Hampshire Home Missionary Society, $2,000; to the New Hampshire Bible Society, $500; to the Foreign Missionary Society, $500; to the New Hampshire Ministers' Widows' Society, $1,000; to the New Hampshire Conference Seminary at Tilton, $500,—total, $5,500; all of which must be regarded as charitable objects."

It is unnecessary to discuss in detail the special characteristics of each of the societies and organizations connected with the Main-street Methodist Episcopal Church. Their purposes are religious, educational, and philanthropic, and hence charitable. The fact that they may more directly benefit their members than those who are not members does not deprive them of their public character. *Webster* v. *Sughrow*, *supra*. Their funds are held

impressed with a public trust under the terms of their respective organizations. They are engaged in promoting, in various ways, public charities; and only those will be specifically referred to which seem to require special discussion.

The work of the Young Women's Christian Association, in accordance with the objects of its incorporation, includes the holding of gospel services, teaching English to foreigners, and furnishing food and lodging for women passing through the city, for which compensation is received from those who are able to pay. Its general object is religious and charitable, and its property exclusively devoted to that object would undoubtedly be exempt from general taxation under chapter 66, Laws 1895, if it were not for its special exemption by chapter 216, Laws 1907. It is therefore entitled to exemption from the inheritance tax. The Auxiliary of the Young Men's Christian Association is a society composed of women, whose object is to extend spiritual, intellectual, social, and financial help to the Young Men's Christian Association of Nashua. The purpose of the latter association, as set forth in its charter (Laws 1891, *c.* 213, *s.* 1), is to improve "the spiritual, intellectual, and social condition of the young men of Nashua," and its property to the amount of $25,000 is thereby exempted from taxation. There is no finding how it carries on its work, or what it in fact does as a religious or charitable body; but upon the assumption that its principal endeavor is to promote the spiritual and intellectual condition of young men, without pecuniary gain or profit to itself, it must be deemed to be a charitable institution, upon the same ground that a church is held to have that character; and the women's Auxiliary, which is in practical effect a branch of it, devoting all its means to promote the purposes of the men's organization, is a charitable body, for substantially the same reason that a Sunday school may properly be regarded as a subsidiary branch of the church society in carrying out its charitable purposes.

With reference to the Home for Aged Women, the argument that it is not a charitable corporation because its beneficiaries are required to turn over to the institution what property they possess, or because they are required to pay an established fee upon their admission, is based upon a narrow and erroneous view of public charity. It makes the test of the legal character of such an institution the fact that it does or does not receive some value in consideration of its admission of an inmate. It treats the arrangement as a purely business affair in which profit, and not charity, is the principal object of the institution. In other words, it makes the Home a mere boarding-house managed for profit. And herein is the obvious error of the contention. It is not man-

aged for profit. "The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence." *McDonald* v. *Hospital*, 120 Mass. 432, 435. See, also: *Hewett* v. *Association*, 73 N. H. 556, 562, 563; *Matter of Will of Vassar*, 127 N. Y. 1. The Day Nursery for similar reasons has the same charitable character.

Nor does the fact that the benefits afforded by the Grand Army of the Republic, to which the Woman's Relief Corps of Nashua is auxiliary, are bestowed only upon those who have been soldiers, or upon their families, to the exclusion of all others, render the objects and purposes of either organization any the less charitable. That every one is not equally eligible to share the benefits directly is no reason why the public advantage is not promoted thereby. *Gafney* v. *Kenison*, 64 N. H. 354; *Webster* v. *Sughrow*, 69 N. H. 380. As the Relief Corps is an association of women in Nashua, which presumably extends its benevolence to veterans and their families in that immediate locality, its formal allegiance to a national organization incorporated in another state is immaterial upon the question whether it is a charitable society within the meaning of the statute. Its character in that regard is not changed by the fact of its dependency upon some other organization. If its charity is administered for the benefit of the public within this jurisdiction, it falls within the class which the legislature intended to favor and encourage.

When, however, an auxiliary body, like the Auxiliary of the Woman's Foreign Missionary Society, though connected with a local church and existing within the jurisdiction as an association, seeks as its principal object "the evangelization of heathen women" and the raising of funds for that purpose alone, it is difficult to discover how the public represented by the people of this state is benefited by the supposed benevolence. Even if there are "heathen women" in our midst, this society can do nothing for their enlightenment and civilization; for, as found in the case, none of its funds "are or can be devoted to charitable objects within the state of New Hampshire." Its money may be sent, and presumably the principal part of it is sent, to assist in the conversion of people, living in remote parts of the earth, from their native religion to that of Christianity. The expenditure of large sums of money for the enlightenment upon religious subjects of the natives of the antipodes evidently was not one of the objects the legislature intended to encourage, when in 1895 the property of charitable associations "devoted exclusively to the

uses and purposes of public charity" was exempted from taxation, or when in 1905 legacies to such associations "in this state" were exempted from the inheritance tax. The benefit to the public of this state of such a trust is so visionary, problematical, and uncertain that it cannot be deemed for the purposes of this case a public charity, without imputing to the legislature motives which it is reasonably certain they did not entertain. The state is not itself a charitable institution, and does not authorize its representatives to expend the public money, by exemptions from taxation or otherwise, for purposes having little or no relation to the welfare of the inhabitants of the state. The purpose of such laws is the acquisition of some supposed public advantage. *Opinion of the Court*, 58 N. H. 623; *Perry* v. *Keene*, 56 N. H. 514. If it is impossible to see how the public good of the state is promoted by a claimed exemption from the tax burden, it cannot be inferred that the legislature intended such a result from language which does not necessarily require such a construction. "If a statute is capable of two meanings, and one is more reasonable and therefore more probable than the other, this fact is necessarily considered, with all other competent evidence, on the question of intent. The evidence of intention may include various inherent probabilities and the probative force of many circumstances, as well as the literal sense of the words used. When the meaning is found by giving due weight to everything that legally tends to prove it, it is not a matter of discretion whether it shall be adopted or rejected. If the evidence establishes the fact that the literal sense is not the true sense, a literal construction would be an alteration of the law." *Opinion of the Justices*, 66 N. H. 629, 651.

In holding that general tax-exemption laws apply to domestic and not to foreign corporations, the court in *Matter of Estate of Prime*, 136 N. Y. 347, 362, say: "It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large." And it is not to be inferred that the legislature undertook to encourage the accumulation of property in this state by foreign or domestic corporations or societies, whose only charitable purpose is to devote it exclusively to the use of religious missionaries for the conversion of the heathen in foreign lands.

The Home Missionary Society is also an auxiliary to a corporation organized in another state, and its object is, in subordination to the principal body, to assist "in the elevation and evangelization of needy and destitute women and children in our own land, and in raising funds for this work." While it seeks to accomplish

religious, moral, and educational results, its field of operation is not confined to, though it may include, this state; and the question whether its charity is a public one which the legislature intended to promote may not be entirely free from doubt. As a matter of fact, a very small part of the funds of this local society is expended in this state; and it does not appear from the case whether it has the right, as between it and the parent society, to use its money for local purposes. As a matter of practice, it has devoted substantially all its funds to the support of charities outside of New Hampshire, and presumably it will continue that practice. If its object was to maintain an orphans' home or a hospital for poor people on the Pacific coast, and all its resources were devoted to that purpose, the public benefit of such a charity in New Hampshire would not be apparent. Perhaps it would be no more evident than the maintenance of missions in China. Its relation to the public interests of this state, which alone the legislature is ordinarily presumed to have in view, would be so slight, arising merely from a general community of interstate interests, that it is not probable such a charity would be the object of legislative bounty and encouragement. Nor should we expect to find the lawmakers exempting from the common burden of taxation a society whose purpose is, as established by long practice, to use its funds exclusively in the promotion of charities in other states. If some substantial local benefit accrues of a public nature by the actual use of some of its funds for charitable purposes in this state, it might be found that it was included within the exemption, though it used the balance of its funds in other jurisdictions. *Balch* v. *Shaw*, 174 Mass. 144. The question would be, whether its charity was of such a character and so administered as to be of any substantial benefit or advantage to the public of this state; and this would be principally a question of fact, to be determined upon competent evidence. But in the absence of such evidence, as in the case of this missionary society, the fact cannot be assumed, and it cannot be found, upon the facts reported, that the society is exempt from taxation.

Case discharged.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
April 7, 1908.

PETITION OF BURNHAM *& a.*, *Trustees.*

A party who excepts to a finding of the superior court, on the ground that it is not warranted by the evidence, should have the evidence adduced at the trial transferred as a part of the case.

When it has been determined that a valid charitable trust is created by a will, the heirs of the testator have no interest in the question of its execution apart from the general public, whose rights it is the duty of the attorney-general to protect.

PETITION, for advice as to the validity of the residuary clause of the will of Emeline R. Balch, and in particular requesting information as to whether the trust fund there provided for should be used for maintaining a hospital for general use, or whether the trustees should apply the fund to establish and maintain a hospital for a special use, and if so for what use. There was a trial in the superior court at the May term, 1907, before *Peaslee*, J., at which time the trustees, the testatrix's heirs-at-law, the attorney-general, and persons interested in a hospital for a special use appeared and were heard. The heirs-at-law filed an answer, claiming that the residuary clause was inoperative, impracticable, null, and void, and prayed for a decree that the estate be turned over to them.

The residuary clause reads as follows: "I give, bequeath, and devise all the rest, residue, and remainder of my estate, real, personal, and mixed, wherever found and however described, for the establishment and maintenance of a hospital to be located at said Manchester and to be known as the Balch Hospital. It is my will that said trust for a hospital be administered by five trustees, to be appointed by the judge of probate for said county of Hillsborough, upon the petition of my executors or administrators. As soon as said trustees shall have been duly appointed and have accepted said trust, my executors or administrators are hereby authorized to convey, transfer, and pay over to said trustees all said rest, residue, and remainder, and are directed to do so as soon as practicable after the remainder is ascertained. Said trustees may adopt rules and regulations for the management of the trust and constitute officers, committees, and agents in furtherance of the charitable objects of this institution, and three of said trustees shall be a quorum for the transaction of business. The original number of five trustees shall be preserved, and in the event of a vacancy one or more of the remaining trustees shall apply immediately to the judge of probate for said county of Hillsborough by

petition to fill said vacancy. During the vacancy I give to the remaining trustees all the powers herein given to the five trustees, and to every substituted or succeeding trustee all the powers herein given to the original trustee. The words 'trustees' and 'my trustees' shall be understood to mean the trustees for the time being, original, succeeding, or substituted. It is my will that so much of said rest and residue shall remain unexpended by my trustees after the establishment of the hospital as that the income thereof shall be amply sufficient to pay all taxes, insurance, current expenses, and all other expenses of maintaining said hospital and keeping the same in suitable repair and condition, and said trustees are directed, as soon as practicable after they shall receive said remainder, to commence the establishment of said hospital and to prosecute the work as rapidly as may be consistent with the best interest of the hospital; and if at any time it shall be deemed best by my trustees to enlarge said establishment, I authorize said trustees to make such changes and additions as may be necessary or useful, reserving sufficient of said remainder to support and maintain said hospital from the income thereof, as above provided for."

It was found that the fund constituting the residue amounted to $170,000; and although there were three general hospitals in Manchester when the will was executed in 1901, that the scheme for building another general hospital there, endowed as provided in the will, was not impracticable. The trustees were advised that the intent of the testatrix was to establish and maintain a general hospital, and that they should so execute the trust. A decree was entered that the will created a valid charitable trust, to which the heirs excepted. The heirs asked to be heard as to the proper execution of the trust, and excepted to a ruling that they had no interest in that matter.

Burnham, Brown, Jones & Warren, for the petitioners.

James O. Bradbury (of Maine) and *Mathews & Stevens*, for the heirs-at-law.

Tuttle & Burroughs, for parties interested in general and special hospitals in Manchester.

BINGHAM, J. The heirs concede that the words used in the residuary clause of the will are sufficiently definite in themselves to create a charitable trust; but they contend, first, that they were not permitted at the trial in the superior court to be heard or to cross-examine witnesses upon the question of the practicability of

establishing another general hospital at Manchester,—that if they had been, they could have shown that it was impracticable to do so, and that the trust attempted to be created was void,—and, second, that all the evidence that was introduced at the trial was to the effect that it was impracticable to establish another general hospital in that city, and that there was no evidence to the contrary.

The answer to the first contention is that it is without foundation in fact, for the case finds that the heirs, the trustees, the attorney-general, and others appeared and were heard. If the fact was as the heirs now claim, they should have had it so stated in the case.

The answer to the second contention is of a similar nature. If there was no evidence upon which the trial court could have found, as it did, that it was practicable to establish another general hospital at Manchester, endowed according to the scheme outlined in the will, the heirs, if they desired to avail themselves of an exception to the finding, should have had the evidence that was introduced at the trial transferred as a part of the case. This they omitted to do. It is therefore to be presumed that the evidence was sufficient to warrant the finding.

Before it was established that a valid trust was created by the will, no question as to its execution could arise. After that was done and it was determined that the trust was charitable, it became the duty of the attorney-general to see that the rights of the public in the trust were protected and that it was properly executed. The heirs had no interest in the question apart from the general public, whose rights were represented by the attorney-general. *Haynes* v. *Carr*, 70 N. H. 463, 482, 484.

Exceptions overruled.

All concurred.

Sullivan,
April 7, 1908.

WOODSUM STEAMBOAT CO. *v.* SUNAPEE.

The residence of a voluntary corporation, so far as it has one, is the town or city where its business is in fact principally transacted, and not the place where the clerk's records are kept and stockholders' meetings are held, nor the locality described as its place of business in the articles of agreement.

PETITION, for the abatement of taxes assessed upon the plaintiff's steamboats in 1907. Transferred without ruling from the November term, 1907, of the superior court by *Chamberlin*, J., upon an agreed statement of facts.

The plaintiff is a corporation, organized under the General Laws in 1886. The articles of agreement, recorded in the office of the secretary of state and of the city clerk of Concord, provide as follows:

"2. The place in which its business shall be carried on shall be Concord, New Hampshire.

"3. The object for which this corporation is established is for the purpose of building a steam vessel or vessels, equipping the same, and performing everything necessary for the navigation of the waters of Sunapee lake, in New Hampshire, for the purpose of carrying and transporting passengers, express, freight, and mail matter on said lake."

The corporation owns and operates boats, valued at over $100, on Sunapee lake. The lake is situated in Sunapee, Newbury, and New London, and the plaintiff owns real estate in each of those towns. About one half the plaintiff's business is done in Sunapee, and the rest in Newbury and New London. Its boats start from Sunapee in the morning and return at night. When not in use they are kept in Sunapee, summer and winter, except that one small boat is usually kept in Newbury during the winter. The general manager, clerk, and treasurer of the corporation reside and have their offices in Concord. The annual meeting of the corporation is held in that city, and the books and records of the corporation are kept there.

In 1907, the plaintiff was advised that its boats were taxable in Concord, and thereupon returned them for taxation and was taxed for them in that city. The defendants also taxed the boats to the plaintiff, and upon a refusal of the selectmen to abate the tax this appeal was taken.

Mitchell, Foster & Lake and *Edmund S. Cook*, for the plaintiff.

Frank O. Chellis and *Martin & Howe*, for the defendants.

PEASLEE, J. It has been decided in this state that corporations are not persons within the meaning of the statute for taxing polls and estates (R. S., *c.* 40, *s.* 1; P. S., *c.* 56, *s.* 1), but that their taxable estate is assessed by virtue of the act providing for its taxation where the corporation is situate (R. S., *c.* 40, *s.* 5) or is located (P. S., *c.* 56, *s.* 9). *Nashua Savings Bank* v. *Nashua*, 46 N. H. 389, 392. But whether the *situs* of a corporation is called its residence, or situation, or location, the result in the present case will be the same.

The plaintiff's property is taxable either under the law pertaining to vessels (P. S., *c.* 56, *s.* 12), or that as to boats and launches. Laws 1905, *c.* 25, *s.* 1. In either event it is to be taxed at the place of residence of the owner, if in the state; otherwise at the home port, or at the place where the property was on April 1. This property was at its home port in Sunapee on that date, and so was rightly taxed there if the corporation resided in that town, or if it had no residence in the state.

The plaintiff's claim is that it had a residence apart and distinct from the place where its business was executed, and that its property of this class should be taxed to it at such residence. This contention cannot be sustained. A voluntary corporation's residence (so far as it has one) is the town or city where its business is principally executed. A town where it merely maintains an office and holds meetings of stockholders cannot be its residence within the meaning of the statute. *Kennett* v. *Company*, 68 N. H. 432.

The original voluntary corporation law of this state provided that the articles of agreement should state "the place within which its business is to be carried on," and that "it shall not do business in any other places than those mentioned in said articles." Laws 1866, *c.* 4224, *s.* 2. The articles were to be recorded in the "town in which the business is to be carried on." *Ib.*, *s.* 1. Copies of all by-laws were to be filed in the office of the clerk of "each city or town where they transact their business." *Ib.*, *s.* 5. A statement of its condition upon organization was to be filed with the clerk of the "town in which the association proposes to do business"; and a similar annual statement was to be "filed and recorded in the clerk's office of each town or city in which the association does business." *Ib.*, *s.* 7.

The commissioners of 1867 provided that the articles should state "the place in which its business is to be carried on" (Comm'rs' Rep. G. S., *c.* 139, *s.* 2), and should be "recorded in the office of the clerk of the town in which the principal business is

to be carried on." *Ib.*, s. 1. The prohibition against doing business elsewhere was omitted. Changes of capital stock were to be recorded in "the town where its principal business is carried on" (*Ib.*, s. 4), statements of condition upon organization in "the town in which the corporation proposes principally to do business" (*Ib.*, s. 5), and annual returns in "the town in which the corporation principally does business." *Ib.*, s. 5. Taking these sections together, it is evident that the phrase "the place in which its business is to be carried on" means the place where the principal business of the corporation is executed. There is no evidence of any legislative intent to change the meaning then applied to the language which is still used in this statute. P. S., c. 147, s. 2; *Ib.*, c. 150, ss. 8, 10, 14, 16.

There is other equally conclusive evidence that the words "the place where business is carried on" do not mean the place where a clerk's records are kept and stockholders' meetings are held. The clerk of every corporation must reside and keep his office in the state (P. S., c. 148, s. 10), and all stockholders' meetings must be held in the state. 1 Thomp. Corp., ss. 694, 696. If a town became the place of business of a corporation by reason of keeping a clerk's office and holding stockholders' meetings therein, there could be no such thing as a New Hampshire corporation which had no place of business within the state. But the statutes provide that if any dividend-paying corporation "has no place of business in this state, all certificates and other papers required by law to be filed or recorded in the town clerk's office shall be so filed or recorded in the office of the secretary of state." P. S., c. 150, s. 15. This provision applies to corporations that merely maintain a corporate organization here, but execute their business outside the state. They have no place of business in the state. "If nothing was done except to hold stockholders' meetings and make records of their proceedings, the corporation would not carry on the business for which it was formed." *Kennett* v. *Company*, 68 N. H. 432.

In 1895, and again in 1897, the town in which records are to be made is referred to by the legislature as "the town which is its principal place of business." Laws 1895, c. 1, s. 2; Laws 1897, c. 49, s. 1. The last act was passed after the court had held in terms that the clerk's office and place where stockholders meet could not be deemed the place of business of the corporation, when its business was executed elsewhere. *Kennett* v. *Company*, *supra*.

The fundamental error in the plaintiff's argument is the assumption that its place of business was fixed by the declaration in the

articles of agreement, without regard to the facts as to where it was to do business. The statute demands a truthful statement of the fact. It requires the incorporators to disclose the actual *situs* of their proposed business. This duty is not performed by stating an imaginary *situs*. The location of the business is not changed by such an act. It is very likely true that the corporation would not thereafter be heard to deny that its *situs* was as it had stated, especially if others had acted upon the statement in good faith (*Galveston R. R.* v. *Cowdrey*, 11 Wall. 459), but this would be far from saying that its representation was binding upon those who were in no way parties to it. *Detroit Transportation Co.* v. *Assessors*, 91 Mich. 382. The authorities relied upon by the plaintiff (*Union Steamboat Co.* v. *Buffalo*, 82 N. Y. 351; *Pelton* v. *Company*, 37 Ohio St. 450) may to a large degree be distinguished from the present case by differences in the statutes. In so far as they hold that a corporation can locate a fictitious place of business and thereby conclude other parties, they run counter not only to the decided law of this state, but also to that of other jurisdictions. *Detroit Transportation Co.* v. *Assessors*, 91 Mich. 382; *Milwaukee Steamship Co.* v. *Milwaukee*, 83 Wis. 590.

It is not necessary to now decide whether a corporation doing a substantial part of its business in each of several towns may select any one of the towns as its *situs*. If under the statute there are difficulties which beset incorporators in the matter of rightly selecting the location of the corporation from the towns of the designated class (*i. e.*, those where it is to do business), the difficulty cannot be legally solved by declaring its *situs* to be a town wholly outside the class prescribed by the statute.

Upon the facts agreed to in this case, the principal place of business of this corporation was in Sunapee. If it might have chosen to be a "resident" of either Newbury or New London, it did not do so. If these facts do not make it a resident of Sunapee, then it has no residence. In any permissible view of the case, the property was rightly taxed in Sunapee.

Petition dismissed.

All concurred.

Strafford,
May 5, 1908.

STAPLES *v.* BOSTON & MAINE RAILROAD.

Records of a railroad company purporting to show the movements of trains are not conclusive evidence upon the question whether a locomotive passed a certain point upon the road at a given time.

The fact that grass and undergrowth near a railroad track were found to be burning soon after the passage of a train warrants the inference that the fire was caused by sparks from the locomotive.

CASE, for burning the plaintiff's buildings situated near the defendants' tracks in Milton. There was a trial by jury, resulting in a disagreement. The defendants moved for a nonsuit and for the direction of a verdict in their favor, and excepted to the denial of both motions. Transferred from the February term, 1907, of the superior court by *Wallace*, C. J.

Mathews & Stevens, for the plaintiff.

Kivel & Hughes, for the defendants.

WALKER, J. The principal contention of the defendant is that reasonable men could not find, as claimed by the plaintiff, that a locomotive passed over the track near the plaintiff's buildings about ten o'clock on the evening of the fire, which occurred about midnight, because the record kept by the defendant of the movement of its trains indicated that the last train over the road before the fire passed that point some four hours before. In view of the fact that several of the plaintiff's witnesses testified that they heard a train in that vicinity at about ten o'clock in the evening, the question presented relates merely to the weight to be attached to the evidence. There is no rule of law that makes the train-sheets conclusive proof of the movements of trains; and it cannot be said as a matter of law that the jury, upon a consideration of all the evidence, might not reasonably find that a train passed the plaintiff's premises at about ten o'clock.

There was evidence that the stubble on the declivity between the track and the end of the barn had been burned, that the fire extended to a pile of boards near the end of the barn, where the fire was first discovered, and that a brisk westerly wind arose about that time, which, fanning the smouldering fire, would naturally cause it to run toward the barn. Finding that the fire which destroyed the plaintiff's buildings started in the dry grass

by the side of the track and then worked its way up to the barn, the jury might also find that it was set by a spark from the locomotive which passed by at ten o'clock, in the absence of any other reasonable explanation of its origin. The fact that locomotives frequently emit sparks which fall near the track causing fires, is some evidence that where the grass or undergrowth near a track is on fire and trains have passed along within an hour or two, the fire was caused by sparks from a locomotive. It is not a mere conjecture, but may be a reasonable inference from the facts proved.

Exceptions overruled.

All concurred.

Strafford,
May 5, 1908.

MORAN *v.* DOVER, SOMERSWORTH, AND ROCHESTER STREET RAILWAY CO.

Where the evidence in an action for personal injuries discloses the nature and extent of medical treatment required by the plaintiff, but is silent as to the value or cost of the physician's services, the jury may avail themselves of their common knowledge and experience in determining the expense properly and reasonably incurred in effecting a cure.

CASE, for personal injuries. Trial by jury and verdict for the plaintiff. Transferred from the September term, 1907, of the superior court by *Stone*, J.

There was evidence that the plaintiff employed physicians to treat her for the injuries, and of the nature and extent of the treatment, but none as to the value or cost of the services. The defendant's request that the jury be instructed "that upon the evidence there could be no recovery for medical attendance and services of the physicians who treated the plaintiff" was denied, subject to exception.

Kivel & Hughes, for the plaintiff.

Samuel W. Emery (of Massachusetts), for the defendant.

PEASLEE, J. So far as a fact in issue is one upon which men in general have "a common fund of experience and knowledge,"

the jury may use this information in making up their minds. 4 Wig. Ev., s. 2570. Such knowledge dispenses with the necessity for introducing evidence on the subject. It is also said that "the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and every-day life." *Ib.*

It is apparent that the rule laid down cannot be applied with mathematical exactness. Upon the particular question involved in this case, the courts are divided. A considerable number hold with more or less strictness to the theory that the value of the services of a physician must be shown by evidence. *Brown* v. *White*, 202 Pa. St. 297; *Hobbs* v. *Marion*, 123 Ia. 726; *Nelson* v. *Railway*, 113 Mo. App. 659; *Houston etc. R. R.* v. *Garcia*, (Tex.) 90 S. W. Rep. 713. Compare with these cases the following: *Kelley* v. *Mayberry*, 154 Pa. St. 440 (jurors allowed to estimate the value of a wife's services to her husband); *Northern etc. Co.* v. *Mullins*, (Tex.) 99 S. W. Rep. 433 (jurors allowed to take into consideration the fact that future medical attendance would probably be necessary); *Murray* v. *Railway*, 101 Mo. 236 (jurors allowed to find the value of the services of a nurse, the measure being "their own knowledge and experience").

In other jurisdictions the rule is that jurors "have some knowledge in common with men in general as to the charges ordinarily made by physicians for attendance and services," and that they may avail themselves of that knowledge "for the purpose of determining what sum the plaintiff should have by reason of the expense he has properly and reasonably incurred in endeavoring to effect a cure." *McGarrahan* v. *Railroad*, 171 Mass. 211, 217, 220; *Scullane* v. *Kellogg*, 169 Mass. 544; *Feeney* v. *Railroad*, 116 N. Y. 375; *Western Gas Co.* v. *Danner*, 97 Fed. Rep. 882.

The latter ruling appears the more reasonable, and is in accordance with the practice at *nisi prius* in this state. It would be difficult to conceive of a matter with which all men are more certainly called upon to deal than the employment and payment of a physician. Knowledge on the subject of doctors' bills is as general as upon almost any question of every-day life.

If more satisfactory proof was available, it might have been produced by the defendant, had it not preferred to allow the case to rest here; and the fact that other evidence was not introduced by the plaintiff was legitimate ground for argument that probably the bills were of small amount. *Boucher* v. *Larochelle*, *ante*, 433.

Exception overruled.

All concurred.

Merrimack,
May 5, 1908.

SILVERMAN *& a.* *v.* GAGNON *& a.*

Upon a petition for a junkdealer's license, the petitioner cannot insist that he is not a dealer in junk within the meaning of the statute.

The question of the suitableness of an applicant for a junkdealer's license, under chapter 76, Laws 1905, is one of fact for the determination of the selectmen; and their discretion upon the subject, if properly exercised, cannot be reviewed or reversed.

Selectmen may reasonably find that an applicant for a junkdealer's license is not a suitable person, from the fact that he proposes to purchase junk and transport it to another town for sale, without having any place of storage or business in the town in which he seeks to be licensed.

PETITION, for *mandamus* to compel the defendants, as selectmen of Allenstown, to take further action on the plaintiffs' applications for licenses to deal in old junk. The defendants refused to grant the licenses. Transferred without a ruling from the October term, 1907, of the superior court by *Pike*, J., upon an agreed statement of facts.

Taggart, Tuttle, Burroughs & Wyman, for the plaintiffs.

Arthur W. Thompson and *Edmund S. Cook*, for the defendants.

WALKER, J. By bringing this action, Silverman seeks an order compelling the defendants in their official capacity to issue to him a license under the provisions of chapter 124 of the Public Statutes, as amended by chapter 76, Laws 1905. He asserts in effect that he is entitled to the license which the defendants wrongfully withhold. This claim is the foundation of his application to the selectmen, as well as of this proceeding. If he is entitled to have a license issued to him under the statute, authorizing him to engage in the business of dealing in junk in Allenstown, he has no right to carry on that business in that town without a license. He does not have the right to deal in junk without a license, as claimed by him in argument, and also the right to a license. The two positions are so radically inconsistent that both cannot be assumed at the same time. Having brought his action for the purpose of obtaining a license, he has elected to regard himself a dealer in old junk within the meaning of the statute. He is not entitled to the relief asked unless he has that character; and as the defendants do not defend on the ground that he is not a junkdealer, he

cannot abandon the fundamental theory of his suit, and insist that he does not have that character, for the mere purpose of having that question judicially determined. For the purposes of this case, at least, it must be assumed that his business is such that it cannot be prosecuted legally in Allenstown without a license. No useful purpose, so far as the decision of this case is concerned, would be subserved by a discussion of a matter the existence of which is vital to the plaintiffs' case, and the truth of which is conceded by the defendants.

One ground on which the selectmen refused to issue a license to Silverman is that he is not a "suitable" person to be a dealer in old junk in Allenstown, because he is a resident of Manchester and does not intend to have any place of business in that town. The statute provides that "the selectmen of a town may license persons, deemed by them to be suitable, to be dealers in, and keepers of shops for the purchase and sale or barter of, old junk," etc. P. S., *c.* 124, *s.* 1; Laws 1905, *c.* 76, *s.* 1. The question of the suitableness of the applicant for a license under the statute is a question of fact for the determination of the selectmen; their discretion upon that subject, if properly exercised, cannot be reviewed or reversed. But the duty imposed upon them in this respect must be performed by them, not in an arbitrary manner, but "by an impartial exercise of a reasonable discretion." *State* v. *Cohen*, 73 N. H. 543, 547. Silverman's contention, then, results in the position that the selectmen could not reasonably find that he was not a suitable person, from the fact that he had no place of business in Allenstown, but proposed to solicit and buy old junk from its residents and transport it to Manchester for sale, without storing it or having a localized place within the limits of the town.

For sufficient legislative reasons, the statute was enacted for the purpose of subjecting this business to local police control. In *State* v. *Cohen*, *supra*, it was deemed to be too plain for argument that (*p.* 545) "the statute was intended principally to protect the public against the evils resulting from the crime of larceny by providing facilities for tracing the stolen property and restoring it to its owner and for the detection and punishment of the thief." In order to accomplish this purpose, one requisite for an applicant to possess is that he must be a suitable person. If he is a person whose method of doing business does not afford reasonable protection against the perpetration of the evils known to be connected with the business, he is not a suitable person. His character for suitableness depends to a large extent upon his methods of business. If they are such as to render police supervision difficult and to afford an ineffective protection against the detection of crime.

and fraud, the selectmen would be guilty of no abuse of discretion in refusing, for that reason, to authorize him to do business in their town. Under Silverman's method of doing business, if he were licensed in Allenstown he might drive into a sparsely settled part of the town, where there is little direct police supervision, fill his wagon with stolen property, and quickly remove it beyond the jurisdiction of the town police, thus rendering it more difficult for them to trace and identify the stolen goods and to apprehend the thief, than it would be if "the dealer" had a business habitation in that town. The secrecy with which he would carry on the traffic in the town would tend to encourage some of the evils which the statute was intended to prevent or discourage. Some degree of publicity in the conduct of the business is essential to the effectual accomplishment of the statutory purpose; and if the way Silverman proposes to carry on his business is not attended with such publicity that the police of Allenstown can have a reasonable opportunity of inspecting his purchases and reclaiming stolen property that may be in his possession, with or without fault on his part, the finding that he was not a suitable person to be licensed as a junkdealer in that town cannot be reversed. It is very plain that the court cannot hold that such a result would not follow from granting a license to such a person to be a dealer in junk in a particular town, or that the defendants acted in excess of their authority in refusing to license Silverman for the reason assigned. If the business the plaintiff proposes to carry on does not require a license, the fact that he is licensed in Manchester would not require him to obtain a license in Allenstown; while if a license in Allenstown is required, the license in Manchester does not authorize the carrying on of the business in Allenstown. It is therefore unnecessary to consider the question whether the fee tendered for a license was sufficient. The case of the other plaintiff is disposed of in the same way upon a similar state of facts. The petition should be denied.

Case discharged.

PARSONS, C. J., and BINGHAM and PEASLEE, JJ., concurred: YOUNG, J., dissented.

Merrimack,
May 5, 1908.

MARTIN *v.* WHITNEY.

A non-resident is privileged from summons upon civil process while in attendance as a witness at the trial of a cause in the courts of this state, and an action thus begun is subject to abatement for want of proper service.

The court of this state does not acquire jurisdiction of an action against a non-resident defendant by service of process upon a resident trustee, when the defendant's sole claim against the trustee is an unliquidated demand for damages subsisting in favor of a copartnership of which he is a member.

ASSUMPSIT, to recover a claim for personal services and expenses. Transferred from the October term, 1907, of the superior court by *Pike*, J., upon an agreed statement of facts.

The writ is dated June 25, 1907, and contains the following command: "We also command you to attach the money, goods, chattels, right, and credits of the said defendant, in the hands of the Boston & Maine Railroad, and especially the funds due Whitney, Martin & Co. by reason of a fire which burned a lot of lumber May 2, 1905, a body corporate doing business at said Concord, to the value of eighteen hundred dollars, and summon said trustee," etc. Service was made upon the trustee June 26, 1907, and upon the defendant July 10, 1907.

The defendant is a resident of Ashburnham, Massachusetts, and is so set up in the writ. He, together with the plaintiff and one Clough, are copartners under the firm name of Whitney, Martin & Co., and were the owners of a large amount of lumber which they claimed was destroyed by fire occasioned by sparks from a locomotive of the Boston & Maine Railroad, on May 2, 1905. Prior to June 25, 1907, the railroad tendered to Martin, in behalf of the firm, over $6,000 on account of the alleged destruction of the lumber. The trustee was not indebted to the defendant individually and did not possess any goods or chattels of the defendant at the time of the service of the writ, nor has it since possessed such.

At the date of this writ and at the time of service upon the defendant, the affairs of Whitney, Martin & Co. were unsettled, but an accounting between the parties was then in process upon a bill in equity pending in Merrimack county, in which Whitney was plaintiff and Martin and Clough were defendants, and by order of the court an auditor had been appointed to state the

account. No report has yet been made. Whitney came into New Hampshire July 9, for the purpose of attending a trial before the auditor upon the accounting. While an opening statement was being made before the auditor, the writ in this action was served upon Whitney, who was in the court room attending the hearing. No other service has ever been made upon him. Whitney testified in his own behalf before the auditor. At the October term, to which the writ in this action was returnable, Albin & Sawyer appeared "specially" for the defendant and moved to dismiss. The question whether this motion should be granted is reserved.

Martin & Howe, for the plaintiff.

Albin & Sawyer, for the defendant.

BINGHAM, J. The motion to dismiss the action should be granted. The service of the writ upon the defendant was illegal, and the case does not disclose facts showing that a valid attachment was made. When the writ was served upon the defendant he was not a resident of this state, but was here attending a hearing in an equity proceeding in which he was interested as party and witness. Non-resident witnesses and non-resident parties as witnesses are privileged from arrest or summons upon civil process while in attendance upon, going to, or returning from the trial of a cause in the courts of this state, and an action thus begun is subject to abatement for want of proper service. *Hubbard* v. *Sanborn*, 2 N. H. 468; *State* v. *Buck*, 62 N. H. 670; *Ela* v. *Ela*, 68 N. H. 312, 313, and cases there cited; *Dickinson* v. *Farwell*, 71 N. H. 213; *In re Healey*, 53 Vt. 694; *Parker* v. *Marco*, 136 N. Y. 585; *Larned* v. *Griffin*, 12 Fed. Rep. 590; 1 Gr. Ev., *ss.* 316, 317; 22 Am. & Eng. Enc. Law (1st ed.) 163–166.

By the service of process upon the trustee the court did not acquire jurisdiction of the action, because no money, goods, chattels, rights, or credits of the defendant were in the hands or possession of the trustee. The case states that "the trustee was not indebted to the defendant individually and did not possess any goods or chattels of the defendant at the time of the service of the writ, nor has it since possessed such." The claim against the railroad for burning the lumber does not belong to the defendant, but to a copartnership of which the plaintiff, the defendant, and another are members, and is unliquidated. If the claim were liquidated it would still be problematical what interest, if any, the defendant might have in it as an asset of the firm; for an accounting of the partnership affairs has not been had, and the firm, if it properly could be, has not been made a party to this proceeding.

But the plaintiff in trustee process proceeds against the trustee upon the strength of the defendant's right and title, and in the absence of fraud can recover only what the defendant could against the trustee. *Richards* v. *Railroad*, 44 N. H. 127, 139; *Forist* v. *Bellows*, 59 N. H. 229, 231, 232; *Tucker* v. *Chick*, 67 N. H. 77, 79; *Corning* v. *Records*, 69 N. H. 390, 396, 397. The defendant could not maintain an action against the railroad for the destruction of the lumber; and this being so, no reason is apparent for acceding to the plaintiff's request to continue the action for notice to the defendant.

Action dismissed.

All concurred.

Hillsborough, May 5, 1908.

GARDINER *& a., Ex'rs, v.* CARTER, *State Treas.*

Shares of stock in a domestic corporation, which form part of the estate of a non-resident decedent, constitute property within the jurisdiction of this state, and are subject to the tax imposed by chapter 40, Laws 1905.

Where the estate of a non-resident decedent consists of shares in a corporation chartered in this and other states, but having only a single issue of stock, the inheritance tax collectible under the law of this state is to be computed upon such proportional part of the market value of the shares as the value of the company's franchises and property here situate bears to the value of all its franchises and property.

A foreign executor or administrator cannot maintain a petition for license to sell the decedent's personalty here situate, under section 23, chapter 189, Public Statutes, if any part of the estate within this jurisdiction is subject to the tax imposed by chapter 40, Laws 1905.

PROBATE APPEAL. Transferred from the September term, 1907, of the superior court by *Peaslee*, J.

Mitchell & Foster and *Brandeis, Dunbar & Nutter* (of Massachusetts), for the plaintiffs.

Edwin G. Eastman, attorney-general, and *Joseph S. Matthews*, for the defendant.

BINGHAM, J. The plaintiffs are the executors, under an appointment from the probate court of Massachusetts, of the estate of

Michael Anagnos, who died testate shortly before August 16, 1906, and who was at that time a resident of Massachusetts. A part of his estate consisted of shares of stock in the Boston & Maine and Fitchburg railroads, the certificates for which at the time of his decease were in Massachusetts. The plaintiffs filed a copy of the testator's will in the probate court for Hillsborough county, and petitioned for a license to receive and dispose of the stock under sections 23 and 24, chapter 189, Public Statutes. The defendant objected to the issuing of the license until a tax of five per cent of the market value of the stock at the time of the testator's death should be paid. The plaintiffs then petitioned to have the amount of the tax determined, and the probate court decreed that the stock should be assessed at its full market value, in accordance with the defendant's contention. An appeal was taken from the decree. In the hearing upon the appeal in the superior court, evidence was offered by the plaintiffs tending to prove the total value of the assets of each road, and the value of such part of the assets of each as were situated in and subject to the jurisdiction of this state; also, that the roads were engaged in the business of interstate commerce and commerce with foreign nations. The court declined to receive the evidence and affirmed the decree appealed from, and the plaintiffs excepted.

The Boston & Maine Railroad is incorporated under that name in Maine, New Hampshire, and Massachusetts, and has but a single issue of stock. It owns franchises and property in all three states, which make up the market value of its stock. The facts pertaining to the Fitchburg Railroad, as to its incorporation, ownership of franchises and property, and the issue of stock, are of the same nature and need not be stated in detail.

The plaintiffs' contention is that only such proportional part of the market value of the stock should be taxed in this state as the value of the franchises and property of the corporation here situated bears to the total value of its franchises and property, wherever situated. They do not question the jurisdiction of the probate court, under the provisions of chapter 40, Laws 1905, to impose a tax upon shares of stock in a domestic corporation owned by a non-resident decedent and passing by will or intestate succession to parties not within the exceptions mentioned in the statute, but rather concede that stock so held is property within the jurisdiction of the state, and that a tax may lawfully be imposed upon its transmission. The court in Massachusetts, in construing a statute containing provisions substantially the same as our own, has so held (*Greves* v. *Shaw*, 173 Mass. 205; *Moody* v. *Shaw*, 173 Mass. 375; *Callahan* v. *Woodbridge*, 171 Mass. 595; Mass. Laws 1891, *c.* 425), and a like holding has been made by the court of

appeals in New York. *In re Bronson*, 150 N. Y. 1; *In re Palmer*, 183 N. Y. 238. The line of argument in these decisions is, that the probate court in the state where the property of the non-resident decedent is situated has jurisdiction of the settlement of the estate there located; that it may collect the assets within the state, pay the debts, make final distribution of the property, pay it over according to the will, or in its discretion cause it to be transmitted to the executor or administrator, if any, in any state or county where the deceased had his domicile, for final distribution; that the statutes imposing succession taxes contemplate that property of non-resident decedents will be administered by an executor or administrator appointed in the state where it is located; and that the right and title of a foreign executor or administrator are subject to the prior right of the state to have the property so administered as to yield the tax.

It was also decided in these cases that, as respects stock in a domestic corporation, the measure of the tax is the market value of the stock, whether all the property of the corporation is within the jurisdiction of the state or not; and it is upon this holding that the defendant relies in support of his contention, that the market value of the stock of the Boston & Maine and Fitchburg railroads should be the measure of the tax to be paid by the plaintiffs. But the plaintiffs' answer to this is, that the corporations whose stock was under consideration in those cases were chartered only in the state where the tax was imposed; that if they were chartered elsewhere this fact was not brought to the attention of the court; and that in the more recent decisions in Massachusetts and New York, upon its being shown that the corporation was chartered in two or more states under the same name, that it had but one issue of stock, and that its property and franchises in the different states constituted the value of the stock, it was held that the measure of the tax was such proportionate part of the value of the stock as the franchises and property of the corporation within the state was of the property and franchises in the several states in which the corporation was chartered. *Kingsbury* v. *Chapin*, (Mass.) 82 N. E. Rep. 700; *In re Cooley*, 186 N. Y. 220.

It seems to us that the conclusion reached in these decisions as to the measure of the tax should be followed in this case, and that the plaintiffs' contention should be sustained. A due regard for the language of our statute, as well as justice to the taxpayer, calls for such a construction of the law. Section 1, chapter 40, Laws 1905, provides that "all property within the jurisdiction of the state, real or personal, and any interest therein, whether belonging to inhabitants of the state or not, which shall pass by will, or by the laws regulating intestate succession, . . . shall

be subject to a tax of five per cent of its value, for the use of the state," etc. By its terms, the statute would seem to be limited in its operation to such property as is located in the state, or such as by reason of the domicile of the owner has its legal *situs* here (*Mann* v. *Carter*, *ante*, 345) and requires the aid of our laws for its transmission. The Boston & Maine Railroad is a domestic corporation in each of the states in which it is incorporated; and while the estate of a deceased non-resident stockholder requires the aid of the probate laws of this state to effectuate a transmission of the stockholder's right in the property of the local corporation, their aid is not required to effectuate the transmission of his right to property of the corporation in other states in which it is also chartered; and the value of the property requiring the aid of our laws for its transmission must, in such case at least, be taken as the measure of the tax called for by our statute.

It may be difficult to ascertain the exact value of the plaintiffs' right in the property of the local corporation; but if the tax is assessed upon such a percentage of the value of the stock as the amount of trackage within the state bears to the total trackage in the several states of its incorporation, the practical difficulty may be obviated, and it does not appear that the requirements of the statute would not be met.

It perhaps should be stated that since the enactment of chapter 40, Laws 1905, petitions under section 23, chapter 189, Public Statutes, cannot be maintained by a foreign executor or administrator, if any part of his testator's or intestate's property within the jurisdiction of the state is subject to a tax under chapter 40; that in such case it is necessary that ancillary administration be taken out by him, if he would establish and make effective his title to the property (*Knight* v. *Hollings*, 73 N. H. 495, 500; *Mann* v. *Carter*, *supra*, 350; P. S., *c.* 182, *s.* 8); that an inventory should be filed as required by section 9, chapter 40; and that these steps should be taken before application is made to the probate court under section 14, chapter 40. The plaintiffs' exception is sustained.

Case discharged.

PEASLEE, J., did not sit: the others concurred.

Hillsborough,
May 5, 1908.

NASHUA LIGHT, HEAT, AND POWER CO. *v.* FRANCESTOWN SOAPSTONE CO. *& Tr.*

A tenant of a lessor, who attorns to the owner of the premises to avoid eviction, is not chargeable as the lessor's trustee.

FOREIGN ATTACHMENT. The defendants were defaulted. The issue of the trustee's chargeability was tried before *Peaslee*, J., at the September term, 1907, of the superior court. The trustee was discharged, and the plaintiffs excepted.

February 15, 1905, the defendants leased to the trustee for the term of three years a tract of land, part of which they leased from the Boston & Maine Railroad. Their lease expired June 1, 1905, and was not renewed. The trustee paid rent to the defendants to that date, and afterward to the railroad. The writ was served on the trustee June 9, 1905.

Henry A. Cutter, for the plaintiffs.

Branch & Branch, for the trustee.

YOUNG, J. The test to determine whether the trustee is chargeable is to inquire whether the defendants could maintain an action against him for rent. *Glauber Mfg. Co.* v. *Voter*, 71 N. H. 68; *Corning* v. *Records*, 69 N. H. 390, 396; *Marsh* v. *Garney*, 69 N. H. 236. It is an answer to such an action for the tenant to show that, in order to avoid eviction, he attorned to the person legally entitled to the immediate possession of the premises. *Russell* v. *Allard*, 18 N. H. 222; *Smith* v. *Shepard*, 15 Pick. 147; *Morse* v. *Goddard*, 13 Met. 177; 11 Cyc. 1120; 8 Am. & Eng. Enc. Law 105–108. The test, therefore, to determine whether the court erred in discharging the trustee is to inquire whether it can be found that the trustee attorned to the railroad in order to avoid eviction; for the plaintiffs do not contend it cannot be found that the trustee acted in good faith, that the railroad's title was superior to the defendants', and that the railroad was entitled to the immediate possession of the premises.

The trustee states in his disclosure that, notwithstanding his lease was not formally cancelled, he paid rent to the railroad after June 1, 1905, because that corporation owned the property. It is clear it can be found from this evidence, not only that the trustee

became the railroad's tenant to avoid eviction, but also that he assumed that relation with the defendants' consent; and either of these facts is fatal to the plaintiffs' right to recover.

Exception overruled.

PEASLEE, J., did not sit: the others concurred.

Sullivan,
May 5, 1908.

WILMARTH v. KING.

The statute authorizing a justice of the peace to impose a sentence of six months' imprisonment as punishment for crime is not in conflict with the constitution.

HABEAS CORPUS. The petitioner, having been duly convicted before a justice of the peace for the county of the offence of drunkenness in a public place, was sentenced by the justice to confinement in the county jail for the term of four months. The ground of his application for discharge was the claim that the sentence of confinement for four months was in excess of the jurisdiction which could be conferred upon a justice of the peace under the constitution. Upon examination before *Wallace*, C. J., in the superior court, the jurisdictional question was transferred to the supreme court for determination, the petitioner being admitted to bail pending the decision.

George R. Brown, for the plaintiff.

Frank O. Chellis, solicitor, for the defendant.

PARSONS, C. J. The extreme term for which imprisonment is authorized as punishment for the offence of which the petitioner was found guilty is six months. P. S., *c.* 264, *ss.* 14, 20; Laws 1903, *c.* 32. Section 3, chapter 248, of the Public Statutes, authorizes every justice of the peace to "hear and determine any prosecution or action of a criminal nature arising within his county, or triable therein, where the punishment is . . . by imprisonment not exceeding six months." The limitation, by constitutional provisions securing to the individual an untrammeled right of trial by jury when accused of crime, upon the judicial

power in criminal cases which may be conferred upon justices of the peace and police courts has been the subject of recent and extensive investigation. *State* v. *Gerry*, 68 N. H. 495; *State* v. *Jackson*, 69 N. H. 511. The conclusion was that the right of trial by jury, as it existed at the adoption of the constitution in 1784, could not be infringed by subsequent legislation, and that any provisions which subject an individual to greater punishment for crime without the verdict of a jury than it was then understood could be so inflicted are beyond the power of the legislature to enact and are void.

"In and prior to 1784, a justice of the peace had authority to try and determine . . . those criminal offences only that were punishable by a fine not exceeding forty shillings, by whipping, or by setting in the stocks." *State* v. *Gerry*, 68 N. H. 495, 510. In *State* v. *Jackson*, 69 N. H. 511, it was held that, as justices of the peace had not in 1784 authority to impose a fine of twenty dollars, such authority could not be conferred upon them by the legislature. While it may be plain that twenty dollars measurably exceeds forty shillings, the attempt to compare the physical punishment then and now inflictible by justices of the peace presents something more than a problem in arithmetic. "It is impossible to determine what term of imprisonment would be an exact equivalent for the pain and disgrace occasioned by twenty stripes laid upon the bare back, or by two or three hours' confinement in stocks located near the meeting-house, or in some other public place. The generation which formed the constitution, and the immediate successor of that generation, had the best means of judging what pecuniary and physical punishments would be equivalents for those which in 1784 limited the jurisdiction of justices, and which soon afterward became obsolete by reason of the change in the notation of money and the change in public opinion rendering corporal punishments odious. Besides knowing all the facts bearing upon the question, they were imbued with the spirit of the law of the times. On a question of this kind one may confidently rely upon the correctness of their decision." *State* v. *Jackson*, 69 N. H. 511, 521.

Prior to the statute of 1867 (G. S., *c.* 234, *s.* 4), giving jurisdiction to justices of the peace in all cases where the fine did not exceed twenty dollars and the term of imprisonment did not exceed six months, no act is found authorizing a fine of that amount; but statutes authorizing the punishment of six months' imprisonment by a justice of the peace are to be found, even antedating the constitution. Laws, *ed.* 1780, *pp.* 63, 64, 65; Laws 1828, *c.* 45, *ss.* 3, 4; R. S., *c.* 116, *ss.* 2, 3; *State* v. *Jackson*, 69

N. H. 511, 517, 520. So that while as to the maximum fine, by which the jurisdiction of justices was attempted to be limited in 1867, there is no evidence from "the practical construction given to the constitution by the men who framed it, and their contemporaries, and their successors inheriting their opinions" (*Hale* v. *Everett*, 53 N. H. 9, 171) that twenty dollars was no more by reason of change in the value of money than the forty shillings fine permitted prior to 1784, and while the contrary may be clear as a mathematical proposition and hence the pecuniary innovation of 1867 be clearly beyond legislative power, these or similar objections cannot be raised to the provision as to imprisonment now attacked.

By the Revised Statutes, justices of the peace were authorized to hear and determine prosecutions and actions of a criminal nature where the punishment was by fine not exceeding ten dollars. R. S., *c.* 222, *s.* 1. Until 1867, there was no general statute measuring their jurisdiction by the term of imprisonment inflictible as punishment; but they were authorized to inflict such punishment in certain cases, included in which were cases in which the imprisonment might extend to six months. And as it is impossible to say as matter of law that imprisonment for six months is more than an equivalent for the barbarous punishment of public whipping and setting in stocks, the grounds upon which the statute was held unconstitutional as to the infliction of the prescribed pecuniary penalty fail upon the question now presented. The presumption is that the legislature intended to obey the constitution and to authorize the infliction of a punishment no greater than was permitted when the constitution was adopted. This involves a legislative finding that the corporal punishment of deprivation of personal liberty for six months does not exceed the like punishment of whipping or setting in stocks directly inflicted upon the person. As this conclusion cannot be shown to be erroneous as matter of law, the statute cannot be successfully assailed on constitutional grounds. The sentence of the plaintiff by a justice of the peace to four months' imprisonment was authorized by the statute. The statute was one which the legislature had power to pass.

Case discharged.

All concurred.

Sullivan,
May 5, 1908.

DARLING *v.* NEWPORT ELECTRIC LIGHT CO.

An electric light company which mutilates shade trees on private premises without the owner's consent is liable therefor in an action of trespass, unless there has been an adjudication of necessity, an assessment of damages, and payment or tender thereof, in conformity with section 5, chapter 81, Public Statutes.

TRESPASS *quare clausum.* Plea, the general issue, with a brief statement that the defendant was licensed by the selectmen of Newport to erect and maintain poles and wires on Summer street in that town, and that the alleged trespass consisted of acts legalized by the license. Trial by the court and verdict for the plaintiff. Transferred from the November term, 1907, of the superior court by *Chamberlin*, J.

The plaintiff's close is on Summer street, and the defendant cut limbs from his shade tree which stood near the line of the street. The defendant's poles were in the street, and the wires were strung upon cross-arms. This brought them close to the plaintiff's tree. Before the alleged trespass the town had voted to install a light on Summer street. To do this it was necessary to erect poles and string wires past the plaintiff's close, but this could have been properly done without interfering with the tree. The cutting was without the plaintiff's consent, and without other authority than that already stated.

The defendant moved for judgment because an action of trespass could not be maintained and because the plaintiff's remedy was by petition to the selectmen for an assessment of his damages. The motion was denied, subject to exception.

George R. Brown, for the plaintiff.

Jesse M. Barton, for the defendant.

PEASLEE, J. It is not necessary to consider in this case what the relative right of these parties would be at common law. The defendant might have obtained a right to maintain its poles and wires in the manner prescribed by the statute. P. S., *c.* 81. It was prohibited from erecting them without so securing the right. *Ib.*, *s.* 1.

Granting that the implied license to erect its line in Summer street could be held to be a compliance with the provision that the

selectmen shall "grant a license for such time as they deem expedient," and "shall fix and state therein the size and location of such poles and structures, the distances between them, the number of wires to be used, and their distance above or below the surface of the highway" (*Ib.*, s. 2), it could not be extended to cover the present case.

"No person or corporation shall have a right to cut, mutilate, or injure any shade or ornamental tree for the purpose of erecting or maintaining their line, without consent of the owner of the land on which it grows; or, if his consent cannot be obtained, unless the selectmen, upon petition, after notice to and hearing the parties, decide that the cutting or mutilation is necessary, and assess the damages that will be occasioned the owner thereby, nor until the damages are paid or tendered." *Ib.*, s. 5. There is no pretence of a compliance with this statute. The justification fails, and the defendant stands no better than any other trespasser. *Strickford* v. *Railroad*, 73 N. H. 81, 83. The abutter has such possession that he may maintain trespass against any one cutting his trees, or in any way invading his possession. *Bigelow* v. *Whitcomb*, 72 N. H. 473, 476.

The provision that any person "damaged in his estate by the erection of any poles or other structures, or by the stringing of any wires for which license is granted," may apply to the selectmen to assess his damages (P. S., c. 81, s. 6), applies only to acts done by virtue of a license. "If a person is damaged in his estate by a license or any act done under it, he may have his damages assessed by the selectmen." *American Loan & Trust Co.* v. *Electric Co.*, 71 N. H. 192, 200. To hold that under this provision one who has obtained a location under section 2 may cut shade trees and put the owner to his appeal to the selectmen to obtain an assessment of his damages, would be to nullify the explicit provisions found in section 5. This section was the law of this state long before section 6 was enacted (Laws 1877, c. 50, s. 2), and provides an essentially different remedy for a different situation. Under section 5 there must be an adjudication of necessity, an assessment of damages, and payment or tender thereof, before injury to shade trees can lawfully be done. Section 6 provides for obtaining compensation for injuries done to property, other than shade or ornamental trees, by virtue of a license obtained under section 2. The reason for making this distinction was doubtless the esthetic and sentimental considerations attaching to shade and ornamental trees. Prevention of injury to such property is of much more consequence than any mere assessment of money damages for a wrong actually committed.

The defendant's argument is based upon the erroneous assump-

tion that the plaintiff's rights in his trees were created by this statute (P. S., *c.* 81). His rights existed at common law, and the statute prohibits their invasion and limits the manner in which they may be appropriated for certain public uses. *Bigelow* v. *Whitcomb*, *supra*. The statute made an adjudication of necessity and the assessment and payment or tender of damages conditions precedent to cutting the plaintiff's tree. A failure to comply with these conditions made the defendant's acts unlawful. *Strickford* v. *Railroad*, *supra*.

Exception overruled.

All concurred.

Grafton,
May 5, 1908.

CANAAN *v.* ENFIELD VILLAGE FIRE DISTRICT.

74 517
74 562

Property of the Enfield Village Fire District situate in Canaan, but used in the construction or operation of the water-works of the district, is exempt from taxation.

ASSUMPSIT, for taxes assessed against the defendants. Transferred from the November term, 1905, of the superior court by *Chamberlin*, J., upon an agreed statement of facts.

George F. Morris (with whom were *Batchellor & Mitchell*, *John M. Mitchell*, and *James B. Wallace*), for the plaintiffs. The decision in *Newport* v. *Unity*, 68 N. H. 587, rests on the special provisions of the New Hampshire statutes as follows: "Buildings, mills, carding machines, factory buildings and machinery, wharves, ferries, toll-bridges, locks and canals, and aqueducts any portion of the water of which is sold or rented for pay, are taxable as real estate." P. S., *c.* 55, *s.* 3. The language of the statute is plain and unambiguous. No distinction is made between water rights owned by private individuals and corporations, and those owned by municipal corporations. Therefore by the plain provisions of the statute "all aqueducts any portion of the water of which is sold or rented for pay are taxable as real estate."

This clause first appears in the revision of the statutes made in 1867. It is evident that the commissioners considered the real estate of water companies taxable by the general provisions of the statutes, and that the foregoing clause was added for the purpose

of removing all doubt about the aqueducts of such companies. Certainly, to hold that the aqueducts of water companies are taxable, and that the real estate of which the aqueducts are a lesser part is not taxable, would be anomalous.

As we have said, no distinction is made as to the ownership of aqueducts, provided a portion of the water is sold or rented for pay. Such was the fact in the Newport case, and such is the fact in the Canaan case. If the plain language of the statute is to be limited it must be by some other provision.

Section 2 of chapter 55 is relied on as working a limitation of section 3. It provides that "real estate of the United States, state, or town used for public purposes, and almshouses on county farms" are not taxable. As was said in the opinion in *Newport* v. *Unity*, this statute antedates any statute enabling towns to acquire extra-territorial property, either by purchase or eminent domain. Hence, in exempting the property of towns used for public purposes, the legislature could not have had in mind that it was exempting property owned by one town which is situated in another town. It must be assumed that the intent of the legislature was to exempt property such as it would be useless and unnecessary to tax (town-houses, etc.), or such property as is mentioned in Cooley on Taxation (3d ed., *vol.* 1, *p.* 263), under the head of "Implied Exemptions": "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they are not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes."

Property in one town belonging to another town does not come within the reason of this rule, because it is not in the same taxing district. The taxation of such property, instead of imposing the burden of levying an extra tax on other property of the town with which to pay that tax, reduces the rate to all other taxpayers in the township. As we think it must be conceded that it is within the power of the legislature to tax public property, and as the only reason for not doing so is that it is a useless form, there can be no implied exemption of extra-territorial property to counteract the express provisions of section 3, quoted *supra*.

Newport v. *Unity* was decided in 1896. The act exempting the property of the defendant district was passed in 1903, after an interim of nearly seven years, during which there were several sessions of the legislature. There was ample opportunity to make the statute plain if the construction in *Newport* v. *Unity* was not sound, or if it did not meet with legislative approval. "In the passage of each act, the legislature must be supposed to have had

in mind and contemplation the existing legislation on the same subject, and to have shaped its own enactments with reference thereto." Black Interp. Laws, *s.* 86.

That the legislature of 1903 had in mind that the property of the Enfield Fire District in Canaan would be taxable under the general laws, unless made exempt by special act, is clear, else there was no necessity for inserting the exemption clause in the Enfield act. There was no attempt or purpose manifested by the legislature of 1903 to change what it must have considered a settled law of the state when the subject was under consideration. But for reasons not clearly manifested, it undertook to take the Enfield District out of the general rule. Again, if by the general laws extra-territorial holdings of towns were exempt or supposed to be exempt from taxation, why, prior to the decision in *Newport* v. *Unity* in 1896, did the legislature by special act exempt the city of Concord in 1891 (Laws 1891, *c.* 261, *s.* 6) and the Whitefield Village Fire District in 1893 (Laws 1893, *c.* 167, *s.* 10)?

In *Niagara Bridge Works* v. *Jose*, 59 N. H. 81, the interpretation of a special act of July 24, 1871, was under consideration. It was claimed by the plaintiff that there was a strong presumption that the legislature did not intend by the special act to exempt the defendant from the operation of the general statute. We quote the following from the opinion of *Stanley*, J.: "If, by the act of 1871, neither the power to contract debts was enlarged, nor the penalty removed, it is difficult to conceive anything gained by its passage. No new right was conferred, nor was any liability modified. The rights and liabilities of the corporation and the directors were the same after as before its passage. But this view is not correct. The act of 1871 was passed for the purpose of effecting a change in the existing law, so far as it related to this corporation. . . . When the act of 1871 was passed, the directors were amenable to the general law, and they could not exceed the limit fixed by section 4 without becoming liable. If this act is to have any effect, it must be to permit that which was before prohibited; and if this is its effect, it renders section 4 of chapter 135 inapplicable to this corporation, and as to it, it was a waiver of the general provisions of law applicable to all corporations."

Guthrie County v. *County*, 34 Ia. 108, is also in point, and supports our theory of the statutory construction to be placed on the Enfield act and existing law. It is there held that if the lands in question were not taxable by the general laws, there was no necessity for the passage of a new act. The enactment of the statute amounts to a legislative declaration that such lands were before

taxable. We believe the opinion in *Newport* v. *Unity* is consonant with the legislative intent, as gathered from the history of the several sections of the tax laws above referred to.

We believe that the maintenance of a system of water-works by a taxing district is a private enterprise, in so far as it concerns the interest of any other similar district not deriving a benefit therefrom. We believe that the exercise of such a function is only *quasi*-public and is not to be classed among those powers of towns usually spoken of as governmental. Every function of a town or taxing district must be placed either in one class or the other; and to say that a power may be of a private nature with respect to negligence suits, and governmental with respect to taxation, is to lose sight of the fact that it is the same power that is being exercised all the while. If the maintenance of a water system is *quasi*-public for one purpose, it is for all. It neither changes its skin nor its color. It is firmly settled by sound reason and authority (*Morrison* v. *Manchester*, 58 N. H. 538, 550), that an exemption of property which should bear its share of the public burdens is equivalent to the imposition of a corresponding tax on other property.

Private property can be taken for public use in but two ways,—by right of eminent domain and by taxation,—and only upon just compensation being made. The protection afforded the citizen by the government is usually conceded to be the just compensation provided by the constitution for all private property he is required to surrender in the shape of taxes. It is probably true, as maintained by the defendant, that exact equality in the distribution of the public burdens, and especially of such as are local, cannot be attained. The individual who lives just beyond the limit of a sidewalk does not enjoy quite the same advantages from its maintenance as his more fortunate neighbor whose house is located beside the walk.

The legislature, in fixing the limits of taxing districts, whether county, town, fire or water districts, considers the advantages to be returned and attempts to equalize them, having regard to the purposes for which the taxing district is formed. We would not expect to find territory which is not adjacent included in one township, or a rural neighborhood united in a fire district with a village. That the legislature may change the limits of taxing districts as exigencies require, is undisputable; but so long as district limits remain fixed, it is indicative of a legislative understanding that there exists a community of interests among the citizens. Beyond its limits the citizens owe allegiance to, and come within the protection of, some other taxing district. Both districts may have a common interest in that they belong to a

larger or superior district; but even then the only interest of each is to bear its just proportion of the burdens of its superior. All taxing districts are separate and distinct in their acts, and, it may be, in their needs. One may require macadam roads, and another electric lights and a fire system. One may require a two per cent tax to keep in repair its highways, and another a five per cent tax. Except in so far as their acts affect the state at large, the one is not interested in the concerns of the other.

We concede that the inhabitants of the state at large have an interest in the preservation of the health of the inhabitants of every locality, and that furnishing a supply of pure water to a municipal district is in a certain sense doing a service to the general public. Nevertheless, if a taxing district can maintain the health of its citizens by some other method, the establishment of a municipal water-plant may not be necessary and is never compulsory. As far as known, no legislature has compelled a village, against its wishes, to construct a system of water-works. A water system is therefore not essential in the machinery of government. It is not a governmental function in the sense in which the term is ordinarily used, but the private enterprise of a taxing district, employed for the protection and convenience of its own citizens, which incidentally renders a valuable service to the general public.

Admitting that, in a sense, a district is performing a service to the general public by protecting its members from pestilence and disease and their property from fires and conflagration, it does not follow that the legislature has a right to single out one taxing district and demand that it pay the city of Manchester $500 for the support of municipal water-works therein, and another with a demand that it pay $1,000 for the maintenance of the highways in Concord. *Opinion of the Court*, 4 N. H. 565, 570. The service rendered by each taxing district outside of the welfare of its own citizens is to the general public, and not to some other like district. Therefore, if financial aid is required for carrying on any work, either governmental (maintenance of highways) or *quasi*-public (maintenance of electric lights), it is to the state that application for such aid should be made. A fair illustration of this principle is found in numerous acts granting aid to small towns for the maintenance of highways. To prove that the maintenance of a water system is a governmental function, proves too much for the purposes of the defendant's case. It proves that they should look to the state for aid. "If the work concerns the public, its cost, in excess of peculiar local benefits, must fall upon the public according to some established rule of uniformity." *Baldwin* v. *Fuller*, 39 N. J. Law 576. The authority of the legislature

to impose on any one taxing district an unequal portion of the burden of maintaining even a governmental profit is denied. *State* v. *Jackman*, 69 N. H. 318, 331.

The question of each district bearing only its share of the public burdens is fundamental. It bears its own and its share of the county and state burdens, but it cannot be asked to bear a share of its neighbor's burdens so long as the legislature permits it to retain its individuality. The acts of every taxing district are private as respects every other district, except in so far as they are integral parts of the county or state. The question strikes deeper than that of determining whether a water system is a private or governmental instrumentality. It is the question of just compensation. It cannot be claimed that there is any such community of interests between Hart's Location and the city of Concord as that the legislature could demand a special tax of $5,000 from the latter for the support of highways in the former. The legislature has never seen fit to associate the two places together. They lack a community of local interest. Such an act would not be taxation but extortion. Neither can it be said that there is any community of interest between the town of Canaan and the Enfield Fire District. Their territory is not even contiguous. There has been no effort to associate the two on any such theory. No extra burden should be imposed on the taxpayers of Canaan for the support of the Enfield District, nor can such burden be constitutionally so imposed until there is such a community of interests as to enable the legislature with propriety to unite the two in a taxing district. The right to maintain district boundaries may not be sacred, but the right of the individuals, within such bounds as exist, to be secure from outside invasion of their private property rights, is sacred and secured to them by the constitution.

The reasoning of the courts in the following cases is certainly entitled to some consideration: *Commissioners* v. *Laurel*, 70 Md. 443; *Cheaney* v. *Hooser*, 9 B. Mon. 330; *Manistee Lumber Co.* v. *Springfield*, 92 Mich. 277; *Wells* v. *Weston*, 22 Mo. 384; *St. Charles* v. *Nolle*, 51 Mo. 122; *Bradshaw* v. *Omaha*, 1 Neb. 16; 1 Cool. Tax. (3d ed.) 225–230.

Streeter & Hollis, for the defendants.

WALKER, J. The Enfield Village Fire District is a public corporation created by the legislature for the promotion of the public welfare. It was organized in 1873 under the general law then in force authorizing its creation (G. S., *c.* 97), and it thereby became a body politic and was invested with certain limited governmental

powers. Its essential character as a governmental agency, as contradistinguished from a private corporation, is as apparent as though the territory and the inhabitants of which it is composed had been specially designated by the legislature as a town. While its territorial boundaries are within the town of Enfield, it is, like a school district similarly situated (*Union School District* v. *District*, 71 N. H. 269), distinct from the town as a governmental agency. Within the limit of the powers conferred upon it, it may be deemed to be a town. P. S., *c.* 2, *s.* 5.

In 1903, the legislature by special act (Laws 1903, *c.* 221) authorized and empowered the defendant to establish water-works "for the purpose of introducing into and distributing through said fire district an adequate supply of pure water in subterranean pipes, for extinguishing fires and for the use of its citizens and for other purposes." It was also authorized to acquire by purchase or by the power of eminent domain streams and ponds, and to build canals and reservoirs for its water-works. The act did not specifically define the territory within which this power might be exercised. So far as the acquisition of the property is concerned, it was not expressly limited to the territory of the district, or to that of the town of Enfield. By section 4 of the act it was provided: "The purchase of real estate and water rights already made by said fire district, the authority voted for the issue of notes or bonds for construction of the said water-works, and the vote of the town of Enfield exempting such notes and bonds from taxation are hereby ratified and confirmed; and all the property of said fire district used in the construction and operation of its water-works shall be exempt from taxation." Before the passage of this act the defendant purchased certain land and water-rights located in the town of Canaan, which it now uses for the supply of water to its water system; and the question, which is presented by an amendment of the original case (*Canaan* v. *Enfield District*, *ante*, 8), is whether this property is subject to taxation by the town of Canaan. It is apparent the legislature of 1903 intended to authorize the district to acquire real estate in Canaan, and in fact ratified and confirmed the acquisition of such property.

In behalf of the plaintiff, it is claimed that the exemption authorized in section 4 only applies to property of the defendant situated in the town of Enfield. It is argued that, though the language used is broad enough to include land situated in other towns owned by the defendant, the intention of the legislature found from the competent evidence bearing on the subject does not warrant so broad a construction. In support of this contention, the case of *Newport* v. *Unity*, 68 N. H. 587, is relied upon.

In that case it was held that real estate used for water-works

and owned by Newport, but situated in Unity, is not exempt from taxation by Unity, under section 2, chapter 55, Public Statutes, which provides that "real estate . . . is liable to be taxed, except houses of public worship, . . . schoolhouses, seminaries of learning, real estate of the United States, state, or town used for public purposes, and almshouses on county farms." The question decided in that case is not precisely the same as the one presented in this case. In that case the element of a special exemption was wanting. Immunity from the tax burden was sought under the general statute of exemptions. But if the theory of the decision is sound, it affords much support to the plaintiff's contention, that the legislature did not intend to exempt other property of the defendant than that situated in Enfield. One ground upon which that decision was based is that before 1867, when the section above quoted was first enacted, there was no statutory exemption of the real estate of towns from taxation; that at that time towns had no general authority to purchase land beyond their limits; and that "if there were, at the time of the revision of 1867, no statutes authorizing towns to purchase real estate outside their limits, it seems plain that the statute is not necessarily to be construed as exempting such property from taxation. The legislature could not have had it in mind. Hence, when they subsequently authorized towns and cities to acquire for public purposes lands in other towns, it cannot be justly presumed that they intended such property to be exempt from taxation." If it is conceded that when the legislature authorizes a town to acquire land in another town for public purposes, a general statutory exemption of public property is not intended to apply to such extra-territorial property, it may be argued with some degree of plausibility that the legislature of 1903, by general words of exemption, did not intend to exempt the defendant's property located in Canaan. If the words of the exemption had been "the real estate of the district used for public purposes," in analogy to the general language used in section 2, chapter 55, Public Statutes, which the court held in *Newport* v. *Unity* did not apply to land located without the town of Newport, the intention to exclude the Canaan property from its operation would not have been more apparent. If the comprehensive language of the general law, exempting the real estate of towns "used for public purposes" from taxation, relates only to real estate located within the territorial boundaries of the town, similar language used in a special act creating a water district might reasonably be restricted to land in the town in which the district is located, in contradistinction to land of the district located in another town. It seems to be important, therefore, to consider whether the reasoning by which the decision in *Newport*

v. *Unity* was reached is logically sound as an authoritative exposition of the legislative intention relative to the exemption from taxation of town property used for water-works purposes when located in another town.

The opinion in that case is based to some extent upon the assumption that previous to 1867 the property of towns used for public purposes was taxable, and that the legislature of that year created the exemption having reference solely to intra-territorial property, for the reason above suggested. If this assumption is sound, it affords weight to the plaintiff's contention that, upon a strict construction, the legislature of 1903 did not intend to extend the defendant's exemption to property which, though used for public purposes in Enfield, was located in Canaan, and that the express mention of the exemption, though unnecessary, was inserted out of abundant caution. If the property in question falls within the taxable class of property, it is taxable unless it is clearly exempted by express legislative language. And the court in *Newport* v. *Unity*, holding that the public water-works of Newport located in Unity fell within the general statutory definition of ratable estate, decided that they were taxable, the same as they would be if owned by an individual or a private corporation. If the court had started with the opposite assumption, viz., that being property devoted to a public use by a town the water-works were not taxable unless specially made so by statute, the conclusion that the legislature did not intend to exempt them, though located in an adjoining town, would have been less obvious. The evidence of that legislative intent would have been less convincing, and the decision would not be an authority for the proposition that, in the absence of an express legislative exemption, the property of towns used for public purposes is taxable. By applying that doctrine to the case at bar, and adopting the rule of strict construction which is observed when the question relates to the exemption of the property of private corporations or of individuals (*Portsmouth Shoe Co.* v. *Portsmouth*, *ante*, 222), it might not be difficult to hold that the legislature did not intend to exempt the defendant's extra-territorial property, and hence that it is taxable. But a re-examination of the grounds of that decision, it is believed, will show that they are fallacious.

When the legislature in 1867 excepted from taxable real estate the "real estate of the United States, state, or town used for public purposes," it did not thereby introduce an innovation, and withdraw from taxation property otherwise subject to that burden. It did not create a new class of non-taxable property. It merely recognized an ancient and uninterrupted rule, which would have been as controlling if it had not been put into legislative language.

"It is certainly not true that all lands in the town were ever taxed, or now are. Lands owned by the town are not taxed, and yet are not exempted by any statute; the parsonage, school-lot, etc., are of this description. All buildings are to be taxed; but was it ever heard of to tax a meeting-house, schoolhouse? Were the public buildings in Exeter, Concord, Hanover, etc., ever taxed? There are and always have been exemptions, where the statute has not expressly made any. They depend on invariable usage, growing out of the reason and nature of the thing. They are more ancient than our statutes (1770), and are not repealed except by express clauses for the purpose, or by provisions necessarily and manifestly repugnant." *Smith*, C. J., note to *Kidder* v. *French*, Smith (N. H.) 155, 157 (1807). In *Grafton County* v. *Haverhill*, 68 N. H. 120, 121, it is said: "It is therefore reasonable to consider that, however general may be the enumeration of taxable property, public property held by the state and counties and municipalities for public and governmental uses was intended to be exempted, unless the right or duty to tax it was provided for in the most express and positive terms, or by necessary implication. Cool. Tax. 172; Black Tax Tit. 410." In recognition of this principle, it was held in that case that county court-houses and jails were exempt from taxation, although county buildings were not included in the statutory exemption of public property.

The same principle is clearly stated in *Franklin Street Society* v. *Manchester*, 60 N. H. 342, where it is held that the constitution does not exempt church property from taxation. The court say (*p.* 349): "So long as towns, under the act of 1791, exercised parochial functions and raised taxes for supporting and maintaining houses of public worship, those places of worship were exempt from taxation as public property by the nature of things, and not by the constitution or by statute. After the act of 1819, when towns were no longer subject to church rates, and the whole management of public worship, including its support, was left to the religious societies authorized and organized for that purpose, the natural reason for exempting this property from taxation ceased." The exemption of such property was neither secured by any constitutional provision, nor granted by any express legislative enactment; but resulted from the very great improbability that the state, through its legislature, should intend to include its own property in a general statutory designation of taxable property. Stated otherwise, such an intention could only be found from express and unequivocal language used in the statute authorizing the tax. In the absence of language necessarily leading to that conclusion, the presumption is that the property of towns, which is properly used in promoting the public welfare, is not taxable.

And this presumption, entertained and acted upon for so many years, has established a rule of the non-taxability of municipal property, except when specially designated as taxable. It is not an accurate statement to say that the property of the state is exempt from taxation; the fact is, it does not belong to the taxable class of property enumerated in a general taxing statute; and it is not exempted from the operation of the statute, for it does not fall within it. Formal exempting language, in a legal view, is as unnecessary as it is harmless. It creates no exemption, and is at most but a mere legislative recognition of a class of non-taxable property. The idea is well expressed in *Yale University* v. *New Haven*, 71 Conn. 316, 331, 332, with reference to the exemption of college buildings in that state: "When the legislature in 1822 saw fit to formally declare that property of the United States, of the state, and of municipal governments, and 'the buildings occupied as colleges,' etc., should be exempt from taxation (Public Acts of 1822, *p.* 35), it did not alter the character of the property or the reason of its not being taxed. The declaration was not an exemption, in the strict sense of the word, as to buildings occupied as colleges and schools, any more than as to property of the United States. They were untaxed, as they had been for nearly two hundred years, without any legislative declaration, because they are not 'ratable estate'; because they had been placed in that class of property which ought not to be taxed, by virtue of a public policy too clear to be questioned, and which had been followed without any specific legislation by our government from its very beginning." See, also, *Camden* v. *Village Corp.*, 77 Me. 530; *Stiles* v. *Newport*, 76 Vt. 154; *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491, 497; *West Hartford* v. *Commissioners*, 44 Conn. 360; *Rochester* v. *Rush*, 15 Hun 239; *S. C.*, 80 N. Y. 302; *People* v. *Assessors*, 111 N. Y. 505, 509; *Black* v. *Sherwood*, 84 Va. 906; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 153.

It would seem that, both upon principle and authority, the public property of towns is not taxable unless specifically made so by clear legislative language. The presumption, which has by long and universal acquiescence become a rule of law, is against its taxability. If the court in *Newport* v. *Unity* had started with the premise that public property of a town is not ordinarily included in a general taxing statute, and cannot be taxed unless specifically mentioned, it is probable that it would not have held substantially that the water-works in question were taxable because not specifically exempted from the operation of the general statute. Treating the property as taxable unless specifically exempted, authorizes a strict construction against its exemption; while viewing it as non-taxable unless specifically designated as taxable, authorizes a

strict construction against its taxableness. In the one case the evidence would show that the legislature did not intend to exempt it from the operation of a general taxing statute; while in the other it would show that the legislature did not intend to include it in the class of property subject to taxation. And as no property is taxable in the absence of legislative authorization (Bill of Rights, *art.* 28; Const., *art.* 5; *Sunapee* v. *Lempster*, 65 N. H. 655; *Carpenter*, J., in *Boody* v. *Watson*, 64 N. H. 162, 195; *Nashua Savings Bank* v. *Nashua*, 46 N. H. 389, 392), and as the rule of the non-taxableness of public town property has been recognized for more than one hundred years, it is a reasonable, if not an inevitable, finding, that in a general statute enumerating the kinds of property subject to taxation the legislature did not intend to include the property of towns.

But it is urged that this conclusion is not unlimited, but must be confined to real estate of towns located within their respective boundaries. It is not claimed that there is any special provision of the constitution imposing such a limitation, or that there is any statute providing in terms for the taxation of extra-territorial property owned by towns. That a town may acquire property in another town for public purposes when authorized to do so by the legislature, is not seriously controverted. In fact, the present proceeding assumes that the defendant has the title to the land in question located in Canaan and is chargeable with the tax assessed thereon. Moreover, there can be but little, if any, doubt that the legislature of 1903 ratified and confirmed the defendant's purchase of the land in Canaan. This was equivalent to an express authorization, not to acquire governmental jurisdiction over a part of Canaan, but to become the owner of the land for the purposes specified. *Schneider* v. *Menasha*, 118 Wis. 298. The contention therefore is, not that the defendant could not become the owner of the land, but that, unlike other land owned by the defendant within its own territory and held for water-works purposes, this extra-territorial land is not, and cannot be, held for public purposes within the meaning of the rule excluding such property from the list of taxable property when located within the town or district claiming the immunity; and hence it is inferred that it is taxable. But argument and discussion are unnecessary to prove that the public character of the use made of the property does not depend upon its territorial location. An imaginary line drawn around land used as a reservoir for the supply of pure water to the inhabitants of an adjoining town, and a legislative act annexing the land thus designated to such town, would not affect the character of the use, or make it public if it was not so before. The admission that such intra-territorial property would be held for

public purposes is a concession that when located extra-territorially it serves the public to the same extent, and for all practical purposes its use is the same. *Schneider* v. *Menasha*, 118 Wis. 298. When, therefore, it is settled or admitted that the public water-works of a town are not taxable unless specially included in the tax list, it would seem to follow that the tax immunity must extend to its land used in connection therewith located in another town. In the absence of express statutory authority to tax it, legislative authority for its public use by the town indicates an intention that it should be treated as non-taxable, as in the case of intra-territorial property. In this view of the case it is not apparent why the location of the property should determine the question of its subjection to the tax laws. The authorities generally recognize no such distinction. See *Stiles* v. *Newport*, 76 Vt. 154; *Somerville* v. *Waltham*, 170 Mass. 160; *West Hartford* v. *Commissioners*, 44 Conn. 360, 369; *People* v. *Assessors*, 111 N. Y. 505, 507; *Camden County* v. *Washington*, 60 N. J. Law 367; *Hackettstown* v. *Mt. Olive*, 63 N. J. Law 191. If water-works like the defendant's are devoted to a public purpose when located within the water district, they serve the same purpose when located outside the district; and since it is conceded that in the former case they partake sufficiently of a public character to be free from the burden of taxation, no sufficient reason is suggested why in the latter case they do not in fact possess the same character. While it may be conceded that the legislature of 1903 had in mind the decision in *Newport* v. *Unity*, and that it constitutes some evidence bearing upon the question of its intention in making the special exemption of the defendant's water-works, it does not outweigh the evidence of the very general understanding for more than a hundred years, that the public property of towns is not taxable unless specially made so by clear legislative language. The act must be read in the light of that understanding, and the exempting clause be deemed a mere recognition of it.

But it is said that this cannot be deemed a correct statement of the legislative purpose, because it authorizes one town to withdraw real estate from the taxable property of another town, causing an increased burden of taxation to fall upon the inhabitants of the latter town, without any compensation therefor; that the constitutional provision of equality prohibits such a result; and that therefore it cannot be presumed the legislature has attempted to authorize it. If this contention were sound, it would afford a cogent evidentiary reason for holding that the exemption granted to the Enfield District, though broad enough to include its land in Canaan, was not intended to have that effect. A construction

that makes a statute unconstitutional in its operation is not to be adopted when it is reasonably susceptible of another and constitutional construction. *Leavitt* v. *Lovering*, 64 N. H. 607, 608. But it will not be contended that the taxpayers of Canaan, much less the town, have a right to have the taxable real estate in the town remain intact for the purposes of raising a revenue. If the state sees fit to appropriate a part of it for public purposes, the taxpayers' rights are not invaded when it is freed from the tax burden. Otherwise the lands taken by the state for a state house, state prison, state library, etc., would be taxable because, aside from their public character, they constitute ratable estate. The same practical hardship as is presented in this case would have arisen if the state had sequestered the land and water-rights in Canaan, now owned by the defendant, for a fish hatchery. It would have been withdrawn from the taxable property of Canaan, but no one would contend that the rights of the taxpayers of Canaan would be invaded thereby. Individual and private rights must yield to the public convenience and necessity. *People* v. *Assessors*, 111 N. Y. 505, 510. If the inhabitants of Canaan can successfully raise this objection in respect to the defendant's water-works located in that town, by similar reasoning the inhabitants of Enfield living outside the district could insist that that part of the water-works system located within the district should be taxed as other property in the town is taxed. If Canaan may tax the property in that town because it is obliged to furnish police protection and highways for its security and convenience, Enfield may claim the same right for the same reason with respect to the defendant's property located therein. The fundamental difficulty with such an argument is that it treats the district or precinct as a private corporation having property and doing business in the town. But the defendant in this case is a public corporation using its property for public purposes. It is as much an agency of the state as the towns of Enfield and Canaan; and so far as it holds its property in that capacity for the public benefit, it is, on principle, no more taxable for it than a county is for its court-houses and jails. *Grafton County* v. *Haverhill*, 68 N. H. 120. Unlike a private corporation, it is not engaged in a gainful occupation. It holds its property in trust for the benefit of the public—not exclusively for the private benefit of its inhabitants. Unlike a strictly private corporation or individual, it cannot charge what it chooses for its water, or refuse to furnish water to those who comply with its reasonable regulations. *Turner* v. *Water Co.*, 171 Mass. 329. In a legal sense, its property belongs to the state. The next legislature may abolish it, even against the unanimous protest of all its citizens, and turn the property over to a new district with differ-

ent territorial boundaries, upon terms deemed to be equitable,—a power which has been exercised with reference to school districts. Laws 1885, *c.* 43; P. S., *c.* 89, *ss.* 14–27; *Sargent* v. *District*, 63 N. H. 528; *Union School District* v. *District*, 71 N. H. 269. "It would seem to follow that the inhabitants of a school district have no rights in the existence or in any of the corporate functions of the district, which can be regarded as vested rights, or which can be set up as beyond legislative control. The authority of the legislature in the premises being supreme, any such vested rights in the district as a body, or in the inhabitants composing it as individuals, would be inconsistent with that authority in the legislature, and hence cannot exist." *Farnum's Petition*, 51 N. H. 376, 379; *Wooster* v. *Plymouth*, 62 N. H. 193, 208. Since the defendant is an agency of the government, receiving all its powers from the legislature and holding its water-works located in Canaan for the benefit and convenience of the public, the constitutional doctrine of equal and proportional taxation, as applied to the facts of this case, has no application.

Nor does it follow from this result, that if the legislature should authorize the defendant to engage in purely commercial pursuits and had the power to do so, property acquired by it in an adjoining town and used by it would escape taxation. A discussion of the supposed analogy would not be useful and is unnecessary. It is sufficient to hold that when an agency of the state, like the defendant, maintains water-works for the benefit of the public, its property so used is not taxable, though in part located in an adjoining town, in the absence of express legislation making it taxable. See *Opinion of the Justices*, 155 Mass. 598. It is also a misconception to say that while the use of the water-works is public as to the inhabitants of the district, it is private as to the inhabitants of Canaan. This argument, as before shown, would also prove that the use is private as to the inhabitants of Enfield not living within the district. But its fallacy consists in treating the taxpayers or the citizens of the district as though they were stockholders in a private corporation and were benefited by having the exclusive right to use the water. Evidently they have no such right. All the citizens of Canaan, and in fact everybody, may enjoy the advantage and convenience of the defendant's water supply. No one is excluded from the public benefit; and though a resident of Manchester may never go to Enfield to quench his thirst and may never have property interests there, his right to the public benefit is none the less real. His convenience in connection with that of all other people, and not merely and exclusively that of the inhabitants of a part of the town of Enfield, seemed to the legislature to require or justify the

establishment of the works and its maintenance by the defendant. *State* v. *Griffin*, 69 N. H. 1, 29–31.

Whether the legislature may authorize the taxation for state purposes of some municipal water-works, and exempt others or omit to include them in the designated classes of taxable property, is a question that is not germane to the present inquiry. The sole question presented is whether under chapter 221, Laws 1903, the tax assessed upon the property of the water district by Canaan is a legal tax; and that question is answered in the negative by holding that municipal water-works are not taxable as real estate unless expressly made so by statute, and that the express exemption of such property in the statute in question was merely a recognition of a fundamental principle relating to the taxability of public property that had been recognized and acted upon for a long period of time. So construed, the statute violates no provision of the constitution. Whether there may be other special statutes or charters relating to the taxation of public water-works, whose true construction might show that they are violative of the constitution, it is unnecessary to determine in the present case; for if it were conceded that there are such statutes, the validity of the statute now under consideration would not be thereby impaired. It is unnecessary to define the extent of the legislative power of imposing taxes upon public corporations in a case like this, where the effect of the statute is, not to impose a tax upon the property, but to leave it in the untaxable class of property.

In accordance with the provision of the agreed case, there must be judgment for the defendant.

PARSONS, C. J. By agreement of parties, the sole question for decision is the validity of the tax sought to be collected in this proceeding. The defendants contend, not only that the tax is not authorized by law, but that its assessment is expressly forbidden by legislative enactment. They are a fire district,—a municipal subdivision of the state,—organized under the general law and embracing a portion of the territory of the town of Enfield. In 1903, they applied to and secured from the legislature authority to construct and maintain suitable water-works for the purpose of distributing throughout the district an adequate supply of water for extinguishing fires and for the use of the citizens. Laws 1903, *c.* 221.

The first question raised is the interpretation of this act: whether it does or does not disclose a legislative intent to exclude the property taxed from the operation of the tax laws of the state. Prior to the passage of the act, the district had purchased the land in the town of Canaan which it has been attempted to subject to

the tax in question. Section 4 of the act expressly ratifies and confirms "the purchase of real estate and water rights already made by said fire district"; and as ratification is equivalent to prior authority, it would seem beyond question that the defendants' ownership of the real estate and water rights in Canaan was within the authority conferred upon them and was lawful. Section 4 also provides that "all the property of said fire district used in the construction and operation of its water-works shall be exempt from taxation."

Under the statutory definition of the word "town" (P. S., *c.* 2, *s.* 5), the defendants are exempted by general law from taxation upon their real estate used for public purposes, which would appear to include the water-works. P. S., *c.* 55, *ss.* 2, 3. But in *Newport* v. *Unity*, 68 N. H. 587, upon consideration of the various provisions of the statutes relating to the taxation of town property held for public purposes, it was determined that the legislative intent, as evidenced by the statutory expressions applicable to that case, was that property owned by one town and held for public water-works, if situated in another town, should be taxable in the town where it was situated; and therefore, unless exempted by the special statute relied upon, this water-works property was liable to be taxed. At the time of that decision Concord had been specially authorized to own real estate and water rights in the towns of Boscawen, Webster, and Hopkinton (Laws 1891, *c.* 261; Laws 1895, *c.* 180), and had been by the enabling act perpetually exempted from taxation on "all property, real and personal, owned and used by said city in the operation of said water-works outside the limits of said city." Laws 1891, *c.* 261, *s.* 6. The Whitefield Village Fire District was also authorized to hold property for water-works purposes in the adjoining town of Jefferson, and said water-works, "with all extensions thereof," were exempted from taxation (Laws 1893, *c.* 167, *ss.* 4, 10); while Manchester had been authorized to take or purchase land in Auburn (Laws 1891, *c.* 26, *s.* 2), Exeter, in Stratham (Laws 1893, *c.* 220), Dover, in Rollinsford, Somersworth, and Madbury (Laws 1889, *c.* 170), Somersworth, "outside of said town of Somersworth" (Laws 1891, *c.* 143), and Ashland, in New Hampton (Laws 1895, *c.* 195), without any provisions as to taxation. The force of this decision therefore was, that in the absence of express language excluding property of this character from taxation, the legislature intended it should be taxed. The soundness of the decision in *Newport* v. *Unity* is now questioned, but no effort has been made to change it by legislative action. There is no evidence that any legislation has been adopted upon the theory that this decision was erroneous. Subsequent legisla-

tion must therefore be interpreted as adopted with the understanding that this decision correctly construed the general statute law. Whether the decision is sound or not, is immaterial upon this branch of the case. Since the decision was announced in July, 1896, there have been numerous enactments relating to water-works construction and operation by towns and districts. In some express authority is given to hold property beyond the territorial limits of the town or district; in others such power may be inferred from the general language used, as in *Newport* v. *Unity*. Some have been expressly confined in their operation to town limits. A few contain express exemptions from taxation. It is unnecessary to refer to these enactments in detail.* They establish a legislative judgment, that in some cases property of this character, owned and situated as this is, ought not to be included in the list of taxable property. Taking into consideration this understanding, the language conferring the power to take and hold real estate and water rights identical with that held in *Newport* v. *Unity* to authorize the holding of real estate in another town (Laws 1895, *c.* 169, *s.* 1), and the fact that the property had been purchased when the act was passed and that all such purchases previously made were ratified and confirmed by the act, it seems clear that the legislature must have intended by the clause, "all the property of said fire district used in the construction and operation of its water-works shall be exempt from taxation," to remove this property from the list of taxable estate. As the legislature did not intend this property should be taxed,

* In addition to the acts cited in the text, the following have been examined: Laws 1899, *c.* 205 (Portsmouth), Laws 1901, *c.* 183 (Plymouth Village Fire District), Laws 1901, *c.* 265 (Jaffrey), Laws 1901, *c.* 289 (Durham), Laws 1903, *c.* 255 (Littleton), Laws 1905, *c.* 169 (Wilton), and Laws 1907, *c.* 247 (Lebanon Center Village Fire Precinct). All the foregoing are expressly authorized to go outside town limits. Only Portsmouth and Durham are exempted from taxation. Bartlett Village Fire Precinct (Laws 1897, *c.* 139) and Hillsborough Bridge Village Fire District (Laws 1897, *c.* 150), while not expressly authorized to extend beyond their territorial limits, are exempted from taxation. Goffstown Fire Precinct (Laws 1891, *c.* 269; Laws 1893, *c.* 162) appears to be limited to Goffstown, but is expressly exempted from taxation. Sunapee (Laws 1901, *c.* 197) and Gorham (Laws 1905, *c.* 188) are confined to the town, as apparently is Claremont (Laws 1899, *c.* 180). Other enabling acts are Laws 1897, *c.* 180, *ss.* 8, 9 (Warner), Laws 1903, *c.* 229 (Hudson), Laws 1903, *c.* 328 (Greenville), and Laws 1905, *c.* 170 (North Conway Water Precinct). Chapter 126, Laws 1907, gives general authority to towns and precincts, but confines their powers to the town acting itself, or in which the precinct constructing water-works is situated.

legislative authority for the imposition of the tax appears to be wanting.

But the plaintiffs contend that nevertheless the property must be taxed, because (1) the town of Canaan has either a constitutional right, or a right prior or superior to the constitution, in its corporate capacity to tax all property within its territorial limits; (2) because if this property is not taxed, the other Canaan taxpayers will in effect be compelled to contribute the amount it should be taxed toward the maintenance of the Enfield water-works, and such enforced contribution violates provisions requiring uniformity and equality in taxation; (3) because the act is special as to the Enfield water-works, and has not general application to all municipal water-works property similarly situated. None of these considerations will support the tax in question.

First, as to the constitutional or corporate right of Canaan to tax all property within its limits. There is no such right. The case is confused by the fact that the town of Canaan appears as plaintiff. To the eye, at least, the action appears to be a controversy between the two municipalities, and to involve necessarily a right of one against the other. The right claimed is not one of corporate power, governmental or proprietary, but of the exercise of the taxing power,—"an incident of the highest sovereignty," which "resides in government as a part of itself." *Phillips Academy* v. *Exeter*, 58 N. H. 306, 307; Cool. Tax. 479; Cool. Con. Lim. 3. "The power of taxation is an attribute of sovereignty belonging to the people; and this power, so far as it has been granted at all, has been delegated under our constitution to the legislature. . . . Towns have no power . . . to change or modify the public law regulating taxation." *Perley*, J., in *Mack* v. *Jones*, 21 N. H. 393, 395; *Chase*, J., in *New London* v. *Academy*, 69 N. H. 443, 444. Under the constitution, the taxing power can be exercised only by force of direct authority from the people, or by the legislature, or through authority derived therefrom. "No . . . tax . . . shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature, or authority derived from that body." Bill of Rights, *art.* 28. No tax can be levied by virtue of the action of any subordinate municipal body unless authority for such action has been conferred by the legislature. 2 Dill. Mun. Corp., *s.* 536. In this state, the execution of the taxing power immediately affecting the taxpayer is in the hands of officers chosen by the municipal subdivisions of the state—the selectmen or assessors, and collectors. Such officials in the performance of these duties are pub-

lic officers—not agents of the municipality through whose agency they are chosen.

In *Hibbard* v. *Clark*, 56 N. H. 155, it was held that taxes were not a debt or demand from taxpayers to the town, in such sense that they could be set off by the town summoned as trustee of such taxpayer against an amount due from the town to such person. One reason given was that neither the collector of taxes nor the town could maintain a suit for the collection of taxes. In Laws 1881, chapter 28, it was provided that "the selectmen of any town . . . may, in a particular case, cause any tax collectible by any town . . . officer to be collected by suit at law or bill in equity." P. S., *c.* 60, *s.* 17. It is said incidentally in *Dana* v. *Colby*, 63 N. H. 169, 171, that this statute authorizes a suit in the name of the town. Whether the suit should be in the name of the town or of the officer charged with the collection of the tax may not be very material as to the maintenance of the action, although the latter seems to be the usual course. See cases cited in Cooley on Taxation 300, note 4. But if for some purposes, including its collection by suit, the tax may be regarded as a debt, it is a debt owed not to the town as a corporation, but to the public. *Dana* v. *Colby*, *supra*; *Edes* v. *Boardman*, 58 N. H. 580, 585. If the town of Canaan may properly appear as plaintiff in the suit, such appearance is not by virtue of any private proprietary interest in the tax. So far as this suit is concerned, as plaintiff it represents the state in the exercise of its sovereign taxing power. Its interest and rights are no more than if the suit were in the name of the tax collector, or if the question involved were the validity of a sale of the defendants' property under the collector's warrant. So far as the town is a party to this suit in the execution of the sovereign power of taxation, the town plaintiff is a mere piece of governmental machinery. *Gooch* v. *Exeter*, 70 N. H. 413. It appears in its purely public capacity in this case for the state, and is the state. The reservations of the bill of rights for the protection of rights not public but private have no application. *Wooster* v. *Plymouth*, 62 N. H. 193; *Farnum's Petition*, 51 N. H. 376. The plaintiff as a town in any capacity has no control over the questions involved in this tax. It cannot by town vote direct whether the property in question should be assessed for taxation or not, or determine its value. By similar action it could not authorize this suit. It has no control over it. Payment to the collector would defeat the suit, and a vote of the town to become nonsuit, or to submit to a verdict for the defendants, could not be pleaded in defence of the action and would not discharge the tax. Although named as plaintiff, the town of Canaan is in no sense a party to the controversy, which is between the state in the exer-

cise of its taxing power and the taxpayer defending. As a governmental agency, the town of Canaan has no power to assess taxes. Taxes are assessed by governmental officers under legislative direction. Whatever private proprietary right of taxation, if any, the town of Canaan possessed prior to the constitution, no such right was reserved to it by that instrument; but such right was expressly denied to it by the provision permitting taxation only by the legislature, or through authority derived therefrom.

But while no rights of the town are infringed by the exemption from taxation of the defendants' property within the plaintiffs' territorial limits, the constitutionality of the exemption, as infringing constitutional rules of uniformity and equality and general legislation as to the individual taxpayers of the town, remains to be considered. It is argued that if this property is not taxed, the burden of the remaining taxpayers is increased; that remitting the defendants' tax of $11.87 is precisely the same as levying a tax of $11.87 upon the remaining taxpayers, and presenting the proceeds to the defendants. *Morrison* v. *Manchester*, 58 N. H. 538, 550; *State* v. *Express Co.*, 60 N. H. 219, 251, 252.

It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation. Such is the effect of the exemption of houses of public worship, parsonages in part, and seminaries of learning. *State* v. *Express Co.*, 60 N. H. 219, 260. Upon the ground that the imposition of a special tax upon the inhabitants of Canaan, to support the water-works of Enfield not intended to serve any portion of the territory of Canaan, would be beyond the power of the legislature, it is urged that, since the exemption would be practically equivalent to such a tax, the exemption must be invalid as contrary to general principles of taxation, well understood in this state and repeatedly elaborated in the decisions of this court. If the question is considered as merely one of equality in taxation, this conclusion seems abundantly sustained by our decisions. *Opinion of the Court*, 4 N. H. 565; *Smith* v. *Burley*, 9 N. H. 423, 437; *Morrison* v. *Manchester*, 58 N. H. 538, 548, 555; *Edes* v. *Boardman*, 58 N. H. 580; *Carpenter* v. *Dalton*, 58 N. H. 615; *First Nat'l Bank* v. *Concord*, 59 N. H. 75, 77, 78; *Berry* v. *Windham*, 59 N. H. 288; *Robinson* v. *Dover*, 59 N. H. 521; *Boston etc. R. R.* v. *State*, 60 N. H. 87, 94; *Berlin Mills Co.* v. *Wentworth's Location*, 60 N. H. 156; *State* v. *Express Co.*, 60 N. H. 219; *Franklin Street Society* v. *Manchester*, 60 N. H. 342, 347; *Weeks* v. *Gilmanton*, 60 N. H. 500; *Curry* v. *Spencer*, 61 N. H. 624; *Cheshire County Tel. Co.* v. *State*, 63 N. H. 167, 169; *Boston & Maine R. R.* v. *State*, 63 N. H. 571, 573; *Boody* v. *Watson*, 64 N. H. 162; *Holt* v. *Antrim*, 64 N. H. 284; *Winkley* v. *Newton*, 67 N. H. 80; *Kennard* v. *Manchester*, 68 N. H.

61; *New London* v. *Academy*, 69 N. H. 443; *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 200; *S. C.*, 70 N. H. 336.

Though the principle relied upon is sound, the application of it as a determinative factor in this case is erroneous. So applied, it proves too much. If it establishes that the exemption is invalid in this case, then all exemptions of every kind and nature are equally invalid; for the exclusion of any property from taxation, to the extent that it is thereby relieved, must as a mathematical proposition increase the burden upon property that is taxed. The exemption of the public property of the state or any of its subdivisions must also in the same way increase the local burden upon the community where it is situated—a burden which could not by the taxing power be directly placed on such community for a non-local purpose. But the principle involved in the question of legislative power to pass the enabling act is not one of taxation, but of exemption. If the constitution requires all property within the state to be taxed, then the exemption is illegal. If it does not require the taxation of all property, the effect that may be produced by the taxation of less than all would seem to be immaterial.

The constitution is not self-executing in the matter of taxation; the details by which an equal division of the expense of protection shall be made are not prescribed by the instrument. Bill of Rights, *art.* 12; Const., *arts.* 2, 5, 6. The framers of the constitution were practical men—not theorists. To them the document was a practical instrument. While prescribing an equal division of the expense of protection, they left the scheme by which such equal division should be worked out to the legislature, being careful to provide against the taking of any part of a man's property for such expense without the assent of the legislature in article 12 of the bill of rights, and repeating that declaration with specific reference to taxation in article 28. It would seem from the reading of these provisions that no tax of any particular property or person could be justified except by virtue of an act of legislation imposing it, and that the framers of the constitution meant by an equal division of the expense of protection such a division as would be "proportional and reasonable," having due regard "for the benefit and welfare of the state" and the special injunctions of article 82 (83). The framers of the constitution must also have had in mind the existing practice in levying taxes, for they specially provided for the assessment of the charges of government "on polls and estates in the manner that has heretofore been practiced." Const., *art.* 6.

But we are not left entirely in the dark to speculate at this late day upon the subject, nor are we at liberty now to draw from

the general terms of a practical instrument the inference that the parties to the contract had in mind an impossible and impractical scheme of altruistic equality. The meaning of the instrument as to the power of legislative exemption from taxation is shown by the uninterrupted exercise of the power since its date. The fact of exemption appears from the reported decisions of this court reaching back a hundred years and by the statutes of the state going even farther back. "It is a well settled rule, that no tax shall be considered as imposed by law, in the absence of a manifest declaration of the intent of the legislature to impose it. . . . Taxation not provided, and in fact prohibited, by law is no taxation—is a purely void act." *Sunapee* v. *Lempster*, 65 N. H. 655, 656.

"By the constitution (Bill of Rights, *arts.* 12, 28; Part II, *arts.* 5, 6) and the uniform practice under it for more than a hundred years, no property can be taxed except such as is declared taxable by the legislature. . . . Much property has been and still is untaxed." *Carpenter*, J., in *Boody* v. *Watson*, 64 N. H. 162, 195. "By our statute, all real estate, with certain specified exemptions, is liable to be taxed. . . . Our statute sets out and describes the different classes of personal property liable to be taxed, and no other personal property than the kinds thus specified and enumerated is liable to be taxed in this state." *Perley*, C. J., in *Nashua Savings Bank* v. *Nashua*, 46 N. H. 389, 392. "There are and have been . . . two classes of statutes upon the subject of taxation. The object of one is to establish the rates and enumerate the property to be assessed." *Smith* v. *Burley*, 9 N. H. 423, 429. "There is no doubt that the legislature may provide by general laws for the exemption of certain classes of property from taxation, as well as exempt it . . . by omitting it in the description of property required to be taxed." *Brewster* v. *Hough*, 10 N. H. 138, 142. "To establish the rules by which each individual's just and equal proportion of a tax shall be determined is a task of much difficulty, and a very considerable latitude of discretion must be left to the legislature on the subject. . . . Within the limits of this discretion, as to the selection of proper subjects of taxation and the proportion of the tax that shall be laid on each subject, the authority of the legislature is, without question, supreme." *Opinion of the Court*, 4 N. H. 565, 570. "From the time of the adoption of the constitution to the present day, only such estates and property have been held to be taxable as the statute in force at the time has declared subject to assessment; and from time to time classes of property, by act of the legislature, have been added to or struck from the list of taxable estates. We are not aware that the legis-

lative power to do this, under our constitution, has ever been questioned." Report of Judge Sawyer, Chairman of Tax Commissioners, 1876, *p.* 8.

Although real estate generally has been taxed, since the Revised Statutes of 1842 certain classes of real estate have been expressly exempted. R. S., *c.* 39, *s.* 2; G. S., *c.* 49, *s.* 2; G. L., *c.* 53, *s.* 2; P. S., *c.* 55, *s.* 2. And prior to the Revised Statutes, if not specially excluded, lands owned by the town were not taxed. "There are and always have been exemptions, where the statute has not expressly made any. They depend on invariable usage, growing out of the reason and nature of the thing. They are more ancient than our statutes (1770), and are not repealed except by express clauses for the purpose, or by provisions necessarily and manifestly repugnant." *Smith*, C. J., note to *Kidder* v. *French*, Smith (N. H.) 155, 157 (1807); *Franklin Street Society* v. *Manchester*, 60 N. H. 342; *Grafton County* v. *Haverhill*, 68 N. H. 120. The universal, contemporaneous, and continuous understanding that no property was taxable except such as was enumerated by the legislature for that purpose seems to follow logically from the constitutional provision that no tax should be laid except by the legislature or authority derived therefrom.

But the meaning of the instrument is settled by the continuous and uninterrupted interpretation placed upon it for over one hundred and twenty years. The question is not now an open one. *Pierce* v. *State*, 13 N. H. 536, 573; *Dublin Case*, 38 N. H. 459, 512; *Great Falls Mfg. Co.* v. *Fernald*, 47 N. H. 444, 459; *Copp* v. *Henniker*, 55 N. H. 179, 209; *King* v. *Hopkins*, 57 N. H. 334, 356; *Morrison* v. *Manchester*, 58 N. H. 538, 551, 552; *State* v. *Hayes*, 61 N. H. 264, 322; *Boston etc. R. R.* v. *State*, 62 N. H. 648, 649; *Keniston* v. *State*, 63 N. H. 37, 38. No case is to be found holding a tax invalid because of the exemption of other property by either express provision or failure to enumerate it as taxable. No case is found in which a tax assessed upon property exempted by the legislature has been held valid. There are many cases in which the extent of a claimed exemption has been discussed and time spent in ascertaining the legislative intent, which was simply wasted if it had been understood that no exemption at all was permissible. In *Warde* v. *Manchester*, 56 N. H. 508, a petition for the abatement of taxes assessed upon property made exempt by the statute, the tax was abated upon the ground that the legislature in exempting the property in question—a seminary of learning—performed a duty prescribed by article 83 of the constitution; and in *Opinion of the Court*, 4 N. H. 565, 570, and in *Sunapee* v. *Lempster*, 65 N. H. 655, exemptions from poll taxes are expressly approved. In *Opinion of the Court*, while it is con-

ceded that a tax upon every poll in the state might be proportional, it is said: "No person would suppose such a tax would be just and reasonable." Under the settled construction of the constitution, the power of the legislature to exempt from taxation a certain class of property, as for example that used for maintaining public water-works, by omitting it from the list of taxable estate or by expressly excluding it therefrom, cannot be denied.

But assume that this universal, uninterrupted interpretation of constitutional uniformity and equality in taxation is erroneous and must be reversed. As has been already said, the constitution is not self-executing in this respect. It does not authorize any officials or department to assess taxes, except by authority from the legislature. If the true construction of the constitution requires the legislature to impose taxation upon all classes of property in the state, the failure of the legislature to comply with the constitutional command would be a violation of duty imposed on it by the fundamental law. If we assume the action of the legislature to have been unconstitutional because of a failure to tax all classes of property, the unconstitutional action of the legislature in refusing or neglecting to provide for the taxation of certain classes of property would not authorize the court to invade the domain of the legislature and order the taxation of such property; for the power of taxation is included within the supreme legislative power vested by article 2 of the constitution in the senate and house of representatives. *Morrison* v. *Manchester*, 58 N. H. 538, 548, 549. In Minnesota, under a constitution requiring "all taxes . . . to be as nearly equal as may be" and authorizing a tax upon all inheritances, it was held that a law which did not place the tax upon all inheritances, but exempted some not within the exception of the constitution, was void. *Drew* v. *Tifft*, 79 Minn. 175,—79 Am. St. Rep. 446; *State* v. *Bazille*, 87 Minn. 500,—94 Am. St. Rep. 718. The court did not undertake to correct what they considered a violation of their constitution, by extending the law so as to include property which ought to have been, but was not, within its terms.

"If the language of the statute is capable of being so construed as to be consistent with the constitution, the court is bound to give it that construction. If not capable of such construction, all the court can do is to pronounce it void. This is the whole extent of the doctrine. . . . It does not authorize the addition to the statute of such words, provisions, or modifications, not therein expressed or implied, as may be necessary to render it consistent with the constitution. If it did, an unconstitutional statute would be impossible. By addition or subtraction its defects would be cured." *State* v. *Gerry*, 68 N. H. 495, 503. In *Boody* v.

Watson, 64 N. H. 162, the power of the court to reverse the action of selectmen in exempting certain property which the true construction of the statute showed the legislature intended should be taxed, and to correct the error by ordering an assessment of the tax, is declared, but there is no suggestion of power in the court to order an assessment in violation of the command of the legislature. Nor is there in that case or the preceding (*Boody* v. *Watson*, 63 N. H. 320) question of the validity of the exemption if authorized by the legislature. Whatever power the court may have to correct unconstitutional action of the legislature in the exercise of the power of taxation confided to that body by the constitution, its power would seem to be limited to declaring the invalidity of taxes assessed under an enactment void because of lack of conformity to the constitution. It cannot make an act taxing some and exempting others valid by extending it so as to include property which the legislature intended should not be taxed, and thereby validating taxes not authorized by the legislature.

Taking all the legislation as to the taxation of municipal water-works, recited earlier in this opinion, together, the legislative intent clearly expressed is that some towns owning property for water-works purposes without their territorial limits should pay taxes on the property in the town in which it is situated, and that others should not. Whether as an exercise of the taxing power such a scheme of taxation is within legislative power, is not material in this suit. So far as it may be claimed that the existing law upon the subject is unequal, if under it Newport and Littleton are required to pay taxes while Concord and Enfield are not, such inequality between different water-works towns is no concern of the plaintiff or its taxpayers. A constitutional question is not generally considered unless raised by one whose right has been invaded by the alleged breach, nor unless its decision is necessary to the determination of the case. *Copp* v. *Henniker*, 55 N. H. 179, 203; Cool. Con. Lim. (7th ed.) 232; 6 Am. & Eng. Enc. Law 1090. Canaan taxpayers are not injured because Littleton and Newport pay taxes, while Enfield does not. Their share of state and county expense is made less, not more, if affected at all, by the error of which they complain; while each taxpayer's share of local Canaan expense is not affected in any way by the taxation or non-taxation of any particular estate outside the town. Whether, as between different water-works towns similarly situated, the law is unequal as imposing different burdens upon each, is a question that may be raised by a town complaining of a burden of taxation imposed upon it and not on others, which perhaps might have been raised, but apparently was not, in *Newport* v. *Unity*.

If this question is raised, it may be a sufficient answer that towns or fire districts have no constitutional right to construct waterworks or to invade the territory of other towns to obtain their supply, and that they cannot complain if the privilege granted and accepted is accompanied by the burden of taxation. This consideration may or may not be sufficient to determine the question. Other answers may be found. It is not intended to suggest that the fact that municipal subdivisions are mere agencies of the state is not a sufficient answer. Local reasons may require taxation in some cases and not in others, precisely as the privilege of going outside the town has seemed necessary for some towns and not for others, or as some towns have been granted the privilege of taking or purchasing existing local aqueducts while others have been expressly excluded from interfering with any pond, spring, or stream used as the source of supply of an existing aqueduct. See the various enabling acts cited *supra*. No ground is perceived upon which it can be held that all such acts must be identical.

But the question, as has been said, is not one of taxation but of exemption; of the exercise, not of the taxing, but of the protective power. "An act entitled an act of taxation may be valid, although not an exercise of the power of collecting the constitutional shares of expense. The title may be an immaterial misnomer and error of form only, and the act may be an exercise of some of the other powers which provide for the common benefit, protection, and security, and which may be conveniently grouped under the name of the protective power. . . . The payment of bounties by tax exemptions, and the receipt of compulsory contributions under the protective power, though they affect the revenue, are not to be confounded with the operation of the tax power which collects the constitutional shares of the expense of protection." *State* v. *Express Co.*, 60 N. H. 219, 257, 259, 260. In the protective power rests the authority for the entire waterworks constructing and maintaining power given the defendants and many other towns and districts. Russ. Pol. Pow. 89. That the supply of water for fire protection and the promotion of the health of the citizens is a public service in which the government may engage, and as to which it has power to make various regulations affecting more or less the private property rights of citizens in no way interested in a particular service, may safely be assumed without citation of authority. P. S., *c.* 108, *ss.* 13, 14; Laws 1895, *c.* 76, *ss.* 1–5.

All the questions material in this case between these parties were raised in *State* v. *Griffin*, 69 N. H. 1, and after most exhaustive consideration settled adversely to the plaintiffs' contentions here. The case was a proceeding under section 1, chapter 26,

Laws 1891, prohibiting under a penalty the placing of sawdust by any person in Lake Massabesic in Auburn and Manchester, or in any tributary thereto. The defendant was a riparian proprietor in Auburn, upon a brook flowing into the lake, and operated a sawmill, the sawdust from which, passing into the brook, was carried away into the lake. For so doing he was found guilty and fined by a magistrate under the statute, and upon his appeal it was claimed that the statute was unconstitutional because he was deprived of his property right as a riparian proprietor, of using the brook to carry off the sawdust, without compensation, and that the law was an unequal one because the statute was special instead of general and discriminated in favor of some citizens to the detriment of others. This is precisely the contention here: that through the effect of the exemption, the citizens of Canaan are deprived of property through the taxing power without the compensation of protection to which they are entitled, and that the statute is limited in its application to Enfield. In that case the defendant relied on his property rights in Auburn while the water-works were solely for the benefit of Manchester, as here the plaintiff relies on alleged rights of property owners in Canaan as against a public use confined to Enfield. "The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property, within the state; and persons and property are subjected to such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity." *State* v. *White*, 64 N. H. 48, 50.

State v. *Express Co.*, 60 N. H. 219, is an elaborate treatise upon the taxing power in this jurisdiction. Not sustainable as an exercise of the taxing power, the act there in question could not be sustained under the protective power, because as was said (*p.* 262): "There is no purpose for which we can presume the statute on which this suit is brought was designed to be a discouraging or encouraging act of the protective power." The contrary appears here. The protection of the property, health, comfort, and lives of the citizens is within governmental power; and the exemption from taxation of water-works designed for effecting such purpose has a plain tendency to encourage their construction and maintenance. But unless we are prepared to overrule *State* v. *Griffin*, it is unnecessary to elaborate the question further. The power to enact legislation for the purpose in view, which may to some extent interfere with private property rights without such compensation as must be awarded under the exercise of the power of eminent domain, or such return as is due for property taken under the taxing power, may be sufficiently rested upon the exhaustive

discussion to be found in that case. The power to act existing, the wisdom of its exercise is not a judicial question. *Gooch* v. *Exeter*, 70 N. H. 413, 415.

There may be good reasons why Manchester, acquiring a large tract of Auburn real estate for the protection of its Massabesic water supply, should pay taxes in Auburn, and none at all why Enfield should pay anything to Canaan. The tax sued for is trifling. Subtracting all but the local tax which alone concerns Canaan, it is more trifling still. It has appeared, however, in the course of the argument, that Enfield has expended a considerable amount of money to render the supply available, and that the tax upon the present valuation is a considerable sum. It does not appear that such improvements call for any additional expenditure for highways, schools, or police; so that the practical question about which the parties have been contending with so much earnestness is not whether the Canaan local treasury shall be deprived of an insignificant sum heretofore obtained by taxation of this land, but it is whether the public using this water shall be taxed a large amount for the profit of Canaan taxpayers. These considerations may not bear directly upon the constitutional question, but they tend to show that the exemption is not an unreasonable exercise of the protective power.

The plaintiffs concede the validity of the exemptions of public property of the state, county, and town (P. S., *c.* 55, *s.* 2), and do not attack the exemption of houses of worship, schoolhouses, and seminaries of learning, doubtless sustainable under some branch of the protective power. Const., *art.* 82 (83); *Warde* v. *Manchester*, 56 N. H. 508. The defendants contend that this property, owned by a municipal subdivision of the state and held for a public purpose, is within that class of property which the plaintiffs concede may be exempted, and they also claim that such property, in the absence of legislation expressly taxing it, is presumptively exempted from the operation of general tax laws. *Grafton County* v. *Haverhill*, 68 N. H. 120; *Franklin Street Society* v. *Manchester*, 60 N. H. 342, 347; *Kidder* v. *French*, Smith (N. H.) 155, 157; Cool. Tax. 130, 131. The decision in *Newport* v. *Unity* does not controvert, but concedes, this principle, and implies that but for the statute taxing such property, the water-works property of Newport held in Unity for the public purpose of supplying water in Newport would be exempt from taxation. *Wayland* v. *Commissioners*, 4 Gray 500; *Somerville* v. *Waltham*, 170 Mass. 160; *West Hartford* v. *Commissioners*, 44 Conn. 360; *Rochester* v. *Rush*, 80 N. Y. 302; *People* v. *Assessors*, 111 N. Y. 505; *Water Commissioners* v. *Gaffney*, 34 N. J. Law 131.

If water-works property publicly owned is not taxable except by force of express clauses taxing it, the omission to tax it, or the exclusion of it from the tax list, cannot be a violation of legislative duty. That the furnishing of water to the citizens of Enfield as a protection against fire and for the promotion of the health of the citizens is a public service is conceded, so far as Enfield is concerned. But it is urged that this is not public property so far as Canaan taxpayers are concerned, if it is public as to residents of Enfield Fire District. This contention fails to distinguish between the ownership and the use. The distinction made in many cases as to the liabilities of municipal corporations growing out of the ownership of property has been already alluded to. But it is unnecessary to consider whether the ownership of these works by the Enfield Fire District is or not, as to all other persons, governmental and public. That the use is sufficiently public to authorize the exercise in Canaan of the power of eminent domain granted by the special act is not denied. Whether the use is public must depend upon its character—not upon whether it is viewed from Enfield, Canaan, or Concord. As to the citizen of Enfield Fire District, not only is the use public, but the ownership is public. His property may be lawfully taken by taxation to support the enterprise, and he has a share in its management through his vote. The Canaan taxpayer cannot be taxed for the support of the works, neither has he any voice in the management. It can perhaps be fairly said that as to him the ownership is private; that his relation to it is precisely what it would be if the ownership were vested in a private corporation.

Upon the question whether ownership in this sense private is material upon the question of implied exemption from taxation of property owned in one town and situated in another, the authorities are not in entire accord, although the weight of authority tends to support the defendants' contention. *Sumner County* v. *Wellington*, 66 Kan. 590,—60 L. R. A. 850, note. In Massachusetts it seems to be the rule that property held for a public purpose for which it could be taken by eminent domain is exempt, in the absence of express provisions taxing it, regardless of the character of its ownership. *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491; *Worcester* v. *Railroad*, 4 Met. 564. This rule may not be generally admitted. Cool. Tax. 60. But whether the legislature may, for the advancement of a purpose deemed by them beneficial to the state, exempt a class of property from taxation, is a different question. Although the property may not be impliedly exempted because of its ownership, it may nevertheless be expressly exempted by the legislature to encourage such use for the general advantage of the state. The use being sufficient to justify an

express exemption, the ownership of the property is not material unless made so by the exempting statute. Whether the ownership of the property used in promoting a public purpose is private or public is immaterial. The question is settled by the universal practice under the constitution. See Judge Sawyer's Report 13–17; authorities *supra*; *State* v. *Griffin*, 69 N. H. 1; *Boston etc. R. R.* v. *State*, 62 N. H. 648, 649; *State* v. *Hayes*, 61 N. H. 264, 332; *Morrison* v. *Manchester*, 58 N. H. 538, 551, 552.

The defendants are engaged in the public service in a certain district. They are bound to serve all who apply for their service on equal terms. Their service is no less public because it does not extend through the whole state. The service of transportation furnished by the Chester and Derry Railroad with its seven or eight miles of track is equally public in principle, if not in extent, with that supplied by the Boston & Maine Railroad operating 1,038 miles. Whether, because the ownership of the property taxed in this case is confined to a particular subdivision of the state, such ownership is public or private as to territory not embraced therein, is immaterial. If the ownership were entirely private, such private character would not invalidate a general tax exemption granted by the legislature under constitutional power to provide for the common benefit, protection, and security.

But the plaintiffs say that if by general law the legislature might exempt all public water-works property from taxation, this exemption is invalid because it professed to deal only with the property of the Enfield water-works and not with water-works property generally. No clause in the constitution prohibiting legislation applicable to a particular place or subject is pointed out. Nothing therein contained expressly requires all legislative acts to be general in terms. If such was the requirement, not only would the particular provision be invalid, but the defendants' entire charter would be void, as well as all others of like character. The sole ground upon which this contention can stand, if at all, is that the exempting clause is "inconsistent with the equality of right which the constitution secures to all." There is no other ground for the contention. *State v. Griffin*, 69 N. H. 1. So far as all persons interested in this proceeding who are or may be affected by this exemption are concerned, it is an equal law. It affects all property within its reach alike. All persons may go to Enfield and enjoy the privileges of the water-works without the burden of the Canaan tax. "The equality of the constitution is the equality of persons and not of places—the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, . . . is an equal law, though no one can enjoy the right, [or] be subjected

to the burden, . . . without going to or being in a particular part of the state." *State* v. *Griffin*, 69 N. H. 1, 30; *Gooch* v. *Exeter*, 70 N. H. 413, 415. The plaintiffs' contention on this point also is concluded by *State* v. *Griffin*. It is impossible to add anything to the discussion in that case. It may however be said, that to hold that the act is invalid on this ground would invalidate many acts not referred to in *State* v. *Griffin*. Charters of schools, seminaries of learning, and corporations for various religious, charitable, and educational purposes have been so exempted. It has not occurred to any one to claim that the exemptions were invalid on this ground. See *Alton Bay Ass'n* v. *Alton*, 69 N. H. 311; *New London* v. *Academy*, 69 N. H. 443; *Young Men's Christian Ass'n* v. *Keene*, 70 N. H. 223.

No good reason has been found for rejecting the principles elucidated in *State* v. *Griffin;* because of the uniform interpretation placed upon the constitution since 1784, it cannot now be held that no power of apportionment in taxation was granted the legislature by the constitution. Cool. Tax. 145. As no constitutional right of the town of Canaan or its taxpayers has been invaded by the legislative direction to the assessors of Canaan to omit this property from the invoice of the town, it is not necessary to speculate upon what basis listing it for taxation by them, without legislative authority for such action, can be sustained. I agree that there should be judgment for the defendants.

YOUNG, J. Although I concur in the result reached in this case, and in most of the reasoning of both the chief justice and Mr. Justice *Walker*, I wish to dissent from so much of the reasoning as seems to imply that a municipal corporation has rights which the legislature is bound to respect, that the defendants' property would not have been taxable even if the enabling act had not contained a clause exempting it from taxation, and that the legislature could not have taxed the defendants' property in either Enfield or Canaan by special act.

BINGHAM, J., concurred in the opinion of Mr. Justice WALKER: PEASLEE, J., not having been present at the argument, did not sit.

Judgment for the defendants.

Grafton,
May 5, 1908.

BRIDGEWATER v. GRAFTON COUNTY & a.

The fact that a town has been decreed aid from adjoining towns for the repair of a bridge does not preclude it from exacting contribution from the county for the same purpose.

The question whether the whole expense of repairing a highway or bridge is burdensome to a town is one of fact.

PETITION, for contribution toward the expense of repairing a bridge in Bridgewater. Trial at the November term, 1907, of the superior court before *Pike*, J., who decreed that the petition be dismissed as to Holderness and apportioned the expense of repairing the bridge as follows: Fifty per cent to Ashland, twenty-five per cent to Bridgewater, fifteen per cent to Plymouth, and ten per cent to Grafton county. To this decree Grafton county excepted.

The plaintiffs' evidence tended to prove the following facts: That part of the bridge chargeable to Bridgewater is situated in the northeast corner of the town, on the main highway through the county from the White Mountain region to the lower part of the state. It is located where it best accommodates the general public, by whom it is much used, but it is about two and a half miles too far north to accommodate the citizens of Bridgewater and is little used by them. There is no village in Bridgewater. Since 1859 there has been a gradual decrease in the value of taxable property in the town, and in 1906 its assessed valuation was only $117,634. The valuation of the county has largely increased during the same period, and in 1906 was $20,583,693. The population of Bridgewater is small and has decreased materially in the past forty years, while that of the county has materially increased.

Alvin F. Wentworth, for the town of Bridgewater.

Marshall D. Cobleigh, solicitor, and *Smith & Smith*, for Grafton county.

BINGHAM, J. The questions in this case arise on an exception to the decree of the court requiring the county of Grafton to aid the town of Bridgewater in defraying the expense of repairing a bridge that crosses the Pemigewasset river in the northerly section of the town, on the highway leading from Plymouth to Ashland,

and constituting a part of the main thoroughfare for north and south bound travel through the county. In support of the exception two positions are taken. The first is that section 2, chapter 73, Public Statutes, does not authorize the court to require a county to aid a town in defraying the expense of repairing a highway or bridge, except where the petitioning town would not be entitled to aid from other towns under section 4 of the same chapter, and would itself have to bear the whole burden unless aided by the county. The second is, that if section 2 does confer such authority, there is no evidence in the case from which the facts essential to the decree against the county could be found.

Under the general law of the state, every town is required to build and keep in suitable repair for public travel all highways and bridges within its limits. P. S., *c.* 75, *s.* 1. This general rule has been modified from time to time by the enactment of laws relieving towns under certain circumstances from a part of the burden thus imposed. P. S., *c.* 73, *ss.* 2, 4; *Ib.*, *c.* 69, *ss.* 11, 12, 13. The essential provisions of section 2, chapter 73, were first enacted in 1840. Laws 1840, *c.* 500. Its jurisdictional requirements have not been altered. The only material change in the law is the omission of a provision authorizing the court to order the whole expense to be paid by the county. Laws 1840, *c.* 500; R. S., *c.* 55, *s.* 18; G. S., *c.* 66, *s.* 2; Comm'rs' Rep. G. S., *p.* iv; *Ib.*, *c.* 67, *s.* 2. It was not until 1867 that section 4, chapter 73, was enacted. Its provisions are not inconsistent with those of section 2, but are supplemental to them. The questions that arise under each are substantially the same. *Rye* v. *County*, 68 N. H. 268. Both were enacted in furtherance of the same purpose—to relieve towns of a part of the burden of repairing highways within their limits when equity and justice should require it. The decree against Plymouth and Ashland for equitable contribution was not, as a matter of law, determinative of Bridgewater's right to equitable contribution from the county, and the decree against the county discloses that it was not as a matter of fact. *Hudson* v. *Nashua*, 62 N. H. 591, 594. The terms "the expense" and "whole expense," as used in the statutes, mean the same; and the court had authority to order the county to pay such part of the whole of Bridgewater's burden in repairing its portion of the bridge as it appeared that equity and justice required.

Whether the whole expense of repairing a highway or bridge is burdensome to a town, is a question of fact. "There is no one unqualified test of burdensomeness. All the circumstances are to be considered,—the extent and cost of the repairs, the relative ability of the town and county, the location and character of the road, the portion of the public benefited by it, and any other evi-

dence that justly bears on the broad question whether the county should equitably be subjected to a portion of the expense." *Rye* v. *County*, *supra*, 268, 269. Tested by this rule, there is evidence from which the court could find the facts essential to the decree.

Exception overruled.

All concurred.

Coös.
May 5, 1908.

RUSSELL *& a.* *v.* HOWELL *& a.*

The builder's lien created by section 10, chapter 141, Public Statutes, is not terminated by the death of the owner within ninety days after the labor is performed.

The heirs of an insolvent decedent are properly made parties defendant in an action to enforce a lien for labor performed upon his buildings.

ASSUMPSIT, to enforce a mechanic's lien. The owner of the premises upon which the labor was performed died insolvent before this suit was brought. The defendants are his heirs, administrator, and widow. The plaintiffs moved for judgment, and the defendants to dismiss; and the questions of law raised by these motions were transferred without a ruling from the December term, 1907, of the superior court by *Chamberlin*, J., upon an agreed statement of facts.

Herbert I. Goss, for the plaintiffs.

William H. Paine, for the defendants.

YOUNG, J. The questions discussed and the only ones considered are (1) whether the owner's death terminated the plaintiffs' lien, and (2) whether the heirs were properly made defendants at the time this proceeding was begun.

1. The statute (P. S. *c.* 141, *ss.* 10, 16) provides in substance that persons who furnish work as the plaintiffs did shall have a lien on the property for ninety days after the work is completed. There is nothing in the statute to suggest that the lien shall be lost if the owner dies within the ninety days; consequently it must be held that the owner's death did not destroy the plaintiffs' lien. The same construction has been given similar statutes in other jurisdictions. 27 Cyc. 52.

2. Real estate vests in the heirs on the death of the owner; consequently they were the proper defendants when this proceeding was begun. As the land is needed to pay debts, it was proper, after the appointment of the administrator, to cite him in to defend; but on the agreed facts, neither he nor the heirs can make any defence to this action which the owner could not make if living. There must be, therefore, a verdict for the plaintiffs according to the agreement of the parties; for in so far as the widow is concerned, she stands just as she would if the lien had been foreclosed in her husband's lifetime.

Case discharged.

All concurred.

Belknap,
June 2, 1908.

WYATT v. STATE BOARD OF EQUALIZATION.

The tax upon savings bank deposits is a property tax, and is rightfully included by the state board of equalization in computing the average rate of taxation on property throughout the state, as a basis for the assessment of the taxes of railroad corporations.

PETITION for *certiorari*, to which the defendants demurred. Transferred from the November term, 1907, of the superior court by *Stone*, J., without a ruling.

Shannon & Tilton and *James W. Remick*, for the plaintiff.

Edwin G. Eastman, attorney-general, for the state.

William B. Fellows and *John M. Mitchell*, for the defendants.

John R. Eastman, *pro se*.

PARSONS, C. J. The question in controversy is the meaning of the statute which provides that "every railroad corporation in this state, not exempted from taxation, shall pay to the state an annual tax upon the actual value of its road, rolling stock, and equipments on the first day of April of each year, at a rate as nearly equal as may be to the average rate of taxation at that time upon other property throughout the state." P. S., *c.* 64, *s.* 1. Similar language is used in the sections governing the taxation of telegraph

and telephone companies (*Ib.*, *s.* 3), of express companies (Laws 1907, *c.* 81, *s.* 6), and of sleeping, dining, and parlor cars. Laws 1907, *c.* 91, *s.* 1.

The petition sets up the legal proposition that the rate is to be found by taking the average of the local tax rates, without including the assessment laid upon savings bank deposits and fire insurance capital. The defendants deny the plaintiff's proposition, and the case has been argued upon this point alone. All other questions have been waived for the time being, and the parties have united in an effort to present this controversy unhampered by any collateral issue.

The plaintiff says that his construction was adopted by the court when it acted as the assessing board; that the question was decided the same way in 1883, and that no change has been made in subsequent re-enactments of the statute; and that a construction including the savings bank tax in determining the average rate of taxation upon other property throughout the state would necessitate a conclusion that the statute is unconstitutional, unless it were held that the legislature intended to grant to railroads a special exemption supportable under the protective power.

The constitutionality of the statute is material in the present proceeding only as evidence of the legislative intent. If it were discovered that the statute sought to be enforced herein was in contravention of the constitution, the necessary result of such conclusion would be the dismissal of the petition. But whether the legislature can constitutionally burden railroad corporations by imposing higher taxes upon them than upon other owners of property throughout the state, or whether they may without violation of the organic law relieve them by a special exemption from the whole or a part of the taxes generally assessed upon property, need not be considered. Judicial decisions in view of which existing legislation upon the subject was originally adopted and subsequently re-enacted establish a legislative intent to treat railroads, for the purpose of taxation, as individuals taxable for the true value of their property at the rate at which other property is taxed in the same taxing district, and exclude any purpose to tax them "for a greater sum than their proportionate and equal share with the other property in the state, ascertained as nearly as it reasonably could be." *Boston & Maine R. R.* v. *State*, 63 N. H. 571, 572; *Boston etc. R. R.* v. *State*, 60 N. H. 87; *Atlantic etc. R. R.* v. *State*, 60 N. H. 133; *Cheshire County Tel. Co.* v. *State*, 63 N. H. 167; *Western Union Tel. Co.* v. *State*, 64 N. H. 265.

The state board of equalization, upon whom the duty of assessing taxes upon railroads is placed, are required to "determine the value of the property to be taxed . . . and the rate of taxa-

tion." P. S., *c.* 63, *s.* 3; *Ib.*, *c.* 64, *s.* 4. In the performance of this duty, it is alleged that the board added together the taxes assessed and collected by municipal officers, those assessed and collected upon unincorporated places by state and county officers, and those collected by the state treasurer upon savings bank deposits, the capital stock of building and loan associations, and insurance companies, and obtained the average rate of taxation by dividing the total amount of such taxes by the total of the selectmen's inventories, the valuation of unincorporated places, the savings bank deposits, and the building and loan and insurance capital. They then assessed the railroads of the state at the rate which in this way they found all other property in the state was assessed.

If one person owned all the property in the state except the railroads, although he paid taxes at different rates upon different portions of it, the average rate of the taxation of the whole would be obtained by the division of the total tax by the total amount of property upon which the several sums were levied. As between two persons, one owning all the railroads and the other owning all the other taxable property in the state, the taxation of the total property of each at the same rate would produce the equal division of public expense required by the constitution. As the taxation of all other property in the state at the same rate as railroads are taxed would produce in the aggregate the sum levied by varying rates on different classes or parcels of property, the owner of the whole could not complain that he paid too much, or the railroad owner too little, because each would pay the same. As the property in the state is divided among many, who hold the different classes of property in varying ratios, it follows that, as between certain individuals and railroads generally, some individuals will pay more and some less than is paid on the same value of railroad property. But so long as railroads pay upon their property the same amount as is paid on the average throughout the state upon that amount of property, their share of the public burden is borne by them. This is the rule applied in tax appeals from local assessors. *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 200. As the method adopted by the board in assessing railroad taxes assesses upon the $28,000,000 of railroad property (the appraisal of which is not in question in this case) the same amount in taxes as is assessed upon the average upon each $28,000,000 of property throughout the state, the result complies with the constitutional rule of equality in taxation, which "requires that throughout the same taxing district the same tax shall be laid upon the same amount of property." *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 336, 344. As the method of the board is apparently mathemati-

cally proportional and constitutionally just, the only ground upon which the result can be attacked is that some one or more of the taxes considered by them in finding the average is not a tax upon property and cannot be considered in the distribution of the burden of taxation placed upon property. *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 336.

The plaintiff contends that the tax upon savings bank deposits, building and loan associations, and insurance capital should not be considered. It is not suggested that the tax on building and loan associations stands any differently from the tax on savings bank deposits. So far, however, as the consideration of the tax upon insurance capital is concerned in this case, the question is purely academic. The tax is so inconsiderable as not to affect the result. Considering it, the exact arithmetical average is a small fraction of a cent less than the rate ($1.72) found by the board. Excluding it, the same rate is a similar fraction more than $1.72. In either event it cannot be held that the rate found by the board is not the average rate "ascertained as nearly as it reasonably could be." *Boston & Maine R. R.* v. *State*, 63 N. H. 571, 572. The substantial question is as to the savings bank tax.

The plaintiff's contention is, that the tax levied with reference to some $66,000,000 of what the board considered property, owned by 183,243 depositors,—nearly one half the population of the state,—should be excluded from the computation, and the tax be determined by the rate upon the remaining $238,000,000, *i. e.*, that more than one fifth of the whole property taxed should be omitted from the calculation. Upon the concession of the plaintiff as to the power of the legislature, the question appears to be, as stated at the outset, purely one of statutory construction. Giving to the language of the section its ordinary meaning, the only question raised by the plaintiff's contention, that the sum collected by the state from savings banks should not be included in computing "the average rate of taxation . . . upon other property throughout the state," is whether the sum so collected is a tax "upon other property throughout the state." As there is no contention that this sum so collected is not a tax of some sort, or that it is not exacted "throughout the state," the question is whether the savings bank tax is a tax upon property. As the question is the meaning of the statute,—what the legislature intended by the words used,—the exact point in issue is much narrower, and is: Was the savings bank tax understood by the legislature, in 1891, to be a tax upon property?

Savings banks, under provisions of the Public Statutes enacted contemporaneously with the section under consideration, are required to pay taxes in two ways. They are taxed for all real

estate owned by them in the towns where it is situate, precisely as all other individuals and corporations, except railroad, telegraph, and telephone companies, who are not so taxed for real estate used in their ordinary business. P. S., *c.* 64, *s.* 12. This is conceded to be a property tax. The tax which is collected by the state treasurer is not based upon property owned by the corporation; it is determined by the amount the bank owes its depositors. Section 5, chapter 65, Public Statutes, requires the payment of "one per cent upon the amount of the general and special deposits on which it [the bank] pays interest." The tax is laid upon the depositors' interest, and not upon the property of the bank. The property of the bank, except real estate, the value of which is deducted from the amount of the deposits taxed, is not taxed. P. S., *c.* 65, *s.* 12; *Laconia Savings Bank* v. *Laconia*, 67 N. H. 324.

From the manner in which the tax is determined, it can be argued with great force that this tax is not a tax upon property of savings banks. It is so declared in effect in the statute and has always been so understood. But because it is not a tax upon property of the bank, it does not follow it is not a property tax. It is a tax upon the amounts entrusted to the bank by the several depositors. The question therefore is: Was a deposit in a savings bank commonly understood to be property in 1891? For the legislature, in the absence of evidence that the terms employed in a statute have attained a peculiar significance in the law, must be understood to have employed the words in a statute with the meaning ordinarily attached to them. The legislature has directed that the words of a statute should be so construed. P. S., *c.* 2, *s.* 2. It cannot be claimed that deposits in savings banks are not commonly understood to be property. But it is not necessary to rely upon common understanding. That they are property is the foundation upon which the following decisions rest: *Mann* v. *Carter*, *ante*, 345, 351; *Robinson* v. *Dover*, 59 N. H. 521; *Berry* v. *Windham*, 59 N. H. 288. The only possible basis for doubt as to the meaning of the plain terms of the statute is confusion as to the nature of the tax under consideration. If the tax is upon the deposits and against the depositors, in effect if not in form it is a tax upon property. If it is a tax against the banks merely as corporations, as has been suggested, it can be argued with force that it is not a property tax. The views that have heretofore been held by the court as to the nature of this tax may be incorrect. It may be true that since 1903 a governmental exaction which is not taxation in the sense in which that subject was before that time understood in this state, and which is "an application of property for public charges, but not a proportional division of

public expense," is now permissible. *Thompson* v. *Kidder*, *ante*, 89, 94.

But neither of these considerations is now material. The legislature cannot be presumed to have known, in 1891, that the constitution would be amended in 1903, or that the judicial declarations as to the nature and character of the tax, then unquestioned, would subsequently be doubted. The statute must be read in the light of the circumstances then existing: the constitution as it was then written, and the law as it was then declared. Under the constitution as it existed and was interpreted from 1784 to 1903, the only subjects of taxation were polls and estates. *Curry* v. *Spencer*, 61 N. H. 624. As the savings bank tax is plainly not a poll tax, it must have been regarded as a property tax unless it was understood to be supported, not as an act of taxation, but as an encouraging or discouraging exercise of the protective power. *State* v. *Express Co.*, 60 N. H. 219, 260, 263. Whether the tax was one or the other was the question directly raised and decided in *Bartlett* v. *Carter*, 59 N. H. 105; while in *Rockingham Ten Cent Savings Bank* v. *Portsmouth*, 52 N. H. 17, 27, 28, the present tax is expressly distinguished from the one half of one per cent on the amount of the capital stock which banks with a capital were formerly required to pay for the benefit of the literary fund (G. S., *c.* 85, *s.* 1; R. S., *c.* 75, *s.* 1), which Judge *Perley*, in *Nashua Savings Bank* v. *Nashua*, 46 N. H. 389, 399, says "is not named or assessed as a tax, . . . and has more the character of a bonus voluntarily paid for the right to exercise the privilege of banking, than of an ordinary tax."

Bartlett v. *Carter* was decided in 1879. The provision therein construed was re-enacted in 1891 (P. S., *c.* 65, *s.* 5) without change. Applying the familiar rule, that the re-enactment of a statute without change is, in the absence of weighty evidence to the contrary, an adoption of previous judicial construction, we have a legislative declaration that the tax in question is intended as a tax upon the property of the depositors, and not as a privilege tax against the bank. That no different understanding was had of this tax by the legislature in 1891 has also been decided by this court. *Petition of Savings Bank*, 68 N. H. 384, 386. That the tax differs in method of collection and rate from that on "other property" is expressly recognized by the court; but with those differences in mind, the tax, upon the ground of its history and purpose and the adjudications as to that effect, was unanimously declared to be a tax upon property. By common understanding and repeated judicial definition adopted by the legislative re-enactment of the statute, the tax whose consideration by the board of equalization in determining the average rate of taxation

upon property throughout the state is attacked was in 1891 established as a tax upon property, and as such comes within the plain terms of the statute. It may be that by overruling *Mann* v. *Carter*, *ante*, 345, *Petition of Savings Bank*, 68 N. H. 384, *Robinson* v. *Dover*, 59 N. H. 521, *Berry* v. *Windham*, 59 N. H. 288, *Bartlett* v. *Carter*, 59 N. H. 105, and *Rockingham Ten Cent Savings Bank* v. *Portsmouth*, 52 N. H. 17, and by rejecting all reference to the history of the legislation and the language of the original act, in which the tax is described as a tax "on the depositors" (Laws 1864, *c.* 4028), it can now be held that this tax is not a property tax, but is a privilege tax. It may be that the authorities cited in *Bartlett* v. *Carter* from other jurisdictions, and upon consideration then rejected as inapplicable here, ought now to be followed. If all this be conceded, the conclusion, if adopted, can have no weight upon the question before the court; for there is no evidence that in 1891 the soundness of the judicial conclusion that this tax was a property tax had ever been questioned. There is direct evidence to the contrary. *Petition of Savings Bank*, 68 N. H. 384.

It may even be conceded that scientific study of the subject of taxation has developed that constitutional provisions for the division of the expense of government, by taking annually for that purpose a proportionate part of his property from each individual according to its value, does not equally distribute the burden, either in proportion to the ability of each to pay or in fair return for benefits received. *Thompson* v. *Kidder*, *ante*, 89, 92. Even if it could be held that the particular directions of the constitution as to the method of taxation might be controlled by general principles of equality of right contained therein (*State* v. *Express Co.*, 60 N. H. 219, 247, 250, 255), such conclusions would not aid in the interpretation of a statute enacted at a time when the constitutional rule was universally understood to be equitable and just. *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 336, 344.

It is said that the provision of the Public Statutes discussed is a re-enactment, without intent to change the meaning, of the act of 1881 (*c.* 53), and that the language of this act excluded the savings bank tax. In support of this conclusion, the practice of the court in assessing the tax under a prior statute somewhat similar in terms is relied upon. Consideration of this contention necessitates a reference to the history of railroad taxation and an examination of the earlier statutes relating to the subject—a proceeding always competent and often of great value in the attempt to ascertain the meaning of a particular enactment.

Prior to the Revised Statutes (1842), there were no special provisions for railroad taxation. Railroad stock, like bank stock, was taxable to the owner in the town in which he resided. Laws

1833, *c.* 108, *ss.* 1, 2; *Pittsfield* v. *Exeter*, 69 N. H. 336. By the Revised Statutes, a special annual tax of one per cent was imposed upon the value of that part of the capital stock of each railroad expended in this state, to be determined by the certificate of the justices of the superior court, to be paid to the state treasurer and by him distributed, one-fourth to the towns in which the railroad was located in proportion to the capital stock expended therein for buildings and right of way, three-fourths to the towns in which the stockholders resided in proportion to the amount of stock owned in each town, the balance, or the proportion owned by non-resident stockholders, to be retained by the state. R. S., *c.* 39, *ss.* 4, 5. Before any tax was assessed at the one per cent rate of the Revised Statutes, the act was amended so that it required the assessment of the tax to be "in proportion, as near as may be, to the taxation of other property on the first day of April . . . in the several towns in which said railroads are situate." Laws 1843, *c.* 34, *ss.* 2, 4. This scheme of taxation, modified only as to the method of assessment and by the provision taxing real estate not used in the ordinary business of the roads and the ten years' exemption, is still in force. *Pittsfield* v. *Exeter*, *supra;* P. S., *c.* 64, *ss.* 1, 2, 4, 12, 13, 15. In the General Statutes of 1867, the subject of taxation was described as the "capital" instead of the "capital stock" of the railroad, and the actual present value of the capital of any railroad expended in this state was required to be determined by the justices of the supreme court. G. S., *c.* 57, *ss.* 1, 2. The tax commission of 1878, as a result of their investigations, reported to the legislature sundry bills, one of which created the board of equalization, and another made new provisions as to railroad taxation. The action of the legislature upon these recommendations established the board of equalization, one of whose duties was to assess the taxes upon the several railroads (Laws 1878, *c.* 73; G. L., *c.* 61), and laid down new rules for the taxation of railroads. "Every railroad corporation in this state not exempted from taxation . . . shall pay to the state an annual tax upon the actual value of the road, rolling stock, and equipments on the first day of April of each year, as near as may be in proportion to the taxation of other property in April in each year, in the several towns and cities in which such railroad is located, to be distributed according to existing laws." Laws 1878, *c.* 70, *s.* 1; G. L., *c.* 62, *s.* 1.

While there are no reported cases disclosing the methods of the prior assessment by the justices, it seems to be established with reasonable certainty that they assessed the tax as a municipal tax of the railroad towns,—that they took no account of the change in 1865 in the method of assessing the tax upon savings bank de-

posits; and it was claimed by counsel for the state, in *Boston etc. R. R.* v. *State*, 60 N. H. 87, that undervaluation of the property in towns for taxation was not considered in making the assessment. In 1879 the board of equalization followed the course that had been pursued by the justices for thirty-six years. They assessed the tax as a municipal tax of railroad towns, paid no attention to the savings bank tax, and did not take into consideration the undervaluation of other property. As the tax rate was not the same in all railroad towns, this action taxed the several railroads at different rates, as must have been the case for thirty-six years before. The act creating the board of equalization provided for an appeal to the supreme court, after the manner of the appeal from the selectmen's assessment, by any one aggrieved. Laws 1878, *c.* 73, *s.* 9; G. L., *c.* 61, *s.* 9; *Ib.*, *c.* 57, *s.* 12; *Boston etc. R. R.* v. *State*, 60 N. H. 87, 94.

The Boston, Concord & Montreal Railroad appealed from the assessment made against them in 1879, alleging as grievances overvaluation, lack of proportion because of the failure to take into consideration the undervaluation of property by the local assessors, and the lack of uniformity in the assessment of the different railroads. The case was heard by referees, who found the value of the railroad, assessed the tax according to the rate in the railroad towns, but reduced the rate in the proportion in which they found other property was undervalued by the selectmen. The questions presented to the court upon this report were the validity of the assessment at the average rate of taxation in the towns in which the railroad was located and the action of the referees in considering the undervaluation of other property. In support of their contentions, counsel for the state relied upon the uniform practice of the justices in assessing the tax as a municipal tax of the railroad towns and in refusing to consider undervaluation of other property. It is held in the case, solely upon the manner in which the tax was distributed (as to which no change had been made in the law since 1842), that the railroad tax was not a town tax, was not assessable in proportion to the taxation of other property in the towns in which the railroad was located, and that it was "either a state tax, or a tax of a triple character, partly state, partly municipal in respect to the railroad towns, and partly municipal in respect to the stockholders' towns"; and the reduction on account of the undervaluation of other property was approved. The referees were instructed to find the facts necessary to be known if the tax were a state tax, or if either party claimed it was partly municipal. The subsequent history of the case shows that neither party claimed anything on account of the municipal character of the tax, and the case was

disposed of upon the theory that the tax was a state tax. The assessment of the referees in proportion to the taxation in railroad towns was set aside, upon the ground that, so far as the tax was a state tax, to be held valid it "must be proportional with the tax of other property throughout the state." *Boston etc. R. R.* v. *State*, 60 N. H. 87, 96, 97.

Although this decision overturned the practice of the court for over a generation, it was not deemed necessary in the opinion to refer to that practice, or to consider the argument of the state based thereon. The former practice of the court, apparently regarded as of no weight at all upon the two questions presented by that case, is not entitled to serious consideration upon the question now presented. The case well illustrates the little weight as a precedent attached to decisions upon questions which may have been involved, but which were not presented to or considered by the court. This case contains no reference to the savings bank tax, although the language of the court, that the tax if a state tax "must be proportional with the tax of other property throughout the state,"—an expression which it is not probable was used in entire forgetfulness of the decision a year before in *Bartlett* v. *Carter*,—includes that tax unless some ground for exception can be found; but the particular question does not appear to have been presented, and it cannot fairly be said to have been decided, though embraced within the languge used. Why the question now presented was not raised in that case, or the change heeded by the court in 1865, may not be very material. It should be borne in mind, however, that the practical question differs greatly today, when the taxable savings bank deposits have increased to $66,000,000 and the difference in rate has also been augmented by the increase in the municipal rate, while the bank rate is less than in 1879.

The act of 1864 taxing savings bank deposits was not passed, as has been assumed in argument, to encourage such deposits by a special method of taxation; but its purpose was to secure the taxation of such accumulations, which under existing law were largely escaping taxation. The existing method of taxing railroad corporations furnished the pattern followed. Robinson Hist. Taxation in N. H. 116, 117; Laws 1864, *c.* 2873; Laws 1861, *c.* 2493; R. S., *c.* 39, *s.* 3; *Nashua Savings Bank* v. *Nashua*, 46 N. H. 389, 394, 396. While if, prior to 1864, all deposits in savings banks had been taxed at the local rate in towns the change then made would have decreased the taxes received therefrom, the facts that deposits of non-residents were not taxed at all, that deposits under $300 were not taxed,—the average deposit being less than $200

(Bank Comm'rs' Rep. 1864),—and that depositors could offset money on which they paid interest, practically exempted nearly all deposits. The result of the law was to tax property not before taxed and to furnish additional revenue to towns. Any computation based on the assumption that, but for the legislation of 1864, all deposits of taxpayers in towns would have been taxed at the local rate, is without basis in fact and misleading. The argument based upon the claim of partial exemption,—that because the legislature, under the practical construction given the constitution, have the power to select the subjects of taxation and thereby exempt classes of property not named (*Canaan* v. *Enfield District*, *ante*, 517), they can limit the proportion to be paid by particular property,—is equally unfounded in law, as has been recently held in Massachusetts. *Opinion of the Justices*, (Mass.) 84 N. E. Rep. 499.

The court, in 1880, having declared the provisions for railroad taxation to be in conflict with the constitution, the legislature at the next session repealed the provisions requiring every railroad corporation to pay "an annual tax as near as may be in proportion to the taxation of other property in the several towns and cities in which such railroad is located," and amended the section so "as to require every such railroad corporation to pay an annual tax as near as may be in proportion to the taxation of other property in all the cities and towns of the state." Laws 1881, *c.* 53. The occasion of the statute was the decision above referred to. Its purpose was to bring the statute within the constitutional requirements announced by the court, that such tax as a state tax "must be proportional with the tax of other property throughout the state." *Boston etc. R. R.* v. *State*, 60 N. H. 87, 96. The form used to express this purpose was probably suggested by the act for the taxation of railroads proposed by the tax commission of 1878. Tax Comm'rs' Rep. 175. That the language was understood to have the meaning of that used by the court appears from a note on page 95 of that case: "By *c.* 53, Laws of 1881, the tax is assessable in proportion to the taxation of other property throughout the state." This note must be chargeable either to Judge Ladd, the reporter, or to Chief Justice *Doe*, the author of the opinion. As the view of either, the note is evidence of weight that the language of the act of 1881 was understood to have the meaning of the language used in the revision of 1891.

But there is other evidence. By chapter 54, Laws 1878, telegraph companies were required to pay a tax of one per cent annually upon the value of their lines, to be appraised by the board of equalization. G. L., *c.* 62, *s.* 14. By section 2 of chapter 53, Laws 1881, above referred to, the provision for the taxation of

telegraph companies was amended so as to require them to "pay an annual tax as near as may be in proportion to the taxation of other property throughout the state, upon the value" of their property made taxable by the statute; and the board were required "to assess said telegraph property at the average rate of taxation of other property throughout the state." The two forms of expression are used in the same act. There is no ground for holding that the legislature intended to, or understood that they could, apply a different rule in the taxation of railroads from that by which they provided telegraph companies should be taxed. It must be concluded that the two expressions had exactly the same meaning. The latter is the form used by the court in the decision from which the legislation resulted. If the reference to cities and towns in section 1 would authorize the conclusion that only property taxed by city and town officers was referred to, the language is broad enough to include all property taxed in cities and towns, whether the tax is collected by municipal or state officers. As the expression used in section 2 of the act contains no terms implying a restriction to taxes collected by municipal officers, it follows that the terms of section 1 having the same meaning were not intended to be so restricted. Telephone companies, in 1883 (Laws 1883, *c.* 110), were required to "pay an annual tax, as near as may be in proportion to the taxation of other property throughout the state," and the board of equalization were directed to assess their property "at the average rate of taxation of other property throughout the state." In 1891, the commissioners in preparing the Public Statutes adopted the language found in the opinion of the court in 60 N. H. 87, and in the statutes taxing telegraph and telephone companies "throughout the state" in place of "in all cities and towns of the state" (P. S., *c.* 64, *s.* 1), indicating in the margin that the change was not intended to alter the meaning. The only possible reason for the change was the belief that the new language expressed more correctly, with less liability to misunderstanding, the meaning of the old. If a meaning can be deduced from the old which is not fairly attributable to the new, it does not follow that this meaning should be ascribed to the new, but the new language is evidence of the meaning of the old.

It is urged that the question now raised was decided in accordance with the plaintiff's contention in *Boston etc. R. R.* v. *State*, 62 N. H. 648. If this claim be correct, a peculiar and extraordinary situation is developed. The case was decided in June, 1883, and does not appear to have been forgotten or overlooked. It is cited 68 N. H. 386, 403, 510, and 69 N. H. 33. The court having held, in June, 1880 (*Boston etc. R. R.* v. *State*, 60 N. H. 87),

that the railroad tax could not constitutionally be assessed in accordance with the terms of the existing statute, the legislature at the next session changed the statute to accord with the view of the court. Laws 1881, *c.* 53. Immediately after the decision was announced, it appearing to be conceded as the result of that case that the railroad tax was a state tax, the board of equalization voted to so assess it; and the court having said that as a state tax the tax "must be proportional with the tax of other property throughout the state," and having recently held in cases before referred to that the saving bank tax was a tax upon property, the board included the deposits and the tax upon them in computing the average tax upon property throughout the state. The tax has been so assessed annually ever since, without objection from any quarter until very recently. If the decision relied upon introduced an exception into the statute, the legislature took no steps to make the written law conform to the judicial decision, and the exception has never been recognized in the execution of the law. Since that decision was announced, numerous tax appeals by railroad, telegraph, and telephone companies have been determined, some of which have been before the court on questions of law and are to be found in the reports, in which abatements were granted, which would have been much less in amount or entirely denied if the law as it is claimed it was decided in 1883 had been relied upon and applied. *Boston & Maine R. R.* v. *State*, 63 N. H. 571; *Western Union Tel. Co.* v. *State*, 64 N. H. 265; *Boston etc. R. R.* v. *State*, 64 N. H. 490. Counsel for the state have acquiesced in the contrary view, and the attorney-general has officially advised against the plaintiff's contention. Although railroad taxation has been the subject of public discussion, no one claimed the case in question to be an authority against the method followed by the board of equalization, until they called the attention of the legislature to the decision in their report for 1906. It is not to be presumed that all these public officers would have failed to heed the opinion of the court if they had understood such a decision had been made. It seems probable that the court, if they were aware the question had been decided by them, would have called attention to it in some of the subsequent cases, although the question was not directly raised. The only reasonable conclusion from the indisputable facts is that no one connected with the assessment of the tax or the conduct of the tax appeals understood the decision to be what the plaintiff claims; and if these persons did not have that understanding, the only probable inference that can be drawn is that no such decision was in fact made. Examination of the opinion in the light of the questions presented leads to the same conclusion.

The fundamental question is what did the case decide, not what is arguable from the language of the opinion. The language of an opinion, like that of all written documents, must be read in the light of the circumstances under which it is used. "Serious misapprehension of the scope and effect of a judicial opinion is often likely to occur, if the exact point in issue is disregarded." *Hedding* v. *Gallagher*, 72 N. H. 377, 391; *Richardson* v. *Mellish*, 2 Bing. 229, 252; *Quinn* v. *Leathem*, [1901] App. Cas. 495, 506; 26 Am. & Eng. Enc. Law 169, 170. In plain terms, to ascertain what a judge meant by what he said it is necessary to know what he was talking about. The report of the case is brief. It is said to be an appeal from the assessment of the plaintiffs' tax of 1880, and that the facts were found by referees; but there is no statement of the facts found and no order for the disposition of the case. It is therefore impossible to determine from the printed volume what facts were before the court, or what effect the court thought the legal principles announced had upon those facts, further than both may be inferred from the language of the opinion, which, so far as it is claimed to relate to the present controversy, is as follows: "By the act of 1878 (G. L., *c.* 62, *s.* 1) and the act of 1881 (*c.* 53), railroads are taxed 'as near as may be in proportion to the taxation of other property' in towns and cities. The savings bank tax (G. L., *c.* 65, *s.* 8) is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality. It is so regarded in the assessment of state, county, and town taxes upon unincorporated persons, and in their tax appeals; and the plaintiffs' charter is not a statutory or a constitutional ground of exemption." This is all there is by way of statement, argument, illustration, or conclusion. What was in fact decided must depend on the question presented. If the language was used in answer to, or in decision of, the question now raised by the plaintiff, the meaning might be tolerably clear and constitute such a judgment as he contends for. The inquiry, therefore, is whether this or some other question was in the mind of the court at the time.

The referees' report and briefs of counsel are accessible in 148 Briefs and Cases 321, *et seq.* The files of the court contain the report and the written motion of counsel setting forth the legal questions raised upon the facts found. The report sets out in detail the method adopted by the board of equalization to ascertain the average rate of taxation, including the savings bank deposits. This the board found to be $1.44 on each $100 of valuation; but upon the ground of the undervaluation of other property, they found railroads should be taxed at the rate of $1.25. The referees

found the value of the road, reducing the appraisal of the board, and found that property included in the selectmen's inventories was taxed at the rate of $1.52 on the appraisal, but was appraised at only 73.6 per cent of its value. They also found that a tax should have been assessed at the rate of $1.52 upon 73.6 per cent of the valuation found by them. This produced the same result as assessing the tax upon the true value at 73.6 per cent of $1.52, or $1.11872,—the method of the board.

Upon the filing of this report, counsel for the plaintiffs moved for judgment on the report in the following manner: (1) That the tax be wholly abated for the reason that the statute under which it was assessed was unconstitutional; (2) that, failing the sustaining of this contention, the tax be assessed at one per cent of .763 per cent of the actual value of the road as found by the referees, or (3) at one per cent of the actual value. In his printed brief counsel states his position as to the assessment in controversy, as follows: "Can said assessment be sustained by reason of the fact that a smaller tax was imposed upon the deposits in savings banks?" The position was taken, not as an attack upon the findings or rulings of the referees as to what the tax should be, but the attack was upon "the assessment of 1880." The position taken was, that the savings bank tax and the railroad tax, being both state taxes, must be uniform, and no higher tax could be assessed on railroads than upon the deposits. As counsel say in their brief: "When the legislature has only $42,000,000 [the total appraisal of railroads and deposits] of property on which to lay a tax, if they make that tax one per cent on two thirds of the property [the bank deposits] and 1.52 per cent on the remaining one third [the railroads], they undertake to do with respect to the remaining one third what they are prohibited from doing by the constitution of the state." The claim in effect was, that the savings bank tax only could be considered in finding the average rate of taxation upon property throughout the state. Whether the tax upon deposits should be considered in connection with all other property and taxation in the state in determining the average rate of taxation, the court were not asked to decide. The propriety of so including it was apparently conceded, as counsel for the state took the position that such consideration was all the constitution demanded or the plaintiffs could ask. The plaintiffs claimed more, and the denial of their contentions was a decision that constitutional equality did not require that railroads should be taxed at the same rate as savings banks; that in ascertaining the rate it was not necessary to exclude all property and taxes except savings bank deposits and the tax upon them. The substance of what was said was, that as taxes upon other property are assessed at

a higher rate than savings bank deposits, the railroads are not wronged if their property is so taxed. How the average rate should be determined, or the validity of the assessment made by the referees, did not arise upon the motions presented to the court, was not discussed, and consequently was not decided. Limiting the decision to the question presented, the subsequent action in reference to railroad taxation, otherwise inexplicable, is readily understood. The record contains no decree of abatement, and reference has been made to a settlement made by the parties with the state treasurer in 1888. From the amount paid on the execution it can be inferred what the parties understood the judgment was, and their understanding may be considered correct. The proposition, however, that from the amount paid and accepted it must be inferred that legal questions not disclosed by the record were presented to and considered by the court, does not require answer. If there had been a judgment of abatement greater than the amount allowed by the referees by the sum which consideration of the tax on deposits would affect the result, there would be evidence that the claim was made and either assented to by the state or decided for the plaintiffs; but a judgment for the amount found by the referees furnishes no evidence that the question was considered by the court or the parties, because the abatement must have been the same if the question was not considered at all, as it would have been if decided adversely to the plaintiffs.

An attempt is made, by assuming that, if the tax upon deposits were considered, the rate upon the valuation found by the referees would be $1.44 instead of $1.52, to show that the consideration of that tax would have materially affected the result, as a foundation for the argument that the question must have been raised and considered. But the referees did not find what the rate or valuation should be, considering only the taxation of the property included in the inventories and the deposits, although both may be computed from the facts found. The rate of $1.44, which the referees say was found by the board of equalization, is the average rate only upon the assumption that the property in the inventories was appraised at its full value, as were the bank deposits. It is apparent that the greater the undervaluation of the inventories, the nearer the tax of that property at $1.52 and of deposits at one per cent approach each other. Property taxed at $1.52 upon 65.79 per cent of its true value would produce the same tax if taxed at one per cent upon its full value. If the undervaluation found to be 73.6 had been 7.8 per cent greater, the tax of both classes would have been equal. In this case consideration of the tax upon deposits would have reduced the rate upon the true value of the railroad property from $1.11872 to $1.1035, and the

rate upon the reduced valuation from $1.52 to $1.50 approximately. The plaintiffs' tax would have been approximately $279.68, exactly $288.61 less. But the valuation to which the plaintiffs were entitled upon their petition for abatement was one at the same ratio to its true value as that of all other property taxed. *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 200. The valuation of polls should not be considered in determining the ratio. *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 336. The finding of the referees was: "The property included in said inventory, excluding polls and money, was valued for taxation at 70 per cent of its actual value. The entire property in said inventories, including polls and money, was valued for taxation at 73.6 per cent of its actual value." Taking account of the taxation of deposits at a less rate, the referees further found that "the property included in the town inventories, the railroads (exclusive of the B. C. & M. [the plaintiffs]), and the savings bank deposits, taken together, were valued for taxation in 1880 at 74 per cent of their actual value." Upon these findings the questions decided in each of the Amoskeag cases, as to the comparison of the valuation of the plaintiffs' property with all other property taxed instead of with like property of individual taxpayers, and the exclusion of the poll taxes from the computation, might have been raised. If judgment was rendered sustaining the tax found by the referees, it does not follow that the court considered these questions and decided each of them adversely to the result reached when they were raised. Why the state did not ask for an assessment upon the basis of all other taxed property; why the plaintiffs did not ask for an assessment including the deposits and excluding other railroad property, or for the exclusion of the poll taxes in determining the rate of property undervaluation; or why, in the settlement of 1888, the state permitted the abatement upon the tax of 1881 to be applied upon the tax of 1880 after the court had expressly decided such application could not be made (64 N. H. 490), so that the whole amount paid in the settlement was less than was due if deduction were made on account of the tax on deposits, is mere matter of speculation. The answers to these questions are immaterial. Any reason for failure to raise the questions would not show that the questions, or any of them, were considered and decided.

The case fails as an authority in the present controversy because it does not appear that any further questions of law as to what the tax should be were ever presented to the court or decided. The case stands precisely like *Boston etc. R. R.* v. *State*, an appeal from the tax of 1881, reported on a minor point in 64 N. H. 490 (December, 1887), in which an abatement was granted on the basis of the board rate, as it was found upon the evidence

presented, though the mistake of calling it $1.40 instead of $1.46 was made. The abatement was a considerable sum ($2,331.10); while if the rate had been computed excluding the savings bank deposits, no abatement could have been granted, because a tax assessed at that rate on the valuation found by Judge *Smith* would have exceeded the tax appealed from. This is not a decision against the plaintiff, because the question was not presented or decided. For the same reason, *Boston etc. R. R.* v. *State*, 62 N. H. 648, is not a precedent in his favor. The question must be held to be an open one, now for the first time raised. If there were doubt as to whether the question was decided in 1883 as claimed, the subsequent history of the case and the twenty-four years' acquiescence in an opposite interpretation would forbid a decision today upon its authority alone, and would require a re-examination of the question. The only value of the case would be the weight and application of the arguments advanced in the opinion. To such consideration it is entitled under the opposite conclusion.

Relying upon his construction of the decision in 1883 (*Boston etc. R. R.* v. *State*, 62 N. H. 648), the plaintiff contends that the re-enactment of the statute is an adoption of the meaning given to it by the court. If it were to be conceded for the purpose of the argument that the plaintiff's interpretation of the decision is correct, the rule invoked would have no weight in the present inquiry. Technically, it does not apply because the tax involved in that case was assessed under the act of 1878 (as construed in *Boston etc. R. R.* v. *State*, 60 N. H. 87), which was repealed in 1881. The decision did not and could not constitute an adjudication of the meaning of the act of 1881, passed a year later. The only reason which sustains the rule is the inference that the legislature, knowing the meaning attached to the language by the court, would have changed the language if a different purpose were intended. From the knowledge of the legislature, actual or presumed, the rule derives its sole force. The entire ignorance of every one connected with tax administration of the rule claimed to have been established in 1883 has already been referred to. It cannot fairly be inferred that the legislature in 1891 had knowledge not possessed by the state assessors, counsel for the state, or members of the court. It has been said by the federal supreme court, "that when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. . . . And . . . that the re-enactment by congress, without change, of a statute which had previously received long continued executive construction, is an adoption by congress of such construction." *United*

States v. *Hermanos*, 28 Sup. Ct. Rep. 532; *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136; *United States* v. *Falk*, 204 U. S. 143, 152. This statute has received but one construction from the officers of the state charged with its execution, since in effect it was formulated by the court in 1880 and enacted by the legislature in 1881.

The interpretation put upon the statute by the board of equalization is therefore supported by the fact that, so assessed, the burden placed upon railroad property is its constitutional and equal share compared with that placed upon all other property in the state; by the language of the court in *Boston etc. R. R.* v. *State*, 60 N. H. 87, practically enacted into the statute; by the decision in *Boston & Maine R. R.* v. *State*, 63 N. H. 571, that railroads cannot be lawfully compelled to pay more; by the plain terms of the statute, defined by repeated decisions of the court, subsequently re-enacted without change; by the uniform practice for twenty-seven years; by the re-enactment of the statute in the light of such practice; and by the use of similar language by the legislature of 1907, when the question was matter of public discussion and had been fully presented to the legislature by the board in their report for 1906, with the suggestion that the matter of a change in method was a subject for legislative action. The meaning of the words "at a rate as nearly equal as may be to the average rate of taxation . . . upon other property throughout the state," in chapters 81 and 91, Laws 1907, cannot be questioned under these circumstances; and it is equally plain it was intended that the taxes thereby provided for upon express companies, sleeping, dining, and parlor cars should be determined as railroad taxes had been, and that both should be taxed the same. It is unnecessary to refer to the failure of the legislature to change the law when the subject was before them in 1907. The only evidence upon the other side is the action of the court from 1865 to 1878, which was repudiated and disapproved when it was before urged as authority, and the reasoning of the opinion in *Boston etc. R. R.* v. *State*, 62 N. H. 648.

If the savings bank tax is an anomaly to the extent that other property holders may not claim that their property cannot be taxed at a different rate, the effect of the anomaly cannot be extended beyond the acquiescence which created it. As there has been no acquiescence in the exclusion of the bank taxes in ascertaining the average rate of taxation throughout the state for the purpose of imposing a uniform tax upon railroads, but the reverse, there is no ground for the contention that such an exception to the constitutional rule of equality has been created by universal understanding. If the assessments, from 1865 to 1880, of a municipal

tax upon railroads, without objection, amended the constitution in this regard, the amendment, if it could apply to a tax assessed as a state tax, has been repealed by the contrary action for twenty-seven years. The reason why the discrimination, if one exists, is not regarded in the taxation of unincorporated persons and in their tax appeals, if it cannot be, may be determined when such question arises. The fact that no unincorporated person has raised the question, and that it has not been decided, is not conclusive against the incorporated person who first raises it.

Reliance is also placed upon some expressions culled from opinions of Chief Justice *Doe* in tax cases. In *State* v. *Express Co.*, 60 N. H. 219, he said: "There can be no proportion or equality between that which is fixed and that which is uncertain and fluctuating." The truth of the quotation relied upon is as self-evident as a preliminary axiom in Euclid. Things that are not equal are unequal. The axiom was relied upon by Judge *Doe* to sustain the unconstitutionality of the fixed tax upon railroad expressmen, which was in issue in that case. Its only bearing in this case is to cast doubt upon the constitutionality of the savings bank tax, which is not now in issue. There would be no difficulty in mathematics or logic in assessing a tax upon railroads in proportion to the tax upon savings banks. So long as that tax only were considered, the two taxes would be the same. But it has not been claimed since 1883 (62 N. H. 648) that railroads were entitled to have only the savings bank rate considered in fixing the rate at which they should be taxed. The railroad tax rate ($1.72) is not equal or proportional to the savings bank rate, because it is not the same; neither is it equal or proportional to the rate of $2.50 in Concord, or the average rate of $1.52 paid in nearly half the towns upon property other than savings bank deposits, for the simple reason that it is not the same but a different rate. Neither the constitution, nor the statute, nor the dictates of natural justice require that the railroad rate should be equal to each of the 238 or more different rates by which property is taxed throughout the state. It is impossible that it should be unless all rates are alike. The only equality possible is to the average, not of the rates, but to the average rate at which all property is taxed. If there is some property upon which the rate of taxation is changed only by legislative action and at long intervals, that fact does not prevent the taxation of such property entering into the computation of the average rate. The rates do not enter into the computation at all. The total amount levied in taxes, divided by the total property taxed, gives the average rate. Every man's taxes, if assessed by this rule, are proportional and equal. So the rate is determined by every board of assessors

in the state. There is no other way. Under it the railroad taxes, so far as the rate goes, are not only proportional, but equal to the taxes on other property.

Aside from the effect of judicial decisions, constitutional interpretation, or the construction of statutory expressions of legislative purpose, the fundamental question involved in the discussion as to the proper method of assessing railroad property is whether the method employed imposes thereon its fair share of the public burden. Whether it does or not is evidence of the legislative purpose. Because individuals on the whole pay more on their property taxed by the local assessors, the impression has arisen that railroads were favored as to the rate; but as the lower average rate is produced by the fact that on between one fourth and one fifth of their whole property individuals embracing nearly one half of the population of the state pay a lower rate, there is no injustice, but mathematical accuracy, in imposing the average rate upon railroads, who are not depositors in savings banks, and whose money, if deposited therein, would not under existing legislation be exempt from taxation by the board of equalization. P. S., *c.* 64, *s.* 12; *New England Tel. & Tel. Co.* v. *Manchester*, 72 N. H. 166; *Carter* v. *Whitcomb*, *ante*, 482.

It is in substance conceded in argument for the plaintiff, that the method followed is mathematically correct and just. Constitutional equality which is not also mathematically equal to a reasonable approximation is inconceivable. Taxes upon property, equal and proportional as a mathematical proposition, are constitutionally just. The substance of the entire argument in support of the plaintiff's claim is that a tax on savings bank deposits is not a property tax. If this proposition be conceded, the conclusions urged may properly follow; but until some ground is suggested for holding that when the language under discussion was used the tax on deposits was understood to be an excise and not a property tax, the argument fails. There has been no argument or claim in the entire discussion that this tax has been at any time since the decision in *Bartlett* v. *Carter*, 59 N. H. 105, or is now, generally understood to be an excise instead of a property tax. The inclusion of the tax on deposits in finding the average rate is the course directed by the legislature, and is not open to constitutional objection.

The constitutional question in this case and in *Boston etc. R. R.* v. *State*, 62 N. H. 648, was involved and decided in the two cases, *Amoskeag Mfg. Co.* v. *Manchester*, reported 70 N. H. 200, 336. In those cases the plaintiffs claimed that because certain property owners, by a low appraisal of their property, had the benefit of an exceptionally low rate, their like property must be appraised—in

effect, taxed—at the same low rate, precisely as the railroad claimed in 62 N. H. 648 that their property should be taxed at the same rate as savings bank deposits. But it was held that the extent of the plaintiffs' right was to an appraisal of their property at the average rate of all the other property; that is, to have their tax assessed at the average rate. If the savings bank tax is not a property tax, under the law of these cases it should not be considered; if it is, it should be. On this question these cases throw no light. They do not hold, but deny, that A's right is to be taxed only the same amount as B on a particular class of property. Upon the contention that on particular classes of their property individuals are taxed more than railroads on like property rests the whole claim of inequality so vigorously advanced. That claim was held to be unsound in the Amoskeag cases, and no doubt is suggested as to the validity of the conclusions then reached.

The equality of the constitution is a practical one. Strictly, it may be doubtful whether railroad property not located or owned in a local taxing district can be assessed for the local purposes of such district. The difficulties of attempting to distribute the property of a railroad among all the towns in which it may be situate or owned, and to tax these separate parcels according to the varying rates,—that is, of assessing the tax as a tax of a triple character,—would be insurmountable. The statute as it has been worked out by judicial decision and executive application, in view of the utter impossibility of any other course, places these public service corporations in a class by themselves, and does substantial justice by requiring them to pay the same rate of tax as is paid by all other property not in that class. Whether the legislature could properly devise some other method need not be considered. The method is just and equitable as between railroad and all other property, and does not violate any rule requiring proportional assessments. Even if the court agreed that some other method would be more economically sound, more productive of revenue, or technically more clearly within constitutional limits, the court has no power to improve the statute by adding to or taking therefrom. So long as the legislature directs, as they plainly have, the inclusion of the savings bank taxes in finding the average rate, the court has no power to order their exclusion.

The question so far as it relates to the taxation of insurance capital has not been considered, because the result in this case would not be affected by any conclusion that might be reached. Upon the facts alleged, the writ of *certiorari* could not be maintained if the claim as to this tax should be held well founded. The court are no more at liberty to advise the board of equalization at the plaintiff's request, than at their own. *Bingham* v. *Jewett*,

66 N. H. 382, 384; *In re School-Law Manual*, 63 N. H. 574, 576; *Opinion of the Justices*, 62 N. H. 704, 706. It may not, however, be improper to remark that many considerations which require the inclusion of the savings bank tax do not apply to this tax. If it should in the future become material and there should be controversy as to it, the question can easily be presented.

Demurrer sustained.

WALKER and YOUNG, JJ., concurred.

PEASLEE, J., *dissenting*. The opinion of the court decides that a new method of railroad taxation was adopted either in 1881 or 1891. It rejects the view that the act of 1881 and the revision of 1891 merely amended the law so far as necessary to bring it within the constitutional requirements laid down in *Boston etc. R. R.* v. *State*, 60 N. H. 87. The conclusion is reached by giving too great weight to the acts of the board of equalization and the attorney-general, and too little weight to the history of the law and the action of the court in relation to it.

The first statute on the subject was passed in 1842, as an amendment to the report of the commissioners who revised the statutes. Comm'rs' Rep. R. S., *c.* 39; R. S., *c.* 39, *ss.* 4–6. It provided for a tax of one per cent upon the value of that part of the capital stock expended within this state, to be determined by the certificate of the justices of the superior court. *Ib.*, *s.* 4. No tax was ever assessed under this law. The Revised Statutes became effective March 1, 1843 (R. S., *c.* 230, *s.* 1), the court did not meet thereafter until July (R. S., *c.* 171, *s.* 12), and before that time the statute of 1842 had been repealed by the act of July 1, 1843, which provides that the tax shall be assessed "in proportion, as near as may be, to the taxation of other property on the first day of April, . . . in the several towns in which said railroads are situate." Laws 1843, *c.* 34, *s.* 4. Under this statute the court assessed a tax based upon the municipal tax rate from the beginning. In the language of their certificates filed with the state treasurer, they "assessed a tax on said corporation in proportion as near as might be to the taxation of other property the present year in the towns through which the road passes." Certificate of Justices *Gilchrist*, *Woods*, and *Eastman*, dated August 29, 1850.

The idea that the tax was at the fixed rate of one per cent until 1867 has apparently arisen from the error made by the compilers who edited the statutes in 1853. In this edition the acts of 1842 and 1843 are both printed, as though the tax were assessed

at one per cent and also at the local rate. C. S., *c.* 41, *s.* 4. The apparent impossibility of complying with both these requirements (except by some process of assessorial legerdemain) would of itself throw great doubt upon the editors' views. The action of the court is ample evidence that the act of 1842 was repealed in 1843, and further confirmation is found in the commissioners' report in 1867. "The capital of every railroad expended in this state shall be taxed as near as may be in proportion to the taxation of other property in April of each year, in the several towns in which such railroad is located." Comm'rs' Rep. G. S., *c.* 58, *s.* 1. In adopting this section, the commissioners understood that they were using substituted words to express the meaning of the existing law. They did not intend to change the sense. *Ib.*, marginal notes; Introductory Rep., *p.* iv. The section was adopted without change (G. S., *c.* 57, *s.* 1), and the court continued to assess the tax as it had from the beginning. The commissioners' report on this topic is entitled to more than ordinary consideration, from the fact that each of the commissioners (Samuel D. Bell, Asa Fowler, and George Y. Sawyer) had been a member of the court and participated in assessing the railroad tax.

Prior to 1864, deposits in savings banks (less small exemptions) were taxed locally as money at interest. Laws 1833, *c.* 108. So long as this was the law, the tax upon savings bank deposits was included in the calculations for obtaining the local rate. In 1864, the system of savings bank taxation was changed, and a tax of three fourths of one per cent on the deposits and accumulations due to depositors was collected by the state. That representing the deposits of residents was paid to the cities and towns where they resided, and that on the deposits of non-residents was retained by the state. Laws 1864, *c.* 4028, *s.* 1. This change brought before the court, in 1865, the question now being litigated: Should the savings bank tax, collected by the state, but for the direct benefit of the municipality, be considered in determining the average rate of taxation upon other property? The act of determining this question was judicial.

"In one class of tax cases our jurisdiction of the questions of liability and amount has been original. From 1843 to 1878 the statute required the railroad tax to be assessed by the justices of this court. . . . The obligatory force of this law has not been an open question since the judicial character of the assessment has been fully admitted. . . . Whatever doubt or opinion may have been entertained by any or all of the judges before the judicial nature of the work was seen and acknowledged, the record shows that for at least eighteen years—the latter half of the period during which the railroad tax was assessed by us and our pre-

decessors—the assessors understood they were acting in the official capacity of justices of this court." *Doe*, C. J., in *Boody* v. *Watson*, 64 N. H. 162, 175, 176.

In the performance of the recognized judicial duty, it was incumbent upon the court in 1865 to determine the *status* of the new tax as related to the railroad tax. The issue was not merely a theoretical one. Its decision involved substantial sums. In the city of Nashua alone, and as to one railroad only (the Nashua & Lowell), it would have made a difference of over $200 in the annual tax. The circumstances were such as to call this matter into prominence. It was near the close of the war, when taxes were on the increase. To follow out the above example: The rate in Nashua went from $1.40 in 1864, to $2.25 in 1865. Twelve cents of this was caused by the withdrawal of savings bank deposits from the local assessment.

The decision of the court was that the tax should be assessed at the local rate, as it had been, and the savings bank tax was left out of the reckoning. Each year thereafter, until 1879, the question was before the court for decision, and the construction put upon the statute was always the same. This alone may well be deemed to settle and fix the meaning of the statute. *Fitchburg R. R.* v. *Prescott*, 47 N. H. 62, 67. In that case it was said that it was the settled practice of the justices of the court in assessing the railroad tax to include fuel on hand for immediate use as part of the taxed estate; and it was held that "upon the point whether these materials are properly so taxed, the long and settled practice of the court might well be considered as conclusive." This language is quoted with approval by Chief Justice *Doe* in *Boody* v. *Watson*, 64 N. H. 162, 176.

Early in the seventies tax agitation increased. Judge Sawyer's report in 1876, as chairman of the first commission, does not refer to the railroad tax; but the report of the second commission, in 1878, gives the full record of the extended hearings upon this subject, and a copy of the legislation proposed by the commission. A perusal of the arguments advanced by counsel for the various railroads will disclose that none of them claimed that the savings bank tax was or ought to be included in calculating the rate. There was criticism of the theory adopted for valuing railroad property, and much complaint of the inequality of taxation caused by using the local rate instead of the average rate throughout the state; but no suggestion was made that there was either legal or equitable claim under existing statutes to a reduction of the railroad tax because of the favor shown savings banks. App. Rep. Tax Comm'rs, 1878, *pp.* 43, *et seq.* In the brief filed by counsel for the roads, the disparity between the savings bank tax and the

railroad tax is pointed out and urged as a reason against further increasing the railroad tax. It is not there claimed that the roads are entitled to share in the existing discrimination against taxpayers in general. *Ib.* 68, 69. The commission proposed an act levying the tax on the road, rolling stock, and equipments at the average rate of taxation in all the cities and towns in the state (*Ib.* 173), and an act establishing the state board of equalization (*Ib.* 193).

The commissioners to revise the statutes reported the existing law without change. Comm'rs' Rep. G. L., *c.* 58. The legislature adopted a compromise measure making the basis for valuation the road, rolling stock, and equipment, but retaining the provision as to the local rate (Laws 1878, *c.* 70; G. L., *c.* 62, *s.* 1), and established the board of equalization. Laws 1878, *c.* 73; G. L., *c.* 61. It would seem that this second re-enactment of the statute as to rate, after thirty-five years of uniform construction by the court, and in view of the arguments reported by the tax commissioners to the legislature, must have given a clear and settled meaning to the language of the act. The legislators must have understood that the rate named in the statute was the rate in cities and towns.

In 1879, the board of equalization assessed the tax as the court had theretofore assessed it, excluding the savings bank tax. The Boston, Concord & Montreal Railroad ran through towns having a high tax rate; and upon an appeal by that road it was held that as the levy was in part, at least, a state tax, it must to that extent be assessed at the average rate throughout the state, because the state was the taxing district. The question whether it was wholly a state tax was left undecided. *Boston etc. R. R.* v. *State*, 60 N. H. 87. The referees by whom the facts were found thereafter reported the average local rate throughout the state, and the court ordered the tax assessed at that rate.

After this decision, the board of equalization voted that the railroad tax be considered a state tax and that it be assessed at a uniform rate. To determine the average rate, they added the total of the local inventories to the taxable savings banks deposits, and the total local tax to the savings bank tax; and, dividing the second result by the first, found an average rate of $1.44+. They then voted that the railroad rate be reduced from $1.44 to $1.25, because other property was undervalued, and assessed the tax at the last mentioned rate. From the tax so assessed the Boston, Concord & Montreal Railroad again appealed, and the case was sent to three referees. Judge Jeremiah Smith was chairman of this board. The case was fully argued both before the referees

and the court. 148 Briefs and Cases 321, *et seq.* It was before the court on a preliminary ruling of the referees in June, 1882, and the next fall they made their final report. This report sets out in detail the method adopted by the board of equalization to include the savings bank tax. It also contains other computations, including that tax by a different method of calculation. After placing all phases of the matter fully before the court, the referees decided that the savings bank tax was to be wholly excluded, and found the amount of the railroad tax upon that basis.

In August, 1883, the court delivered the opinion affirming the judgment of the referees. "By the act of 1878 (G. L., *c.* 62, *s.* 1) and the act of 1881 (*c.* 53), railroads are taxed 'as near as may be in proportion to the taxation of other property' in towns and cities. The savings bank tax (G. L., *c.* 65, *s.* 8) is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality. It is so regarded in the assessment of state, county, and town taxes upon unincorporated persons, and in their tax appeals; and the plaintiffs' charter is not a statutory or constitutional ground of exemption." *Boston etc. R. R.* v. *State*, 62 N. H. 648, 649. This language seems reasonably plain. The savings bank tax is an exception; it cannot be classified; and as it is not taken into account in assessing the taxes of individuals, so it is to be disregarded in assessing taxes of corporations.

It is urged that because this particular method of taking advantage of the savings bank rate was not argued to the supreme court, therefore the question was not there decided. This argument fails to take into account the nature of the proceeding and the duty of the court in the premises. The appeal is taken from the decision of the board of equalization to the supreme court at its law term; and upon the appeal the court is required to make such order as justice requires. G. L., *c.* 61, *s.* 9. By this procedure all questions of assessment are transferred to the court for final decision. *Boody* v. *Watson*, 64 N. H. 162, 175. The positions taken by Judge Ladd on behalf of the road were: (1) That the tax was wholly unconstitutional; (2) that it could not be assessed at a higher rate than the savings bank tax of one per cent. Both of these positions were denied by the court. Had it then decided the case? By no means. It had merely decided (as to two propositions) what the tax should not be. The problem of what the tax should be was still to be solved. The scope of inquiry had been narrowed by the elimination of these two propositions, but the question what the assessment should be remained. The judges had before them the referees' report, calling to their

attention the somewhat crude method by which the board of equalization included the savings bank tax. It also presented a more scientific calculation for the inclusion of that tax; and it closed with the decision of the referees that the law was that the savings bank tax should be excluded. With this report to act upon, and in discharge of the duty to dispose of all questions presented as justice required, the court made use of the language before quoted. In so doing they intended to decide, as Judge *Isaac W. Smith* entered upon his files, that the tax was "to be assessed as if there were no savings banks"; or, to put it as Judge *Clark* made the entry in his docket, it was "agreed that no deduction of tax should be made on account of savings bank tax being one per cent and other property one and a half per cent." The argument that because the omission of the savings bank tax from the calculation would have made a difference of but a few hundred dollars in the tax assessed, therefore the court paid no attention to that matter, is hardly worthy of serious consideration. The question involved was a legal one. It was not a commercial transaction.

It is further urged in disparagement of this case as an authority, that the final order for abatement, made at the June law term, 1884, is not in harmony with this view of the decision. Before taking the appeal the road paid $17,000 on the tax assessed against it, and the referees were of opinion that the tax should be $21,255.68, leaving a balance due of $4,255.68. The claim is that the court thereafter allowed an additional abatement of $2,331.10, so that the balance finally paid was but $1,924.58; and from this it is argued that whatever the decision may mean, it cannot be what the plaintiff here contends. When the facts are fully known, this position is seen to be untenable. The idea that only $1,924.58 was paid comes from a statement in the printed report of the state treasurer for the year 1888, wherein this sum is named as the balance received from the Boston, Concord & Montreal on account of the tax for 1880. In fact, it was the balance of the $4,255.68 due upon the tax for 1880, after deducting therefrom an abatement of $2,331.10 which the road had obtained on the tax for 1881. *Boston etc. R. R.* v. *State*, 64 N. H. 490. The order allowing the abatement of $2,331.10 was made in the appeal from the tax for 1881 in 1888, four years after the case involving the 1880 tax went off the docket. When the facts are rightly understood, it appears that the order made in 1884, and complied with in 1888, constitutes an additional affirmation of the rule by the court. Here, again, added weight is given to the transactions by the fact that the chairman of the referees and the counsel for the road had both been members of the court when it assessed the railroad tax.

With the disposition of that case, litigation on this subject ceased, and the court had no further occasion to construe the statute until the question was raised in this proceeding. The record of forty years constant dealing with the matter of fixing the rate shows that one course was consistently pursued. From the assessment of the first tax in 1843, it was levied in proportion to the local rate. In 1865, it was decided by the judges to continue to assess at the local rate, and leave out the newly created savings bank tax. This decision was yearly reaffirmed when the assessments were made, until 1879. In that year the board of equalization followed the same rule, but abandoned it the next year. In 1882, Judge Jeremiah Smith held that the rule followed by the court was the correct one, rejecting the innovation sought to be introduced by the board of equalization. In 1883, the opinion heretofore quoted (62 N. H. 648) again asserted the position that the savings bank tax was not to be considered, and the order in the case made the next year reaffirms the decision. No other rule was ever countenanced by the court.

The legislature of 1881 amended the law to conform to the decision of *Boston etc. R. R.* v. *State*, 60 N. H. 87, substituting "all the cities and towns of the state" for "the several towns and cities in which such railroad is located." Laws 1881, *c.* 53; *Boston etc. R. R.* v. *State*, 62 N. H. 648; *State* v. *Jackson*, 69 N. H. 511, 523. The commissioners to revise the statutes in 1891 reported the act with changes which were not intended to alter its meaning (Comm'rs' Rep. P. S., *c.* 63, *s.* 1), and the legislature adopted the act as reported by the commissioners. P. S., *c.* 64, *s.* 1. Applying the usual rule, it must be held that the construction of the statute has thus become settled, so that it cannot be changed except by legislative action. *Tomson* v. *Ward*, 1 N. H. 9; *Jewell* v. *Holderness*, 41 N. H. 161; *Frink* v. *Pond*, 46 N. H. 125; *Parsons* v. *Durham*, 70 N. H. 44; *Burgess* v. *Burgess*, 71 N. H. 293.

It is urged that there has been "continued uninterrupted acquiescence and recognition of the method of the board of equalization by the legislature." This assertion is not borne out by the record history of the board and its relations to the legislative department. The act creating the board contained no provision for its making any report of its doings to the legislature. An abstract of its equalization of local valuations throughout the state was to be compiled by the secretary of state as a basis for apportioning the state tax. The secretary of state was to lay this before the legislature at the opening of the session, when the state tax was to be apportioned. Laws 1878, *c.* 73, *s.* 8; G. L., *c.* 61, *s.* 8. The records of the board's proceedings were to be filed with the secretary of state. Laws 1878, *c.* 73, *s.* 2; G. L.,

c. 61, *s.* 2. A certificate of "their determination" as to the railroad tax was to be filed with the state treasurer. Laws 1878, *c.* 70, *s.* 4; G. L., *c.* 62, *s.* 4. There were no other provisions for reporting the acts of the board. The provision requiring an annual "report of their doings" to be filed with the secretary of state was added by the commissioners who revised the statutes in 1891. Comm'rs' Rep. P. S., *c.* 62, *s.* 7; P. S., *c.* 63, *s.* 7. There are, then, three places where information concerning the acts of the board from 1879 to 1891 may be sought: the record filed with the secretary of state, the reports to the legislature, and the certificates filed with the state treasurer.

The records of the board for 1879 do not show what the rate was or how it was determined. After the decision in *Boston etc. R. R.* v. *State*, 60 N. H. 87, the board met on September 7, 1880, and considered the recent decision of the supreme court in the appeal cases, and counsel were heard in reference to the intent and meaning of the decision. The next day it was voted that the tax upon railroads be regarded as a state tax and be assessed at a uniform rate. September 29, they adopted a resolution reciting that the average rate of taxation upon the taxable property of the state was about $1.44, and that there was such undervaluation that the railroad tax ought to be assessed at $1.25. Below the record of this meeting is an unsigned statement, evidently written by the secretary of the board, as follows:

VALUATION AND TAXATION, 1880.

Amount of inventories	$168,995,309	Taxes on same	$2,563,144.31
Savings bank deposits	28,293,929	" " "	282,939.29
Amount taxed	$197,289,238	Amt. of taxes	$2,846,083.60

Average rate 1.442 on a $100.

This is the assessment from which the appeal was taken which is reported 62 N. H. 648.

In 1881, below the record of the meeting held September 21, is a similar statement of valuation and taxation, giving a rate of $1.46. September 27, it was voted to fix the railroad rate at $1.25, "so that the rate be fixed proportionally as much below the average rate upon other property as other property has been undervalued."

In 1882, the board reheard many appeals from the tax of 1881, which were sent to them by the court under the rule adopted at the December, 1881, law term. There is no record of how the abatements were allowed, but the files of the court in the several counties seem to show that it was because other property was

undervalued. The rate question was not considered. There is a similar statement as to valuation and taxation this year, giving a rate of $1.41. The railroads were taxed at this rate, and their valuation was reduced eighteen per cent because other property was undervalued. By this method the railroads were given the benefit of the lower rate on savings banks twice—once by the reduction of rate and again by a reduction of values. The same thing is probably true of the preceding year, when the rate was reduced twice. From this time the method of reducing valuation, instead of a second reduction of the rate, was followed.

In 1883, a similar record was made. The rate was $1.49, and seventeen per cent was taken from the valuation.

All these assessments were made before the court decided the 1880 appeal. That decision was announced late in August 1883, and the assessment for that year was made July 13—a month or two earlier than in former years. The first secretary of the board died before their sessions in 1884, and there is no further record of how the rate was made up, nor does it appear (as it did appear in the 1879 appeal case) that any consideration was given to the decision of the court. From 1884 to 1890, the record merely shows a vote to assess at the "average rate" of so much, with certain percentages deducted from the valuation.

The legislature did not understand that under the law the board was required to report to it upon the railroad tax. In 1881, the house adopted a resolution requesting the board to report in what way and manner they made the railroad tax, upon what basis they valued the railroad property, how they determined the rate of taxation, and whether they made the assessment in accordance with the statute. The board replied: "We regarded the railroad tax as a state tax, and held that as such it should be assessed as near as practicable upon a uniform valuation with the other property of the state and at a uniform rate. How we endeavored to effect these objects will more fully appear from our answer to the other branches of your inquiry. . . . The rate of taxation was determined by the average rate of taxation of the other property in the state, modified by a proportional value thereof. To this end we received evidence to show that the property of the state was not assessed at its full value; and having ascertained, so far as the evidence showed, the extent of such undervaluation, we deducted from the average rate of taxation a per cent equal to the per cent of undervaluation, and thus made the valuation and rate of taxation of railroads as near as practicable uniform with that of other property in the state. To the question whether this assessment is in accordance with the statute, we have to say: The statute (chap. 62, sec. 1, Gen. Laws) provides that the tax on

railroads shall be 'as near as may be in proportion to the taxation of other property . . . in the towns and cities in which such railroad is located.' This implies that the railroad tax is a municipal tax; but the supreme court, in the case of the Boston, Concord & Montreal Railroad's appeal from our assessment of 1879, practically decided that this tax is a state tax. And in that opinion the court say that 'if the railroad tax is a state tax, this statutory provision is in conflict with the constitution, since a state tax must be proportional throughout the state.' Following what seemed to us the plain interpretation of this opinion, we assessed the railroad tax as a state tax, and disregarded the statutory provision referred to. A copy of the valuation and assessment of the several railroads is hereto annexed." Journal of Senate and House, 1881, *p.* 395. There was no statement of the rate and no further information given as to how it was arrived at.

September 6, 1887, Governor Sawyer transmitted to the senate and house the report of the board for that year. In the house, this was ordered to be referred to a special committee of one from each county, and no further notice was taken of it. In 1889, the report of the board for 1888 was transmitted with other department reports. All others were referred, but nothing was done with this. Assuming that these were the printed reports, neither of them contained any reference to the railroad tax; and aside from these, the journals do not disclose any reports from the board from 1881 to 1891. These two reports (for 1887 and 1888) are included with the bound volumes of department reports for 1887 and 1889 respectively. No others were so included up to 1891.

It might be urged that the secretary of state presumably laid before the legislature the printed summary provided for by the statute, that this was probably the statement entitled "Valuation and Taxation in New Hampshire," and that in this way the legislators were informed. Assuming this to be true, what does it show for the period under consideration? The printed report for 1881 contains a summary of the local assessments and taxes, and at the foot a computation adding these to the savings bank deposits and tax, and a statement that the average rate is $1.46. This includes the savings bank figures, although that fact is not stated. Immediately following this, as a part of the same statement, is the following: "Add to the amount of taxes above given the railroad and telegraph taxes (estimated as assessed last year) $176,192, and we have the whole amount of taxes assessed upon the persons and property of the state, to wit, $3,111,007, being a little less than $9 for each inhabitant." There is no other reference to the railroad tax.

In 1882, there is a similar recapitulation giving an average rate

"including savings banks," followed by the summary for the preceding year. The reports for 1883, 1884, and 1885 are in similar form.

In 1886, there is the first statement of the railroad tax. It appears as a table giving taxable valuation of and the tax assessed against each road. In the summary of valuations, similar to those in former years, the rate is this year omitted for the first time. A mathematical computation shows that in the cities and towns it was $1.52, that including savings banks it was $1.413, and that the railroads were assessed at $1.42.

In 1887, the table of railroad taxes disappears, and the statement of the rate reappears. There was a similar report in 1888, with the additional element of capital in insurance companies and tax thereon.

In 1889 and 1890, the rate is given, followed by the usual statement of the rate, etc., for the previous year, and there is a table of valuation and taxation of railroads, but no accompanying statement of rate. In none of these years is railroad taxation or average rate mentioned in the preliminary report of the board. In the volumes of annual departmental reports, printed and bound by the state for preservation in its archives and for distribution to the towns and libraries in the state, this report was not included. G. L., *c.* 5, *s.* 6. The people were never officially informed of the acts of the board of equalization until the passage of the act of 1891, calling for a report. P. S., *c.* 63, *s.* 7. Such information on this subject as went to the legislature was an addendum to tables returned as a basis for assessing the state tax, to which this information was not germane. It appeared as information of general interest, with nothing to show its relation to the railroad tax. When requested to state how they determined the rate, in 1881, the facts were not given by the board, and they never stated in plain terms how the railroad rate was made up. Their certificates filed with the state treasurer follow in substance the form adopted by the court before 1878, and give no information on this subject.

It is immaterial why these reports were made as they were. The issue here is the publicity given to the details of the acts of the board. It is evident that what they had done could have been discovered by a search of the records in the secretary of state's office, coupled with mathematical computations based upon those records and the printed reports. But the claim here is that these acts were "notorious." The question is not: Could it have been proved that the acts were done? The issue is: Did the people know the facts? It rests upon the proponents of the doctrine of repeal by practical construction to establish their case.

The available evidence here seems to disprove their proposition. Certainly, it does not prove the things necessary to establish that the people of the state, by their representatives in the legislature of 1891, knowingly and intelligently abandoned the right to a considerable portion of the tax upon public service corporations.

If further proof is sought as to how much or how little was known in the late eighties of this course of procedure, it may be found in the interesting history of the Boston, Concord & Montreal Railroad's appeal from the tax for 1881. That case was made an exception to the general practice in that year and was heard by the court, instead of being sent for a retrial before the board of equalization. The reason appears to have been that in this case there was a special question (the value of the road) not common to the other cases. At the trial early in 1888, counsel for the road claimed that the rate found by the board of equalization for 1881 was $1.46. February 24, 1888, the secretary of the board, in response to an inquiry from counsel for the state, wrote him that the "board rate" for 1881 was $1.40. This was accepted by counsel on both sides and by the court as final, and the decision in the case rests upon this letter. The rate was in fact $1.46. That fact could have been ascertained either by inspecting the records of the board on file with the secretary of state or from the printed statements of "Valuation and Taxation," often referred to as the reports of the board. The evidence was not obtained from either of these sources. The fact that the rate reported varied largely from that printed in the statement of valuation and taxation, and from the record at the state house, passed unnoticed by either court or counsel. It is evident that the notoriety of this procedure did not extend to the legal profession at that time. Knowledge of how the state board of equalization was assessing a tax, not possessed by eminent counsel or by judges of the supreme court, is not to be imputed to the constantly changing membership of the legislature.

There is another source from which it is quite likely the legislators obtained knowledge of this decision of 1883. Morrison's Digest, issued in the bound volume in 1891, was available in the advance sheets in 1890. Under the title "Taxation," subhead "Banks, Railroads, Telegraph Companies," he states the law of this case (*p.* 735): "In the assessment of a railroad 'as near as may be in proportion to the taxation of other property' in towns, the rate at which savings banks are taxed by the state is not considered. *B., C. & M. Railroad* v. *State*, 62–648." Whether this was or was not known to the legislators, it is convincing proof that knowledge of the overruling power of the acts of the board of equalization had not become universal in 1891.

The evidence is more persuasive that the legislators did not, than that they did, know how the board was assessing this tax. In one year (1881) we have the direct testimony of the house that it was ignorant of the rate and wished to be informed. It knew no more (so far as this issue is concerned) after the board made answer than it did before. If on the one hand it is to be urged that, with all this evidence of lack of knowledge, it is still presumed that the legislators knew what was being done by this board of lay judges, and that it approved and adopted their acts, what is to be said about their knowledge of the longer period covered by the contrary practice of the supreme court, of the earliest practice of this board, and of the reversal of its later action by the court? It is not to be presumed that the legislature understands that six years of disregard of a decision by the board of equalization overrules the action of the court of last resort.

It is said that, conceding the soundness of all that is urged as to the history of the statute, yet the legislature of 1891 must have intended to include the savings bank tax in the computation of the rate for the railroad tax because the court in 1879 held the former to be a property tax. This argument only takes into account a part of the evidence. If the legislature in 1891 knew that the court said in 1879 that the savings bank tax was a property tax, they also knew that in 1883 the court said "the savings bank tax is an anomaly, and is universally understood to have acquired the position of an exception to the constitutional rule of equality. It is so regarded in the assessment of state, county, and town taxes upon unincorporated persons, and in their tax appeals; and the plaintiffs' charter is not a statutory or constitutional ground of exemption." 62 N. H. 649.

But aside from the question of precedent, the case is against the defendants upon principle, because of the nature of the savings bank tax. The tax is computed at three fourths of one per cent upon the amount of general and one per cent upon the special deposits on which the corporation pays interest, including dividends declared but not paid, with certain exemptions. P. S., *c.* 65, *s.* 5; Laws 1895, *c.* 108, *s.* 1; Laws 1907, *c.* 102. It is not a tax levied upon a valuation put upon the property of the bank. It is not computed at the varying rate which is determined from year to year by the extent of the public needs. Whether the bank has much or little surplus, whether its assets have been carried on the books at a high or low figure, the amount of the assessment is not varied; and whether the needs of government be great or small, the rate is always the same. Such a tax is not a tax upon property, but rather a privilege tax, or an excise upon the fran-

chise which the bank enjoys. This is the almost universal rule. *Jones* v. *Bank*, 66 Me. 242; *State* v. *Bank*, 71 Vt. 234; *Commonwealth* v. *Bank*, 5 Allen, 428; *S. C., sub nom. Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Suffolk Savings Bank, Pet'r*, 151 Mass. 103; *Coite* v. *Society*, 32 Conn. 173; *S. C., sub nom. Society for Savings* v. *Coite*, 6 Wall. 594; *Monroe Savings Bank* v. *Rochester*, 37 N. Y. 365; *State Assessors* v. *Railroad*, 48 N. J. Law 146; *Trenton Savings Fund* v. *Richards*, 52 N. J. Law 156; *United States etc. Co.* v. *State*, 79 Md. 63; *Southern Gum Co.* v. *Laylin*, 66 Ohio St. 578; *Pingree* v. *Auditor-General*, 120 Mich. 95; *State* v. *Anderson*, 90 Wis. 550; *Plummer* v. *Coler*, 178 U. S. 115; Cool. Tax. (3d ed.) 412, 413. See, also, the authorities collected in the note, 60 L. R. A. 333.

An *ad valorem* tax is a tax "upon property by a valuation, and effect can only be given to it by means of assessors, who value the property and apportion the tax by their estimate." Specific taxes are "those which impose a specific sum by the head or number, or by some standard of weight or measurement, and which require no assessment beyond a listing and classification of the subjects to be taxed. License taxes and other taxes on business or occupation, stamp taxes, taxes on franchises and privileges, are usually specific. . . . As regards all such taxes, the law by which they are laid is of itself a complete apportionment. Ministerial officers have nothing to do but to list the subjects of taxation; classify them where that is necessary; ascertain the number, weight, measurement, etc., . . . and collect the sum which the law has definitely fixed." Cool. Tax. (3d ed.) 412, 413.

"The decisive reason why it cannot be supported as a tax on property, in the sense in which that phrase is used in the constitution in the article cited, is that it is not 'proportional'; that is, it is not laid according to any rule of proportion whatever, but is imposed only on the corporations designated in the act, without any reference to the amount required to be raised by taxation for public purposes, or to the actual property held by such corporation subject to taxation, or to the whole amount of property in the commonwealth liable to be assessed for the public service." *Commonwealth* v. *Company*, 12 Allen 298, 300.

The amount of the tax "is not fixed or determined by a valuation of the property of the bank. The average of deposits during a certain period includes only the amount credited to depositors. It does not embrace a valuation of the investments made by the bank, or the market value of its property. The tax is assessed wholly irrespective of investments, and without any regard to the profit or loss made or incurred by the corporation on

the property in its possession or on the business which it has carried on. The average of deposits during the period of time denoted in the statute may not be equivalent to the whole property owned by the bank, exclusive of money invested in the securities of the government. The amount of the tax in no way depends on the aggregate of the investments of the bank. It must be the same whether the investments have been profitable or otherwise. No valuation of property is necessary to the assessment of the tax, and none is in fact made. How, then, in any just sense, can the assessment be deemed to be a tax on property?" *Commonwealth* v. *Inst. for Savings*, 12 Allen 312, 314.

Much of the reasoning contained in these authorities appears to to have been approved in this state. "The idea of proportional and reasonable or just and equal taxation is founded on the declaration in the bill of rights, that every member of the community is bound to contribute his share in the expense necessary to the protection of his property. This proportion is wholly destroyed by fixing a tax upon value on one kind of property, and a tax on gross receipts upon another. While the amount to be raised on other kinds of property depends upon the amount required for public objects, and the rate of taxation depends upon the amount of property within the taxing district and the public necessities, under the statute in question the rate is always the same. There can be no proportion or equality between that which is fixed and that which is uncertain and fluctuating." *State* v. *Express Co.*, 60 N. H. 219, 245. The last sentence states the present case in a nutshell. There can be no proportion between the fluctuating railroad tax and the fixed savings bank tax.

The suggestion that the savings bank tax is laid upon the property of the depositors is the only reason which has been advanced for the holding which is peculiar in this state. In no case is the matter reasoned out. No attempt has been made to answer the convincing logic which has prevailed in substantially all other jurisdictions. If the conclusions here reached resulted from irresistible logic, they should be followed, even against the unanimous judgment of all other courts. If they did not so result, they should be abandoned.

It was first held that the assessment upon savings banks was a property tax. *Bartlett* v. *Carter*, 59 N. H. 105. The next step in the progress of the argument is the decision that all property taxes must be proportional. *Boston etc. R. R.* v. *State*, 60 N. H. 87, 96. Immediately after this follows the decision that our constitution provides "no warrant for the imposition of any other tax than one assessed upon a proportional and equal valuation of all the different kinds of property on which it is to be levied." *State*

v. *Express Co.*, 60 N. H. 219, 246. And then the question of the constitutionality of the savings bank tax was presented for decision. The court said: "The savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality." *Boston etc. R. R.* v. *State*, 62 N. H. 648; *Somersworth Savings Bank* v. *Somersworth*, 68 N. H. 402.

The tax was sustained, as an anomaly, because of the universal understanding that such a tax was an exception to the constitutional rule of equality. It was anomalous because its name and kind had theretofore been excluded by the court from the New Hampshire constitutional scheme for taxation. There was no power to lay a franchise tax in this state. But by the universal understanding, such a tax was given a place in a constitutional scheme for taxation. It was an exception to the constitutional rule of proportional equality, as all specific taxes are. So while the court in this state generally denied the validity of these taxes that would be valid elsewhere, in this instance the tax was held to be valid. The universal understanding could not be ignored; yet the decision could not be reconciled with the previous utterances of the court. The court having declined to follow its argument to its legitimate conclusion, the logic of the situation called for a modification of the earlier cases. Whether the decision was intended to effect such a result, cannot be ascertained. The matter was disposed of with the brief declaration that the law was as stated. There is in all this at least a suggestion that the earlier decisions against the constitutionality of any tax not assessed by a proportion common to all other taxes may have been erroneous; and this doubt appears to have recent sanction. *Thompson* v. *Kidder*, *ante*, 89, 90.

But it is not necessary to now determine whether an excise on a franchise could or could not have been levied in 1880. By the amendment to the constitution adopted in 1903, taxes upon franchises are expressly provided for, and must now be valid if not repugnant to other constitutional limitations. *Thompson* v. *Kidder*, *supra*, 96. If before 1903 franchise taxes were anomalies which could not be classified under our constitution, they are so no longer.

Not being a property tax, this levy upon savings banks is not included in the class of taxes upon property. A tax upon a fixed basis of value, and at a fixed rate, has no logical relation to one upon the true value of property, assessed at a fluctuating rate adjusted to the varying public needs. "There can be no proportion or equality between that which is fixed and that which is

uncertain and fluctuating." *State* v. *Express Co.*, *supra*; *Oliver* v. *Washington Mills*, 11 Allen 268, 277.

It is said that this reasoning is fallacious because the figures can be combined and the rule of three can be applied to the result. Of course, any figures relating to any subject, or to an indefinite number of subjects, can be thus combined and an arithmetically correct result obtained. But much more than a question of arithmetic is here involved. It is the constitutional question of whether, in assessing taxes upon property (as distinguished from excises), the rule of proportional equality must be followed. The soundness of that rule has never before been doubted by the courts of this state. The same line of reasoning now adopted by the court was urged by counsel in *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 336, on the subject of including poll taxes in the determination of distribution of the common burden. It was there conceded that the defendants' mathematics were faultless; but the fact that there was error "in taking as the common burden to be proportioned the whole tax instead of the property tax" was then seen to be fatal to the proposed process. It is equally so here.

By the process here adopted by the majority of the court, the railroad tax is in part based upon an equal distribution of the public needs from year to year and in part upon an arbitrary rate. The result cannot be a tax based wholly upon an equal distribution of the annual burden. Unless it is true that A's property tax can be levied at the rate required for public uses and B's tax upon his property at a fixed rate, the process adopted is faulty and the conclusion reached is wrong. In *Boston etc. R. R.* v. *State*, 62 N. H. 648 (where the question of the nature of the savings bank tax was involved), and again in *Somersworth Bank* v. *Somersworth*, 68 N. H. 402 (where the constitutionality of that tax was directly in issue), it was said that the savings bank tax is "an exception to the constitutional rule of equality." Any other tax apportioned according to this tax must in turn be contrary to that constitutional requirement.

The railroad tax is a property tax, and must be laid in accordance with the constitutional rule of equality. If the statute calls for a levy in violation of this rule, it is unconstitutional and void. *Boston etc. R. R.* v. *State*, 60 N. H. 87. The presumption is that the legislature intended to keep within constitutional limits. *State* v. *Jackson*, 69 N. H. 511. The mere fact that the statute can be construed to infringe the constitutional limitation is not enough to warrant such an interpretation of the legislative intent. The rule is imperative that such an intention is not to be implied. It must be clearly manifested. *Leavitt* v. *Lovering*, 64 N. H. 607.

A legislative intent to thus violate the rule of equality is not

shown in this case. The act of 1881 was passed because the court had just said that the statute as it then existed was an offence against that rule. The evident and only purpose of the legislature was to correct that error. It is as certain that it did not intend to include what the constitution excluded, as that it intended to correct the former exclusion of that which the constitution included. In a peculiar degree, the thought that the statute be kept within constitutional limits must have been in the minds of those legislators. "And when the intention of the legislature is plain, it is the duty of the court so to construe the act as to carry out the intention if the language used will fairly admit of such construction." *State* v. *Jackson*, 69 N. H. 511, 526.

The case as to the insurance tax is still clearer. A stock fire insurance company pays "a tax of one per cent upon the amount of its paid-up capital on the first day of April." P. S., *c.* 65, *s.* 9. It is common knowledge that while the stock in some of these companies has been and is of large value, that in others has been worth nothing. But the same tax—one per cent upon the par value of the stock—is uniformly levied. It seems superfluous to extend the argument upon the proposition that this is not a property tax. The soundness of the conclusion appears to be conceded. Nor should the question be avoided upon the ground that the error has decreased the railroad tax but a few hundred dollars. In the year 1906, the board of equalization carried their tax rate to the third decimal. No good reason appears why this should not always be done in figuring these taxes, which deal with large amounts of property in single items.

If the exclusion of the insurance tax meant great and impractical labor in the computation of the railroad tax, there might be ground to justify its retention in the calculations. It might then well be said that the result was as near an approximation as could reasonably be arrived at. But the situation presents the reverse of this proposition. The inclusion of the insurance tax adds one more factor to the complications of the computation. Its exclusion would simplify the matter. In this posture of the affair, the erroneous inclusion which complicates cannot be justified on the plea of simplification; nor can the simplifying exclusion be refused because complications ought to be avoided. The question of the inclusion of this tax is directly involved in the present case. It should be decided. If, as the majority opinion suggests, the tax is to be differentiated from the savings bank tax, the reasons should be given.

The rights of the public service corporations are not infringed by the exclusion of the fixed savings bank and insurance taxes from the computation of their proportional shares of the public

burden. Those heretofore unclassified anomalies are not considered in the assessment of property taxes upon unincorporated persons, and the public service companies' charters are neither statutory nor constitutional grounds for claiming an exemption. *Boston etc. R. R.* v. *State*, 62 N. H. 648. The demurrer should be overruled.

BINGHAM, J., *dissenting*. I agree with Judge *Peaslee* in all that he has said; and while little can be added to his able and exhaustive discussion, the question is of such importance, and the opinion of the majority is so fallacious in reasoning and unjust in its result, that I feel I would be remiss in the performance of my duties if I failed to state, in part at least, the views I entertain.

The main question in the case is whether the taxes assessed upon savings banks and fire insurance companies shall be taken into consideration in ascertaining the rate at which railroad, telegraph, telephone, and express companies shall be taxed. The board of equalization, acting under the advice of the attorney-general and in disregard of the decision of the court in *Boston etc. R. R.* v. *State*, 62 N. H. 648, have added the amount of savings bank deposits and fire insurance capital to the amount of property in the various cities and towns throughout the state, and the amount of the tax raised upon savings bank deposits and fire insurance capital, at the fixed rates of three quarters of one per cent and one per cent, to the amount raised in cities and towns throughout the state to meet the public charges incurred by them and by the counties and such part of the state charges as have been apportioned to them, and with these figures as a basis have computed the rate for the assessment of the tax upon the above named corporations. The result of this method of computation has been to reduce the amount of tax paid by public service corporations upon their taxable property from $70,000 to $75,000 each year below what they would have had to pay if their property had been taxed at the same rate at which individuals are taxed for town, county, and state purposes upon an equal amount of property. This being the result, the question presented is: Does the statute under which the tax is assessed authorize the adoption of such a method of computation; and if it does, is it sanctioned under the provisions of our constitution?

In *Amoskeag Mfg Co.* v. *Manchester*, 70 N. H. 336, 344, Chief Justice *Parsons*, then an associate justice, in delivering the opinion of the court said: "By an unbroken line of decisions in this state during the last seventy-three years, from the *Opinion of the Justices*, in 1827 (4 N. H. 565) to the decision in this case (*ante*, *p.* 200), it has been conclusively settled that the constitutional rule of equality

in taxation requires that throughout the same taxing district the same tax shall be laid upon the same amount of property, 'so that each man's taxable property shall bear its due portion of the tax according to its value.' *Opinion of the Court*, 4 N. H. 565, 568. The share which every person is bound to contribute for the protection in the enjoyment of his life, liberty, and property, to which he is entitled (Bill of Rights, *art.* 12), is his proportional part of the expense of such protection according to the amount of his taxable estate. . . . Any scheme of mathematical reasoning which . . . assesses against the plaintiffs a tax greater or less than that assessed to others upon the same amount of taxable estate,—a result in conflict with the constitution and fundamental principles of justice,—is inevitably unsound and erroneous, either in the theory itself, or in the premises upon which such system is based. If the method is correct, the result must be right. If the result is wrong, the reasoning is fallacious. The accuracy of the method of computation is safely and sufficiently tested by the result."

Starting with these declarations as our premise, and they are undoubtedly sound, it is apparent that all taxes upon property which are sanctioned under the provisions of our constitution must be proportional and equal; that each man's taxable estate must bear its due proportion of the public burden according to its value; and that any scheme of mathematical reasoning which assesses against the property of one man in the same taxing district a tax greater or less than that assessed to others on the same amount of taxable property is in conflict with the constitution and fundamental principles of justice, and the reasoning by which such a result is reached is fallacious.

In *Boston etc. R. R.* v. *State*, 60 N. H. 87, it was held, Chief Justice *Doe* delivering the opinion, that the tax assessed upon railroads pursuant to the statute here under consideration was a proportional tax, that it must be laid according to the constitutional rule of equality, and that if it was a state tax it "must be proportional throughout the state"; in other words, that the tax was a property tax, and that the property of the railroad must bear its due proportion of the public burden according to its value. It having been thus determined that the railroad tax is a property tax, we will now consider the nature of the tax assessed upon savings banks.

In *Boston etc. R. R.* v. *State*, 62 N. H. 648, 649, it was held, in an opinion delivered by the same chief justice, that "the savings bank tax (G. L., *c.* 65, *s.* 8) is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have

acquired the position of an exception to the constitutional rule of equality." In *Somersworth Savings Bank* v. *Somersworth*, 68 N. H. 402, the constitutionality of the savings bank tax was sustained, not, however, on the ground that it was a property tax and that the property of the bank bore its due proportion of the public burden according to its value, but upon the ground, as announced in *Boston etc. R. R.* v. *State*, 62 N. H. 648, that "the savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality." The opinion in this case was also written by Chief Justice *Doe*. It was edited by Judge *Walker* after Judge *Doe's* death, and was adopted by his surviving associates, including the present chief justice, as the opinion of the court.

In *State* v. *Griffin*, 69 N. H. 1, 33, Chief Justice *Carpenter*, in speaking of the savings bank tax and the statute authorizing its assessment, said: "This court, in 1883, less than twenty years after the enactment creating the discrimination, declared that 'the savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality.' *Railroad* v. *State*, 62 N. H. 648, 649"; and that it became an exception "solely by virtue of the statute creating it, and less than twenty years of public acquiescence." See, also, *State* v. *Gerry*, 68 N. H. 495, 510. It is therefore authoritatively determined by these decisions that in this state the savings bank tax is not a proportional and equal tax, that the property of the bank does not bear the same amount of tax as is borne by others upon a like amount of property, and that it is not a property tax within the meaning of our constitution, but an anomaly and an exception to the constitutional rule of equality. These decisions are directly in conflict with the earlier decision of *Bartlett* v. *Carter*, 59 N. H. 105, and must be considered as overruling it, to the extent that they hold that the tax upon savings banks is an anomaly and not a proportional tax laid upon property according to the constitutional rule of equality.

It was also held in *Boston etc. R. R.* v. *State*, 62 N. H. 648, that the savings bank tax, being an anomaly and not laid according to the constitutional rule of equality, was not to be taken into consideration in assessing the tax upon railroads; that it was not taken into consideration in assessing state, county, and town taxes upon individuals; and that the railroads stood in no different relation to the tax to be assessed upon them. The syllabus to the case states that "in the assessment of a railroad 'as near as may be in proportion to the taxation of other property' in towns, the

rate at which savings banks are taxed by the state is not considered." There can be no doubt as to the meaning of this decision. The entry of Judge *Isaac W. Smith*, upon the record of the case preserved in 148 Briefs and Cases 321, states that the tax upon railroads is "to be assessed as if there were no savings banks." The entry in Judge *Clark's* docket is that it is "agreed that no deduction of tax should be made on account of savings bank tax being one per cent and other property one and a half per cent." And the figures in the office of the state treasurer show that the tax paid by the railroad was in accordance with the findings of the referees, which excluded the savings bank tax from the computation. The question arose upon an appeal from the tax of 1880. The referees found that the true value of the railroad was $1,900,000; that property generally throughout the state was assessed at 73.6 per cent of its true value; that the railroad should therefore be valued for purposes of taxation at 73.6 per cent of $1,900,000, or at $1,398,400; that the average rate of taxation throughout the state, excluding the tax on savings bank deposits, was $1.52, and including it, $1.44; that the railroad should be taxed at the rate of $1.52 on $1,398,400, and should pay a tax of $21,255.68. In 1880, the railroad paid to the state treasurer on its tax for that year $17,000. This left a balance of $4,255.68 due the state. In 1888, an abatement of $2,331.10 was allowed the railroad on its appeal from the tax of 1881. This sum was applied by the state treasurer, under the direction of Attorney-General Barnard and Edwin G. Eastman, our present attorney-general, upon the balance of $4,255.68, leaving still due the state upon the tax for 1880 the sum of $1,924.58. This balance, with interest to June, 1888, was then paid by the railroad. If its property had been assessed by the referees at the rate of $1.44, which rate would have included the savings bank tax, the tax then assessed against it would have been $20,136.96, or $1,118.74 less than the tax in fact assessed, and the payment made by it would have been correspondingly less. These facts clearly disclose the meaning of the court as expressed in their decision in this case, and demonstrate beyond a doubt that what the court intended to decide, and what they in fact decided, was that in assessing taxes upon railroads the tax upon savings banks should be excluded from the computation.

Again, in the case of *Amoskeag Mfg. Co.* v. *Manchester*, *supra*, in which the opinion was delivered by our present chief justice, it was decided that in determining the amount of the public burden to be apportioned to the Amoskeag Company as a tax upon its property, the tax assessed upon polls could not be taken into consideration; that a poll tax was not a property tax; that there was

"no constitutional provision as to the relative amounts to be assessed upon polls and upon property"; and that "a legislative enactment requiring such a distribution of the taxes between polls and estates as would compel a portion of the taxpayers to pay on their property more than others paid on the same amount of property would be in violation of the constitution."

But the chief justice, in delivering the opinion of the majority in the present case and construing the statute directing the assessment of taxes upon public service corporations, not only holds that the act directs that a less amount of tax shall be imposed upon the property of public service corporations than is imposed upon a like amount of property owned by others, but also that the statute so construed would be constitutional; for he decides that the board of equalization were right in taking into consideration the savings bank tax in determining the tax to be assessed upon public service corporations, and this notwithstanding the direct effect of such a method of computation is to permit them to pay some $70,000 or $75,000 less tax each year than other taxpayers are required to pay upon the same amount of property. It is indisputable that such a construction of the statute and method of computation produces this result. The answer to the chief justice's present position is that the statute, if it must be so construed, is clearly unconstitutional; and to use his own language as given in *Amoskeag Mfg. Co.* v. *Manchester*, *supra*, "any scheme of mathematical reasoning which . . . assesses against . . . [the public service corporations of the state] . . . a tax . . . less than that assessed to others upon the same amount of taxable estate,—a result in conflict with the constitution and fundamental principles of justice,—is inevitably unsound and erroneous, either in the theory itself, or in the premises upon which such system is based. . . . . If the result is wrong, the reasoning is fallacious. The accuracy of the method is safely and sufficiently tested by the result."

The savings bank tax being a fixed tax, and not one laid according to any rule of proportion or equality,—no matter by what name it may be designated, whether anomaly, excise, or something else,—cannot be taken into consideration in ascertaining the proportional and equal share of the public burden to be assessed upon public service corporations; for, as said in *State* v. *Express Co.*, 60 N. H. 219, "there can be no proportion or equality between that which is fixed and that which is uncertain and fluctuating." This statement of the court in that case was true when it was made and is true today, as applied to the assessment of proportional and equal taxes upon property, and cannot be belittled or snuffed out

by being referred to as being "as self-evident as a preliminary axiom in Euclid."

What has been said as to the savings bank tax applies with equal force to the tax upon fire insurance capital. In neither case are the taxes assessed upon any basis of proportionality or equality to meet the public charges of government, as is the case with those levied upon public service corporations and individuals, and neither should be taken into consideration in assessing the taxes required to be levied upon such corporations or individuals.

Cheshire,
July 2, 1906.

GAUDETTE, *Adm'x*, *v.* BOSTON & MAINE RAILROAD.

CASE, to recover for injuries resulting in the death of Philip Gaudette, the plaintiff's intestate, who accidentally fell into a vat of hot alkaline solution while at work in the defendants' repair yard at Keene. The defendants' motion for a nonsuit was granted, and the plaintiff excepted. Transferred from the October term, 1905, of the superior court by *Peaslee*, J.

Joseph Madden, for the plaintiff.

John E. Allen and *Streeter & Hollis*, for the defendants.

PARSONS, C. J. The motion was properly granted. The deceased was an intelligent man and was familiar with the surroundings and methods of doing business. There was no evidence that the defendants' knowledge of the danger from which the injuries resulted was, or could have been, superior to that of the plaintiff's intestate. *Dube* v. *Gay*, 69 N. H. 670. Whether rules should have been adopted by the defendants, which if enforced would have prevented the leaving of the pair of wheels near the southwesterly corner of the vat into which the deceased fell, is immaterial, because there was no evidence tending to show that the presence of the wheels caused or contributed to his fall.

Exception overruled.

All concurred.

Carroll,
Nov. 7, 1906.

HUTCHINS v. BERRY & a.

The plaintiff's motion to bring forward this case and others between the same parties (73 N. H. 611, 603, 310; 72 N. H. 211, 77; 71 N. H. 128, 117), and for further modifications of the order regulating the use of the reservoir formed by dam A, was denied. No questions of law other than those already considered were presented.

James A. Edgerly, *Arthur L. Foote*, and *Felker & Gunnison*, for the motion.

Leslie P. Snow and *Sewall W. Abbott*, opposed.

Grafton,
Nov. 7, 1906.

NATIONAL BANK OF NEWBURY v. SAYER.

ASSUMPSIT, upon a bank check. Transferred from the November term, 1905, of the superior court by *Chamberlin*, J.

Smith & Smith, for the plaintiffs.

Batchellor & Mitchell and *George F. Morris*, for the defendant.

WALKER, J. In addition to the facts reported upon the former transfer of the case (73 N. H. 595), it appears by an amendment that the defendant did not intend to make Plant a present of the check, but gave it to the plaintiff at Plant's request, to prevent the plaintiff's taking and selling the horse upon the mortgage, and that the plaintiff then delivered to the defendant the mortgage and note, with the indorsement on the mortgage, and intended thereby to transfer to the defendant the property interest it had in the same. In view of the verdict for the plaintiff, this additional finding of fact does not necessarily disclose error of law. If, as reasonably may be inferred in support of the verdict, the real consideration for the defendant's check was the giving up by the plaintiff of its purpose to take the horse under an honest belief that it had a right to do so, it is immaterial in this action whether any title passed to

the defendant by its delivery of the note and mortgage to him. If, however, the transaction amounted merely to a purchase by the defendant of the unindorsed note and mortgage already paid, it would seem under the authority of *Dunn* v. *Meserve*, 58 N. H. 429, that there was a complete failure of consideration for the defendant's check, and that the verdict must be set aside. But as such is not the necessary interpretation of the verdict, in view of the reported facts, it must stand.

Case discharged.

All concurred.

Cheshire,
March 5, 1907.

LANE *& a., Ap'ts, v.* KEENE.

KEENE *& a. v.* LANE *& a.*

APPEAL, by citizens and taxpayers of Keene, from the laying out of a highway by the mayor and aldermen, and BILL IN EQUITY, brought by the city and a landowner interested in the laying out, praying that the appeal be dismissed and the appellants enjoined from its further prosecution. At a hearing before *Peaslee*, J., at the October term, 1906, of the superior court, a decree was ordered for the city, and the appellants excepted.

Joseph Madden, for Elisha F. Lane and others.

Cain & Benton, for Helen R. Colony.

John E. Allen, for the city of Keene.

Per Curiam. In the absence of a demurrer to the bill in equity, the only question raised by the exception to the decree for the city is as to the right of citizens and taxpayers of the city to appeal from the laying out of a highway by the mayor and board of aldermen, which was determined adversely to the right in *Bennett* v. *Tuftonborough*, 72 N. H. 63.

Exception overruled.

Belknap,
June 4, 1907.

CURTIS *v.* LACONIA CAR COMPANY WORKS.

CASE, for negligence causing personal injuries. Trial by jury and verdict for the plaintiff. Transferred from the November term, 1906, of the superior court by *Peaslee*, J.

This is the same case which was before the court in 73 N. H. 516. The plaintiff's evidence was substantially the same as that introduced at the former trial, together with the evidence then offered and excluded, but held to be competent by the former decision. The defendants' motions for a nonsuit and for the direction of a verdict in their favor were denied, subject to exception; also their motion to set aside the verdict on the ground that it was against the law and the evidence; also their motion, made after the jury had been discharged, to recall the jury and inquire of them whether they considered certain evidence, and to set the verdict aside if it turned out that the defendants were prejudiced for want of such consideration. The latter motion was supported by an affidavit of one of the defendants' counsel, setting forth the substance of conversations had with members of the jury after their discharge. The court denied the motion, because "it does not appear that justice requires that the jury be recalled and interrogated as to what evidence they did or did not consider in coming to their verdict."

George B. Cox and *Shannon & Tilton*, for the plaintiff.

Jewell, Owen & Veazey, for the defendants.

CHASE, J. The defendants' exceptions to the denial of the motions for a nonsuit and for an order of judgment in their favor raise the same question of law that was before the court upon the former transfer of the case, and that was then decided adversely to them. *Curtis* v. *Car Works*, 73 N. H. 516. The exception to the denial of the motion to set aside the verdict on the ground that it is against the law and the evidence raises no question of law (*Wilbur* v. *Berry*, 71 N. H. 619) and is not insisted upon. The exception to the denial of the motion to recall the jury and interrogate them as to the evidence which they considered in arriving at their verdict, etc., cannot be sustained. *Winslow* v. *Smith*, *ante*, 65; *State* v. *Frazier*, *ante*, 112.

Exceptions overruled.

All concurred.

Rockingham, Oct. 1, 1907.

RAND *v.* ANDERSON.

BILL IN EQUITY. Transferred from the April term, 1907, of the superior court by *Stone*, J., upon an agreed statement of facts.

John G. Crawford, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendant.

Per Curiam. The case is so ambiguous in its terms relating to the questions of law intended to be transferred, and so deficient in material facts relating to the only questions which it seems probable were intended, that no useful purpose can be served by further considering it.

Case discharged.

Strafford, Dec. 3, 1907.

STRAFFORD COUNTY *v.* DOVER.

ASSUMPSIT. Facts agreed. Transferred from the February term, 1907, of the superior court by *Wallace*, C. J. The county seeks to recover the sum of $496 as money paid out for board of prisoners sentenced to the county house of correction from the Dover police court, upon complaints charging offences under section 21, chapter 264, Public Statutes, none of which was for drunkenness.

Dwight Hall, solicitor, for the plaintiffs.

George T. Hughes, for the defendants.

BINGHAM, J. The questions of law upon which the rights of the parties to this controversy depend cannot be properly considered upon the facts contained in the agreed case; and until the facts involved in the questions are fully and clearly presented, it is not deemed advisable to consider them. *Dame* v. *Woods*, 73 N. H. 391, 392.

Case discharged.

All concurred.

Rockingham,
Dec. 26, 1907.

SHUTE v. BARTLETT, *Adm'r, & a.*

BILL IN EQUITY, to redeem from a mortgage given by the plaintiff to Morrison, the defendant Bartlett's intestate. The condition of the mortgage is that it shall be void if Shute pays the taxes on the property and the sum of $15 per month to Morrison during life, and keeps the buildings in repair and insured for Morrison's benefit. Shute having failed to make the required payments, Morrison took peaceable possession for the purpose of foreclosing the mortgage, but died before the foreclosure was complete. Shute demanded of the administrator an account of the amount due on the mortgage, and brought this action upon a refusal to furnish it. The question of Shute's right to redeem was transferred by *Wallace*, C. J., from the April term, 1907, of the superior court.

Edwin B. Weston, for the plaintiff.

John G. Crawford, for the defendants.

YOUNG, J. No reason occurs to the court, and none has been suggested, why mortgages of this kind are not governed by sections 4 to 13, chapter 139, Public Statutes; for the relation of the parties contemplated by the contract is not so personal in its nature that neither of them can assign his interest in the property without the consent of the other. *Pattee* v. *Boynton*, 73 N. H. 525.

Case discharged.

All concurred.

Rockingham,
Feb. 4, 1908.

TILTON *& a.* v. TILTON *& a.*

PETITION FOR PARTITION. The defendants claimed title to the premises by deed and by prescription. Upon trial by the court a verdict was found for the defendants upon each issue, and the plaintiffs excepted. Transferred from the April term, 1907, of the superior court by *Wallace*, C. J.

Llewellyn F. Hobbs, for the plaintiffs.

Eastman, Scammon & Gardner, for the defendants.

PEASLEE, J. The plaintiffs' sole objection to the verdict upon the issue of adverse possession is that the possession of a co-tenant is not adverse as against his fellows until by some notorious act he claims an exclusive right. The case finds that, since 1865, the defendants and their ancestor in title have been in possession, claiming to own the land by deed and occupying it openly, adversely, and without disturbance. If the plaintiffs wished to raise the question whether any evidence was presented upon which such finding could be predicated, they should have made the objection at the trial. This objection is not transferred by the general exception to the verdict, and was waived by the submission of the issue without raising the question by the appropriate motion. *Farnham* v. *Anderson*, *ante*, 405, and cases cited.

As there is no error in the verdict upon the issue of adverse possession, it is unnecessary to consider the questions presented upon the issue of title by deed.

Exception overruled.

All concurred.

Grafton,
Feb. 4, 1908.

COBLEIGH, *Adm'r*, *v.* CROSS *& a.*

BILL IN EQUITY, for the construction of the following paragraph in the will of Mary N. Cross: "Second. All the rest, residue, and remainder of my estate, both real and personal of every description, I give, bequeath, and devise to my husband, Joseph Cross, of said Lebanon, he to have the use of during life and to have so much of the principal as he shall need for his comfortable support and maintenance, provided that my said husband shall also provide a home and suitable maintenance to Sarah W. Baker during her life from my said estate, remainder over after the decease of my said husband Joseph Cross and said Sarah W. Baker, to my son Frank G. Cross and to his heirs and assigns forever." Joseph is dead and Sarah survives.

Transferred without a ruling from the October term, 1907, of the superior court by *Stone*, J.

Marshall D. Cobleigh, pro se.

Beneficiaries default.

PEASLEE, J. The testatrix intended that Sarah should be provided "a home and suitable maintenance" during her life from the estate. The fact that the remainder over is not to take effect until after the death of Sarah is satisfactory proof that the testatrix did not intend that Sarah's support should be cut off by the death of the widower Joseph during Sarah's life.

As the testatrix intended to preserve the principal of her estate as far as possible, the payments to Sarah should be made from the income, so far as it is sufficient for her support according to her station in life, leaving the principal intact except in so far as it may be needed to make up deficiencies in the income to satisfy the charge for Sarah's support and maintenance.

Case discharged.

All concurred.

Cheshire,
April 7, 1908.

ISRAEL *v.* FINKELSTEIN *& a.*

ASSUMPSIT, for the price agreed to be paid for an assignment of the plaintiff's claim against one Levine. Trial by jury and verdict for the plaintiff. Transferred from the April term, 1907, of the superior court by *Stone*, J.

The defendants Samuel and Julia Finkelstein are partners, and the contract sued upon was made by Julia. A motion for a nonsuit as to Samuel was denied, subject to exception.

Cain & Benton and *David Stoneman* (of Massachusetts), for the plaintiff.

Frank T. Vaughan, *Joseph Madden*, and *Albin & Sawyer*, for the defendants.

PEASLEE, J. The defendant Samuel relies upon two propositions to support his exception. He says there was no evidence of consideration for, nor of authority to make, the promise sued upon. Neither claim is well founded. There was evidence that one thing the defendants were to receive and did receive was an assignment of the plaintiff's claim against Levine. It is conceded that such an assignment is a sufficient consideration for a promise.

Upon the issue of authority the case stands no better. There was evidence that at about the time of this transaction the defendants were engaged in the business of buying up claims against Levine. This would warrant the conclusion that each partner had authority to bind the firm by such a purchase. *National State Capital Bank* v. *Noyes*, 62 N. H. 35.

Exception overruled.

All concurred.

Hillsborough,
May 8, 1908.

HEAD & DOWST CO. *v.* NEW ENGLAND BREEDERS' CLUB

ASSUMPSIT, to enforce a builder's lien. Transferred from the September term, 1907, of the superior court by *Peaslee*, J., upon exceptions taken at the trial. The New England Breeders' Club did not appear at the trial, but the case was defended by an assignee appointed in proceedings under the state insolvency statute. When the case came on for argument, it appeared that the assignee in insolvency had surrendered the property to a trustee appointed in proceedings in bankruptcy under the federal statute and had been discharged as assignee. The trustee in bankruptcy had notice of the proceedings. Neither he nor the defendants of record appearing to sustain the exceptions, they were overruled without consideration.

PEASLEE, J., did not sit.

Burnham, Brown, Jones & Warren, for the plaintiffs.

Henry F. Hollis, as *amicus curiæ*.

July 19, 1907.

OPINION OF THE JUSTICES.

The statute directing the governor to provide by contract for the railroad transportation of certain public officers imposes upon him a duty pertaining to the fiscal administration of the government, as to the performance of which the governor and council may require the opinions of the justices of the court.

The phraseology of an act is to receive a natural and reasonable construction, in the absence of proof that it was employed in a restricted or peculiar sense.

Under chapter 79, Laws 1907, the governor is required to provide for the railroad transportation of the justices of the supreme and superior courts, the bank commissioners, the superintendent of public instruction, the fish and game commissioners, and the commissioner of labor.

To the Supreme Court:

The governor and honorable council respectfully require the opinion of the justices upon the following question: Who are the salaried state officers for whose transportation authority is provided in section 2 of "An act to prohibit free transportation by common carriers and for other purposes," approved March 22, 1907?

CHAS. M. FLOYD, *Governor.*

STEPHEN S. JEWETT,
WILLIAM H. C. FOLLANSBY,
HERBERT B. VIALL,
J. DUNCAN UPHAM,
FRANK P. BROWN,
} *Councilors.*

Concord, N. H., June 19, 1907.

To His Excellency the Governor, and the Honorable Council:

Section 2 of the act passed at the last session of the legislature, entitled "An act to prohibit free transportation by common carriers and for other purposes," provides that "the governor is hereby authorized and directed to contract prior to each regular and extra session of the general court, for the steam railroad transportation of the members, officers, and employees of the same; the governor is also hereby authorized and directed to contract for the transportation of the salaried state officers, appointed by the governor and council or elected by the legislature, whose

transportation expenses are made, by statute, a charge upon the state treasury, during their respective terms of office." Laws 1907, *c.* 79, *s.* 2. This provision of the statute not only empowers the governor to arrange by contract for the transportation expenses of certain state officials by steam railroads, but requires him to do so. It imposes a duty upon him in this respect, so far at least as its performance is reasonably practicable.

By article 40 [41] of the constitution, the governor is styled "a supreme executive magistrate." He is the head of, and his duties pertain to, the executive department of government, as contradistinguished from the legislative and judicial departments. While it is an essential principle of constitutional law, that these three governmental powers "ought to be kept as separate from, and independent of, each other as the nature of a free government will admit" (Bill of Rights, *art.* 37), it is difficult to understand why the duty imposed upon the governor by the statute under consideration is not an executive duty, within the meaning of the constitution. The nature of the duty—the exercise of judgment and discretion in the making of contracts—indicates that it is not exclusively a legislative duty, while no one would claim that it is a judicial duty. Hence the conclusion would seem to follow necessarily, that it is an executive duty which the legislature had the power to impose upon the governor as the "supreme executive magistrate" of the state. It pertains exclusively to the fiscal administration of the affairs of government and is plainly designated in the language of the constitution as executive.

In the attempt to perform that official duty, it is assumed that the governor is in doubt what state officers section 2 refers to, for the expenses of whose transportation upon official business he is required to enter into contracts with steam railroads in behalf of the state. Since the councilors are elected "for advising the governor in the executive part of government" (Const., *art.* 59 [60]), it is also assumed that he has required the advice of the council in the premises, whose "advice and consent" are made by article 55 [56] essential to the valid payment of the money from the treasury, which would be required for the full and effective performance of the duty imposed upon the governor by the statute in question. It thus appears that the governor and council, upon due consideration of an executive duty properly before them, involving an important question of law upon which they are in doubt, have jointly exercised the authority vested in that body "to require the opinions of the justices" of this court. Const., *art.* 73 [74]. No reason that is of controlling importance occurs to us why the request of the governor and council should not be

complied with. We therefore deem it our duty to return an answer to the question propounded.

For reasons presumably deemed sufficient to the legislature, a certain class of officers is designated as falling within the purview of the section of the statute above quoted; that is to say, "the salaried state officers, appointed by the governor and council or elected by the legislature, whose transportation expenses are made, by statute, a charge upon the state treasury." The language of the statute does not seem to be doubtful or ambiguous. Whether in a given instance a person is a salaried state officer, whether he is appointed by the governor and council or elected by the legislature, and whether his traveling expenses are made by statute payable by the state, are questions whose solution in the affirmative gives rise to the statutory duty imposed upon the governor. To ascertain the legislative intention from the language used, it is not necessary to resort to subtle or technical definitions. The phraseology of the act is to receive a reasonable and natural construction, in the absence of sufficient evidence that it was employed in a restricted or peculiar sense. And as we have not discovered such evidence, our opinion is that the intention of the legislature will be carried out by giving the language of section 2 its natural and ordinary meaning. Upon such a construction of the statute, little doubt can be entertained that many officials possess the statutory characteristics mentioned; as, for instance, the justices of the supreme and superior courts (Const., *art.* 45, [46]; Laws 1905, *c.* 107, *s.* 1; Laws 1903, *c.* 101, *s.* 1), the bank commissioners (P. S., *c.* 162, *ss.* 3, 4; Laws 1903, *c.* 80, *s.* 1), the superintendent of public instruction (P. S., *c.* 94, *s.* 1; *Ib.*, *c.* 286, *s.* 10; Laws 1905, *c.* 58, *s.* 1), the fish and game commissioners (Laws 1901, *c.* 79, *s.* 1; Laws 1903, *c.* 11, *s.* 1), the commissioner of labor (Laws 1893, *c.* 48, *ss.* 1, 3), and perhaps others.

Whether the governor, as the chief executive officer of the state, is authorized to make contracts with common carriers in behalf of the state for the traveling expenses of state officials not included in said section 2, which are made a charge, expressly or by reasonable implication, upon the state treasury, is a question we have not considered, since it does not seem to be included in the request submitted.

FRANK N. PARSONS.
REUBEN E. WALKER.
GEORGE H. BINGHAM.

I entertain no doubt that it is the duty of the justices of the supreme court, under article 73 [74] of the constitution, to give opinions to the governor and council when required by them, upon

important questions of law touching the exercise of their executive powers or the performance of their executive duties in matters pending before them. I am equally confident that it is the duty of the justices not to give opinions upon other questions, even if the state or the public have a direct interest therein and the governor and council request the opinions. My difficulty in this instance arises from my doubts as to which side of the line of duty the question submitted falls. If the governor, in negotiating a contract for the transportation mentioned in section 2, chapter 79, Laws 1907, acts in "the executive part of government" (*art.* 59 [60]),—if the negotiation contemplated is a matter as to which he may, with the councilors or a majority of them, "hold a council" within the meaning of article 61 [62],—the governor and council undoubtedly have authority to require the opinions of the justices upon the question submitted. But if the statute merely makes the governor alone a special agent to negotiate the contract in behalf of the state, as evidently would be the case if the state treasurer or John Doe, instead of the governor, had been delegated for the purpose, it seems to me that the governor, either alone or in connection with the council, would not have authority to require the justices' opinions relating to the powers and duties of his agency. At first I took the latter view of the governor's function; but upon further investigation and reflection, I am inclined to the opinion, not without some doubts however, that the authority delegated to the governor is of an executive nature, such as he may properly "hold a council" with the councilors upon. Consequently, I have considered the question submitted, and join with my associates in the foregoing opinion, as an answer thereto.

WM. M. CHASE.

I do not think this case comes within the provision of the constitution (Const., *art.* 73 [74]) which requires the justices of the supreme court, when thereto requested, to advise the governor and council "upon important questions of law."

JOHN E. YOUNG.

July 19, 1907.

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Misconception of issue by jury, *Winslow* v. *Smith*, 65.
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Supposititious facts and inferences in charge, *State* v. *Newman*, 10.
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If rights of owners have been defined by judicial decree, *Ib.*
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Unconditional deed of right of flowage, *Chapman* v. *Company*, 424.
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If terms of absolute legacy unambiguous, *Harris* v. *Ingalls*, 35.
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Provision that executor divide estate into equal parts, *Ib.*
each of which is bequeathed to heirs of certain relatives, *Ib.*
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If will gives use of realty during life, *Little* v. *Colman*, 215.
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Bequest of income of estate does not create trust, *Ib.*
If income to be divided among children, *Treadwell* v. *Williams*, 311.
and entire estate given to last surviving child in fee, *Ib.*
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Express direction to divide residue, *Harris* v. *Ingalls*, 339.
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authorizes executor to convert realty into money, *Ib.*
if such course necessary to effectuate testator's intent, *Ib.*
Under bequest to "legal heirs" of relatives, *Ib.*
persons entitled are those who answered description, *Ib.*
at testator's decease, according to law of this state, *Ib.*
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Bequest to heirs of a relative who survived testator, *Ib.*
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Evidence as to oral declarations of testator, *Ladd* v. *Ladd*, 380.
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Reason of appeal from allowance of will, *Managle* v. *Parker*, 422.
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WITNESS.

Husband competent to testify in wife's behalf, *White* v. *Poole*, 71.
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Whether witness qualified to testify as expert, *Hess* v. *Shurtleff*, 114.
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CORRECTIONS.

Page 151, line 12 from bottom, for "25" read *5*.
Page 287, line 8 from bottom, for "488, 489" read *498, 499*.